NOT DESIGNATED FOR PUBLICATION

DEBORAH W. MESSA, WIFE OF/AND LESTER R. MESSA, JR., INDIVIDUALLY AND ON BEHALF OF THEIR MINOR DAUGHTER, RACHAEL MESSA, AND STEPHEN MESSA	*	**NO. 2007-C-0960**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

VERSUS * * * * * * *

LAKELAND MEDICAL CENTER, L.L.C., HOLLADAY PROPERTY SERVICES, INC., HEALTHCARE SECURITY SERVICES OF LOUISIANA, INC., AND JULES MEYERS

ON SUPERVISORY WRITS DIRECTED TO
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2004-13269, DIVISION "D-16"
HONORABLE LLOYD J. MEDLEY, JUDGE

* * * * * *

JUDGE MICHAEL E. KIRBY

* * * * * *

(Court composed of Judge Michael E. Kirby, Judge Max N. Tobias Jr., Judge Roland L. Belsome)

BELSOME, J. – CONCURS IN THE RESULT

FRANKLIN D. BEAHM
A. REBECCA WILMORE
BEAHM & GREEN
145 ROBERT E. LEE BOULEVARD
SUITE 408
NEW ORLEANS, LA 70124
COUNSEL FOR RELATOR (LAKELAND MEDICAL CENTER, L.L.C.)

DERRICK D. T. SHEPHERD
SHEPHERD & ASSOCIATES, L.L.C.
2009 AMES BOULEVARD
MARRERO, LA 70072
AND
DEANA PALMASANO LEJARZA
PALMISANO LEJARZA LAW FIRM, L.L.C.
3500 N. CAUSEWAY BLVD., SUITE 108
METAIRIE, LA 70002
COUNSEL FOR RESPONDENTS

WRIT DENIED.

Relator, Lakeland Medical Center, L.L.C. seeks review of a written judgment rendered on July 5, 2007, which denied its motion for summary judgment.

FACTS

According to plaintiffs' petition, at the time of her injury Deborah Messa was employed as a licensed practical nurse by Bernstein & Associates, L.L.C. d/b/a Louisiana Heart Center and worked at their office located at 6040 Bullard Avenue, Suite 200, New Orleans, Louisiana. The petition contends that on November 19, 2003, at approximately 9:20 a.m., Mrs. Messa was returning to work after conducting rounds. The petition asserts that as she approached the entrance to the building, she noticed a man standing near the entrance with a crumpled dollar bill in his hand. As she approached the man, he asked her if she had change for a dollar and she responded that she could not provide him with change. The man then threatened her and stuck his hand under his shirt as if to indicate that he had a gun. The man then began to pull, tug, and beat Mrs. Messa, eventually knocking her to the ground. The man continued to kick and beat Mrs.

Messa as he dragged her along the ground for approximately thirty to forty feet. As this was happening, the petition contends that Mrs. Messa was screaming for help and could see a security vehicle nearby. Plaintiffs contend that the security vehicle did not see her or render assistance. Eventually, a physician inside the building at 6040 Bullard Avenue heard her screams and called 911. The petition asserts that the man's actions caused Mrs. Messa to suffer injuries to her back, arms, and face and that the man absconded with her purse.

The plaintiffs sued Lakeland, Holladay Property Services, Inc., Healthcare Security Services of Louisiana, Inc., and Jules Meyers, the security officer on duty at the time of the incident. The petition contends that Lakeland is at fault for failing to properly monitor their property, provide a reasonably safe place for patrons, or provide reasonable or adequate security measures to deter crime. The petition contends that the incident caused Mrs. Messa to suffer physical injuries, pain and suffering, and a loss of wages. Further, the petition alleges that the incident caused Mr. Messa to suffer from clinical depression and a loss of consortium, and the children to suffer a loss of consortium.

Lakeland filed a motion for summary judgment on April 10, 2007, and asserted that summary judgment was warranted because the property on which the attack occurred was sold to another entity in 2000. Thus, Lakeland argued that summary judgment was warranted because it did not have a duty to protect Mrs. Messa from suffering an attack on property that it did not own. Further, Lakeland's motion asserted that summary judgment was warranted because the attack was not foreseeable. Plaintiffs denied Lakeland's statement of uncontested fact and attached several documents which they contend establish that the attack was foreseeable. The parties argued the merits of Lakeland's motion on June 29,

2007. The trial court denied Lakeland's motion. In written reasons for judgment it wrote that it denied Lakeland's motion because:

> The present case is replete with questions of fact such as: Who owned the land where the plaintiff was injured; Was there security provided for that land; Was the security that was provided adequate; Did the security provider breach a duty to the plaintiff; Where in fact did the attack actually occur; Was the plaintiff owed a duty and by whom and was that duty breached? All of the questions posed are fact intensive and need to be addressed either through more discovery or trial.

DISCUSSION

Appellate courts review summary judgment *de novo,* using the same criteria applied by trial courts to determine whether summary judgment is appropriate. *In re Bester*, 2000-2208 (La. App. 4 Cir. 9/18/02), 828 So.2d 644. The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions. The procedure is favored and shall be construed to accomplish these ends. La. C.C.P. art. 966(A)(2). A summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B). The burden of proof remains with the movant.

However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. La. C.C.P. art. 966(C)(2); *Brule' v.*

Audubon Com'n, 2004-1774 (La. App. 4 Cir. 4/20/2005), 902 So.2d 403. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2). An adverse party to a supported motion for summary judgment may not rest on the mere allegations or denial of his pleading, but his response, by affidavits or as otherwise provided by law, must set forth specific facts showing that there is a genuine issue of material fact for trial. La. C.C.P. art. 967; *Longo v. Bell South Telecommunications, Inc.*, 2003-1887, pp. 4-5 (La. App. 4 Cir. 10/7/04), 885 So.2d 1270, 1273-1274.

As previously noted, relator's writ application argues that the trial court erred by failing to grant its motion for summary judgment because: 1) it did not have a duty to protect Mrs. Messa from suffering an attack on property that it did not own; and, 2) the attack was not foreseeable, even if it happened on its property. Analysis of the applicable case law reveals that in the context of the present case the two issues are related.

In *Posecai v. Wal-Mart Stores, Inc.*, 99-1222 (La. 11/30/99), 752 So.2d 762, a patron sued a store after she was robbed at gunpoint in the store's parking lot. The trial court concluded that the store bore a portion of liability for the patron's injuries and awarded damages. The Fifth Circuit Court of Appeal affirmed and amended the judgment and the Supreme Court granted writs. On the issue of whether the store owed the patron a duty the Supreme Court observed:

> A threshold issue in any negligence action is whether the defendant owed the plaintiff a duty. Whether a duty is owed is a question of law. In deciding whether to impose a duty in a particular case, the court must make a policy decision in light of the unique facts and circumstances presented. The court may consider various moral, social, and economic factors, including

> the fairness of imposing liability; the economic impact on the defendant and on similarly situated parties; the need for an incentive to prevent future harm; the nature of defendant's activity; the potential for an unmanageable flow of litigation; the historical development of precedent; and the direction in which society and its institutions are evolving.

Posecai, 99-1222, p. 4, 752 So.2d at 766. (Citations omitted.)

Further, the Court held:

> We now join other states in adopting the rule that although business owners are not the insurers of their patrons' safety, they do have a duty to implement reasonable measures to protect their patrons from criminal acts when those acts are foreseeable. We emphasize, however, that there is generally no duty to protect others from the criminal activities of third persons. This duty only arises under limited circumstances, when the criminal act in question was reasonably foreseeable to the owner of the business. Determining when a crime is foreseeable is therefore a critical inquiry.

Posecai, 99-1222, p. 5, 752 So.2d at 766. (Citations omitted.)

In order to determine whether a given crime is foreseeable, the Court elucidated the following test:

> With the foregoing considerations in mind, we adopt the following balancing test to be used in deciding whether a business owes a duty of care to protect its customers from the criminal acts of third parties. The foreseeability of the crime risk on the defendant's property and the gravity of the risk determine the existence and the extent of the defendant's duty. The greater the foreseeability and gravity of the harm, the greater the duty of care that will be imposed on the business. A very high degree of foreseeability is required to give rise to a duty to post security guards, but a lower degree of foreseeability may support a duty to implement lesser security measures such as using surveillance cameras, installing improved lighting or fencing, or trimming shrubbery. The plaintiff has the burden of establishing the duty the defendant owed under the circumstances.

> The foreseeability and gravity of the harm are to be determined by the facts and circumstances of the case. The most important factor to be considered is the existence, frequency and similarity of prior incidents of crime on the premises, but the location, nature and condition of the property should also be taken into account. It is highly unlikely that a crime risk will be sufficiently foreseeable for the imposition of a duty to provide security guards if there have not been previous instances of crime on the business' premises.

Posecai, 99-1222, pp. 9-10, 752 So.2d at 768.

The trial court denied Lakeland's motion, holding that further discovery was needed. Lakeland contends that the trial court erred and asserts that the law does not impose a duty upon them towards Mrs. Messa because the attack commenced upon property that it did not own. The plaintiffs do not directly address this aspect of Lakeland's argument. Nevertheless, we have reviewed the record and make the following observations.

First, while it appears that the underlying attack began on property that was not owned by Lakeland it is not at all clear that the attack terminated on property owned by some entity other than Lakeland. Lakeland asserts that the attack terminated on other property but it does not support this assertion with evidence. Second, Lakeland has shown that it sold the property at 6040 Bullard Avenue in July of 2000 for ten dollars. However, Lakeland continued to own the entirety of the parking lot that surrounded 6040 Bullard Avenue. It is undisputed that Lakeland provided for security services to patrol its property but the scope of the security services' contractual duties is very unclear. Specifically, Lakeland attaches a copy of its contract with Healthcare Security Services, Inc. (hereinafter "HSS"). In the contract, which was entered into prior to the sale of 6040 Bullard Avenue, HSS is obligated to provide security officers and services to Lakeland.

However, the contract does not specify which areas of Lakeland's campus are covered or what areas HSS is obligated to patrol. Rather, the contract merely notes that "[s]taffing levels, deployment, and the level of security services are determined by Client." Thus, Lakeland was in sole control of the range of security services to be provided to visitors to its campus. However, the record is devoid of any evidence that would explain the scope or duties of the security services. Accordingly, it is entirely possible that further discovery will show that Lakeland obligated itself to provide security to 6040 Bullard.

Thus, while the case law might support Lakeland's contention that, in general, it has no duty to provide security against crimes transpiring on other property, the record is unclear as to whether it might have assumed a duty to provide security to individuals on 6040 Bullard Avenue's property. As the Supreme Court has noted, in deciding whether to impose a duty in a case such as the present one a court's analysis must focus upon the unique facts of each case. Thus, we do not find that the trial court erred in denying Lakeland's motion in favor of further discovery.

Additionally, we note that there is evidence in the record that creates a genuine issue of fact as to whether the underlying crime was foreseeable. As previously noted, the case law provides that the imposition of a duty in a case such as the present one is dependant upon a finding that the crime was foreseeable. Accordingly, the issues raised by Lakeland's writ application are intertwined.

Essentially, Lakeland argues that plaintiffs can point to no evidence which would support a finding that the underlying crime was foreseeable. Plaintiffs counter Lakeland's foreseeablity argument with copies of correspondence dated October 26, 2000, November 20, 2000, and November 28, 2003 between Gerald

Fornoff, Lakeland Medical Center's C.E.O., and Robert E. Ruel, III, of Orthopeadic & Sports Medicine Clinic located at 6050 Bullard Avenue. Plaintiffs contend that the foregoing correspondence shows that Lakeland was aware of predatory crime issues on its campus well before the incident at suit. Specifically, in the October 26, 2000, letter, Ruel writes, among other things:

> As you may be aware, we have recently experienced a sudden increase in criminal activity at 6020, 6040, and 6050 Bullard Avenue. Drs. Ruel and Dickey have discussed this issue and requested that I communicate to you their concern for the safety of patients and employees.
>
> Both physicians consider the North section of the campus to be at a greater risk for criminal activity. The rationale for this belief is seeded in the fact that the North section of the campus is isolated from the main hospital facility and provides easy access to both the South I-10 Service Road, as well as, unfenced wooded areas. There is particular concern for the parking areas as they are adjacent to the undeveloped wooded space on the east and west sides. The overgrown areas provide quick refuge for anyone considering or conducting criminal acts. In addition to safety issues, the physicians are also concerned about how this activity adversely affects their practices.
>
> Dr. Ruel has already experienced the loss of patients due to vehicle theft and break-ins. One elderly patient has stated that "she has developed anxiety disorder and is unable to leave her home" as a result of the attempted theft of her vehicle while attending a physical therapy.

Further, in the November 20, 2000, correspondence, Fornoff responded to Ruel's October 26, 2000, letter by writing, in part:

> First, I wholeheartedly agree that we have a security issue on this campus. Of concern, obviously, is that it's not only at Lakeland but at Methodist as well as other local areas with large accumulation of vehicles. As you and I discussed, this is not a new concern but one that has appeared to be cyclic for numerous years. This

> does not, however, release us from responsibility to make every effort to resolve this problem.
>
> As you noted in your letter, the easy access from the service road as well as the unfenced wooded area are locations that support this element. . . .
>
> It's interesting to note that from the 6th of this month to today, Lakeland has had zero break-ins while Methodist has had four (4). This doesn't mean we have resolved the problem but that it may merely have shifted. As well, I found that the NOPD has reported six (6) apprehensions as well as eleven (11) arrests since the beginning of the month. . . .

In the November 28, 2003, letter, Fornoff responded in part to a letter from Ruel dated November 19, 2003:

> It might be of some comfort to know that Lakeland has one of the best records relative to theft and burglary of any business in Eastern New Orleans. This was provided directly to my director by the Crime Prevention Officer from the 7th District. It is also of interest that in the 7th District there were 124 armed robberies year-to-date compared to 147 year-to-date last year. We had one.
>
> On our campus, in 2003, we have had four (4) auto thefts; a 44% decrease from prior year. Also missing property reported decreased from twenty-seven (27) in 2002 to twelve (12) in 2003 and auto vandalism remained at two (2) as in the prior year.

In addition to the foregoing correspondence, plaintiffs also point to testimony from their security expert, Dr. Wade Schindler, who opined that his investigations revealed that 6040 Bullard Avenue had a crime rate which was four and a half times the national average. Further, Dr. Schindler also testified that Mrs. Messa's experience was predictable. Specifically, Dr. Schindler testified that he conducted a crime study on the Seventh Police District in the late 1990's. He also noted that he had written the crime analysis for the city for approximately three to four years, and that he knew the crime patterns in the city and that the

Seventh District, during the time of the underlying incident, was one of the most active districts for crime. Insofar as his opinions, Dr. Schindler stated that he has yet to finalize his opinion. However, Dr. Schindler also testified that the area surrounding the scene of the incident was a high crime area at the time of the incident. Moreover, Dr. Schindler also stated that, in his opinion, the underlying crime was predictable: "It's the kind of crime that's very predictable because it's the kind of crime that is usually done – it's very easy to get off the interstate to pull your robberies, to pull your aggravated assaults, and get right back on the interstate. So it's easy access. The fact that there's no fence, there's no check points to go through, you can get in and get out. It's an easy crime. You can commit it real fast, and you can be gone." Additionally, Dr. Schindler responded to the following questions:

> Q. And you think that there was a trend in this incident that could have predicted the crime against Ms. Messa?
>
> A. Well, just that one day, this is just one perpetrator. And when you take a look at the number of criminals that operate in the seventh district, this event was what would be considered very predictable.
>
> * * *
>
> Q. What about the location makes it ideally suited for predator crime?
>
> A. No fence. Easy to get into the facility. Easy to get out. Availablity to the interstate. No checkpoint. Nobody checking any cars or people coming in.

Thus, we find that there is, at the least, a genuine issue of fact as to whether the incident was foreseeable. Because the duty issue in the present case is dependent upon a factual analysis of crime in the area the trial court did not err

when it denied summary judgment on the basis that more discovery is needed. Accordingly, we deny Lakeland's writ application.

WRIT DENIED.