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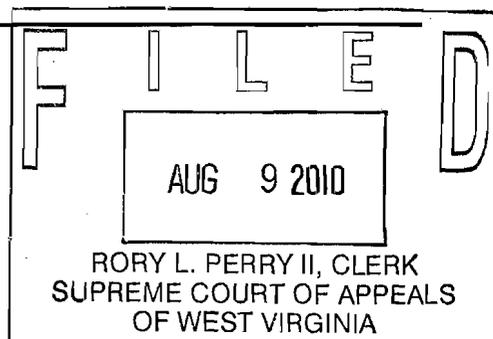
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DAVID MEANS,
*Appellant and
Plaintiff below,*

v.

DARDEN PROPETIES, II, LLC and OSI, LLC
Appellees and Defendants below.

From the Circuit Court of Kanawha County
Civil Action No. 08-C-3400
Honorable James C. Stucky



BRIEF OF APPELLEES, DARDEN PROPERTIES II, LLC AND OSI, LLC

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I. PRELIMINARY STATEMENT

Appellees Darden Properties, II, LLC and OSI, LLC respectfully request that the Court affirm to the Circuit Court's ruling below. The Circuit Court ruled appropriately and lawfully, and committed no reversible error in the underlying action by dismissing Appellant's claims against Appellees. The Circuit Court correctly concluded that the law of West Virginia does not impose upon property owners and occupiers the duty to protect individuals from criminal acts on property owned and controlled by another. Therefore, Appellant has stated no claim upon which relief can be granted. In support of their position, Darden Properties, II, LLC and OSI, LLC state as follows:

II. KIND OF PROCEEDING AND NATURE OF RULING BELOW

This case is a civil personal injury action in which the Appellant alleges that Appellees and other Defendants are liable to him because two unknown assailants laid in wait on Appellees' property before assaulting him on his employer's adjacent property. Appellant seeks to overturn an Order dismissing his claims against Appellees pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.

III. STATEMENT OF FACTS

Darden Properties, II, LLC owns and OSI, LLC operates an Exxon branded One Stop convenience store ("One Stop") located at the corner of Greenbrier and Washington Streets in Charleston. Complaint, ¶ 4-5. Adjacent to the One Stop on Washington Street is a Domino's Pizza franchise ("Domino's"). Id. There is no allegation or controversy that Appellees do not own or operate the Domino's or the land on which it sits. A low concrete/block wall and chain link fence divides the two properties. Complaint, ¶ 13.

Two unknown assailants shot the Appellant at approximately 11:00 p.m. on Christmas Eve, December 24, 2007. Complaint, p. 4. At the time, both the One Stop and the Domino's were closed. Appellant had arrived at the Domino's between 10:00 p.m. and 10:30 p.m. to check inventory and order food supplies for Domino's. Complaint, ¶ 11. He parked his car on the Domino's property located at the back of the store. Complaint, ¶ 16. Appellant does not allege that he was on the One Stop property at any time before or after the assault. Instead, he alleges that two unknown assailants laid in wait on the One Stop property before entering the Domino's property to assault him. Complaint, ¶ 17.

IV. STANDARD OF REVIEW

Appellate review of a circuit court's order granting a motion to dismiss is de novo. Syl. pt. 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 461 S.E.2d 516 (1995); Syl. pt. 1, Albright v. White, 202 W. Va. 292, 503 S.E.2d 860 (1998). In conducting a de novo review, this Court applies the same standard applied in the circuit court.

Generally, a motion to dismiss should be granted only where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. Murphy v. Smallridge, 196 W. Va. 35, 36, 468 S.E.2d 167, 168 (1996). For purposes of a motion to dismiss, the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true. Lodge Distrib. Co., Inc. v. Texaco Inc., 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978).

Dismissal is appropriate if, after viewing the allegations of the complaint in a light most favorable to the nonmoving party, it is apparent that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. Syl. pt. 3, Chapman v. Kane Transfer Co., Inc., 160 W. Va. 530, 236 S.E.2d 207 (1977). Complaints are to be read liberally

as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure. State ex rel. Smith v. Kermit Lumber & Pressure Treating Co., 200 W. Va. 221, 488 S.E.2d 901 (1997) (quoting State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. at 776, 461 S.E.2d at 522).

V. LAW AND ARGUMENT

A. **The existence of a duty of care is a matter of law to be decided by the court.**

Appellant's claims against Appellees sound in negligence and premises liability. "In order to establish a prima facie case of negligence in West Virginia, it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. No action for negligence will lie without a duty broken." Syl. pt. 2, Smoot ex rel. Smoot v. American Electric Power, 222 W. Va. 735, 671 S.E.2d 740 (2008)(citing Syl. pt. 1, Parsley v. General Motors Acceptance Corp., 167 W. Va. 866, 280 S.E.2d 703 (1981)). The determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law. Syl. pt. 5, Aikens v. Debow, 208 W. Va. 486, 541 S.E.2d 576 (2000).

B. **West Virginia law does not impose upon property owners and/or possessors a duty to protect individuals from criminal attacks on another's property.**

The law of premises liability in West Virginia states that landowners or possessors owe non-trespassing entrants a duty of reasonable care under the circumstances. Syl. pt. 4, Mallet v. Pickens, 206 W. Va. 145, 522 S.E.2d 436 (1999) (emphasis added). This Court has on occasion been called upon to determine whether the facts of an underlying case created a duty of the defendant as a matter of law. However, there is no authority in West Virginia that establishes a landowner's duty to protect individuals from criminal attacks on non-owned or possessed property.

As a general rule, West Virginia landowners have no duty to protect visitors to **their own property** from the deliberate criminal conduct of third parties. Syl. pt. 6, Miller v. Whitworth, 193 W. Va. 262, 455 S.E.2d 821 (1995); Strahin v. Cleavenger, 216 W. Va. 175, 183, 603 S.E.2d 197, 205 (2004) (emphasis added). This Court has carved out two narrow exceptions to the rule. First, a landowner may be held liable for the criminal acts of a third party if a special relationship exists between the property owner and the plaintiff. Second, duty and liability may exist when the property owner's affirmative actions or omissions expose the plaintiff to a foreseeable high risk of harm from intentional conduct. Miller, 193 W. Va. at 266, 455 S.E.2d at 825.

Neither exception can save Petitioner's claims against the Respondents because the decisions in both Miller and Strahin explicitly and implicitly limit the exceptions to individuals who have either **entered upon the defendant's land or have some connection to it**. When the duty in question is between a landowner and a non-entrant, there must be a significant nexus between the defendant's business interests on the owned premises and the non-owned premises where the injury occurred. "[A] duty exists only when the business owner has actual or constructive knowledge that its invitees regularly use the adjacent property in connection with its business." Andrick v. Town of Buckhannon, 187 W. Va. 706, 711, 421 S.E.2d 247, 252 (1992).

In Andrick, a restaurant operator leased the premises on which the restaurant was located from the motel owner across the street. Id. at 707. The restaurant operator's lease expressly provided that restaurant customers would be allowed to park in the motel parking lot free of charge. Id. at 707. Furthermore, a sign on the door of the restaurant advised customers that parking was available across the street at the motel. Id. at 708. A comparable sign was posted at the motel. Id. at 708. The plaintiff chose to dine at the restaurant and parked across the street at the motel. Id. at 708. The plaintiff fell and was injured in the motel parking lot; the plaintiff

brought suit against both the restaurant operator and the motel owner. Id. This Court held that the combination of the lease, signage, and knowledge that the motel parking lot was being used by the restaurant customers was sufficient to impose a duty upon the restaurant operator to maintain the parking lot. Id.

In the present case, Appellant had no meaningful or material connection to the One Stop premises. Mr. Means was not employed by either of the Appellees, and he does not allege that he entered the One Stop property at any time on December 24, 2007. Instead, Appellant alleges that the One Stop property was a frequent site of crime and that the chain link fence and an outbuilding on the One Stop property allowed his assailants to lay in wait before entering the Domino's property to attack him.

The mere existence of a chain link fence and outbuilding on a landowner's property in an alleged high crime area cannot be said to increase the harm to a non-entrant on adjacent property. If the opposite were true, the implications would be staggering. At hearing the circuit court noted that if such a duty existed, any property in alleged high crime rate – such as Charleston's East End and West Side – would be subject to liability for any criminal attack by an unknown third party who hid behind a fence or tree on their property in preparation for a crime.

The existence of a specific duty requires more than just a consideration of foreseeability. Issues of public policy, including the magnitude of the burden of guarding against an alleged injury and the consequences of placed the burden on the defendant must be considered. Mallett, 206 W. Va. at 156, 522 S.E.2d at 447. This circuit court could not conclude as a matter of law that the duty urged by plaintiff is viable. In practice, to do so would require the elimination of every fence, building, and tree in an area deemed or alleged to be located in high crime area.

Such a societal burden is too great and the Circuit Court correctly refused to conclude that such a duty exists.

Appellant argues that the Circuit Court erred by limiting its focus on the fact that the fence and outbuilding allowed the assailants to remain hidden and lay in wait. While this is an incomplete summary of the Circuit Court's focus, those facts are the only facts linking the One Stop property to the Appellant's shooting. Furthermore, Appellant alleges that the Appellees did not utilize safety and security precautions such as security guards, surveillance cameras, and adequate lighting. Even if these allegations were correct, Appellant ignores the fact that the duty that would require those precautions would arise from the Appellees' relationships with people on the One Stop property, not on adjoining, but unrelated property.

C. Appellant takes the "foreseeability" element out of context.

Appellant repeatedly states in his brief that the criminal acts of the assailants were foreseeable, and therefore, the Appellees owed the Appellant a duty of care. Appellant cites cases speaking of the "foreseeability of harm." See Sewell v. Gregory, 179 W. Va. 585, 371 S.E.2d 82 (1988); Neely v. Belk, Inc., 222 W. Va. 560, 668 S.E.2d 189 (2008); Strahin v. Cleavenger, 216 W. Va. 175, 306 S.E.2d 197 (2004); Miller v. Whitworth, 193 W. Va. 262, 455 S.E.2d 821 (1995). However, each of the cited cases deals with the premises liability issue when the plaintiff was located on the defendant's property, not an adjacent unrelated property. The fundamental requirement for a claim for premised liability is that the injury complained of occurred **on the defendant's property**, not on another's property. In very limited circumstances, this Court has extended the scope to the property of a third party, but it has done so only in cases in which some nexus was present between the defendant and the third party's

property. Only when the Court has concluded that there is a nexus between the defendant and the third party's property does the Court get to the issue of foreseeability.

D. Appellant's allegations of "foreseeability" against the Appellees are not sufficient to establish a claim upon which relief may be granted.

In Miller v. Whitworth, the Supreme Court of Appeals of West Virginia reviewed a case where the plaintiff, a tenant of a mobile home park, was allegedly injured by another tenant on the property owned by the landlord. 193 W. Va. 262, 455 S.E.2d 821. The plaintiff filed suit against the landlord alleging a duty to protect the plaintiff from criminal conduct of third parties on the premises. The Court held that "under the common law of torts, a landlord does not have a duty to protect a tenant from the criminal activity of a third party. . . **A landlord's general knowledge of prior unrelated incidents of criminal activity occurring in the area is not alone sufficient to impose a duty on the landlord.**" Id. at 827.

In the present case, the Appellant alleges that the Appellees "observed or were made aware of numerous instances of illegal and/or violent activity, on their property, including, but not limited to fighting, robberies, panhandling, loitering, public intoxication, and acts of prostitution. Complaint ¶ 8. There is no controversy that both the One Stop and the Domino's were closed at the time of the events alleged in the Complaint. Even if Appellant's allegations of prior activity is correct, knowledge of these activities cannot trigger a duty to protect third parties from criminal assailants on another's property during hours in which both the owned property and the unowned property are closed for business. To conclude otherwise would completely eviscerate the law of premises liability and create an incomprehensible range of liability for landowners based on the criminal acts of third parties who simply choose to launch a criminal attack from a landowner's property.

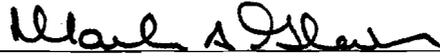
In cases from West Virginia and other states, foreseeability in the context of premises liability and criminal attacks is limited to events in which the criminal attack takes place on the defendant's premises against a victim with some connection, e.g., customer, employee, tenant, to the subject property. Appellant does not cite a single case with facts remotely similar to the present case in which there was no connection between the plaintiff and the defendant's property and both the defendant's property and the property where the attack took place were closed for business. Implicit in Appellant's allegations and argument is the proposition that the Appellees (and similarly situated people and businesses) must act as a de facto police force 24 hours a day, 7 days a week. Our society has established an actual police force for the purpose of deterring and solving crime and this Court should reject Appellant's effort to shift the responsibility by imposing previously unheard of theories of civil liability.

VI. CONCLUSION

In the present case, Appellant had no relationship whatsoever with the One Stop premises. Instead, he was merely an employee of the business located next door. Even when viewed in the light most favorable to the Appellant, no set of facts could establish any duty on the part of Appellees to the Appellant. Extending the law of premises liability to a landowner of a separate property than where the injury occurred would go against public policy and the costs would outweigh any benefits gained. Accordingly, in the absence of a recognizable duty, Petitioner has no viable claim against the Respondents and the Circuit Court correctly and properly dismissed Petitioner's claims against Respondents in this matter.

Respectfully submitted,

Darden Properties, LLC and OSI, LLC,
Appellees and Defendants below,
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From the Circuit Court of Kanawha County
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CERTIFICATE OF SERVICE

The undersigned counsel for the Appellees, Darden Properties II, LLC and OSI, LLC., does hereby certify that a true copy of the foregoing "*Brief of Appellees Darden Properties II, LLC and OSI, LLC*" was served upon all counsel by placing the same in an envelope, properly addressed with postage fully paid and depositing the same in the U.S. Mail, on this the 9th day of **August, 2010** as follow:

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