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Missouri Supreme Court Clarifies: Siding with Business Owners in Negligent Security Actions May Have Been Wrong All Along - L.A.C. v. Ward parkway Shopping Center Co., L.P.

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Missouri Supreme Court Clarifies: Siding with Business Owners in Negligent Security Actions May Have Been Wrong All Along

*L.A.C. v. Ward Parkway Shopping Center Co., L.P.*¹

I. INTRODUCTION

Fear of criminal attack is a fact of life for most people, so they do their best to take preventative measures to protect themselves and those they love. Thus, while most parents would never allow their children to spend an evening in a dark alley with their friends, most parents do feel comfortable dropping their children off at a shopping mall for the night to socialize, shop, or watch movies. Parents do this because they find comfort in knowing that their children will be indoors in a well-lit area in the midst of other shoppers, storekeepers, and security. The atmosphere of certain public places, such as shopping centers, has traditionally made patrons feel safe and secure.

Up until now, if a patron was criminally attacked in a place of business such as a shopping mall, Missouri courts generally did not side with a patron who sued the owner of the premises.² This was recently changed by the Missouri Supreme Court’s holding in *L.A.C. v. Ward Parkway Shopping Center Co., L.P.*, in which the court held that a patron could sue as a third party beneficiary of the contract between the shopping center and the security company, and the security company had a duty to protect patrons from foreseeable attacks, and the attack on the patron was foreseeable.

II. FACTS AND HOLDING

On March 15, 1997, twelve-year-old L.A.C. and her friend A.G. went to the Ward Parkway Shopping Center to see a movie.³ After the movie, L.A.C. and her friends congregated in a common area.⁴ L.A.C. then sat down on a bench in front of J.M. Porters, a store in the mall, where she talked to a fifteen-year-old boy she had met at the shopping mall the previous weekend.⁵ The boy lured...
L.A.C. away from the group of friends by taking her purse down a hallway and stopping so she could catch up.\(^6\) She pursued him and he demanded that she give him a kiss before he would return her purse.\(^7\) She complied, giving him a kiss and letting him give her a hickey on her neck.\(^8\) After returning her purse, however, he grabbed her and picked her up.\(^9\) He then carried her to a walkway connecting the mall to the parking lot where he allegedly raped her.\(^10\)

L.A.C.’s friends did not intervene when the boy picked her up because the boy was older and had a gun showing.\(^11\) Instead, L.A.C.’s friend A.G. went downstairs and found an IPC International security guard who was patrolling the mall.\(^12\) A.G. told the guard that her friend needed help.\(^13\) She pointed to the door through which the boy had carried L.A.C. and told the guard that the boy had a gun.\(^14\) Dismissing her, the guard said that the boy was only joking and the guard left to attend to something else.\(^15\) A.G. found another guard, who also dismissed her.\(^16\) When A.G. finally saw L.A.C. again, L.A.C. “broke down” and told A.G. that she had been raped.\(^17\) L.A.C. reported the rape to the police and went to the hospital.\(^18\) The boy was arrested the next day and eventually convicted of rape by a juvenile court.\(^19\)

The owners, operators, and managers of the Ward Parkway Shopping Center together comprise the “Ward Parkway Group.”\(^20\) G.G. Management, the managers of the mall, contracted with IPC International Corp., a security

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6. L.A.C., 75 S.W.3d at 250.
7. Id.
9. L.A.C., 75 S.W.3d at 250.
10. Id.
11. Id.
12. Id.
13. Id.
15. Id.
16. L.A.C., 75 S.W.3d at 251. In A.G.’s earlier testimony at the juvenile proceedings of the assailant she testified that she only contacted one IPC security guard. Id. at 251 n.1.
17. Id. at 251.
18. Id.
19. Id. The defendants’ version of the facts differed considerably. Id. at 251 n.1. The defendants contended that L.A.C. referred to her assailant as her boyfriend. Id. They also contended that when A.G. saw her immediately after the incident she was “laughing and giggling.” Id.
20. Id. at 251. The Ward Parkway Shopping Center Company L.P. and W.S.C. Associates, L.P. owned and operated the mall. Id. G.G. Management provided management services for the mall. Id.
company, to provide security at the mall.\textsuperscript{21} L.A.C. sued Ward Parkway Group and IPC International for negligence.\textsuperscript{22} She also sued G.G. Management and IPC for breach of contract on the basis that she was a third party beneficiary of their contract.\textsuperscript{23}

The contract between G.G. Management and IPC included multiple terms relevant to the present case.\textsuperscript{24} First, according to the terms of the agreement, the IPC security guards were authorized to arrest and detain people in order to protect mall customers.\textsuperscript{25} Further, the mall management and IPC agreed that they together would determine the number of security guards necessary to "provide adequate security at the mall."\textsuperscript{26} The contract also stated that security guards were assigned the duty of making frequent rounds to check for safety hazards, and to "[r]eport immediately to . . . the Manager any unusual incidents, hazardous conditions, accidents, defects, suspicious activities, or criminal activities observed during" their shifts.\textsuperscript{27} The contract also provided that the officers were to keep a log of all incidents that occurred during their shifts.\textsuperscript{28}

In turn, IPC bound its employees to a Policy and Procedures Manual that it published for its employees.\textsuperscript{29} The manual stated that the management hired IPC "to create a safe, orderly atmosphere in which customers may relax and shop

\begin{enumerate}
\item \textit{Id.}
\item \textit{Id. at 253.}
\item \textit{Id.}
\item \textit{Id. at 251.}
\item \textit{Id.} The contract provided: "[IPC] shall avoid making an arrest of any kind; provided, however, the employees or agents of [IPC] may detain an individual when necessary to protect either that individual or mall customers or employees from risk of serious injury." \textit{Id.} (emphasis omitted).
\item \textit{Id.} Another provision of the contract provided: Manager and Contractor shall agree upon the proper level of staffing needed to provide adequate security to [the] mall. Upon agreement, the staffing level shall be conclusively deemed for all purposes to be a material representation by Contractor to Manager that the staffing level is one which will provide full and adequate security to the Mall.
\item \textit{Id. at 251-52.} The officers were to make rounds randomly of the common areas, sidewalks, parking lots, and ring roads. \textit{Id.} They were also to make motorized patrols of the parking lots and ring roads. \textit{Id. at 252 n.2.}
\item \textit{Id. at 252.} The IPC incident reports within three years of the incident contained descriptions of multiple crimes, both violent and non-violent, which purportedly occurred at the Ward Parkway Shopping Center. \textit{Id. at 253.} The reports included one sexual assault, one robbery and abduction, thirteen armed or attempted armed robberies, nine strong-arm robberies, four aggravated assaults, and twenty-eight simple assaults. \textit{Id.} Many of these crimes involved female victims. \textit{Id. at 254.} Further, the executive vice president of IPC stated that rape was a major concern of the company. \textit{Id. at 255.}
\item \textit{Id. at 252.}
\end{enumerate}
without undue concern for their own safety." The manual declared that it was IPC's "ultimate goal" to ensure the continued patronage of the customers. Furthermore, a training manual also distributed by IPC to its employees stated that "[t]he personal safety of yourself, fellow Officers, customers and tenants to the mall is absolute priority at all times." L.A.C. made two primary claims. First, L.A.C. sued G.G. Management and IPC for breach of contract as a third party beneficiary of the management and security contract. Second, she sued the Ward Parkway Group, G.G. Management, and IPC for negligence. Following discovery, Ward Parkway Group moved for summary judgment. IPC moved for judgment on the pleadings. In deciding whether to grant these motions, the trial court found that the defendants owed no duty to protect the plaintiff from the criminal acts of a third party, and, therefore, the court granted summary judgment in favor of the defendants. L.A.C. appealed the judgments against her on her negligence claims against both defendants and her contract claims against IPC. On appeal, the Supreme Court of Missouri reversed the trial court's decision, holding that: (1) the rape was foreseeable; (2) the plaintiff could bring suit as a third party beneficiary because the contract between G.G. and IPC "clearly and directly provided for the safety of the mall's business invitees"; and (3) the security company had a duty to business invitees to exercise reasonable care when providing security services.

III. LEGAL BACKGROUND

A. The Negligent Security Claim

In general, storekeepers or proprietors are not liable to their customers for the criminal actions of third persons on their premises. Because there is a

30. Id.
31. Id.
32. Id. at 253.
33. Id.
34. Id.
35. Id.
36. Id.
37. Id. at 250.
38. Id. at 255. She did not appeal the judgment on her contract claim against G.G.
39. Id. at 250.
40. 62A AM. JUR. 2D, Premises Liability § 513 (1990 & Supp. 2002); see also Ross v. Papler, 68 F. Supp. 2d. 790 (W.D. Ky. 1998) (noting rumors of illegal prostitution by the tenants are not enough to put the building owner on notice of imminent criminal attacks when there were no prior criminal incidents in the vicinity); Martinko v. H-N-W
special relationship between business owners and customers (who are invitees), however, a duty may be imposed on a proprietor to guard customers against harm inflicted by third parties.\textsuperscript{41} Whether the duty is imposed turns on foreseeability.\textsuperscript{42} Harm to customers may be foreseeable if a business establishment is considered one that would likely attract harmful criminal conduct\textsuperscript{43} or if the proprietor of a business was put on notice of criminal activity because there were prior similar criminal incidents on the premises.\textsuperscript{44} Police reports, security reports, and crime studies of the area are all used to prove that there have been prior similar incidents, making future harm foreseeable.\textsuperscript{45}

There are at least four tests employed by courts in the U.S. to determine the issue of foreseeability.\textsuperscript{46} The first, and most stringent, test is the "specific harm" test.\textsuperscript{47} Under this approach, a criminal act by a third person is only foreseeable if a business owner had notice of the specific danger immediately prior to the assault.\textsuperscript{48} In Virginia, for instance, the proprietor must know that an individual on the premises has a violent history and poses an "imminent probability of harm" to business patrons before a duty to protect them is imposed.\textsuperscript{49} The second test, the "prior similar incidents rule," is less stringent\textsuperscript{50} and requires only
that a defendant have notice of a sufficient number of prior similar criminal acts before a duty is imposed. Courts using this approach vary as to how similar to the instant offense the prior incidents must be to establish foreseeability. As a result, some courts have molded the prior similar incidents rule into a third approach to determining foreseeability—a balancing test. Under this third test, a court considers, among other factors, the probability and magnitude of harm weighed against the costs and burdens of preventing the harm. The final test, the "totality of the circumstances" test, is similar. Under this test, if the proprietor has reason to anticipate criminal conduct, either from prior incidents or the location and nature of his business, he may be held to have a duty to protect his customers if the frequency and severity of criminal conduct on his premises exceeds the norm.

In Missouri, the definitive decision regarding how to determine if criminal acts by third parties were foreseeable to a business proprietor is *Madden v. C & K Barbecue*. *Madden* involved kidnapings from restaurant and shopping center parking lots. In *Madden*, the court refused to adopt any single version of the foreseeability tests contrary to the lower courts' later attempts at classifying the decision. Instead, the court used a traditional negligence standard. Thus,

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51. *L.A.C.*, 75 S.W.3d at 256.


53. *L.A.C.*, 75 S.W.3d at 256; see also *McClung*, 937 S.W.2d at 901.

54. *McClung*, 937 S.W.2d at 901. The court stated:

> Several factors are to be considered in deciding whether a risk is an unreasonable one, thereby giving rise to a duty. "Those factors include the foreseeable probability of the harm or injury occurring; the possible magnitude of the potential harm or injury; the importance or social value of the activity engaged in by defendant; the usefulness of the conduct to defendant; the feasibility of alternative, safer conduct and the relative costs and burdens associated with that conduct; the relative usefulness of the safer conduct; and the relative safety of alternative conduct."

*Id.* (quoting *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995)).


56. *Id.*

57. 758 S.W.2d 59 (Mo. 1988).

58. *Id.* at 61.

establishing foreseeability in Missouri involves conventional tort law analysis, in which the main focus is on whether there is sufficient evidence from which a reasonable person would have foreseen harm to patrons.\textsuperscript{61} If harm to these invitees is reasonably foreseeable, the defendant has a duty to protect the invitees from harm inflicted by unknown third parties.\textsuperscript{62} The most important evidence in this examination is whether there were prior similar incidents that would put a reasonable person on notice of this harm.\textsuperscript{63} Although \textit{Madden} made clear that Missouri has not specifically adopted the prior similar incidents test, the number of occurrences and their similarity to the incident in question are the primary factors considered in determining foreseeability in Missouri.\textsuperscript{64} Stated generally, violent crimes are foreseeable if other violent crimes have occurred on the premises.\textsuperscript{65}

\textbf{B. Contract Claims of Third Party Beneficiaries}

As a general rule, a third person may enforce a contractual obligation made for her benefit as a third party beneficiary\textsuperscript{66} and can maintain an action for breach of the contract even though she is not privy to the contract.\textsuperscript{67} To benefit from a contract, a third party must be a “primary beneficiar[y],” although the contracting parties need not have had the benefit of the third party as their
primary goal in contracting. The terms of the contract must articulate an
intention to benefit an "identifiable person or class" of which the third party is
a part. Whether there was an intention to benefit the third party is evidenced
by the situation of the parties, the purpose of the agreement, and the
circumstances surrounding the agreement. If the parties intended the contract
to benefit a third party, therefore, the courts generally agree that the third party
has a right of action and reject the normal requirements of consideration and
privity.

1. Types of Third Party Beneficiaries

Under Missouri law, a contract can benefit a third party as a donee,
creditor, or an incidental beneficiary, depending on the purpose of the contract.
If the purpose of the contract is to make a gift to the third party or to give him a
right against the promisor, he is a donee beneficiary. If the contract implies a
duty of the promisee to the third person and performance of the contract will
satisfy that duty, the third person is a creditor beneficiary. A contract of this
kind usually calls for performance to be rendered directly to the beneficiary, but
this is not necessarily so. Finally, if the third party beneficiary is neither a
creditor beneficiary nor a donee beneficiary, she is an incidental beneficiary.

What sort of beneficiary a person is considered to be is important because, under

68. Id.
1987).
70. Black & White Cabs of St. Louis, Inc. v. Smith, 370 S.W.2d 669, 675 (Mo. Ct.
72. Kansas City N.O. Nelson Co. v. Mid-Western Constr. Co. of Mo., 782 S.W.2d
672, 677 (Mo. Ct. App. 1989).
73. Id.; see also Terre Du Lac Ass'n, 737 S.W.2d at 213 (citing RESTATEMENT
OF CONTRACTS § 133(1)(a) (1932)) ("A person is a donee beneficiary if the purpose of the
promisee in obtaining the promise of all or part of the performance thereof is 'to make
a gift to the beneficiary or to confer upon him a right against the promisor to some
performance neither due nor supposed or asserted to be due from the promisee to the
beneficiary.'").
74. Kansas City N.O. Nelson Co., 782 S.W.2d at 677; see also Terre Du Lac
Ass'n, 737 S.W.2d at 213 (citing RESTATEMENT OF CONTRACTS § 133(1)(b) (1932)) ("The
person is a creditor beneficiary if the 'performance of the promise will satisfy an actual
or supposed or asserted duty of the promisee to the beneficiary.'").
75. RESTATEMENT OF CONTRACTS § 133 cmt. d (1932).
76. Id. See Terre Du Lac Ass'n, 737 S.W.2d at 213 (citing RESTATEMENT
OF CONTRACTS § 133(1)(c) (1932)) ([A] person is an incidental beneficiary if he is neither
a donee nor a creditor beneficiary.").
Missouri law, only creditor beneficiaries and donee beneficiaries may recover as third party beneficiaries to a contract.\(^{77}\)

In contrast to Missouri law, the Restatement (Second) of Contracts has done away with the classification of beneficiaries as creditor, donee, or incidental.\(^{78}\) Instead, beneficiaries are classified only as intended or incidental.\(^{79}\) A party is an intended beneficiary if "recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties" and either the promisee has an obligation to pay money to the beneficiary or the promised performance is intended to benefit the beneficiary.\(^{80}\)

2. Privity

Historically, parties not privy to a contract have not been able to use duties created under that contract as a basis for a tort claim, but rather only contract claims.\(^{81}\) When a separate duty arises out of the contract, however, tort liability can attach.\(^{82}\) The terms of the contract and the circumstances determine if there is a duty.\(^{83}\) A duty is created if the circumstances and contract terms indicate that the defendant "assumed a duty to exercise reasonable care to prevent harm to the plaintiff."\(^{84}\) Importantly, in Wolfmeyer v. Otis Elevator, the Missouri Supreme Court recognized an independent duty when a contract involves the safety of another person.\(^{85}\) In Westerhold v. Carrol, however, the court cautioned that this exception to the privity requirement should be limited to avoid exposing parties

\(^{77}\) \textit{Id.}
\(^{79}\) \textit{Id.}
\(^{81}\) \textit{Id.}
\(^{83}\) \textit{Id.}
\(^{84}\) \textit{RESTATEMENT (SECOND) OF Torts} § 324A (1965).
\(^{86}\) \textit{Id.}; \textit{see also} Aetna Ins. Co. v. Hellmuth, Obata & Kassabaum, Inc., 392 F.2d 472, 476-77 (8th Cir. 1968).
to unlimited liability, and whether the exception applies should be determined on a case by case basis.\textsuperscript{86}

\section*{IV. \textsc{Instant Decision}}

\subsection*{A. The Majority}

In \textit{L.A.C. v. Ward Parkway Shopping Center Co., L.P.}, the Missouri Supreme Court held that summary judgment granted in favor of the Ward Parkway Group defendants should be reversed because the Ward Parkway Group owed a duty to its business invitees to protect the invitees against violent criminal acts by third parties.\textsuperscript{87} The court began by discussing the various methods other courts use to determine the foreseeability of criminal acts and, therefore, whether the proprietor is liable for the criminal acts of unknown third persons.\textsuperscript{88} The court noted the specific harm test, the prior similar incidents rule, the balancing test, and the totality of the circumstances test. The court emphasized that Missouri decidedly does not adopt any single version of the foreseeability tests.\textsuperscript{89} The court explained that fifteen years ago, in \textit{Madden}, the court followed the "traditional principles of the law of negligence" and did not adopt a specific test to establish foreseeability, though there was much speculation in the lower courts as to how to categorize its decision.\textsuperscript{90} Instead of adopting a particular test, the court said that a plaintiff must show that a reasonable person in the proprietor's circumstances would anticipate danger and take measures to protect invitees.\textsuperscript{91} The court noted that prior violent crimes on the premises would make a reasonable person anticipate danger and, thus, would likely impose a duty on a proprietor.\textsuperscript{92} In saying all of this, the court rejected the inconsistent categorizations adopted by the appellate courts and reiterated the

\begin{itemize}
\item \textsuperscript{86} Westerhold v. Carroll, 419 S.W.2d 73, 77-78 (Mo. 1967). Many other states have similarly held that a security company assumes a duty to protect the safety of others when it enters a security contract. See Brown v. Nat'l Supermarkets, Inc., 679 S.W.2d 307, 310 (Mo. Ct. App. 1984); Erickson v. Curtis Inv. Co., 447 N.W.2d 165, 170-71 (Minn. 1989); Jones v. Tokhi, 535 N.W.2d 46, 48-49 (Wis. Ct. App. 1995); Prof'l Sports, Inc. v. Gillette Sec., Inc., 766 P.2d 91, 93 (Ariz. Ct. App. 1988); \textit{Eaves Brooks Costume Co., Inc.}, 556 N.E.2d at 1096; see also \textsc{Restatement (Second) of Torts} \textsection{324A} (1965).
\item \textsuperscript{87} L.A.C. v. Ward Parkway Shopping Ctr. Co., L.P., 75 S.W.3d 247, 259 (Mo. 2002).
\item \textsuperscript{88} \textit{Id.} at 256.
\item \textsuperscript{89} \textit{Id.} at 257.
\item \textsuperscript{90} \textit{Id.}
\item \textsuperscript{91} \textit{Id.}
\item \textsuperscript{92} \textit{Id.}
\end{itemize}
general standard for foreseeability set out in Madden. With this standard, the court noted it had more leeway to adapt duty and breach to the case at hand, without advancing the implication that a business owner is the insurer of invitees' safety.

The court then explained how traditional tort law applies to cases involving liability of a proprietors for the actions of third parties. In any tort case, a plaintiff must show that the defendant had a duty to use reasonable measures to protect the plaintiff and that the defendant breached that duty causing injury to the plaintiff. Furthermore, the court stated that, in order to establish a duty, a plaintiff must show that it was foreseeable that something was likely to occur that would harm the plaintiff. The court then enumerated the general rule that there is generally not a duty to protect against the criminal acts of third persons because these acts are generally not foreseeable. The court then explained, however, that when a plaintiff and the defendant have a special relationship, like that of business owner and invitee, an exception to this rule exists. In these cases, a duty is imposed if the harm to the invitee was foreseeable. As the court pointed out, a plaintiff does not have to show that the specific type of harm suffered was foreseeable. Rather, she must show that, in general, a reasonable person would have foreseen harm and taken measures to protect business invitees.

Given all of this, the court concluded by stating the general rule that violent crimes are foreseeable if there have been other violent crimes on the premises. The court then moved on to its analysis of the case at hand. The court began by stating that there were enough violent incidents on the premises for L.A.C. to establish a question of foreseeability sufficient to avoid summary judgment. The court noted that, within the three years prior to the incident, seventy-five violent crimes had occurred on the mall property. Sixty-two

93. Id. at 258.
94. Id. at 257.
95. Id.
96. Id.
97. Id.
98. Id. The court also noted another exception to the rule, not applicable in the instant case. If a particular person on the premises of a business is known to be violent or dangerous or conducts himself in a manner indicating such, the business owner will have a duty to protect invitees in this case as well. Id.
99. Id. at 258.
100. Id.
101. Id. Violent crimes include "robbery, assault, burglary, stealing, arson, abduction, murder, sexual assault and rape." Id.
102. Id. at 258-59.
103. Id. at 258.
percent of these crimes involved female victims and included abduction, sexual assault, and robbery.\footnote{Id.} Further, the court noted that the mall security director stated that he believed that the mall had a duty to protect against violent crime and IPC’s vice president stated that rape was a security concern for the mall.\footnote{Id. at 258 n.10.} Because the incident reports and the defendants’ testimony demonstrated that the defendants were aware of the past crimes on the premises, the court found that future crimes of the same nature were foreseeable.\footnote{Id. at 258-59.} Thus, the court concluded, it would be reasonable for a jury to find that the defendants had a duty to protect invitees such as L.A.C. from such harm.\footnote{Id. at 259 n.12.}

The court then began its analysis of L.A.C.’s contract claim against IPC. First, the court stated that L.A.C.’s claim rested upon whether she was a third party beneficiary to the contract between the mall and IPC.\footnote{Id. at 259.} A third party beneficiary, the court stated, is one whom the contracting parties intended as the primary beneficiary.\footnote{Id.} The intention of contracting parties should be taken from the document itself, the court noted, but if such an intention is unclear a court may look to the surrounding circumstances.\footnote{Id. at 260.} The contract must “express directly and clearly an intent to benefit an identifiable person or class” of which the party claiming to be a primary beneficiary is a member.\footnote{Id. (quoting Terre Du Lac Ass’n v. Terre Du Lac, Inc., 737 S.W.2d 206, 213 (Mo. Ct. App. 1987)).}

The court next examined the contract between the mall and IPC. The court noted that, under the contract, IPC security officers were empowered to detain suspects in order to protect mall customers from injury inflicted by suspects and

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\item[104.] \textit{Id.} Crimes “on the premises” are included in the Madden test for foreseeability. \textit{Id.} at 258 n.10. This would include crimes in the parking lot or areas adjacent to the mall. \textit{Id.} The defendant tried to limit the introduction of evidence concerning crimes inside the mall and exclude those in the parking lot, but the court disagreed with this limitation because L.A.C. alleged that her abduction occurred inside the mall while the rape occurred outside the mall in a walkway leading to the parking lot. \textit{Id.} at 258-59. The defendant also tried to exclude evidence of robberies, escaping suspects, and other altercations, arguing that these were not indicative of the future occurrence of a rape, but the court stated that these were exactly the type of acts that would put a reasonable person on notice that measures should be taken. \textit{Id.} at 258 and n.10, 259.
\item[105.] \textit{Id.} at 259.
\item[106.] \textit{Id.}
\item[107.] \textit{Id.} The court noted that it only held that a duty existed and they did not consider the extent of the duty. \textit{Id.} at 259 n.12. The court stated that the duty may range from proper lighting to installing security systems or contracting with a security company. \textit{Id.}
\item[108.] \textit{Id.} at 260.
\item[109.] \textit{Id.}
\item[110.] \textit{Id.}
\item[111.] \textit{Id.} (quoting Terre Du Lac Ass’n v. Terre Du Lac, Inc., 737 S.W.2d 206, 213 (Mo. Ct. App. 1987)).
\end{enumerate}
that the contract twice mentioned the steps that would be taken to provide adequate security.\textsuperscript{112} The court also noted that the security guards were supposed to make frequent rounds and report any criminal or suspicious activities, hazardous conditions, or accidents by reporting to management and entering the incidents into a log book.\textsuperscript{113} In turn, as the court observed, IPC agreed to bind its employees to these regulations and provide "full and adequate security" for the mall.\textsuperscript{114} Thus, the court concluded that the purpose of the contract between the mall and IPC was to protect customers from violent crime, and, therefore, those customers, including the plaintiff, were creditor beneficiaries.\textsuperscript{115}

The court also addressed whether a tort duty by one of the contracting parties to the third party could arise from the contract. The court stated that, in general, a contract cannot give rise to a tort duty, but in Missouri, an exception exists if the contract involves the safety of other persons.\textsuperscript{116} The court noted, citing decisions from other states and lower courts, that a security company assumes a duty to ensure the safety of third persons when it enters into a security contract.\textsuperscript{117} The court said that the contract at hand not only set out a general duty to protect customers from harm but also that a specific duty arose when L.A.C.'s friend approached the two mall security guards seeking help.\textsuperscript{118} According to the court, once the security had notice of the criminal incident, the issue of foreseeability disappeared.\textsuperscript{119} Thus, the question surrounding the duty to protect dissipated and the business owner owed the standard reasonable duty to his customers. Accordingly, the court held that L.A.C. had standing to sue in tort for breach of the security contract between IPC and the mall.\textsuperscript{120}

\textbf{B. The Dissent}

Chief Justice Stephen Limbaugh disagreed with all of the majority's findings. He expressed concern that the majority's holding would swallow the general rule that proprietors generally have no duty to protect their customers from the criminal acts of unknown third persons.\textsuperscript{121} Chief Justice Limbaugh thought that the prior incidents relied on by the majority were so dissimilar to the abduction and rape of the plaintiff that there was not a sufficient basis for

\begin{itemize}
\item 112. \textit{Id.} at 260-61.
\item 113. \textit{Id.} at 261.
\item 114. \textit{Id.}
\item 115. \textit{Id.} at 262.
\item 116. \textit{Id.}
\item 117. \textit{Id.}
\item 118. \textit{Id.} at 263.
\item 119. \textit{Id.}
\item 120. \textit{Id.}
\item 121. \textit{Id.} at 263-64 (Limbaugh, C.J., dissenting).
\end{itemize}
concluding harm to the plaintiff was foreseeable. He also stated that a distinction should be made between crimes occurring inside the mall and crimes occurring in the parking lot because in the parking lot patrons can be isolated and an attack is easier to make. He reasoned that most of the prior crimes were dissimilar and he distinguished the only sexual assault listed by the majority on the ground that the perpetrator was a mall employee, not an unknown third person. Chief Justice Limbaugh also distinguished Madden from the current case by noting that, in Madden, there had been twelve recent robberies of business patrons.

Chief Justice Limbaugh criticized the majority’s failure to cite Wood v. Centermark Properties, the only Missouri case to address mall owners’ liability. In Wood, the Missouri Court of Appeals found no liability on the part of mall owners for the abduction of the plaintiff from a parking lot when the crimes produced by the plaintiff to establish foreseeability were mostly purse snatchings and robberies. Chief Justice Limbaugh stated that because these crimes were not sufficient to establish foreseeability in Wood, the similar circumstances in L.A.C. would also be insufficient to establish foreseeability. Hence, he stated that he would not impose a duty on the mall owners in the instant case because injury to the plaintiff was not foreseeable.

Turning to the contract claim, Chief Justice Limbaugh then stated that the plaintiff could not be a third-party beneficiary if the court held in the negligence case that there was no duty. A creditor beneficiary is given that status because performance of the promise by the promisor satisfies a duty the promisee owed to the third party. If the mall owners owed no duty to the plaintiff, then the plaintiff could not be a creditor beneficiary. Chief Justice Limbaugh also pointed out longstanding precedent in Missouri that a party “not privy to a contract” cannot use the duties created by the contract as a basis for a tort. He rebutted the majority’s application of the exception set forth in Wolfmeyer with the court’s language in Westerhold in which the court held that the Wolfmeyer

122. Id. (Limbaugh, C.J., dissenting).
123. Id. (Limbaugh, C.J., dissenting).
124. Id. (Limbaugh, C.J., dissenting).
125. Id. at 265 (Limbaugh, C.J., dissenting).
126. Id. (Limbaugh, C.J., dissenting).
128. Id. at 524-25.
129. L.A.C., 75 S.W.3d at 265 (Limbaugh, C.J., dissenting).
130. Id. (Limbaugh, C.J., dissenting).
131. Id. at 266 (Limbaugh, C.J., dissenting).
132. Id. (Limbaugh, C.J., dissenting).
133. Id. (Limbaugh, C.J., dissenting).
134. Id. (Limbaugh, C.J., dissenting).
exception was a narrow one, to be used when there is a close relationship between a third party and the contracting parties. Chief Justice Limbaugh stated that the result in *L.A.C.* is exactly what the court forbade in *Westerhold*.

V. COMMENT

In *L.A.C. v. Ward Parkway Shopping Center, Co., L.P.*, the Missouri Supreme Court did not enlarge the exception to the general rule that a business owes no duty to its patrons to protect them from crimes by third parties when it held that shopping mall owners have a duty to protect patrons from such criminal acts when it is foreseeable that those patrons might be injured. Instead, the court merely revived the special facts and circumstances exception established in *Madden*. Before the *Madden* decision, exceptions to the general rule were limited to cases in which frequent and recent crimes by unknown assailants had occurred on the premises. This was known as the "violent crimes exception." *Madden*, however, rejected a strict approach and left the imposition of duty open for the court to decide in each case, after considering all of the circumstances, by following an ordinary negligence standard. Even so, since *Madden*, the lower courts have generally found that landowners and proprietors owe no duty to invitees. Though some may say the lower courts

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135. Id. (Limbaugh, C.J., dissenting); see also Wolfmeyer v. Otis Elevator Co., 262 S.W.2d 18, 22 (Mo. 1953) (holding that a defendant can enter into a contract and place himself in a position in which he will have to protect the third party).

136. *L.A.C.*, 75 S.W.3d at 266 (Limbaugh, C.J., dissenting); see also *Westerhold v. Carroll*, 419 S.W.2d 73, 77-79 (Mo. 1967) (limiting the *Wolfmeyer* exception to cases in which the third party and the contracting parties had a close relationship so as to shield parties from "unlimited liability to an unlimited number of persons").

137. *L.A.C.*, 75 S.W.3d at 266 (citing Faheen v. City Parking Corp., 734 S.W.2d 270, 272 (Mo. Ct. App. 1987)).

138. Id. at 263-64 (Limbaugh, C.J., dissenting).

the Madden decision, the Missouri Supreme Court characterized the inconsistent lower rulings as misinterpretations of the Madden decision. Included in these misconstrued decisions is Wood, which the dissent used as the main case supporting the proposition of duty. Thus, L.A.C. merely clarifies a past Missouri Supreme Court ruling and does not overrule longstanding Missouri precedent, as was stated by the dissent. Rather, the court noted the utility of the general tort law's flexible standard over the more rigid approaches taken by other states.

The court in L.A.C. also held that the plaintiff could sue in tort for a duty arising under a contract as a third party beneficiary of the contract. This decision is also consistent with prior rulings, though there is less precedent in this area. The court made its decision on the general contract principles of third party beneficiaries and applied the principles to the terms of the contract. The holding does not create any new law, as Missouri's law on third party beneficiaries is already established. Instead, the decision rests within the exception created in Wolfmeyer v. Otis Elevator that a contract can create a duty to a third party if the contract involves the safety of a third party. This is not the first time in Missouri a tort duty to a third party has arisen from a contract between a proprietor and a security company, and such a duty has been upheld in many other states as well.

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140. See Richardson, 81 S.W.3d at 63.
141. L.A.C., 75 S.W.3d at 258. The court characterized the discrepancy between the lower rulings and the Madden decision as being one of misunderstanding and not blatant defiance. Id.
142. Id. see also Richardson, 81 S.W.3d at 63 n.9.
143. L.A.C., 75 S.W.3d at 265-66.
144. Id. at 258.
145. Id. at 262.
146. Id. at 260-62.
147. See generally Andes v. Albano, 853 S.W.2d 936 (Mo. 1993); Terre Du Lac Ass’n v. Terre Du Lac, Inc., 737 S.W.2d 206 (Mo. Ct. App. 1987); Kansas City N.O. N elicson Co. v. Mid-Western Constr. Co. of Mo., 782 S.W.2d 672 (Mo. Ct. App. 1989).
148. 262 S.W.2d 18 (Mo. 1953).
149. Id. at 22.
150. See Brown v. Nat’l Supermarkets, Inc., 679 S.W.2d 307, 309-10 (Mo. Ct. App. 1984) (appealed on other grounds at 731 S.W.2d 291) (holding that a customer shot in the supermarket parking lot by an unknown assailant could be a third party beneficiary under the contract between the security company and the supermarket).
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The dissent pointed to *Westerhold v. Carroll* as precedent for the proposition that a party not privy to a contract cannot use the duties created under the contract as a basis for a tort suit. The *Westerhold* decision, however, merely held that whether a party to a contract would be liable to a third party beneficiary was a policy matter requiring the court to consider many factors. It urged limiting the *Wolfmeyer* exception but did not narrow it to a point of non-existence. It is left open to the court to decide when to apply the exception, using the factors outlined in the case.

The opinion would have been more clear if the court had adopted the Restatement standard for third party beneficiary classification. The Restatement classifies third party beneficiaries as either intended beneficiaries or incidental beneficiaries. Intended beneficiaries can recover and incidental beneficiaries cannot. Adopting this approach would eliminate the possibly confusing analysis the court goes through to determine that the plaintiff is a creditor beneficiary and, thus, would leave less wiggle room for the lower courts in similar cases. After the mischief that occurred with the *Madden* decision, the court might want to limit the opportunity the lower courts have to make a finding of law that keeps the plaintiff’s case from the jury.

Furthermore, Chief Justice Limbaugh’s logic for finding that there was no duty is questionable. He argued against including the parking lot crimes in the evaluation of whether there were sufficient similar crimes to establish foreseeability. He pointed out that people are more exposed and more easily isolated in a parking lot than inside the mall and, thus, it is an attractive location for violent crime. Thus, Chief Justice Limbaugh argued that a distinction must be made between indoor and outdoor crime, with the parking lot crimes excluded.

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*Jones v. Williams, 408 N.W.2d 426 (Mich. Ct. App. 1987).*

152. *L.A.C., 75 S.W.3d at 262.* See *Westerhold v. Carroll, 419 S.W.2d 73, 77-79 (Mo. 1967).*

153. *Westerhold, 419 S.W.2d at 81.*

154. *See id.*

155. *Id.* The court stated:

The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to defendant’s conduct, and the policy of preventing future harm. *Id.* (quoting *Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958).*)

156. *See supra* note 78-79 and accompanying text.

157. *See supra* note 80 and accompanying text.

He refuted the majority's reasoning for including the parking lot crimes, that the crimes happened both inside and outside, by saying that the walkway where the rape happened is distinguished from the parking lot because the walkway is secluded and for employee use only. However, if secluded walkway crimes, isolated parking lot crimes, and indoor crimes are distinguishable, then eventually secluded indoor crimes in bathrooms and walkways, and perhaps crimes in specific stores, would be distinguishable as well. If that were to happen, the only way a plaintiff could recover is if an identical crime at an identical location happened in the recent past. Nothing else would, in the eyes of the court, put proprietors on notice that patrons might be injured on their premises. This formulation serves to protect even the most negligent proprietors with the technicalities of the prior similar incidents rule. Although Chief Justice Limbaugh raised no issue with the adoption by the majority of a general tort standard of evaluation, the analysis he imposed suggests something very similar to the rigid prior similar incidents rule explicitly rejected by the court in *Madden*.

Technically the case does not lay down any new law but instead reinforces existing law. Instead of restricting themselves to the application of rigid rules, the lower courts will have to recognize that in Missouri, proprietors have a special relationship with customers and, thus, are very much within the *Wolfmeyer* exception. Without the restrictions of the prior similar incidents or other rules, the courts will give more weight to crimes and circumstances which bear on foreseeability but were not applicable under those tests. This will make it easier for a plaintiff to get her case to a jury and will expand the scope of the proprietor's duty. There may no longer be the one "free" crime that proprietors get under the prior similar incidents rule. Instead, they will be liable for any harm that a reasonable person would have protected against.

**VI. CONCLUSION**

In *L.A.C.*, the Missouri Supreme Court held that the standard for determining foreseeability of criminal acts that injure invitees is a general tort standard and not one of the more rigid standards previously used by the lower Missouri courts. This may have the result of wrenching the foreseeability issue from the judge's hands and more frequently making it a question of fact for the jury. The court also may have created a new cause of action by reviving an old exception in finding that the plaintiff was a third party beneficiary of the security contract between the shopping center and the security company. In doing so, the

159. *Id.*

160. The first crime on the premises will never subject the owner to liability because, by definition, there were no prior crimes to establish foreseeability. Landwehr, *supra* note 2, at 74.
court overturned the general policy of the lower Missouri courts to side with landowners and proprietors and opened the door for plaintiffs in negligent security cases. Whether this simply allows rightful plaintiffs to recover or makes business owners' responsibilities unproductively burdensome remains to be seen. It may be that, in the end, the added cost of security and possibly higher insurance premiums will be passed along to consumers who will enjoy a safer environment.

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