

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

08.25.11

Just Call The Cops!: Court Of Appeals Holds That Landlords Have A Duty To Respond To Known Criminal Activity

By Drew Broaddus

Is a premises owner under a duty to protect invitees from the criminal acts of third parties? If so, to what extent? Michigan appellate courts have searched for clear answers to these questions for decades. The tension arises from the fact that, generally, an individual has no duty to protect another from the criminal acts of a third party. The rationale underlying this general rule is that criminal activity, by its deviant nature, is normally unforeseeable. However, a duty to protect against certain criminal activities can arise when there is a “special relationship.” The relationship between a business owner and a customer is one such relationship. *MacDonald v PKT Inc*, 464 Mich 322 (2001). But how far is a premises owner required to go? Isn't law enforcement the responsibility of the police? And in what other contexts might such a “special relationship” exist?

The Court of Appeals sought to answer these questions in *Bailey v Schaff*, _ Mich App _ (2011). The specific issue presented in *Bailey* was whether the owner of an apartment complex (Evergreen) owed a duty to the guest of a tenant, once it was reported to Evergreen's agents that a gunman was threatening people on the premises. The issue was described by the Court of Appeals as one of “first impression.” *Bailey* adopted the rule previously developed in the context of merchants and storekeepers that the owner does owe a duty to the invitee in such circumstances. However, that duty is limited to taking “reasonable measures in response to an ongoing situation that is occurring on the premises, which means expediting the involvement of, or reasonably attempting to notify, the police.”

In *Bailey*, Plaintiff went to a party at a friend's apartment, located in Evergreen's complex. Evergreen had a contract with a company called Hi-Tech to provide security. During the party, an Evergreen resident complained to two of Hi-Tech's security guards that there was a man on the premises waving a gun. The resident also told the security guards that this person was threatening to shoot the guests. She pointed to the area of the gathering and identified the man with the gun. Hi-Tech's guards did not immediately respond to this information. They instead decided to complete another task. In the interim, the gunman shot Plaintiff. Approximately 10-15 minutes passed between the time of the resident's complaint to Hi-Tech's guards and the shooting. Apparently, Hi-Tech's guards did not react at all until after they heard the gunshots. Plaintiff sued the apartment complex (Evergreen), the security firm (Hi-Tech), the gunman, and others. The trial court dismissed Plaintiff's claims against all except the gunman.¹

¹ Notably, Plaintiff's claim against Hi-Tech was dismissed under *Fultz v Union-Commerce Assocs*, 470 Mich 460 (2004), as Hi-Tech's responsibilities arose solely out of its contract with Evergreen, and Plaintiff was not a third party beneficiary of that agreement. The Court of Appeals affirmed without mentioning *Loweke v Ann Arbor Ceiling*, 489 Mich 157 (2011).

SECRET WARDLE NOTES:

Bailey holds that a landlord owes a duty, both to tenants and their guests, to take “reasonable measures” in response to an *ongoing* crime that takes place on the premises. This generally means calling the police; landlords and their agents *are not* expected to fight crime themselves.

Landlords are under no duty to provide security, and when security is provided, it *does not* create a duty to *prevent* crime.

CONTINUED...

Numerous issues were raised on appeal. However, the Court of Appeals devoted most of its 20 page opinion to the question of whether Evergreen owed a duty to Plaintiff to protect him from the gunman's criminal acts. After a lengthy discussion of the "evolution of the duty" to respond to criminal acts, *Bailey*, Slip Op at 10, the Court of Appeals found that Evergreen did owe a duty to Plaintiff. That duty was articulated by the Court as follows:

"Our basic premise is that public safety is the business of the government, and we emphasize that under the circumstances at issue, the only duty the owner or manager of an apartment complex has is to summon the police when, either directly or through their agents, they observe criminal acts in progress that pose a risk of imminent harm to identifiable invitees, whether tenants or guests, who are lawfully on their premises." *Bailey*, Slip Op at 2.

However, the Court noted that Evergreen *was not* under a duty "to provide security or otherwise make the premises safe from criminal activity." *Id.* at 19. In so holding, the Court emphasized the particular circumstances of Bailey's shooting:

"[W]e note the extreme nature of the ongoing situation at Evergreen on August 4, 2006. This was not an animated discussion among friends. It was not a domestic quarrel. It was not an argument where fighting words were exchanged. It was not a sod-throwing incident similar to the one the *MacDonald* Court considered. It was not an occasion in which one person threatened another with a set of barbeque tongs or even a baseball bat. It was not a fistfight or a brawl. It was the most deadly circumstance of all: a man brandishing a gun—apparently in full view of two security guards—who threatened to fire, and ultimately did fire, that gun with near fatal consequences." *Bailey*, Slip Op at 19.

The fact that this was an *ongoing* situation was crucial to the finding of a duty. If there had not been time to react – for example, if the gunman had suddenly walked up to Plaintiff and shot him – Plaintiff's claim against Evergreen probably would have failed. This was recently illustrated in *Youmans v BWA Properties*, unpublished Court of Appeals opinion, decided 7/26/11 (No. 297275).

It is important to note the procedural posture of *Bailey*. The claim against Evergreen was dismissed by the trial court for failure to state claim. The Court of Appeals *did not* find that Evergreen breached a duty or that it had liability. It only found that there was a duty.

CONTACT US

Farmington Hills

30903 Northwestern Highway, P.O. Box 3040
Farmington Hills, MI 48333-3040
Tel: 248-851-9500 Fax: 248-851-2158

Mt. Clemens

94 Macomb Place, Mt. Clemens, MI 48043-5651
Tel: 586-465-7180 Fax: 586-465-0673

Lansing

6639 Centurion Drive, Ste. 130, Lansing, MI 48917
Tel: 517-886-1224 Fax: 517-886-9284

Grand Rapids

2025 East Beltline SE, Ste. 209, Grand Rapids, MI 49546
Tel: 616-285-0143 Fax: 616-285-0145

www.secrestwardle.com

SECRET
SW
WARDLE

Copyright 2011 Secrest, Wardle, Lynch, Hampton,
Truex and Morley, P.C.

This newsletter is published for the purpose of providing information and does not constitute legal advice and should not be considered as such. This newsletter or any portion of this newsletter is not to be distributed or copied without the express written consent of Secrest Wardle.

CONTRIBUTORS

Premises Liability Practice Group Chair

Mark F. Masters

Premises Liability Practice Group Co-Chair

Caroline Grech-Clapper

Editor

Bonny Craft

We welcome your questions and comments.

OTHER MATERIALS

If you would like to be on the distribution list for *Boundaries*, or for newsletters pertaining to any of our other practice groups, please contact Secrest Wardle Marketing at swsubscriptions@secrestwardle.com or 248-539-2850.

Other newsletters include:

Benchmarks – Navigating the hazards of legal malpractice

Blueprints – Mapping legal solutions for the construction industry

Community Watch – Breaking developments in governmental litigation

Contingencies – A guide for dealing with catastrophic property loss

Fair Use – Protecting ideas in a competitive world

In the Margin – Charting legal trends affecting businesses

Industry Line – Managing the hazards of environmental toxic tort litigation

Landowner's Alert – Defense strategies for property owners and managers

No-Fault Newslite – A road map for motor vehicle insurers and owners

On the Beat – Responding to litigation affecting law enforcement

On the Job – Tracking developments in employment law

Safeguards – Helping insurers protect their clients

Standards – A guide to avoiding risks for professionals

State of the Art – Exploring the changing face of product liability

Structures – A framework for defending architects and engineers

Vital Signs – Diagnosing the changing state of medical malpractice and nursing home liability