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LITIGATING THE NEGLIGENT SECURITY CASE: WHO'S IN CONTROL HERE?

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Safety and security are among the most rudimentary of concepts that derive from the principles of self-preservation. Under certain circumstances, an obligation may arise to protect not only oneself, but also to protect others from the compromise of their safety and security. When that duty is then breached, negligence principles will factor into the analysis when the failure to satisfy this obligation causes injury to or the death of the person to whom the obligation is owed. Under general premises liability principles, an individual or entity can become exposed to significant liability when he, she, or it is not even present to cause the harm. In this regard, when that harm arises from the danger caused by criminals attacking visitors on land owned or possessed by the person or entity, the basis of that exposure is categorized as "negligent security." As this Article will discuss, a common thread that runs through the obligation on the part of one in possession of land to protect others on the land is the concept of "control." Thus, as will be explored, when an individual maintains control over a tortfeasor, the instrumentality that a tortfeasor

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uses to commit the harm, or the land upon which a tort is committed, a duty will arise to use reasonable measures to guard against the compromise of safety and security of others.

I. THE CONCEPT OF "DUTY"

The analysis of a negligent security case begins with an assessment of the type of duty that the property owner owes to a visitor. Generally, a person or entity has no duty to take precautions to protect another person against criminal acts of third parties coming onto the owner's premises.[1] However, exceptions to this maxim have emerged from which claims for negligent security have arisen. The first significant exception to this general principle is the "special relationship" exception, in which the property owner assumes a duty to protect the victim of an assault based upon some special relationship arising out of law. The second critical exception to the doctrine arises when the owner has control over the property in question and, as a result, assumes a duty of reasonable care to the victim of the assault, commensurate with the legal status of the visitor.

A. The Special Relationship Exception: Control of Others

"Florida recognizes the special relationship exception to the general rule of non-liability for third-party misconduct. The existence of a special relationship gives rise to a duty to control the conduct of third persons so as to prevent them from harming others."[2] Whether a duty arises, as a matter of law, is resolved by the courts through a determination of policy considerations "which lead the law to say that the particular plaintiff is entitled to protection."[3] In this regard, special relationships, such as those involving a landlord–tenant, common carrier–passenger, rental car company–driver, hotel–guest, employer–employee (with due regard for the workers' compensation exclusivity provision of Sec-

1. T.W. v. Regal Trace, Ltd., 908 So. 2d 499, 503 (Fla. 4th Dist. Ct. App. 2005); RESTATEMENT (SECOND) OF TORTS § 315 (1965); *see* 65 C.J.S. Negligence § 60 (WestlawNext through June 2014) (discussing the general rule that there is "no duty to control the conduct of a third party to protect another from harm").

2. D.M. *ex rel.* K.M. v. Publix Super Markets, Inc., 895 So. 2d 1114, 1117 (Fla. 4th Dist. Ct. App. 2005).

3. Rupp v. Bryant, 417 So. 2d 658, 667 (Fla. 1982) (quoting WILLIAM PROSSER, THE LAW OF TORTS § 53, 325–26 (4th ed. 1971)) (internal quotations omitted).

tion 440.11, Florida Statutes),[4] convenience store employee–customer, and school–student relationships, may give rise to a duty to protect the visitor, who is normally a party vulnerable to third-party criminal acts.[5]

The rationale of this type of protection, provided for by the existence of a special relationship, arises from the concept of "control." Perhaps the best description of the derivation of this duty is articulated in the Michigan case of *Williams v. Cunningham Drug Stores, Inc.*,[6] in which the court noted that the rationale behind imposing a duty to protect in a "special relationship" is based upon the concept of "control," in that "[i]n each situation one person entrusts himself to the control and protection of another, [and there is] a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is best able to provide a place of safety."[7] Nevertheless, even where a special relationship exists, the key ingredient, in connection with this obligation, is that the risk of criminal attack must be "reasonably foreseeable."[8]

An example of such can be found in *United States Security Services Corp. v. Ramada Inn, Inc.*,[9] in which a guest was criminally assaulted while staying at a Ramada Inn hotel. The guest brought a claim for negligent security against both the hotel and its security company.[10] Analogizing the relationship between the

4. FLA. STAT. § 440.11 (2014).

5. *See generally* Hall v. Seaboard Air Line Ry. Co., 93 So. 151, 156 (Fla. 1921) (discussing the duty of a common carrier); *D.M. ex rel. K.M.*, 895 So. 2d at 1117 (discussing the liability of an employer); Gross v. Fam. Servs. Agency, Inc., 716 So. 2d 337, 339 (Fla. 4th Dist. Ct. App. 1998) (discussing the duty of supervision in a university); Shurben v. Dollar Rent-A-Car, 676 So. 2d 467, 468 (Fla. 3d Dist. Ct. App. 1996) (discussing the duty of a rental car agency); Salerno v. Hart Fin. Corp., 521 So. 2d 234, 235 (Fla. 4th Dist. Ct. App. 1988) (discussing the duty of a landlord); RESTATEMENT (SECOND) OF TORTS § 315 (discussing the general rule as to controlling the conduct of a third party).

6. 418 N.W.2d 381 (Mich. 1988).

7. *Id.* at 383 (footnote omitted).

8. *Salerno*, 521 So. 2d at 235.

9. 665 So. 2d 268 (Fla. 3d Dist. Ct. App. 1995).

10. *Id.* at 269. These materials address only the issue of negligent security in the context of premises liability as it relates to an owner or possessor of land. They do not expressly address the issue of security companies that are *specifically contracted* to guard against crime as a particular undertaking, but rather the general duty of a landowner or possessor to protect visitors from third-party criminal attacks. *See* Burns Int'l Sec. Servs. Inc. of Fla. v. Phila. Indem. Ins. Co., 899 So. 2d 361, 364–65 (Fla. 4th Dist. Ct. App. 2005) (discussing "the *common law* duty to exercise reasonable care" in keeping a premises safe); Vasquez v. Lago Grande Homeowners Ass'n, 900 So. 2d 587, 592 (Fla. 3d Dist. Ct. App. 2004) (also discussing "the *common law* duty to exercise reasonable care" in keeping a

hotel and the plaintiff to that of the traditional innkeeper/guest relationship, long recognized under the English common law as creating a special relationship, the court found that the hotel owed a non-delegable duty of security to its guests.[11] Thus, the hotel could not discharge its obligation to provide reasonable security by simply hiring a security company to protect its guests, and accordingly, the hotel could be found vicariously liable for the malfeasance of the guards.[12]

In *Ramada*, the court also recognized that the special relationship applicable to a hotel and its guests similarly applies to a landlord and its tenants.[13] Thus, in *T.W. v. Regal Trace, Ltd.*,[14] the Florida Fourth District Court of Appeal delineated the contours of the landlord/tenant relationship. In that case, the court made it clear that the lynchpin of the analysis "centers on superior knowledge."[15] Nevertheless, based upon this relationship and the duty that arises therefrom, a landlord becomes obligated to provide not only safe housing, but also adequate security for incidentals of that housing, including parking lots, sidewalks, playgrounds, and all areas surrounding and essential to living in the environment. Although the landlord does not have a duty to "in-

premises safe); Wells Fargo Guard Servs. Inc. of Fla. v. Nash, 654 So. 2d 155, 156 (Fla. 1st Dist. Ct. App. 1995) (finding that "Wells Fargo owed a duty to Nash"), *rev'd*, 678 So. 2d 1262 (Fla. 1996); Williams v. Office of Sec. & Intelligence, Inc., 509 So. 2d 1282, 1283 (Fla. 3d Dist. Ct. App. 1987) (finding Office of Security & Intelligence, Inc.'s negligence to be the proximate cause of a rape); Fincher Investigative Agency, Inc. v. Scott, 394 So. 2d 559, 560 (Fla. 3d Dist. Ct. App. 1981) (discussing Fincher Investigative Agency's potential negligence in failing to properly train its security guard). Additionally, if the liability of such person or entity to a visitor is based upon the owner, possessor, or person in control's "*active conduct* or *affirmative negligence* rather than the condition of the property," then ordinary negligence principles apply in determining the liability of such person or entity. Byers v. Radiant Grp., L.L.C., 966 So. 2d 506, 508 n.3 (Fla. 2d Dist. Ct. App. 2007) (emphasis added).

11. *U.S. Sec. Servs. Corp.*, 665 So. 2d at 270.

12. *Id. See also* Armiger v. Associated Outdoor Clubs, Inc., 48 So. 3d 864, 873, 875 (Fla. 2d Dist. Ct. App. 2010) (holding in part that the owner of a racetrack owed a non-delegable duty to maintain its premises in a reasonably safe condition and could not escape that duty by hiring an employee or an independent contractor to perform the non-delegable duty).

13. *U.S. Sec. Servs. Corp.*, 665 So. 2d at 270 (quoting Goldin v. Lipkind, 49 So. 2d 539, 541 (Fla. 1950) and PROSSER & KEETON ON THE LAW OF TORTS § 71, 511–12 (W. Page Keeton ed., 5th ed. 1984)). *See also* Suarez v. Gonzalez, 820 So. 2d 342, 346 (Fla. 4th Dist. Ct. App. 2002) (stating that the special relationship between a landlord and its tenant imposes a non-delegable duty of care upon the landlord to use reasonable care in selecting its subcontractors to make repairs).

14. 908 So. 2d 499 (Fla. 4th Dist. Ct. App. 2005).

15. *Id.* at 505.

vestigate,"[16] it does have a duty to use reasonable care to remedy or, at least, warn of conditions about which it has superior knowledge.[17]

In the very recent and tragic case of *Knight v. Merhige*,[18] the Fourth District Court of Appeal reached perhaps the outer limit of the special relationship test, and the limits to which one is obligated to control the conduct of another. In this case, the parents of an emotionally disturbed young man of thirty-five years, invited their son to a Thanksgiving dinner with their relatives, despite the request of the relatives, who were in significant fear of the young man, that the parents not to bring him to the event.[19] Sadly, the young man attended and murdered many of his relatives at the Thanksgiving dinner, including a six-year-old child.[20] The young man eventually pled guilty to the crime and was sentenced to life imprisonment.[21] The personal representative of the deceased relatives then sued the young man's parents, claiming that they had violated their duty to the dinner guests, based upon the "special relationship" between the parents and the murdered relatives, which, the personal representative claimed, gave rise to a legal duty to protect the relatives from their son's conduct.[22] The trial court, disagreeing with this contention, granted the defendant's motion to dismiss with prejudice.[23] The court believed that the plaintiffs failed to state a cause of action, ruling that no duty existed on the part of the young man's parents to protect the dinner guests from the actions of the son.[24]

On appeal, the Fourth District Court of Appeal agreed with the trial court, ruling that the imposition of such a legal duty, when a special relationship is contended, turns upon whether the defendants had "control over the premises where the injury occurred, the instrumentality causing the injury, or the person causing the injury."[25] Even though the parents had assumed some

16. *Id.* at 501.
17. *Id.*
18. 133 So. 3d 1140 (Fla. 4th Dist. Ct. App. 2014).
19. *Id.* at 1142–43.
20. *Id.* at 1143.
21. *Id.*
22. *Id.* at 1142–43.
23. *Id.* at 1143–44.
24. Knight v. Merhige, 133 So. 3d 1140, 1141 (Fla. 4th Dist. Ct. App. 2014).
25. *Id.* at 1144.

degree of informal financial responsibility for the well-being of their son, there was not sufficient "control" over the person causing the injury, an adult child, where there was no "legal custody" that had been established.[26] Moreover, from a "public policy" perspective, the court opined that the balancing factors weighed in favor of a finding of no liability.[27] The court expressed that it is a socially desirable result, in most instances, to encourage even a "deeply troubled" child to attend family gatherings, and a holding in favor of liability would prove to be a disincentive for parents to encourage socially desired interaction with family members for fear of civil liability.[28] Thus, as the court noted, "[d]ifficult and tragic cases such as this one should not set the standard for the entire universe of family interaction."[29]

1. The Residential Landlord Tenant Protection Act

In this regard, Florida has also imposed upon a landlord a statutory obligation to maintain premises under its control in a reasonable condition.[30] Under the Residential Landlord Tenant Protection Act, a landlord is obligated to provide for its tenants "[t]he clean and safe condition of common areas."[31] The statute specifically confers a private right of action on a tenant.[32] Thus, a statutory right of action replaces what would normally be pled as the basis of a duty that was breached in a general negligence count rather than as a separate statutory cause of action.[33] The Residential Landlord Tenant Protection Act also contains an at-

26. *Id.* at 1147.
27. *Id.* at 1149–50.
28. *Id.* at 1150–51.
29. *Id.* at 1151.
30. *See* FLA. STAT. § 83.51 (2013) ("The landlord at all times during the tenancy shall . . . [c]omply with the requirements of applicable building, housing, and health codes; or . . . maintain [all] structural components in good repair."). The violation of a statutory duty, such as the Residential Landlord Tenant Protection Act or the Convenience Business Security Act, discussed *infra*, may also potentially give rise to an argument that the owner is negligent *per se*, if the plaintiff can establish that the statute is designed to protect a particular class of persons from the particular type of injury and such a person suffered the type of injury that the statute is designed to protect because the defendant failed to take such precautionary measures. DeJesus v. Seaboard Coast Line R.R. Co., 281 So. 2d 198, 201 (Fla. 1973) (and its progeny).
31. FLA. STAT. § 83.51(2)(a)(3).
32. *Id.* § 83.54.
33. *See id.*

torneys' fee provision for violations of this section.[34] Moreover, the statute has been viewed by the legislature as so significant that a separate provision, Section 83.47, voids any provisions in a rental agreement to the extent that it "[p]urports to waive or preclude the rights, remedies, or requirements set forth" in the statute, or "[p]urports to limit or preclude any liability of the landlord to the tenant or of the tenant to the landlord, arising under law."[35] Thus, this codified provision, setting forth the special relationship between a landlord and a tenant, may form, in and of itself, the basis of a negligent security claim against a landlord who fails in its responsibility to provide a safe living environment to its tenants.

In the watershed case of *Paterson v. Deeb*, the First District Court of Appeal considered, for the first time, the effect of the Residential Landlord Tenant Protection Act on the rights of the victim of a crime; the decision provided harsh results for the landlord.[36] In this case, the plaintiff was a tenant of an old building that had been marked by the owner for demolition.[37] Ignoring the victim's demands for security, which were premised upon the fact that trespassers had unrestricted access to the premises, the landlord chose to forego its common law and statutory obligations to provide safe and clean common areas and decided not to "waste" its money to repair the building and provide for security.[38] Not unexpectedly, the facts became grim as an assailant gained access to the premises; threatened the victim at knifepoint; bound her hands, feet, and mouth; and then battered and raped her.[39]

The landlord, in defending the suit, attempted to take refuge in the fact that never before had the complex experienced a comparable crime.[40] Unimpressed with this argument, the court opined that, although under previous cases based upon the common law prior similar incidents were required to establish liabil-

34. *See* FLA. STAT. § 83.48 ("In any civil action brought to enforce the provisions of the rental agreement or this part, the [prevailing party] may recover reasonable attorney fees . . . from the nonprevailing party.").

35. Ray v. Tampa Windridge Assocs., Ltd., 596 So. 2d 676, 677 (Fla. 2d Dist. Ct. App. 1991).

36. 472 So. 2d 1210, 1214–17, 1220 (Fla. 1st Dist. Ct. App. 1985).

37. *Id.* at 1213.

38. *Id.*

39. *Id.*

40. *Id.* at 1214–15.

ity, the Residential Landlord Tenant Protection Act provided additional protection for the tenant and created, in effect, a "statutory warranty of habitability."[41] The court, in statesmanlike fashion, made it clear that it was not about to give the landlord a free pass from providing security, stating:

> We are not willing to give the landlord one free ride, as it were, and sacrifice the first victim's right to safety upon the altar of foreseeability by slavishly adhering to the now-discredited notion that at least one criminal assault must have occurred on the premises before the landlord can be held liable.[42]

Quoting a California opinion, the First District made clear that, when it comes to the Residential Landlord Tenant Protection Act, foreseeability is not defined solely by a prior similar incident.[43] Thus, finding that based upon the landlord's utter disregard for the safety of its tenants and obligation of the statute, the court found that the landlord had, in essence, willfully violated the statute; the court not only affirmed liability, but also ruled that the trial court should have allowed the jury to consider punitive damages.[44] Thus, this case and the statute that it interprets provide incentive for a landlord to adequately maintain the common areas and maintain proper security for property which is under its control, and for which the tenant has forfeited her ability to control.

2. The Convenience Business Security Act

In order to combat the rash of late night robberies committed in convenience stores and gas stations that also contain convenience stores in the State of Florida, in 1990, the Florida legislature passed the Convenience Business Security Act,[45] which was designed to encourage business owners in control of these havens

41. *Id.* at 1216 (quoting Mansur v. Eubanks, 401 So. 2d 1328, 1330 (Fla. 1981)) (internal quotations omitted).

42. Paterson v. Deeb, 472 So. 2d 1210, 1218–19 (Fla. 1st Dist. Ct. App. 1985).

43. *Id.* at 1219.

44. *Id.* at 1220–21. Similarly, the court in Grant v. Thornton, 749 So. 2d 529, 532 (Fla. 2d Dist. Ct. App. 1999), found that a landlord was negligent for failing to comply with county building code, by maintaining front door containing deadbolt that required key to be used to exit from the inside.

45. FLA. STAT. §§ 812.171–172 (2014).

for dangerous criminals to take reasonable precautions to protect consumers and employees who are particularly vulnerable to attacks. Codified in Sections 812.171 and 812.172 of the Florida Statutes, the statute is quite explicit as to its purpose and the class of individuals it is designed to protect. As set forth in the Convenience Business Security Act itself:

> The Legislature finds that the provisions of this act are intended to prevent violent crimes and thereby to protect employees and the consumer public at late-night convenience businesses.[46]

In this regard, the Convenience Business Security Act mandates certain minimum requirements for all "convenience businesses"[47] that qualify under the statute and further mandates certain heightened requirements for those businesses that have experienced one or more of the qualifying, violent-type crimes.[48] Thus, the first inquiry in deciding whether or not this special relationship has been violated is to determine if the business is a qualifying enterprise under the statute.

a. What Is a Qualifying Enterprise?

In order to qualify as a convenience business, the enterprise must fit within the definition of "convenience business" under the Convenience Business Security Act, and must not fit within one of the enumerated exclusions. The statute, in Section 812.171, defines a convenience business as follows:

> As used in this act, the term "convenience business" means any place of business that is primarily engaged in the retail sale of groceries, or both groceries and gasoline, and that is open for business at any time between the hours of 11 p.m. and 5 a.m. The term "convenience business" does not include:
>
> (1) A business that is solely or primarily a restaurant.
>
> (2) A business that always has at least five employees on the premises after 11p.m. and before 5 a.m.

46. FLA. STAT. § 812.172 (1997).
47. *Id.*
48. *Id.* § 812.173(4).

> (3) A business that has at least 10,000 square feet of retail floor space.
>
> The term "convenience business" does not include any business in which the owner or member of his or her family work between the hours of 11 p.m. and 5 a.m.[49]

Under the statute, the crime itself does not have to actually occur between the hours of 11:00 p.m. and 5:00 a.m., although issues of causation may be raised if the business qualifies under the Act but fails to follow its mandatory requirements.

A case that discussed the applicability of this definition of "convenience business" is *Baker v. State*.[50] In *Baker*, a store that had regular business hours from 7:00 a.m. to 10:00 p.m. but sometimes operated past 11:00 p.m. was held not to constitute a convenience business for purposes of the Convenience Business Security Act.[51] Similarly, in *Floval Oil Corp. v. Munoz*,[52] the Third District Court of Appeal found that a company that was not "*primarily* engaged in the retail sale of groceries, or both groceries and gasoline," could not be held liable under the Convenience Business Security Act for the death of one of its workers.[53]

Moreover, care must be taken to examine whether the injured or killed employee would qualify as an "owner" of the convenience store business or truly an employee. Often, this consideration may become paramount when the killed or injured employee is leasing the building itself to operate his or her own business. In this context, a court will most likely look at the true relationship between the landlord and tenant, and the degree to which the landlord has truly relinquished "control" to the tenant, or whether the landlord remains so actively involved in the business itself as to blur the definition and distinction of who is the "owner" and who is the "employee." Under these circumstances, the court will likely leave the determination as to ownership of the business to the finder of fact.

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49. *Id.* § 812.171.

50. 951 So. 2d 78 (Fla. 1st Dist. Ct. App. 2007). The term "convenience store" in the statute was changed to "convenience business" in 1992. 1992 Fla. Sess. L. Serv. 1 (West).

51. *Baker*, 951 So. 2d at 80.

52. 679 So. 2d 286 (Fla. 3d Dist. Ct. App. 1996).

53. *Id.* at 286–87 (emphasis added) (quoting FLA. STAT. § 812.171 (1993)) (internal quotations omitted).

Finally, a paradox is apparent in the contours of the Convenience Business Security Act in that the announced intent of the statute, as set forth in Section 812.172, conflicts with the immunity conferred to an employer under the workers' compensation statute in Section 440.11. As is well recognized by the workers' compensation immunity statute, and cases interpreting it, the employer is immune from liability for negligently failing to provide an employee with a safe work environment if the employer has secured worker's compensation insurance.[54] At this time, there is no case directly on point that addresses the conflict between the announced intent of the Convenience Business Security Act and the workers' compensation statute. Although *Floval* comes close, the court in that case determined that the store did not qualify as a convenience business under the statute. Nevertheless, as the law stands now, until and unless the Florida Legislature carves out a specific exception for employees injured or killed in those businesses which qualify under the Convenience Business Security Act, the legislative intent to protect employees of these businesses will be subsumed by the protections of workers' compensation immunity, and the legislative intent, in this regard, will be frustrated.

b. Protections Mandated Under the Act for Qualifying Businesses

Once it is determined that the business qualifies as a "convenience business," the statute sets forth certain criteria with which qualifying conveniences stores must comply.[55] Pursuant to the statute, every convenience business must be equipped with the following security devices and comply with the following standards:

(1) A security camera system capable of recording and retrieving an image to assist in offender identification and apprehension.

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54. FLA. STAT. § 440.11(1) states, in pertinent part, as follows:

> The liability of an employer prescribed in s. 440.10 shall be exclusive and in place of all other liability, including vicarious liability, of such employer to any third-party tortfeasor and to the employee, the legal representative thereof, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . .

55. FLA. STAT. § 812.173 (1997).

(2) A drop safe or cash management device for restricted access to cash receipts.

(3) A lighted parking lot illuminated at an intensity of at least 2 foot-candles per square foot at 18 inches above the surface.

(4) A conspicuous notice at the entrance which states that the cash register contains $50 or less.

(5) Window signage that allows a clear and unobstructed view from outside the building and in a normal line of sight of the cash register and sales transaction area.

(6) Height markers at the entrance of the convenience business which display height measures.

(7) A cash management policy to limit the cash on hand at all times after 11 p.m.[56]

The Convenience Business Security Act further provides that a qualifying "convenience business shall not have window tinting that reduces exterior or interior view in a normal line of sight"[57] and must "be equipped with a silent alarm to law enforcement or a private security agency."[58]

In addition to these physical requirements, which must be implemented within every qualifying convenience store, the statute mandates a training program for all employees of convenience stores pursuant to Section 812.174. This provision requires the owner or principal operator of the store to adopt and implement a robbery deterrence and safety program to protect its retail employees within sixty days of employment.[59] A curriculum for this program must be submitted to the Office of the Attorney General, who shall either approve or reject the program within sixty days of its submission. If the training was actually provided to the employee, the statute provides that "[n]o person shall be liable for ordinary negligence due to implementing"[60] the program. While its meaning is not a model of clarity, this language, in combination with the "semi" safe harbor for implementation of the statutory protections that can be found in Section 768.0705, discussed

56. *Id.* § 812.173(1).
57. *Id.* § 812.173(2).
58. *Id.* § 812.173(3). *See* Fla. Admin. Code Ann. r. 2A-5.005 (1998).
59. FLA. STAT. § 812.174.
60. *Id.* § 812.174.

below, provides a substantial degree of protection against either statutory or common law liability for employers who implement the provisions of the Convenience Business Security Act, including the training of employees.

The statute further provides for enhanced security measures that must be taken if a murder, robbery, sexual battery, aggravated assault, aggravated battery, kidnapping, or false imprisonment occurs, or has occurred at a convenience business since July 1, 1989, and arises out of the operation of the convenience business.[61] Under those circumstances, the convenience business must implement at least one of a number of statutorily specified enhanced security measures. The listed measures are (1) providing at least two employees on the premises at all times after 11 p.m. and before 5 a.m.; (2) installing, for use by employees at all times after 11 p.m. and before 5 a.m., a secured safety enclosure of transparent polycarbonate or other material that meets at least one of specified minimum standards; (3) providing a security guard on the premises at all times after 11 p.m. and before 5 a.m.; (4) locking the business premises throughout the hours of 11 p.m. to 5 a.m., and transacting business only through an indirect pass-through trough, trapdoor, or window; *or* (5) closing the business at all times after 11 p.m. and before 5 a.m..[62] A convenience business that has implemented and maintained these enhanced security measures without any occurrence or incidence of such crimes for a period of no less than twenty-four months may file with the Department of Legal Affairs a notice of exemption from the enhanced security measures if statutorily specified conditions have been met.[63]

A "semi" safe harbor for convenience businesses that are subject to the Convenience Business Security Act can be found in Section 768.0705. This statute provides that "[t]he owner or operator of a convenience business that [has] substantially implement[ed] the applicable security measures listed in [Sections] 812.173 and 812.174 shall [have] a presumption against liability in connection with criminal acts that occur on the premises and that are committed by third parties who are not employees or

61. *Id.* § 812.173(4).
62. *Id.* § 812.173(4)(a)–(e).
63. *Id.* § 812.173(5).

agents of the owner or operator of the convenience business."[64] Consequently, a business that has complied with the provisions of the statute walks into court with a presumption against liability, not only relating to the Act, but to common law premises liability as well. Compliance with the Convenience Business Security Act, although not conclusively determinative, would therefore prove to be a substantial disincentive for any plaintiff who seeks to bring such a claim.

B. The Common Law "Control of the Premises" Exception

The second key exception to the general common law rule—that a premises owner has no duty to protect third parties from criminal attacks on his premises—arises for a person or entity that has control over the premises and has superior knowledge of foreseeable criminal attacks. The first issue that arises in this context examines the question of who actually has control over the premises. Florida courts agree that legal title and ownership of the premises are not essential ingredients of a cause of action based on premises liability.[65] When determining who is liable in a premises liability action, the critical factors courts consider are possession and control of the property.[66] Critically, this control can be either "actual" or "constructive."[67] After the issue of control is determined, the analysis then focuses upon the status of the crime victim. Once these factual questions are resolved, the key question then becomes the foreseeability of the criminal attack.

1. Criminal Attacks Directly on the Premises

"As a general principle, a party has no legal duty to control the conduct of a third person to prevent that person from causing

64. *Id.* § 768.0705.

65. Regency Lake Apartments Assocs., Ltd. v. French, 590 So. 2d 970, 974 (Fla. 1st Dist. Ct. App. 1991).

66. *Id.*

67. *See* Michael & Philip, Inc. v. Sierra, 776 So. 2d 294, 297–98 (Fla. 4th Dist. Ct. App. 2000) (quoting Daly v. Denny's, Inc., 694 So. 2d 775, 777 (Fla. 4th Dist. Ct. App. 1997) and stating that

"the duty to protect strangers against the tortious conduct of another can arise if, at the time of the injury, the defendant is in actual or constructive control of . . . the instrumentality; . . . the premises on which the tort was committed; or . . . the tortfeasor.").

harm to another."[68] As noted in the case of *Michael & Philip, Inc. v. Sierra*,[69] the duty to protect strangers against the tortious conduct of others arises in three contexts: when the defendant has control of (1) the instrumentality of the harm; (2) the tortfeasor himself; or (3) the premises upon which the tort was committed.[70] In this regard, the duty to protect third persons from injuries rests on the party who has the right of possession, custody, and control of the premises, in that the duty to protect others from injury resulting from a dangerous condition on the property rests upon "the right to control access by third parties."[71] The right is not based upon ownership of the premises, but rather on control. For example, in a leased property context the right may fall entirely upon the lessee if the property owner has relinquished complete control of the premises to the lessee.[72] However, where the landlord/owner retains control over a portion of the leased premises, then the landlord/owner will be the responsible party.[73]

An example of this can be found in *Publix Super Markets, Inc. v. Jeffery*,[74] in which the Third District of Court of Appeal determined that where the owner of a property retains the responsibility under a lease to maintain common areas, including the parking lot, the obligation of keeping the parking lot safe from criminal attacks lies with the owner and not the tenant.[75] However, in *Wal-Mart Stores, Inc. v. McDonald*,[76] the court made clear that both the landlord and the tenant can have concurrent

68. Boza v. Carter, 993 So. 2d 561, 562 (Fla. 1st Dist. Ct. App. 2008) (quoting Aguila v. Hilton, Inc., 878 So. 2d 392, 398 (Fla. 1st Dist. Ct. App. 2004)).

69. 776 So. 2d 294 (Fla. 4th Dist. Ct. App. 2000).

70. *Id.* at 297–98 (quoting Vic Potamkin Chevrolet, Inc. v. Horn, 505 So. 2d 560, 562 (Fla. 3d Dist. Ct. App. 1987)). *See generally* Knight v. Merhige, 133 So. 3d 1140 (Fla. 4th Dist. Ct. App. 2014) (deciding that the parents of a mentally disturbed man were not liable for the torts he committed because they lacked necessary control); Daly v. Denny's, Inc., 694 So. 2d 775 (Fla. 4th Dist. Ct. App. 1997) (holding that a business owner did not owe a duty to a stranger who was attacked on an adjacent property by people who had come over from his property, as he did not control the instrumentality, the premises on which the tort was committed, or the tortfeasors).

71. Bovis v. 7-Eleven, Inc., 505 So. 2d 661, 664 (Fla. 5th Dist. Ct. App. 1987).

72. *See, e.g.*, Brown v. Suncharm Ranch, Inc., 748 So. 2d 1077, 1079 (Fla. 5th Dist. Ct. App. 1999) (holding that a tenant maintains premises liability even when the landlord has the authority to terminate the month-to-month lease).

73. *See* RESTATEMENT (SECOND) OF TORTS § 328E (1965) (explaining that possession of land is based upon control, intent to control, and right to immediate occupation).

74. 650 So. 2d 122 (Fla. 3d Dist. Ct. App. 1995).

75. *Id.* at 124.

76. 676 So. 2d 12 (Fla. 1st Dist. Ct. App. 1996).

duties to provide reasonably safe premises.[77] Thus, under this line of reasoning, both the landlord and the tenant may be responsible, based upon the manner in which the respective rights and obligations are specifically provided for in the underlying lease, for the safety of the visitor to the premises.[78]

2. Off-Site Criminal Attacks

A person or entity in possession or control of a piece of property may also have exposure for injuries that occur off of the premises, when he or she realizes or should realize that criminal attacks on patrons using his or her property are reasonably foreseeable.[79] In *Holiday Inns, Inc. v. Shelburne*,[80] the Fort Pierce Holiday Inn had, inside of the premises, a tavern called the "Rodeo Bar."[81] When visiting this popular evening club, patrons of the bar would often park at a nearby fruit stand, gas station, or Waffle House. The evidence demonstrated that the club's management was aware of fights, both inside and outside of the tavern.[82] On the night in question, certain patrons of the bar got into a fight and left the premises.[83] When they went to their vehicles, parked at the fruit stand, one of the patrons pulled a firearm and shot three others, killing one of them.[84]

Examining a case from Arizona, the Fourth District came to the conclusion that a duty of reasonable care can extend beyond the actual boundaries of the property owned by the defendant.[85] The court found that the duty can be extended beyond the busi-

77. *Id.* at 15. *See also* Haines v. Dania Corner, Inc., 920 So. 2d 1289, 1291 (Fla. 4th Dist. Ct. App. 2006) (exempting the landlord of liability where the premises were in exclusive control of the tenant, pursuant to an oral agreement by the tenant to maintain the premises); Russ v. Wollheim, 915 So. 2d 1285, 1287 (Fla. 2d Dist. Ct. App. 2005) (noting that the liability of an owner of leased property depends upon the extent to which he retains possessory interest or control over it).

78. *See* Salerno v. Hart Fin. Corp., 521 So. 2d 234, 235 (Fla. 4th Dist. Ct. App. 1988) (ruling that a landlord was liable for injury to a tenant when the landlord failed to provide adequate security despite the tenant's request for increased security due to substantial criminal activity in the area).

79. RESTATEMENT (SECOND) OF TORTS § 371 (1965); *see also* WILLIAM PROSSER, LAW OF TORTS § 41, 242 (5th ed. 1984).

80. 576 So. 2d 322 (Fla. 4th Dist. Ct. App. 1991).

81. *Id.* at 324.

82. *Id.* at 328–29.

83. *Id.* at 324.

84. *Id.*

85. *Id.* at 330.

ness premises when the property owner controls premises adjacent to their own, and also "[when] the invitor knows his invitees customarily use such adjacent premises in connection with the invitation."[86] Critically, in this case, the court extended liability to premises not in the actual or constructive control of the owner, but, rather, to those properties *which he simply knows are dangerous and that his patrons use*, even if the owner has absolutely no right to control the property.[87] The implications of this decision, and its progeny, in this regard are significant. Because the evidence demonstrated that the company knew that its patron customarily used adjacent premises to patronize the Rodeo Bar, the *Holiday Inns, Inc.* court found that the bar could be held liable for the activity in the lot, regardless of whether or not the company had "the right to control access by third parties."[88]

Subsequent cases that cite *Holiday Inns, Inc.* have found responsibility on the part of the landowner to use reasonable care to prevent reasonably foreseeable criminal attacks on its patrons in a variety of circumstances. For example, in *Marinacci v. 219 S. Atlantic Boulevard*[89] the court found that a club owner was liable for an assault occurring in a municipal parking lot where a bouncer at the club informed the patron that she could park in the lot.[90] In *Johnson v. Howard Mark Productions, Inc.*,[91] the Second District reversed summary judgment when the lower court ruled that an owner of a teenage night-club could be held liable for the death of its patron who was crossing the street to patronize the club.[92] In *Wakefield v. Winter Haven Management, Inc.*,[93] the court found that a Holiday Inn was liable for a stolen vehicle simply because the hotel knew that the adjacent gas station was

86. Holiday Inns, Inc. v. Shelburne, 576 So. 2d 322, 329 (Fla. 4th Dist. Ct. App. 1991) (quoting Ember v. B.F.D., Inc., 490 N.E. 2d 764, 772 (Ind. 2d Dist. Ct. App. 1986)).

87. *Id.* at 333–34.

88. Bovis v. 7-Eleven, Inc., 505 So. 2d 661, 663 (Fla. 5th Dist. App. 1987).

89. 855 So. 2d 1272 (Fla. 4th Dist. Ct. App. 2003). When evaluating a claim against a tavern based upon the actions of its patrons, consideration should also be given to whether the tavern owner faces exposure under Section 768.125 of the Florida Statutes, which confers a private remedy against taverns for tortious conduct by their underage patrons, if willfully served, and by habitual drunkards, if knowingly and unlawfully provided alcoholic beverages by the bar. FLA. STAT. § 768.125 (2014).

90. *Marinacci*, 855 So. 2d at 1274.

91. 608 So. 2d 937 (Fla. 2d Dist. Ct. App. 1992).

92. *Id.* at 938.

93. 685 So. 2d 1348 (Fla. 2d Dist. Ct. App. 1996).

being used by hotel guests and never told them not to park there.[94]

Although not specifically decided in a negligent security context, two other cases of significant note have affirmed the judicial view of off-premises liability. In *Ramirez v. M.L. Management*,[95] the Fourth District Court of Appeal found that the special relationship inherent in the landlord/tenant context extended the boundaries of an apartment complex to an off-premises site where a tenant was bitten by a dog in a neighborhood park.[96] In this case, the complex had advertised, in a brochure, that there was an adjacent park with a jogging trail.[97] Thus, citing *Holiday Inns, Inc.*, the court found that the complex had "extended its operations" to the local park and was responsible for utilizing reasonable care to protect its tenant, with whom it had a special relationship.[98]

Similarly, in *Almarante v. Art Institute of Ft. Lauderdale, Inc.*,[99] the Fourth District held that a "landowner's conduct can give rise to a zone of risk extending beyond the physical boundaries of his property when harm reaching outside those boundaries is foreseeable."[100] In this case, the Art Institute had placed its dormitories on either side of a busy urban highway, requiring its students on one side of the street to cross the highway on a daily basis for meals and other necessities of student life.[101] Analogizing this situation to the one created by a hotel in *Gunlock v. Gill Hotels Co.*,[102] the court found that the hotel owed a duty to exercise reasonable care for safety of patrons passing over highway to and from its premises.[103]

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94. *Id.* at 1349–50.
95. 920 So. 2d 36 (Fla. 4th Dist. Ct. App. 2005).
96. *Id.* at 38.
97. *Id.* at 37.
98. *Id.* at 39.
99. 921 So. 2d 703 (Fla. 4th Dist. Ct. App. 2006).
100. *Id.* at 705.
101. *Id.* at 704.
102. 622 So. 2d 163 (Fla. 4th Dist. Ct. App. 1993).
103. *Id.* at 164. *See also* Johnson v. Howard Mark Prods., Inc., 608 So. 2d 937, 938 (Fla. 2d Dist. Ct. App. 1992) (holding that a trial court prematurely determined that a night club had no duty to protect patrons from dangers incidental to parking); Thunderbird Drive-In Theatre, Inc. v. Reed, 571 So. 2d 1341, 1343–44 (Fla. 4th Dist. Ct. App. 1990) (determining that a jury question was presented as to whether a drive-in theatre was liable for injuries resulting from traffic conditions at its entrance). For useful background information, see generally George Bair South, Note, *The Duty to Protect Customers From Criminal Acts Occurring off the Premises: The Watering-Down of the "Prior Similar Inci-*

Finally, when considering the issue of off-premises liability, it must be remembered that there is a critical distinction between a landowner's (possessor's) duty to its own patron and its obligation to individuals who are not patrons or invitees of the establishment sued. For example, in *Daly v. Denny's*,[104] a Super 8 Motel laid adjacent to a Denny's restaurant. Debra Daly, the plaintiff in the case, had eaten at Denny's and was sitting in a car in the Denny's parking lot when she was accosted and shot in the neck by individuals who had been loitering in the Super 8 Motel's parking lot, next door. In her Complaint, the plaintiff alleged that there had been numerous armed robberies, assaults, and other criminal acts committed on the property, owned by the Super 8 Motel. Accordingly, in addition to suing Denny's, Ms. Daly sued the corporate owner (Capri Riviera Beach, Inc.) of the Super 8 Motel.[105] Nevertheless, the court decided that the motel did not have control over: (1) the instrumentality; (2) the premises on which the tort was committed; or (3) the tortfeasor, so the motel could not be held responsible for Ms. Daly's injuries.[106]

Thus, the court granted the motel owner's motion to dismiss.[107] This decision emphasizes that the possessor's duty to use reasonable care to protect individuals from third-party attacks presupposes that the individual in need of protection is in a relationship with the possessor from which the duty will arise.

II. THE STATUS OF THE CRIME VICTIM

Once it is determined who may be held liable for injuries occurring to a crime victim, the next step is to determine the level of care to which the responsible party may be held. This, of course, is analyzed by evaluating the status of the visitor/crime

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dents" Rule, 19 HOFSTRA L. REV. 1271 (1991); Bruce G. Warner, Note, *Premises Liability in Florida After* Holiday Inns, Inc. v. Shelburne*: Will Florida Extend a Landowner's Duty of Care Beyond the Physical Boundaries of His Property?*, 16 NOVA L. REV. 597 (1992); 6 FL. PRAC. *Personal Injury & Wrongful Death Actions* § 10:8 (2013–2014 ed.).

104. 694 So. 2d 775 (Fla. 4th Dist. Ct. App. 1997).

105. *Id.* at 776.

106. *Id.* at 777. *See generally* Knight. v. Merhige, 133 So. 3d 1140 (Fla. 4th Dist. Ct. App. 2014) (deciding that the parents of a mentally disturbed man were not liable for the torts he committed because they lacked necessary control); Michael & Philip, Inc. v. Sierra, 776 So. 2d 294 (Fla. 4th Dist. Ct. App. 2000) (holding that a gymnasium owed no duty to a motorist who was injured by a stolen car when the car's keys had been stolen from the gymnasium).

107. *Daly*, 694 So. 2d at 777.

victim.[108] As noted in the seminal case of *Post v. Lunney*,[109] visitors upon private property are trespassers, licensees, or invitees; the classification of their status determines the duty of care that the property owner or possessor owes to visitors.[110] Importantly, the status of the visitor is a question of fact for the jury to decide.[111] Additionally, the Florida Supreme Court in *Wood v. Camp* noted:[112]

> The presence upon the premises, reasonably to be expected by the owner, his family, agents or servants, of the person who is injured; the person's purpose for being upon the premises; and the location where he was at the time of injury, are factors to be weighed together with all other evidence bearing on the duty allegedly owed and bearing on what constitutes "reasonable care in the circumstances."[113]

Thus, the status of a visitor as an invitee, for example, need not be established solely by express words or conduct, but can be reasonably implied from the circumstances.[114]

For example, in the somewhat unusual case of *Darley v. Marquee Enterprises, Inc.*,[115] the plaintiffs Susan Darley and her friend were driving in a car that careened down a roadway through the parking lot of the Sunrise Musical Theatre and wound up down a grass embankment, where it landed in a lake in which Susan ultimately drowned.[116] Darley's estate sued the defendant for negligence, and the lower court refused, at trial, to allow the jury to consider and determine whether Susan was on the property as a public invitee.[117] Reversing the lower court, the Fourth District looked at the facts and circumstances, including the fact that there were no barriers to entry, or any other indication that the parking lot was not public property.[118] Thus, the

108. *See* Byers v. Radiant Grp., L.L.C., 966 So. 2d 506, 508 (Fla. 2d Dist. Ct. App. 2007) (noting that the extent of the duty of care that the possessor of land owes to a visitor to the property depends on whether the visitor is an invitee, licensee, or trespasser).
109. 261 So. 2d 146, 147–48 (Fla. 1972).
110. *Id.* at 147.
111. Pedreira v. Silva, 468 So. 2d 1073, 1074 (Fla. 3d Dist. Ct. App. 1985).
112. 284 So. 2d 691 (Fla. 1973).
113. *Id.* at 695.
114. *Pedreira*, 468 So. 2d at 1074.
115. 565 So. 2d 715 (Fla. 4th Dist. Ct. App. 1990).
116. *Id.* at 717.
117. *Id.* at 717–18.
118. *Id.* at 719.

court concluded, sufficient evidence existed in the record for a jury to conclude that Darley entered the premises either by express or implied invitation. Accordingly, the court reversed the lower court and remanded the case for a new trial for the court to determine if she was a public invitee, foreseeable licensee, or a trespasser.[119]

A. Trespassers

A trespasser is one who enters the owners' property for his or her own convenience without right or authority.[120] The common

119. *Id.*; *see* Poe v. IMC Phosphates MP, Inc., 885 So. 2d 397, 404 (Fla. 2d Dist. Ct. App. 2005) (holding that the classification of motorists who were injured after driving off of the public highway and onto private land was a question of fact for the jury). For a more detailed discussion of the three categories of visitors to land possessed by another and the duty of care owed to each, see Wood v. Camp, 284 So. 2d 691, 695 (Fla. 1973) (expanding the class of invitees entitled to reasonable care to include licensees by invitation); Post v. Lunney, 261 So. 2d 146, 147 (Fla. 1972) (ruling that a visitor who was invited onto a private estate as part of a tour of homes was an invitee); Lukancich v. City of Tampa, 583 So. 2d 1070, 1071–72 (Fla. 2d Dist. Ct. App. 1991) (reversing summary judgment and remanding for trial when both the plaintiff's visitor classification and the degree of care exercised by the defendant were disputed); *see also* FLA. STAT. § 768.075 (2014) (limiting the liability of "[a] person or organization owning or controlling an interest in real property, or an agent of such person or organization" to persons under the influence of alcohol or controlled substances, to trespassers, and to persons who attempt to commit or who commit a felony on the property). If the liability of a possessor of land to a visitor is predicated on the possessor's active conduct or affirmative negligence rather than the condition of the property, then the principles of ordinary negligence apply in determining the issue of liability. *See* Maldonado v. Jack M. Berry Grove Corp., 351 So. 2d 967, 968 (Fla. 1977) (stating that an injured person's status is only relevant "when liability is predicated upon an alleged defective or dangerous condition of the premises"); Hix v. Billen, 284 So. 2d 209, 210 (Fla. 1973) (distinguishing between active negligence on the part of a landowner and negligence based upon the condition of the premises); Byers v. Radiant Grp., L.L.C., 966 So. 2d 506, 510 (Fla. 2d Dist. Ct. App. 2007) (ruling that invitees did not lose their status and become uninvited licensees or trespassers by participating in a brawl in a store parking lot). The status of a visitor to land possessed by another may change from one of the three categories to another. For example, an invitee may lose his or her status and become a licensee or trespasser by going to a part of the premises that is beyond the scope of the invitation or refusing to leave when requested. *See Byers*, 966 So. 2d at 509 (noting that invitees may lose their status by going to a part of the premises that is off-limits or by remaining on the premises for an unreasonable time); Fla. E. Coast Ry. Co. v. Pickard, 573 So. 2d 850, 855 (Fla. 1st Dist. Ct. App. 1990) (ruling that a man injured attempting to hop on to a moving train was a trespasser regardless of whether railroad employees knew of his presence); Brant v. Matlin, 172 So. 2d 902, 904–05 (Fla. 3d Dist. Ct. App. 1965) (holding that the status of a party guest changed when she was invited to stay beyond the conclusion of party to take care of the hosts' children). The issue as to the visitor's status, in this regard, is determined as of the time that the visitor is injured. *Byers*, 966 So. 2d at 509.

120. Seitz v. Surfside, Inc., 517 So. 2d 49, 50 (Fla. 3d Dist. Ct. App. 1987). *See also Post*, 261 So. 2d at 147 (noting that a "trespasser is one who enters the premises of another

law rule as to trespassers is that the landowner has the duty to avoid willful and wanton harm to him and upon discovery of his presence, to warn him or her of known dangers that cannot be discovered with ordinary observation.[121] From the defendant's perspective, if the jury determines that the status of a visitor is either a trespasser or uninvited licensee, the case is likely all but won.[122] As set forth in *Post v. Lunney*, a trespasser is someone "who enters the premises of another without license, invitation, or other right, and intrudes for some definite purpose of his own."[123] In this case, the owner simply must avoid willfully injuring the visitor.[124] Historically, in the event that the property owner learned of a trespasser, he was obligated to warn the trespasser of dangers known to him, but not openly apparent to ordinary observation to the trespasser.[125] In 1999, the Florida Legislature codified Florida's version of a premises liability statute in Section 768.075,[126] which formerly applied only to alcoholically-impaired trespassers.[127] The statute provides that the landowner has no duty whatsoever to warn an "undiscovered"[128] trespasser of dangers on the property.

B. Licensees

The concept of a licensee, under the common law, is that, where the owner or possessor of land knows of the continuous existence of a trespasser, the trespasser's status elevates to that of an uninvited licensee.[129] Under this doctrine, the historical duty is to not intentionally, or from willful and wanton conduct, expose the licensee to harm and to warn him or her against actual dangers which are known to the property owner but are not

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without license, invitation, or other right, and intrudes for some definite purpose of his own, or at his convenience, or merely as an idler with no apparent purpose, other than perhaps to satisfy his curiosity" (quotation marks omitted)).

121. *Seitz*, 517 So. 2d at 50.

122. *See* Lane v. Estate of Morton, 687 So. 2d 53, 54 (Fla. 3d Dist. Ct. App. 1997) (noting that a "known trespasser" is the legal equivalent of an "uninvited licensee").

123. 261 So. 2d 146, 147 (Fla. 1972) (quotation mark omitted).

124. Wood v. Camp, 284 So. 2d 691, 693–94 (Fla. 1973); *Post*, 261 So. 2d at 147.

125. Bovino v. Metro. Dade Cnty., 378 So. 2d 50, 51 (Fla. 3d Dist. Ct. App. 1979).

126. FLA. STAT. § 768.075 (2014).

127. FLA. STAT. § 768.075 (1998).

128. "Undiscovered" meaning that his presence was not detected within twenty-four hours preceding the incident. FLA. STAT. § 768.075(3)(a)(3) (2014).

129. Savignac v. Dep't of Transp., 406 So. 2d 1143, 1146 (Fla. 2d Dist. Ct. App. 1981).

open to ordinary observation.[130] Under the statute, the term "licensee" was omitted, and instead, this visitor is now described as a "discovered trespasser" (someone whose presence was discovered within twenty-four hours of the injury).[131] Stating that the discovered trespasser's status is not "elevated to that of an invitee" unless the owner clearly intends it to be so, the statute sets forth that the duty to a discovered trespasser is, essentially, similar to the previously described duty to a licensee, in that the owner must refrain from "gross negligence or intentional misconduct" and "must warn the trespasser of dangerous conditions that are known" to the owner, but not readily observable to others.[132] Thus, in the negligent security context, if the landowner knows that a vicious criminal is about to prey on property over which he has control, he must warn a "discovered" trespasser, if the owner discovers his presence and if the trespasser does not also know of the predator. However, for an "undiscovered" trespasser, the landowner has no duty at all to warn of impending danger.

C. Invitees

Obviously, to the extent that an issue arises, the challenge from the plaintiff's perspective is to qualify as a business invitee. A business invitee as described in the Restatement (Second) of Torts is defined as follows:

> (1) An invitee is either a public invitee or a business visitor.
>
> (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.
>
> (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.[133]

The comments to this Restatement section are particularly instructive. As noted by the committee, where land is held open to

130. Emerine v. Scaglione, 751 So. 2d 73, 74 (Fla. 2d Dist. Ct. App. 1999); Pedreira v. Silva, 468 So. 2d 1073, 1074 (Fla. 3d Dist. Ct. App. 1985).

131. FLA. STAT. § 768.075.

132. *Id.* § 768.075(3)(a)(3)(b).

133. RESTATEMENT (SECOND) OF TORTS § 332 (1965).

the public, there is an invitation to the public to enter for the purpose for which it is held open, and any member of the public who enters for that purpose is considered to be an invitee.[134] Moreover, "it is immaterial that the visitor does not pay for his admission,"[135] that the owner does not hold the land open for a business purpose, or even that the visitor's presence is in no way related to any business dealings with the owner, or any possible benefit for the owner.[136] In *Darley*,[137] described above, the court found that the jury should have the opportunity to consider whether the driver of the errant vehicle qualified as a public invitee, even though, from all accounts, the parking lot to the musical theater was not actually open and the plaintiff entered onto the premises with no thought of benefiting the land owner.

D. The Duty to the Business Invitee

1. The Duty to Warn and to Convey Accurate Information

Whether the duty arises based upon the special relationship between the property owner and visitor or based upon the control of the premises exception, the duty to the invitee is clear: (a) to warn of concealed dangers of which the owner knows or reasonably should know of; or (b) to take corrective action.[138] Importantly, in the negligent security context, the Fourth District Court of Appeal has concluded that a landlord has *no* duty to investigate the crimes posing a danger to its tenants, even in the context of the "special relationship" created by the landlord/tenant relationship.[139] In a case certain to challenge the boundaries of a residential landlord's duties, the court found that even though the landlord did not have a duty to conduct an independent investigation into crime problems in the community, it did have an obligation to warn tenants of criminal conduct of which it was aware.[140] It remains to be seen if this opinion will have the effect of encouraging landowners and possessors to place their heads squarely

134. *Id.*
135. *Id.* at § 332 cmt d.
136. *Id.*
137. 565 So. 2d 715 (Fla. 4th Dist. Ct. App. 1990).
138. Berman v. Weberman Caterers, Inc., 647 So. 2d 1068, 1068 (Fla. 3d Dist. Ct. App. 1994).
139. T.W. v. Regal Trace, Ltd., 908 So. 2d 499, 506 (Fla. 4th Dist. Ct. App. 2005).
140. *Id.*

into the sand and profess a lack of knowledge regarding crime for which they should have been aware.[141]

Nevertheless, from the perspective of information, a landlord, hotel owner, or other entity who becomes a party to a contract or a contractual relationship and who knowingly disseminates false information may set itself up for a claim based upon fraud.[142] A claim for fraud occurs when a false statement concerning a material fact is made, the person making the statement knows of its falsity, the speaker intends the listener to rely on the statement, and the party actually relies to his or her detriment.[143] Such a claim may often arise when overly exuberant advertising material or overly aggressive leasing agents make express or implied representations relating to the safety and security of the premises that they know or should know are not true. In such a case, a claim of fraud may arise that could, eventually, transform into an amended complaint authorizing punitive damages.[144] As set forth by the Florida Supreme Court in *First Interstate Development Corp. v. Ablanedo*,[145] proof of fraud sufficient to create a jury question on the issue, and supportable of compensatory damages, is sufficient to establish punitive damages.[146]

Along these lines, the Fourth District Court of Appeal in *Wal-Mart Stores, Inc. v. Caruso*[147] held that an owner of a premises is

141. *Id.* at 504 ("for the duty regarding third party criminal acts to arise, it must be proven that the landlord has knowledge of prior similar conduct"). *But see* Lambert v. Doe, 453 So. 2d 844, 845–47 (Fla. 1st Dist. Ct. App. 1984) (detailing how an apartment complex failed to warn parents of a nine-year-old of the danger of allowing him to play with a twelve-year-old that the complex knew had molested another child); Ten Assocs. v. McCutchen, 398 So. 2d 860, 861–62 (Fla. 3d Dist. Ct. App. 1981) (holding landlord liable where he knew or had constructive knowledge of prior rapes and failed to warn a tenant who was raped when an intruder came through her window). *See also* 41 FLA. JUR. 2D Premises Liability § 45 (WestlawNext through Aug. 2014).

142. *See* Southstar Equity, LLC v. Lai Chau, 998 So. 2d 625, 633 (Fla. 2d Dist. Ct. App. 2008) (affirming a significant punitive damage award in this negligent security case based, primarily, upon the jury's finding of intentional misrepresentation); Crown Eurocars, Inc. v. Shropp, 636 So. 2d 30, 31, 34 (Fla. 2d Dist. Ct. App. 1993), *aff'd*, 645 So. 2d 1158 (Fla. 1995) (holding that an award of damages was supported by evidence of the automobile dealer's false statements).

143. 27 FLA. JUR. 2D *Fraud and Deceit* § 90 (WestlawNext through Aug. 2014).

144. *See* FLA. R. CIV. P. 1.190 (f) (explaining the required showing for amended pleadings seeking punitive damages).

145. 511 So. 2d 546 (Fla. 1987).

146. *Id.* at 538–39. *See also* Rappaport v. Jimmy Bryan Toyota of Ft. Lauderdale, Inc., 522 So. 2d 1005, 1006 (Fla. 4th Dist. Ct. App. 1988) (holding that a "claim of fraud [is] sufficient to justify a compensatory damage award").

147. 884 So. 2d 102, 103–05 (Fla. 4th Dist. Ct. App. 2004).

only required to protect against criminal acts by third parties if the act is reasonably anticipated and the owner had actual or constructive knowledge of the specific danger.[148] In *Wal-Mart*, a store that contracted with an optometrist to provide services at its vision center was found to not owe the optometrist a duty to protect him from unforeseeable harm arising from another store employee's attempt to poison him and, thus, could not have been negligent in its surveillance of the optometrist's office, even though the store's agents knew that larcenies had been committed in the vision center.[149] This knowledge did not provide the store with the requisite notice that an employee would attempt to commit a violent criminal act or pose a risk to physical safety.

Perhaps the more interesting query arises in the context of fraudulent nondisclosure in the context of a residential lease. Although no case in Florida has directly addressed the issue, it is clear that the doctrines of *caveat emptor* and *caveat lessee* no longer apply to the sale or leasing of residential property.[150] Thus, the rationale supportive of the landmark decision in *Johnson v. Davis*[151] is equally supportive in the context of the residential lease, and perhaps even more so in light of the "special relationship" between the landlord and the tenant, discussed above. Under *Johnson*, the seller of residential real estate is liable for fraud where he intentionally fails to disclose facts materially affecting the value of the property.[152] This doctrine has been specifically applied to the sale of a residential condominium unit.[153] Accordingly, no justification could exist for failing to apply this rationale in the context of a residential lease, and, like in the circumstances of fraudulent misstatements, an egregious circumstance of fraudulent nondisclosure may also give rise to a claim for punitive damages.[154]

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148. *Id.* at 105.

149. *Id.* at 104.

150. *See* Mansur v. Eubanks, 401 So. 2d 1328, 1329 (Fla. 1981) (overruling the principle of caveat lessee and holding that a lessor has a duty to inspect the premises prior to a tenant's possession); Haskell Co. v. Lane Co., Ltd., 612 So. 2d 669, 674–75 (Fla. 1st Dist. Ct. App. 1993) (refusing to allow the doctrine of caveat emptor to replace the applicable law of real property transactions).

151. 480 So. 2d 625 (Fla. 1985).

152. *Id.* at 630.

153. Billian v. Mobil Corp., 710 So. 2d 984, 986, 989–90 (Fla. 4th Dist. Ct. App. 1998).

154. *See* Barrow v. Bristol-Myers Squibb Co., No. 96-689-CIV-ORL-19B, 1998 WL 812318, at *47 (M.D. Fla. Oct 29, 1998) (citing *Billian*, 710 So. 2d at 992–93, for the prem-

2. The Duty to Use Ordinary Care to Keep the Property in a Reasonably Safe Condition

Concomitant with the standard duty of care in premises liability cases is the duty to keep one's property in a reasonably safe condition and correct dangerous conditions that the owner knows or should reasonably know about.[155] In the negligent security context, a property owner must use ordinary care to protect its business invitees from harm due to reasonably foreseeable risks of injury.[156] The lynchpin in this inquiry is the concept of "foreseeability." As noted by the Florida Supreme Court in *Stevens v. Jefferson*:[157]

> The foreseeability requirement has often been met by proving that the proprietor knew or should have known of the dangerous propensities of a particular patron.... But specific knowledge of a dangerous individual is not the exclusive method of proving foreseeability. It can be shown by proving that a proprietor knew or should have known of a dangerous condition of his premises that was likely to cause harm to a patron.

Without proof that the crime was foreseeable to the property owner or controller, a court will have no choice but to enter a directed verdict on behalf of the defendant.

The issue of foreseeability is, normally, a question for the jury.[158] Normally, the clearest manner of proving foreseeability is based upon the introduction of evidence as to similar criminal conduct in the relevant location over a relevant period of time. Often, the type of evidence that the court will consider, in addition to expert testimony, consists of police reports and crime grids, both of which have been specifically deemed admissible in

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ise that punitive damages may arise when the defendants make a deliberate and knowing concealment designed to cause, and actually causing, detrimental reliance by plaintiff).

155. *See* La Villarena, Inc. v. Acosta, 597 So. 2d 336, 337 (Fla. 3d Dist. Ct. App. 1992) (stating that a landowner has a duty to maintain the premises and warn an invitee of any known, undiscoverable, and latent perils).

156. *See* Satchwell v. LaQuinta Motor Inns, Inc., 532 So. 2d 1348, 1349 (Fla. 1st Dist. Ct. App. 1988) (finding that a motel operator had a duty to keep the premises in a safe condition and protect business invitees from reasonably foreseeable harm).

157. 436 So. 2d 33, 34–35 (Fla. 1983) (quoting Crislip v. Holland, 401 So. 2d 1115, 1117 (Fla. 4th Dist. Ct. App. 1981)).

158. Odice v. Peasron, 549 So. 2d 705, 706 (Fla. 4th Dist. Ct. App. 1989).

evidence to support foreseeability.[159] A court may also consider testimony of sources such as former employees, former residents, and former patrons, as well as documents such as corporate incident reports, internal notes and complaints.[160] These are just a few examples of the type of evidence that can establish foreseeability. Certainly, even police officers, at times, are called to establish the foreseeability of criminal attacks in a particular location.[161]

In connection with the issue of foreseeability, the question often arises as to how "similar" the prior criminal conduct must be to prove relevant. In this regard, the courts seem to be split on the subject.[162] The majority of the courts in this state favor the premise that the risk to patrons which triggers an obligation on the part of the landowner to take responsible measures to guard against a criminal attack need only be "general."[163] In *Aguila v. Hilton, Inc.*,[164] for example, the court found that Florida law does not impose a general duty on the owner of a business to ensure the safety of an intoxicated person who is about to leave the premises of the business.[165] In this case, the court found that the hotel did not have a duty to control the conduct of an intoxicated college student who, after being asked by a motel security guard to leave the private party in a guest room during spring break, caused a collision that killed a motorist.[166] The court was persuaded by the fact that the injury did not occur on the premises, the hotel did not have the right to prevent the student from using his truck, and further did not have right to tell the student what

159. *See* Holiday Inns, Inc. v. Shelburne, 576 So. 2d 322, 330–31 (Fla. 4th Dist. Ct. App. 1991) (explaining that criminal incident offense reports are evidence of foreseeability); Green Co. v. Divincenzo, 432 So. 2d 86, 87–89 (Fla. 3d Dist. Ct. App. 1983) (finding "a computer printout of police records of reported crimes in the area" to be sufficient).

160. For the type of evidence that may be employed to establish foreseeability, *see generally*, DANIEL B. KENNEDY, FORENSIC SECURITY AND THE LAW, THE HANDBOOK OF SECURITY 118, 123–28 (2006).

161. *Id.*

162. *See generally* Wilton H. Strickland, *Premises Liability: A Notable Rift in the Law of Foreseeable Crimes*, 83 FLA. B.J., Dec. 2009, at 20. It appears, both from this article as well as the discussion in this material, that there is a "notable rift" both among the District Courts in general, and even within the District Courts internally, in that there appears to be an inconsistent manner of addressing this important issue even within the same court.

163. Hendry v. Zelaya, 841 So. 2d 572, 574 (Fla. 3d Dist. Ct. App. 2003).

164. 878 So. 2d 392 (Fla. 1st Dist. App. 2004).

165. *Id.* at 398.

166. *Id.* at 394–96.

to do once he departed the premises.[167] In this case, the hotel did not control the premises, the instrumentality of the harm, or the person who committed the tort.[168]

In *Hendry v. Zelaya*,[169] the Third District Court of Appeal drew upon the lines of cases emanating from *Stevens v. Jefferson*.[170] For example, in *Hall v. Billy Jack's, Inc.*,[171] the Florida Supreme Court opined that foreseeability can be established not only by proving that a tavern owner had actual or constructive knowledge of the dangerous propensities of a particular assailant, but also by proving that its proprietor knew or should have known of the dangerous condition that could cause a patron harm, such as the reputation of the tavern or the likelihood of disorderly conduct there.[172] Thus, in this case, the court opined that the property owner must take prophylactic measures to protect against *either* a "specific" or a "general" risk of danger.[173]

Addressing this issue in *Holiday Inns v. Shelburne*, the Fourth District of Appeal drew from the Florida Supreme Court's decision in *Stevens v. Jefferson* and *Hall v. Billy Jacks*.[174] In *Holiday Inns*, the trial court allowed the plaintiff to admit into evidence fifty-eight reports of criminal activity at the Rodeo Bar during the eighteen months prior to the parking lot shooting, "even though the majority of the reports were incidents of aggravated assault with a knife, attempted sexual battery, discharging a firearm in public, aggravated battery, twenty-eight reports of burglary-grand theft, and numerous reports of simple batteries and criminal mischief."[175] On appeal, the Fourth District ruled that the trial court was correct in this decision, stating that "[f]oreseeability is determined in light of all the circumstances rather than by a rigid application of a mechanical 'prior similar' rule."[176]

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167. *Id.* at 398.
168. *Id.*
169. 841 So. 2d 572 (Fla. 3d Dist. Ct. App. 2003).
170. 436 So. 2d 33 (Fla. 1983).
171. 458 So. 2d 760 (Fla. 1984).
172. *Id.* at 761–62.
173. *Id.* at 762.
174. This watershed case is also important for its impact on off-premises liability. *See supra* pages 21–23.
175. Holiday Inns., Inc. v. Shelburne 576 So. 2d 322, 331 (Fla. 4th Dist. Ct. App. 1991).
176. *Id.* (citing Paterson v. Deeb, 472 So. 2d 1210, 1219 (Fla. 1st Dist. Ct. App. 1985)).

In fact, as previously discussed, the First District Court of Appeal in *Paterson v. Deeb*[177] made clear that foreseeability is not determined solely by evidence of prior similar criminal conduct. Quoting from *Crislip v. Holland*,[178] the *Paterson* court noted that in order to determine foreseeability, it is not necessary that the landowner be able to see the exact type of injury, or the precise manner in which the injuries would be inflicted. Rather, it would suffice to establish that the landowner should "foresee that some injury would likely result in *some* manner as a consequence of his negligent act."[179] Thus, in *Paterson v. Deeb*, the court found the landlord liable and imposed punitive damages, in the face of no evidence establishing a prior criminal episode at that location.[180]

In *Paterson v. Deeb*, the court also explored the issue of the relevant location. In this regard, the court expressed the opinion that allegations of prior criminal acts that had occurred "in the vicinity" are pertinent to determining foreseeability, and the "geographic area" of the reported crimes "need not relate to offenses occurring on the premises or within the block where the apartment is located."[181] Subsequent to *Paterson v. Deeb*, the court in *Odice v. Peason*[182] further made clear that off-site crimes are relevant to this determination.[183] Nevertheless, even though crimes in nearby locations may meet the test of legal relevancy, from a practical perspective it may become difficult to establish to a jury that the crime at issue was foreseeable if the location becomes too remote. Similarly, from a time perspective, courts have ruled criminal activity from as distant as five years prior to the crime in question as being relevant.[184]

Nevertheless, in a contrary interpretation, the Fourth District Court of Appeal addressed a bizarre set of circumstances in

177. *Paterson*, 472 So. 2d at 1214–15.

178. *Id.* at 1218 (citing Crislip v. Holland, 401 So. 2d 1115, 1117 (Fla. 4th Dist. Ct. App. 1981)).

179. *Paterson*, 472 So. 2d at 1117 (emphasis added).

180. *Id.* at 1220–21.

181. *Id.* at 1218 n.7.

182. 549 So. 2d 705 (Fla. 4th Dist. Ct. App. 1989).

183. 549 So. 2d 705, 706 (Fla. 4th Dist. Ct. App. 1989).

184. *See* McCain v. Fla. Power Corp., 593 So. 2d 500, 504–05 (Fla. 1992) (holding that an electric utility had a greater duty of care with an underground electric cable because it created a foreseeable zone of risk); Czerwinski v. Sunrise Point Condo., 540 So. 2d 199, 200–01 (Fla. 3d Dist. Ct. App. 1989) (finding that a landlord had a duty to provide adequate security after a robbery and sexual assault incident because there was a five-year history of crimes on the property that made another crime foreseeable).

Wal-Mart Stores v. Caruso.[185] In that case, the plaintiff, Caruso, sued Wal-Mart for negligence for failing to protect him against the criminal act of another employee when Wal-Mart had hired an assistant, Fernesha Foster, to assist him in his optometry practice.[186] Foster had previously stolen checks and destroyed files for a former employer who she did not list on her employment application.[187] While working for Caruso, she was caught on video camera placing rat poison into Caruso's lunch, which resulted in Caruso being hospitalized.[188] Drawing from other Fourth District Court of Appeals cases, the court found that although Wal-Mart knew that certain larcenies had been committed in the vision center, this knowledge did not provide Wal-Mart with the requisite notice that Foster would attempt to poison Caruso. Thus, the court found that Wal-Mart could not be held liable under negligence principles, because it did not have "actual or constructive knowledge of the specific danger."[189]

III. BREACH OF THE DUTY OF CARE

A claim based upon an allegation of negligent security is premised upon a three-part analysis. The first is "foreseeability," the second is "adequacy of security," and the third component is a determination of whether or not the lack of adequate security caused injury or death to the claimant.[190] The first analysis, fore-

185. 884 So. 2d 102 (Fla. 4th Dist. Ct. App. 2004).
186. *Id.* at 103–04.
187. *Id.*
188. *Id.*
189. *Id.* at 105.
190. *See* 34 CAUSES OF ACTION 2D 105 *Cause of Action Against Landlord for Failure to Protect Tenants Against Criminal Acts* §§ 12, 20–29, 33 (WestlawNext thought Oct. 2014) (explaining the role of foreseeability, failure to provide adequate security, and proximate causation in assessing negligent security claims); Daniel B. Kennedy, *Applications of Forensic Sociology and Criminology to Civil Litigation*, 7 J. APP. SOC. SCI. 236 (2013) (noting that plaintiff and defense forensic criminologists and security experts must address these basic issues in the evaluation of cases). *See also* Reichenbach v. Days Inn of Am., Inc., 401 So. 2d 1366, 1368 n.6 (Fla. 5th Dist. Ct. App. 1981) (Cowart, J., concurring) (explaining that although, in many respects, the terms "deterrence" and "prevention" are used interchangeably in describing the causation element, there is a difference between these two concepts. Judge Cowart notes that deterrence means to inhibit, turn aside, or discourage a would-be offender, where "[t]o prevent is to stop, to obstruct or to deprive another of the power to act regardless of his will or desire to act"). In this footnote, Judge Cowart provides a creative and interesting discussion about the role of deterrence or prevention in the murder of Lee Harvey Oswald by Jack Rudy, as well as the attempted assassinations of President Reagan and Pope John Paul II in support of his assessment

seeability, has already been discussed in the context of establishing a duty. Foreseeability, however, encompasses both the duty and proximate causation elements of a negligence lawsuit.[191]

Similarly, the concept of preventability or deterrence is also linked specifically to the causation element, in that once a crime becomes foreseeable, the issue then turns to whether or not it was deterrable or preventable with adequate security. If a jury determines, as a factual mater, that even with reasonably adequate security a particular crime (such as a crime of passion) or a particular criminal (such as an urban terrorist) was not preventable, a plaintiff's case stands little chance of success.[192] However, since a large share of third party "predatory" crimes are considered to be crimes of opportunity, a crucial portion of any case will focus upon the presence or absence of "adequate security," the analysis most closely tied to the issue of breach of the duty of care.[193]

The question of adequacy of security is also normally a question for a jury to decide.[194] As noted in *Holley v. Mt. Zion*, this analysis involves the "balancing of risks involved against the expenses required to obviate them, [and] may appropriately be made only [by] the trier of fact."[195] Thus, for example, the prior practice of providing armed guards, in that case, constituted an admissible indication of the complex's appreciation of the risks involved and the measures necessary to address them.[196] Similarly, in *Green Companies v. Divincenzo*,[197] the jury considered proof that security conditions had relaxed, including the removal of the guard, change in location of locks and cameras, and change in

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that adequate security measures may deter crime generally "but can not [sic] reasonably be expected to prevent all crime or any one specific criminal act." *Id.* at 1368 (Cowart, J., concurring). *See also* Orlando Exec. Park, Inc. v. P.D.R., 402 So. 2d 442, 451 (Fla. 5th Dist. Ct. App. 1981) (Cowart, J., dissenting) (noting that even the best security measures cannot "prevent a particular assault made without warning by a determined assailant in an area commonly open to the public").

191. 34 CAUSES OF ACTION 2D 105 § 20.

192. *See* DANIEL B. KENNEDY, FORENSIC SECURITY AND THE LAW, THE HANDBOOK OF SECURITY 133–35 (2006) (explaining that the motivation of the criminal, such as a suicide bomber or morbidly jealous lover, is a key consideration in the ability of reasonably security measures to deter criminal activity; the author notes, however, that "without proving the critical element of causation, of course, the plaintiff cannot make his or her case").

193. 34 CAUSES OF ACTION 2D 105 § 21, 33.

194. Holley v. Mt. Zion Terrace Apartments, Inc., 382 So. 2d 98, 99–100 (Fla. 3d Dist. Ct. App. 1980).

195. *Id.* at 100.

196. *Id.*

197. 432 So. 2d 86 (Fla. 3d Dist. Ct. App. 1983).

time that the locks would be activated as evidence that a landlord of an office complex breached its duty to provide reasonably adequate security.[198]

When investigating, evaluating, and defending a case of adequate security, care should be taken to evaluate the entire security program of the complex, or possible lack thereof. First, the practitioner should determine if, in fact, the complex has a security plan in place, and if they have adhered to the plan. A corollary to this is to determine whether or not the property has ever experienced a security audit. Next, an evaluation should be made as to whether or not the complex had devoted any attention to perimeter controls, such as gates, curbing, sidewalks, fencing, signage, striping, or any other attributes of a security program that would further the goal of taking a property from disorganized to organized. As most security experts will testify, criminals normally thrive on disorganized properties, and will often seek to avoid properties that demonstrate care, attention, and organization. Additionally, video or surveillance cameras can also prove to be a deterrent to crime particularly when linked to a security patrol.

A plethora of security agencies also provide strong crime deterrent and prevention functions. These private agencies often provide marked cruisers that appear like police vehicles.[199] Depending on the amount of money that a complex is willing to spend, these security agencies will provide foot patrol officers as well as vehicle patrol, and can monitor both the location and the officers from a remote access.[200] Usually, these security companies will provide an initial Assessment plan, as well as a periodic assessments of risk, and can craft a program that will gradually bring a property from disorganized to organized. Although many apartment complexes will provide rent abatements for municipal officers and deputies to live in an apartment complex, for exam-

198. *Id.* at 87.

199. *See* David A. Sklansky, *The Private Police*, 46 U.C.L.A. L. REV. 1165, 1168 (1999) (explaining that "the private security industry already employs significantly more guards, patrol personnel, and detectives than the federal, state, and local governments combined, and the disparity is growing").

200. *See, e.g.*, Critical Intervention Services, Inc., *Welcome to Critical Intervention Services*, http://www.cisworldservices.org (last visited Apr. 10, 2015) (generally describing services and providing links to more detailed descriptions of various security options); G4S USA, Inc., *Security Services*, http://www.g4s.us/en-US/What%20we%20do/Services/Security%20Personnel/ (last visited Apr. 10, 2015) (explaining security personnel services).

ple, and leave their police vehicles parked outside of their unit, these "courtesy officers" rarely can serve as comprehensive a function as paid private patrol units, particularly those with security officers who are well versed in their rights and power to search and apprehend criminals.

Perhaps no security aspect is more significant, and easily evaluated, as proper lighting. Crime statistics and criminology research have generally supported the simple proposition that criminals simply do not like the light and thrive in darkened shadows.[201] Moreover, by enhancing the visibility of the location, suspicious or threatening behavior can be detected early enough for evasive action. In this regard, the Illuminating Engineering Society of North America (IESNA), the organization that is generally accepted as promulgating the standards for the industry, has established and published guidelines for security lighting and the standards that should be met by a responsible business owner.[202] As these guidelines demonstrate, lighting normally measured in "foot-candles" must not only be adequate, but also evenly distributed to avoid shadows and hiding places. Nevertheless, of all the security practices that are supportive of inadequate security claims, none is more prevalent than inadequate lighting.[203]

In addition to IESNA, other well-recognized organizations, such as the National Parking Association and Urban Land Institute have published materials and guidelines that provide checklists and standards that should be used in evaluating the adequacy of a security program. Often, the local police department and lighting authority will provide security evaluations and audits free of charge. For example, the nationally recognized and funded program CPTED (Crime Prevention Through Environmental Design) is often employed by local law enforcement agencies who offer free-of-charge audits of local properties, to evaluate the likelihood that a particular location may fall subject to preda-

201. KATE PAINTER & DAVID P. FARRINGTON, THE CRIME REDUCING EFFECT OF IMPROVED STREET LIGHTING: THE DUDLEY PROJECT, SITUATIONAL CRIME PREVENTION: SUCCESSFUL CASE STUDIES 210–26 (1997).

202. *See* IESNA SEC. LIGHTING COMM., GUIDE FOR SECURITY LIGHTING HANDBOOK FOR PEOPLE, PROPERTY, AND PUBLIC SPACES (9th ed. 2003).

203. *See generally* NORMAN R. BOTTOM, THE PARKING LOT AND GARAGE SECURITY HANDBOOK 28 (1988).

tory criminal activity.[204] Certainly, to the extent that a business refuses to belong to these organizations, or avail itself of the programs which are offered free of charge, that owner leaves itself extremely vulnerable to attacks of its patrons and business invitees, and the consequential costs that are associated with its negligence.

IV. CAUSATION

As described above, the final part of the liability analysis is a determination as to whether or not, with reasonable security measures, a crime could be deterred or even prevented. In order to establish legal causation under Florida law, a plaintiff must establish that the tortfeasor's actions "more likely than not" caused the damage to the plaintiff and "that the negligence probably caused the plaintiff's injury."[205] Thus, in order for a plaintiff to establish that, with reasonable security, the injury caused by the third-party criminal attack would not have occurred, a plaintiff

> must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.[206]

A. Evidence as to How the Crime Was Committed

In *Brown v. Motel 6 Operating, L.P.*,[207] a decedent was found shot to death in a Motel 6 that had a past history of criminal activity.[208] However, in this particular case, there was no evidence

204. *See CPTED Trainings*, NAT'L CRIME PREVENTION ASSOC., http://www.ncpc.org/training (last visited Apr. 10, 2015) (listing upcoming training dates with police departments nationwide).

205. Friedrich v. Fetterman & Assocs., P.A., 137 So. 3d 362, 365 (Fla. 2013) (quoting Gooding v. Univ. Hosp. Bldg., Inc., 445 So. 2d 1015, 1018 (Fla. 1984)).

206. *Id.*

207. 989 So. 2d 658 (Fla. 4th Dist. Ct. App. 2008).

208. *Id.* at 658.

of forced entry, nor any evidence of any activity apart from the actual shooting. Importantly, there was no evidence as to, specifically, how the plaintiff was killed, although from the fact that he was shot, there was obviously evidence of the possibility of homicidal violence.[209] The court even acknowledged that "a jury could find that the motel breached its duty to provide adequate security."[210] The problem, the court noted, was that "in addition to showing a breach of duty, a plaintiff must demonstrate that the injury resulted from the breach of duty" and "[i]t is incumbent upon the plaintiff to prove legal causation."[211] Thus, finding that there was no "evidence that the shooting could have been prevented with greater security,"[212] the Fourth District Court of Appeal affirmed the lower court's decision to grant summary judgment on behalf of the landowner.[213]

Following on the heels of *Brown v. Motel 6*, the Fourth District Court of Appeal reached a very similar conclusion in *ERP Operating Limited Partnership v. Sanders*.[214] In this case, two young adults were shot to death in their apartment.[215] There was, like the circumstance in *Brown v. Motel 6*, no sign of forced entry. However, jewelry, a credit card, cash, and a computer modem were all stolen from the apartment.[216] The plaintiff's security expert, a criminologist, testified that the crime was opportunist in nature and the complex had experienced twenty criminal incidents, including apartment burglaries and robberies within three years prior to the murder, for which no notice had been provided to the residents.[217] Moreover, although the complex's training video emphasized the importance of repairs to mechanical failures, the gate to the complex was operational for four months during the year of the murder, and it was apparent, testified the expert, that the crime was the result of a home invasion.[218] Nev-

209. *Id.* at 659.
210. *Id.*
211. *Id.* (citing Kayfetz v A.M. Best Roofing, Inc., 832 So. 2d 784, 786 (Fla. 3d Dist. Ct. App. 2002); Warner v. Fla. Jai Alai, Inc., 221 So. 2d 777, 779 (Fla. 4th Dist. Ct. App. 1969).
212. *Brown*, 989 So. 2d at 659.
213. *Id.* at 660.
214. 96 So. 3d 929, 933 (Fla. 4th Dist. Ct. App. 2012).
215. *Id.* at 930.
216. *Id.*
217. *Id.* at 931.
218. *Id.*

ertheless, the expert acknowledged that there was no way of knowing precisely how the crime had taken place.[219]

Drawing upon its holding in *Brown v. Motel 6*, the court noted that there was sufficient evidence to support a breach of duty to provide adequate security.[220] Nevertheless, the plaintiff was unable to establish that "the breach was the proximate cause of the murders."[221] Critically, the Fourth District Court of Appeal proclaimed that "[w]ithout proof of how the assailants gained entry into the apartment, the plaintiff simply could not prove causation."[222] Accordingly, the court determined that the trial court should have granted a directed verdict upon the defendant's motion at trial, and reversed and remanded the case for entry of judgment on behalf of the defense.[223] Thus, this case and *Brown* suggest that unless a plaintiff can establish precisely how the crime was committed, a court is very likely to grant a directed verdict on the issue of causation.[224]

More recently, however, in the case of *50 State Security Service, Inc. v. Giangrandi*,[225] the Third District Court of Appeal addressed a similarly sad situation as that considered in *Brown* and *Saunders*, but reached a different result based upon the evidence admitted at trial which actually established, through the perpetrator's statements, how the crime was committed. In *Giangrandi*, the estate of Mrs. Giangrandi sued a security company after she was murdered in her home by a burglar.[226] Citing both *Brown* and *Saunders*, the court noted that "[i]n negligent security cases like this one, which involve a crime inside a dwelling, the presence or absence of a jury issue on causation usually turns on whether sufficient evidence has been presented that connects the negligent security to the perpetrator's entry into the victim's residence," and, even in circumstances in which a breach of duty is

219. *Id.* at 932.
220. *Id.* at 933.
221. *Id.*
222. *Id.*
223. *Id.*
224. *But see* North v. Mayo Grp. Dev., L.L.C., No. 3:11-cv-444-J-32JBT, 2013 WL 2319430, at *1 (M.D. Fla. May 28, 2013) (noting that where "[t]he facts regarding how the intruders gained entrance onto Defendants' unsecured premises are known," a directed verdict is not appropriate if there is evidence that reasonable security measures would probably have deterred the crime).
225. 132 So. 3d 1128 (Fla. 3d Dist. Ct. App. 2013).
226. *Id.* at 1129.

established, "no jury question on causation is presented where a plaintiff cannot establish how the perpetrator gained access to the dwelling."[227] However, the court noted that "Florida courts have found a jury question on the issue of causation where a plaintiff presents sufficient evidence for a jury to find that the perpetrator gained access to a dwelling in a manner that would have been detected or deterred had the breach in security not occurred."[228] In this particular case, the perpetrator of the crime had provided a sworn confession to the police within three days of the murder, which was introduced into evidence and, if believed, supplied a sufficient basis for a jury to conclude that the crime may have been avoided if the security company had properly been performing its rounds.[229] Hence, the appellate court affirmed the lower court's decision to deny a new trial on the case after a substantial verdict in favor of the plaintiff and the estate.[230]

B. The Unique Circumstance of the "Profiler"

Recently, in the case of *L.B. v. Naked Truth*,[231] the Third District Court of Appeal rendered a significant decision that could significantly impact how a defendant may attack the issue of causation. In this case, L.B., a sales clerk at an adult retail store owned by The Naked Truth III, Inc., was robbed and raped.[232] Because there had been four prior armed robberies at the store during the overnight shift, the last one occurring only two months before the assault on L.B., she sued the store for negligent securi-

227. *Id.* at 1135.

228. *Id.* In this case, the plaintiff introduced evidence that the murderer fit the profile of an unsophisticated, opportunistic thief "who would easily be detected or deterred by a roving guard properly patrolling in a vehicle with overhead flashing lights." *Id.* at 1132. However, the defense was denied the opportunity to present evidence that the decedent was a "targeted victim" because she worked with the homeless, in that the trial court held that it would be "pure speculation to connect the inference that she was working with the homeless and the fact that an individual perpetrates a crime." *Id.* The court did not cite the case of *L.B. v. Naked Truth III, Inc.*, 117 So. 3d 1114 (Fla. 3d Dist. Ct. App. 2012). However, presumably, this was the basis of the lower court's ruling.

229. *50 State Sec. Serv., Inc.*, 132 So. 3d at 1135.

230. *Id.* at 1136–37. Judge Rothenberg provided a very lengthy and vigorous dissent in this matter. *Id.* at 1137 (Rothenberg, J., dissenting). The dissent focused upon the fact that the causative element was apparently satisfied by circumstantial evidence that the roving security patrol would have deterred the crime, and Judge Rothenberg believed that this amounted to an improper "stacking of inferences." *Id.* at 1149.

231. 117 So. 3d 1114 (Fla. 3d Dist. Ct. App. 2012).

232. *Id.* at 1115.

ty.[233] The attacker was identified, and a co-worker testified that three days prior to the incident, the assailant came into the store and asked if L.B. was working.[234] He then traveled twenty-two miles to rob the store and commit the sexual assault, three days later.[235] At trial, the plaintiff presented expert testimony asserting that the rape was "a crime of opportunity that was foreseeable and preventable."[236] In rebuttal, the defense called a former FBI agent, who had worked for the FBI for twenty-five years, including eight years in the FBI's behavioral sciences unit, and provided training for FBI field agents in the investigation of sex and other violent crimes.[237] He had also taught at various law enforcement academies, trained major companies on the prevention of violent crimes, and conducted specialized research on sex and violent crimes.[238] This expert testified that the crime committed on L.B., based upon the evidence presented, was a "victim-targeted crime,"[239] which was not preventable even with reasonable security.[240] The jury reached a verdict for the defense, and L.B. appealed.[241]

The thrust of the plaintiff's appeal was based upon an earlier case from the Third District Court of Appeal, *Smithson v. V.M.S. Realty, Inc.*[242] In *Smithson*, the court reversed the lower court's verdict in a negligent security case, when the lower court allowed the introduction of testimony from a security expert who presented the statement of the perpetrators of the robberies and murders, and then opined as to their motive in committing the crimes. First the Third District opined that this expert was permitted to serve as a conduit for inadmissible hearsay.[243] More importantly, the court ruled that the expert was qualified to render an opinion on security matters and on the adequacy of the defendant's security; however, the court opined that the expert

233. *Id.* at 1115–16.
234. *Id.*
235. *Id.*
236. *Id.* at 1116.
237. *Id.* at 1120 (Rothenberg, J., dissenting).
238. *Id.*
239. *Id.* at 1116.
240. *Id.*
241. *Id.*
242. 536 So. 2d 260 (Fla. 3d Dist. Ct. App. 1989).
243. *Id.* at 262. *See* Sikes v. Seaboard Coast Line R.R. Co., 429 So. 2d 1216, 1222 (Fla. 1st Dist. Ct. App. 1983) (holding that an expert's testimony was not merely a conduit for inadmissible evidence but was based on information relied on).

was not qualified to testify about "the robbers' motives for choosing Mr. Smithson as their target.[244] The reasoning behind the coconspirators' conduct is a matter beyond the scope of his expertise."[245] Drawing from this decision, the Third District Court of Appeal in *L.B. v. The Naked Truth* ruled that the introduction of expert testimony that the rape and robbery of L.B. was a "victim-targeted crime" which was not preventable with reasonable security measures violated the *Smithson* prohibition against allowing an expert to testify as to the perpetrator's motive.[246] Accordingly, the court reversed the jury's verdict and ordered a new trial.[247]

In an extremely detailed and well-reasoned dissent on motion for rehearing, Judge Rothenberg opined that the defendant's security expert appropriately addressed the issue of causation in establishing that the crime committed, based upon the evidence, was not preventable even with reasonable security measures.[248] As set forth by Judge Rothenberg, the expert properly explained "that: (1) these were victim-targeted crimes; (2) victim-targeted crimes are difficult to prevent; and (3) the store was not negligent in failing to provide additional security measure to protect its employees."[249] Judge Rothenberg specifically emphasized that, not only was the expert not testifying as to the perpetrator's "motive," the expert specifically disclaimed on the witness stand that he was attempting to present evidence as to the perpetrator's motive.[250] Moreover, as noted by Judge Rothenberg, if the defense expert's testimony was improper, then the testimony of L.B.'s expert who testified that this was a "crime of opportunity" was equally improper.[251] Judge Rothenberg emphatically disagreed with the majority's holding that testimony as to the "victim-targeted" nature of the crime would necessarily be improper. Instead, he would have held that such testimony is admissible to rebut causation if presented by a properly qualified security expert.[252]

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244. *Smithson*, 536 So. 2d at 262.
245. *Id.*
246. *Naked Truth III, Inc.*, 117 So. 3d at 1117.
247. *Id.* at 1119.
248. *Id.* at 1120–22 (Rothenberg, J., dissenting).
249. *Id.* at 1122.
250. *Id.* at 1123.
251. *Id.* at 1122–23.
252. *Id.*

In considering the issue of profiling, it should be kept in mind that there is a fine line between characterizing the profile of the *crime* versus characterizing the profile of the *criminal*. From a social science perspective, "the basic premise of profiling is that behavior reflects personality and, therefore, a criminal's behavior during a crime will reflect the kind of person he or she is."[253] In this regard, it may be argued that this type of "[p]rofiling was developed to create a model for the apprehension of serial murders," and not for use in civil litigation.[254] However, forensic criminologists Daniel B Kennedy, Ph.D., and Robert J. Homant, Ph.D., suggest that although profiling may have its limitations, it can be an appropriate and effective tool to establish causation in this genre of cases, when used appropriately and when presented by qualified criminologists.[255] As noted by Kennedy and Homant:

> In essence, then, when profilers become involved in civil cases, they attempt to evaluate the perpetrator's basic personality and to opine as to whether he or she was the type to have been deterred by security measures. In other words, the profiler may say the perpetrator would not have responded to appropriate security measures, so the fact that they were not in place really made no difference. The victim would have been attacked anyway, so any failure to provide security on the part of the defendant landholder had no causal relationship to the victim's ultimate injuries. Conversely, the profiling expert may opine that the perpetrator would have responded to appropriate security measures and, therefore, there was a causal relationship between the landlord's failure to provide security and the victim's ultimate injuries.[256]

Whether the concept of profiling the criminal is accepted and permitted in connection with negligent security litigation, however, should be a distinct and dissimilar issue to how the type of "crime" is characterized. Negligent security experts, testifying as to their opinion concerning whether a crime is one of "opportuni-

253. Daniel B. Kennedy & Robert J. Homant, *Problems with the Use of Criminal Profiling in Premises Security Litigation*, 20 TRIAL DIPLOMACY 223, 224 (1997).

254. 2 JOHN ELLIOT LEIGHTON, LITIGATING PREMISES SECURITY CASES § 12A:6 (WestlawNext through Nov. 2013).

255. Kennedy & Homant, *supra* note 253, at 223–29. As stated by Kennedy and Homant, "[t]he basic premise of profiling is that behavior reflects personality and, therefore, a criminal's behavior during a crime will reflect the kind of person he or she is." *Id.* at 224.

256. *Id.* at 225.

ty" or "victim-targeted" aids a jury in evaluating the essential issue of causation. Whether or not a specific type of criminal (as characterized by criminologists or behavioral scientists) can be deterred by reasonable security measures is debatable. As suggested by Kennedy and Homant, this issue is subject to a case-by-case analysis after full evaluation of the type of crime, the qualifications of the expert, and the amount of scientifically accepted research available on the topic. In short, this type of testimony may well be subject to evaluation based upon a traditional *Daubert* analysis.[257]

V. APPORTIONMENT OF FAULT

Section 768.81[258] of the Florida Statutes provides for the apportionment of fault among tortfeasors and identifies the relative divisions based upon comparative negligence of the plaintiff and relative responsibility among both named and unnamed tortfeasors. From the perspective of the Restatement (Third) of Torts, Section 14:

> A person who is liable to another based on a failure to protect the other from the specific risk of an intentional tort is jointly and severally liable for the share of comparative responsibility assigned to the intentional tortfeasor in addition to the share of comparative responsibility assigned to the person.[259]

Thus, based upon these principles as set forth in the Restatement, a negligent tortfeasor whose duty is to protect its invitee from the intentional acts of third-party predators becomes liable for the share of comparative responsibility assigned to the intentional tortfeasor. As stated by the Kansas Supreme Court in *Kansas State Bank & Trust Co. v. Specialized Transportation*

257. *See generally* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). On July 1, 2013, the Florida Legislature amended Section 90.702 to adopt the *Daubert* standard to the admission of expert testimony in Florida, replacing the previous standard based upon *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Under the *Daubert* standard, the trial judge serves as a gatekeeper to ensure that the proffered expert is qualified to render an opinion, and that the testimony is reliable and relevant for the jury's determination. *See generally* Alex Cuello & Stephanie Villavicencio, *Adoption of Daubert in the Amendment to F.S. § 90.702 Tightens the Rules for Admissibility of Expert Witness Testimony*, FLA. B.J., Sept./Oct. 2014, at 38.

258. FLA. STAT. § 768.81 (2014).

259. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 14 (1999).

Services, Inc., "negligent tortfeasors should not be allowed to reduce their fault by the intentional fault of another that they had a duty to prevent."[260]

Against this backdrop, in 1997, the Florida Supreme Court penned its short, but immensely significant decision in *Merrill Crossing Associates v. McDonald*.[261] In *Merrill Crossings*, a shopping center patron was shot by an unknown assailant in the center's parking lot.[262] The patron sued the shopping center and its tenant for inadequate security.[263] At trial, the Court excluded the assailant from the verdict form as an apportionment defendant under *Fabre v. Marin*.[264] From an adverse verdict and judgment, both Wal-Mart and Merrill Crossings appealed, first to the First District Court of Appeal, and then to the Florida Supreme Court upon the Court of Appeal's certification of the issue as a question of great pubic importance. The Supreme Court specifically found that:

> It would be irrational to allow a party who negligently fails to provide reasonable security measures to reduce its liability because there is an intervening intentional tort, where the intervening intentional tort is exactly what the security measures are supposed to protect against.[265]

Examining the language of Section 768.81, the court made note of the fact that, in limiting apportionment to negligence cases, the legislature expressly excluded actions "*based upon* an intentional tort."[266] Thus, the court concluded that, because of the apportionment statute was not applicable to the case, the trial court was correct in excluding the intentional tortfeasor from the verdict form.[267]

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260. 819 P.2d 587, 606 (Kan. 1991).
261. 705 So. 2d 560 (Fla.1997).
262. *Id.* at 561.
263. *Id.*
264. 623 So. 2d 1182, 1184 (Fla. 1993).
265. *Merrill Crossings*, 705 So. 2d at 562–63.
266. *Id.* at 563 (emphasis in original).
267. *See also* Jones v. Budget Rent-A-Car Sys., Inc., 723 So. 2d 401, 402 (Fla. 3d Dist. Ct. App. 1999) (explaining that Florida Statute Section 768.81 does not permit the allocation of fault to intentional tortfeasor); Stellas v. Alamo Rent-A-Car, 702 So. 2d 232, 234 (Fla. 1997) (affirming that a negligent tortfeasor cannot reduce its liability by apportioning fault to criminal who broke into victim's car and stole her purse, where it was the duty of the negligent tortfeasor to protect against such conduct).

Even though the intentional tortfeasor is omitted from the verdict form, comparative negligence is applicable to the negligent plaintiff in a negligent security case.[268] Moreover, under *Merrill Crossings*, only the *intentional* tortfeasor is eliminated from apportionment on the verdict form. *Negligent* tortfeasors are still subject to apportionment as Fabre defendants. In *Burns International Security Services, Inc., of Florida v. Philadelphia Indemnity Insurance Co.*,[269] Philadelphia Insurance Company argued that even negligent tortfeasors should be excluded from the verdict form when the action, itself, is based upon an intentional tort. Citing *Merrill Crossings*, Philadelphia Insurance argued that Section 768.81 precluded apportionment of fault for *Fabre* defendants accused of negligent activity when the lawsuit is premised upon the criminal conduct of a third party. The court distinguished the *Merrill Crossings* holding, however, and pointed out that even in that case, the Florida Supreme Court apportioned damages between Merrill Crossings and Wal-Mart, the two negligent tortfeasors.[270] Thus, the court in *Burns* saw no reason to exempt negligent security cases from the rest of the universe of negligence cases in which liability is apportioned between negligent, but not intentional, tortfeasors.[271]

In *Hennis v. City Tropics Bistro, Inc.*,[272] the Fifth District Court of Appeal made clear that the prohibition set forth by Section 768.81 and the *Merrill Crossings* case only prohibits the placement of the intentional tortfeasor on the verdict form, and not other negligent parties. In that case, the court affirmed a verdict that apportioned liability to other "negligent" parties in connection with a criminal attack upon a patron leaving a nightclub.[273] The court made clear that the lower court correctly applied both the statute and the *Merrill Crossings* case, when the plaintiff did not even attempt to place the perpetrator of the crime on the verdict form.[274] In so doing, the Fifth District Court of Appeal cited *Burns International Security Services of Florida v.*

268. *See* Harrison v. Housing Res. Mgmt., Inc., 588 So. 2d 64, 66 (Fla. 1st Dist. Ct. App. 1991).
269. 899 So. 2d 361 (Fla. 4th Dist. Ct. App. 2005).
270. *Id.* at 366.
271. *Id.* at 366.
272. 1 So. 3d 1152 (Fla. 5th Dist. Ct. App. 2009).
273. *Id.* at 1156–57.
274. *Id.* at 1156.

Philadelphia Indemnity Insurance Company[275] extensively in support of its decision. Clearly, the only person legislatively and judicially excluded from the verdict form, automatically, is the perpetrator of the intentional act giving rise to the plaintiff's injury, and from which the land owner (or possessor) may owe a duty to protect its visitor.

VI. CONCLUSION

In examining the responsibility of a person (either natural or corporate) who becomes responsible to take reasonable measures to protect the safety and security of others, the most critical examination as to whether or not a duty arises is the degree to which the individual or entity assumes or maintains control over the land, the person committing the crime, or the instrumentality of the assault. If the person or entity is deemed to have assumed such a duty, then that person or entity will be responsible to take either those measures delineated by statute, or those protections which a jury will determine, under general common law, are sufficient to protect visitors on land. If the failure to take reasonable measures to satisfy that duty results in the injury or death of another, damages, which may be significant, and which may not be apportioned to the actual perpetrator of the crime will readily flow. However, as is demonstrated from the development of this genre of cases, the critical element that constitutes the threshold consideration is the consideration of control.

275. 899 So. 2d 361 (Fla. 4th Dist. Ct. App. 2005).