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Landlords Take Heed – Attempts to Provide Security to Tenants May Not Be Viewed Differently

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It remains the law in South Carolina that a landlord generally owes no affirmative duty to a tenant to provide security for the leased premises to protect the tenant from criminal activity of third parties. In a recent opinion, clearly based upon a thorough analysis of the law and the facts of the particular case, the South Carolina Supreme Court succinctly concluded Section 323 of the Restatement (Second) of Torts controls in any analysis of voluntarily assumed duties, and the concept of the undertaking exception is not limited to a landlord's undertaking to make repairs, thereby at least suggesting a landlord heightens its duty when it undertakes to provide security services for the purported protection of its tenants. *Wright v. PRG Real Estate Management, Inc., et al*, 2019 WL 1273060 (March 20, 2019).

Wright rented an apartment in a complex where public walking trails loop through the area making it and other surrounding communities accessible from those trails. While Wright found this particular complex appealing because of its proximity to her job, and attractive because it was recommended by members of her church, she was also persuaded by the representations made by apartment employees that security officers were on site – patrolling the complex. The complex employed courtesy officers: off-duty officers who would spend at least two hours daily walking the property, answering calls concerning incidents and providing daily reports to the property manager. An internal manual of the complex revealed it did not provide security for residents and employees should never indicate otherwise. This information was not given to residents.

Some years after renting her apartment, Wright returned home from choir practice at approximately 10:00 p.m. to two armed men who kidnapped and robbed her in the parking lot. At the time of this attack, the complex had had no security officers for a period of approximately two months. Again, residents were not notified. Furthermore, the monthly tenant newsletter continued to note security was a top priority of the ownership and management and provide a security pager number. Neither Wright nor any other tenants were apprised that security was limited to the parameters of

the courtesy officer program.

Wright filed suit against the owner and the management of the complex, alleging various causes of action. At the trial court level, Defendants filed a motion for summary judgment arguing they owed no duty to provide security and even if they did, that duty was not breached. Defendants alternatively argued that even if they had a duty and if that duty was breached, their negligence was not a proximate cause of harm to Wright. Wright appealed and the Court of Appeals affirmed. The case was recently before the South Carolina Supreme Court upon writ of certiorari to review the following: 1) whether Defendants voluntarily undertook a duty to provide security services; 2) if the facts of this case supported such a duty, whether it was a question of fact that Defendants breached that duty and 3) whether such breach proximately caused Wright's harm.

In its analysis of the respective positions of the parties, the court began with the recognition that in South Carolina, a voluntarily assumed duty is rooted in section 323 of the Restatement (Second) of Torts (1965) that provides, in part, that whether gratuitously or for consideration, one who undertakes to provide services to another which he should recognize as necessary for the protection of the other's person or property is subject to liability to the other for physical harm resulting from the failure to exercise reasonable care to perform the undertaking if a) the failure to exercise such care increases the risk of such harm or b) the harm is suffered because of the other's reliance upon the undertaking.

In further examination of the claims, the court recognized that while South Carolina does not impose an affirmative duty upon a landlord to provide security to protect its tenants from criminal activity of third parties, there are exceptions to the general rule, including the affirmative acts exception and the undertaking exception.[1] Recognizing previous ambiguity between these two exceptions, the court provided guidance. Citing to previous authority, the court referenced the affirmative acts exception as arising when one who assumes to act, when under no obligation to do so, may become subject to the duty to act with due care. Such exception is generally limited to situations where a landlord's direct action heightens the risk of a tenant's harm from criminal activities. The court offered an example of a landlord giving a master key to one who should not have it. Such affirmative acts may impose liability upon the landlord for the criminal acts of third parties. The undertaking exception, however, may arise from a landlord's more attenuated acts. Again concluding Section 323 controls in analyzing voluntarily assumed duties, the court notably clarified the undertaking exception is not limited to a landlord's undertaking to make repairs. Thus, Wright's allegations that Defendants were negligent in their failure to provide security invoked the undertaking exception in the present action.

Continuing its scrutiny of Wright's allegations and the previous holdings based thereon, the court confirmed that in order to establish a duty of care under section 323 (a) or (b) Wright must establish the Defendants' failure to exercise due care in the execution of the duties voluntarily assumed increased the risk of harm or that Wright suffered harm due to her reliance on the undertaking. Acknowledging that proximate cause may be 'hanging by a slender thread' under the facts of Wright, the court found the question of proximate cause should nevertheless be resolved by a jury. Reminding that legal cause is founded in foreseeability, the court found Wright presented evidence sufficient to support a claim that Defendants' negligence in their execution of the security program could have been a proximate cause of her harm. Criminal acts of third parties cannot be considered completely unforeseeable, as a matter of law, when an alleged breach was a defendant's failure to properly conduct a program specifically intended to protect against those very events.

Landlords – take heed. While there is generally no extended examination of dissenting opinions in this forum, this author recommends a careful read of the dissent in *Wright* wherein there is offered a deliberate examination of proximate cause, or perhaps the lack thereof. The dissent reminds us that proximate cause requires proof of causation-in-fact, that is evaluated by the 'but for' test. Proximate cause also requires legal cause that is proven by establishing foreseeability.

Wright certainly offers the practitioner clarification of the law of South Carolina. The *Wright* court establishes it remains the law that a landlord does not have an affirmative duty to provide protection against criminal acts of third parties to its tenants. Noteworthy, however, is the court's conclusion that once a landlord assumes such an undertaking, an exception to the general law may be created thereby, thus requiring the landlord to perform its undertaking with reasonable care.

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[1] The other two exceptions, being the concealed danger exception and the common area exception are not at issue in this case.

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