

35506

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

DAVID MEANS,

Plaintiff,

v.

CIVIL ACTION NO.: 08-C-3400  
Honorable James C. Stucky

KANAWHA PIZZA, LLC, et al.,

Defendants.

**ORDER GRANTING MOTION TO DISMISS  
OF DEFENDANTS DARDEN PROPERTIES II, LLC AND OSI, LLC**

Plaintiff filed his complaint in the above styled matter on December 19, 2008. On April 24, 2009, defendants Darden Properties II, LLC ("Darden") and OSI, LLC ("OSI") filed a motion to dismiss, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, on grounds that they owed no duty to the plaintiff.

On July 14, 2009, defendants' motion was fully argued before the court. The court has carefully considered the arguments presented by counsel, all papers of record, and pertinent legal authorities. Upon the findings of fact and conclusions of law set forth below, and for the reasons discussed in the following opinion, the court concludes that the motion to dismiss filed by Darden and OSI should be granted.

**Findings of Fact**

Following is a brief sketch of the facts as alleged in the complaint. In December 2006,

---

<sup>1</sup> Plaintiff's complaint originally named Darden Properties, LLC and One Stop, Inc. The defendants' motion to dismiss included this misnomer as a ground for dismissal. At the outset of the hearing on defendants' motion, plaintiff moved for leave to amend his Complaint to substitute Darden Properties II, LLC for Darden Properties, LLC and to substitute OSI, LLC for One Stop, Inc. This Court granted the motion and ordered that the parties be substituted.

plaintiff, David Means, was employed by a Domino's Pizza restaurant operated by defendant Kanawha Pizza, LLC and located on land owned by PLC WV, LLC. On December 24, 2006, Mr. Means arrived at the Domino's Pizza restaurant between 10:00 and 10:30 p.m. for the purpose of performing a food inventory and preparing an order for the resupply of food items.

The Domino's Pizza restaurant is located on the north side of Washington Street East and is adjacent to OSI's Exxon-branded gas station ("The Exxon property") to the east. The Domino's Pizza and Exxon properties are divided by a small concrete curb and a chain-link fence. The chain-link fence is approximately three feet high and part of the fence has inserted slats, limiting the visibility through it. On opposite of the Exxon property is bounded by Greenbrier Street, a four lane road that runs along the side of the grounds of the West Virginia State Capital Building.

Both the Exxon station and the Domino's Pizza restaurant were closed when Mr. Means arrived on December 24, 2006. On his way into the building, Mr. Means noticed two males sitting on the small concrete curb which divides the Exxon and Domino's Pizza properties. Mr. Means parked behind the restaurant and entered through a door located at the rear of the building. After about an hour Mr. Means exited the store and started walking to his car. Two individuals standing behind the fence on the Exxon property yelled at Mr. Means, who then began to run. The two unknown individuals jumped over the fence onto the Domino's property. After entering the Domino's property, at least one of the individuals discharged a firearm in Mr. Means' direction several times. A bullet struck Mr. Means in the leg, however, he managed to start his car and drive himself to the emergency room. The two assailants were never arrested or identified.

### Conclusions of Law

Plaintiff's claims sound in negligence. "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). Furthermore, 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).

Plaintiff concedes that he never entered upon the Exxon property on December 24, 2006. Nor does he contend any nexus between the Darden or OSI and the Domino's Pizza property, which would require Darden or OSI to protect individuals on the Domino's Pizza property. Instead, Plaintiff alleges that the chain link fence and an outbuilding on the Exxon property allowed the assailants to lie in wait before entering the Domino's property to attack him.

In support of their motion to dismiss, OSI and Darden point out that there is no authority in West Virginia which establishes a landowner's duty to protect individuals from criminal attacks on non-owed or possessed property. Generally speaking, 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). The West Virginia Supreme Court has carved out two narrow

exceptions to this rule. A landowner may only be liable for the criminal acts of a third party if (1) a special relationship exists between the defendant and the plaintiff or (2) when the defendant's affirmative actions or omissions have exposed another to a foreseeable high risk of harm from intentional conduct. *Miller*, 193 W. Va. at 266, 455 S.E.2d at 825. Plaintiff argues that the second exception applies in this case and defeats the defendants' motion.

OSI and Darden argue that neither exception can save the plaintiff's case because the decisions in both *Miller* and *Strahin* explicitly and implicitly limit the exceptions to individuals who have 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. It has been stated that this "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 which the restaurant was located on from the motel owner across the street. *Andrick*, 187 W. Va. at 707, 421 S.E.2d at 248. The restaurant operators lease expressly provided that restaurant customers would be allowed to park in the motel parking lot free of charge. *Id.* Furthermore, a sign on the door of the restaurant advised customers that parking was available across the street at the motel. *Id.* at 708, 249. A comparable sign was posted at the motel. *Id.* The plaintiff chose to dine at the restaurant and parked across the street at the motel. *Id.* The plaintiff fell and was injured in the motel parking lot. *Id.* 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 <sup>905</sup> ~~patients~~ <sup>patrons</sup> was sufficient to impose a duty upon the restaurant operator to maintain the parking lot. *Id.*

In the present case, plaintiff had no meaningful connection to the Exxon premises. Mr. Means does not allege that he entered the Exxon property at any time on December 24, 2009. Instead, by coincidence, plaintiff was employed at a business located adjacent to the Exxon property. The Court cannot conclude that this is sufficient to create the sort of connection contemplated in *Andrick* which would give rise to a duty.

Plaintiff counters that his location at the time of the attack is irrelevant and that the second exception identified in *Miller* – where a landowner’s affirmative actions or omissions expose the plaintiff to a foreseeable high risk of harm from intentional conduct – provides the basis for OSI and Darden’s duty. Specifically, plaintiff alleges that the chain-link fence between the Exxon and Domino’s Pizza properties and an outbuilding located on the Exxon property allowed the assailants to “lie in wait” before attacking Mr. Means.

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 non-owned property. If the opposite were true, the implications would be staggering. Landowners in high crime areas would be subject to liability for any criminal attack perpetrated by someone unknown to the landowner, who secreted himself on the landowner’s property for the purpose of committing a crime off of it. 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 placing the burden on the defendant must be considered. *Mallett*, 206 W. Va. at 156, 522 S.E.2d at 447. This Court cannot 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 burden is too great and this Court cannot conclude that a duty exists as urged by the plaintiff.

Accordingly, the court concludes that the allegations of plaintiff's complaint do not establish any duty, which, if broken would create a cause of action upon which relief could be granted against OSI and/or Darden.

Wherefore it is hereby **ORDERED** as follows:

1. OSI, LLC and Darden Properties II, LLC's motion to dismiss is hereby **GRANTED**, with prejudice.
2. The Clerk of the Circuit Court is directed to provide copies of this order to the following counsel of record.

J Kristofer Cormany  
Cormany Law, PLLC  
P.O. Box 11827  
Charleston, WV 25339

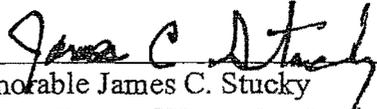
John Kennedy Bailey  
John Kennedy Bailey, PLLC  
P.O. Box 2505  
Charleston, WV 25329

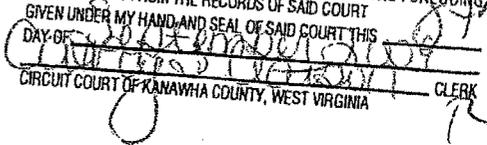
Mark A. Glover  
Pullin, Fowler, Flanagan, Brown & Poe, PLLC  
JamesMark Building  
901 Quarrier Street  
Charleston, WV 25301

Andrea M. King  
John R. Fowler, PLLC  
Suite 1190 United Center  
500 Virginia Street, East  
Charleston, W. Va. 25301

Thomas S. Sweeney  
MacCorkle, Lavender & Sweeney, PLLC  
300 Summers Street, Suite 800  
Charleston, WV 25301

Dated this 31 day of August, 2009.

  
Honorable James C. Stucky  
Circuit Court of Kanawha County

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, ss  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY,  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS  
DAY OF 30th August 2009  
  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA CLERK