

# boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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## The Reasonableness of Defendant's Efforts to Contact the Police in Response to a Third Party Criminal Act on Defendant's Property is Decided by the Jury and Not the Court

By Jack Weston

In *Lamar v Ramada Franchise System, Inc.* (2007), an unpublished decision of the Michigan Court of Appeals, the Court of Appeals held that the issue of whether a Defendant acted reasonably in contacting the police in response to a criminal assault of Plaintiff was a question of fact for the jury.

Plaintiff sued Defendant for injuries allegedly received in a fight involving numerous individuals on Defendant's premises. Plaintiff alleged that Defendant failed to make reasonable efforts to contact the police in response to the fight. Defendant filed a motion for summary disposition based on the holding of the Michigan Supreme Court in *MacDonald v PKT, Inc.*, 464 Mich 322, 332 (2001). *MacDonald* held that the only duty owed by a property owner, on learning that a criminal act against an invitee has occurred on the owner's property, is to make reasonable efforts to contact the police. The trial court determined that the question of whether Defendant had made reasonable efforts was to be determined by the court as a matter of law, and granted Defendant's motion. In granting the motion, the trial court relied on the following excerpt from *MacDonald* to conclude that the determination whether a merchant's response was reasonable was a matter for the court to decide:

"Having established that a merchant's duty is to respond reasonably to criminal acts occurring on the premises, the next question is what is a reasonable response? Ordinarily, this would be a question for the factfinder. However, in cases in which overriding public policy concerns arise, *this Court may determine what constitutes reasonable care. See Williams [v Cunningham Drug Stores, Inc.*, 429 Mich 495, 501 (1988)], *citing Moning v Alfano*, 400 Mich 425, 438; 254 NW2d 759 (1977). Because such overriding public policy concerns exist in the instant cases, the question of reasonable care is one that we will determine as a matter of law."

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*Lamar* is an unpublished decision and not binding on trial courts. However, it complicates a relatively settled area of law. Its holding that the reasonableness of the landowner's efforts should be decided by the jury, not the judge, and should be distinguished by the facts of most cases.

In *Lamar*, unlike most cases, there was a factual dispute concerning the length of time that elapsed before it called the police. Because these factual issues would directly relate to whether Defendant's response to the fight was reasonable, it was for a jury to decide which witnesses should be believed. Generally, the duration of the fight and the length of time a property owner was aware of the altercation are not in dispute.

## CONTINUED...

Plaintiff appealed the trial court's dismissal. The Michigan Court of Appeals generally agreed with the trial court's interpretation of *MacDonald*, noting that: "[a] merchant can assume that patrons will obey the criminal law. This assumption should continue until a specific situation occurs on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee." *MacDonald*, p 335. The Court emphasized that the duty owed by the merchant at that point is limited to responding reasonably to a situation occurring on the premises. *Id.* Fulfilling the duty requires that the merchant make reasonable efforts to contact the police. *Id.*, p 336.

The Court of Appeals disagreed with the trial court's interpretation and reliance on the passage cited above as giving the trial judge the authority to decide the issue of whether the response was reasonable, as opposed to leaving that determination to the jury. The Court of Appeals based its disagreement on a subsequent part of the *MacDonald* opinion, in which the *MacDonald* Court held:

"Consequently, in any case in which a *factfinder*, be it the trial court or a jury, will be assessing the reasonableness of the measures taken by a merchant in responding to an occurrence on the premises, a plaintiff may not present evidence concerning the presence or absence of security personnel, or the failure to otherwise resort to self-help, as a basis for establishing a breach of the merchant's duty. A jury thus must be specifically instructed with the principles of *Williams* and *Scott* as we have outlined them here."

The *Lamar* Court then held:

"Contrary to the trial court's determination in this case, the foregoing discussion indicates that the assessment of the reasonableness of a defendant's efforts to contact the police is to be made by the trier of fact, not by the court as a matter of law in every instance."

The Court of Appeals further differentiated the instant case on its facts. Specifically, since there were disputed facts concerning when the fight started, and how long it had been going on before the Ramada Inn's employees contacted the police, the issue of whether the employees made reasonable efforts to contact the police should be decided by the trier of fact. The dismissal by the trial court was therefore reversed.

## 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 48083-5651  
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, S.E., Ste. 209, Grand Rapids, MI 49546  
Tel: 616-285-0143 Fax: 616-285-0145

### **Champaign, IL**

2919 Crossing Court, Ste. 11, Champaign, IL 61822-6183  
Tel: 217-378-8002 Fax: 217-378-8003

[www.secrestwardle.com](http://www.secrestwardle.com)

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## CONTRIBUTORS

### **Premises Liability Practice Group Chair**

Mark F. Masters

### **Editor**

Erene Golematis

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