

CIVIL LIABILITY FOR CRIMINAL ACTS OF THIRD PARTIES

Virginia courts have recently addressed whether civil liability for criminal acts of third parties may be imposed in several high profile cases. As a general rule, a party does not have a duty to warn or protect another from the criminal acts of a third person. *Burns v. Gagnon*, 283 Va. 657, 727 S.E.2d 634 (2012). However, the courts have recognized two exceptions to this general rule. Both of these exceptions require a Plaintiff to prove the existence of a special relationship (1) between the defendant and the third person which imposes a duty upon the defendant to control the third person's conduct, or (2) between the defendant and the plaintiff which gives a right to protection to the plaintiff. *Id.* at 668-69, 641-642. Once a special relationship has been established, a Plaintiff then must address the foreseeability of the criminal harm.

BROWN V. JACOBS

The Supreme Court of Virginia addressed the special relationship doctrine in an Opinion from February 2015, *Brown v. Jacobs*, 2015 Va. Lexis 14 (Va. February 26, 2015). In this wrongful-death claim, the decedent, Arthur Brown ("Brown"), was a private investigator hired by attorney Sherwin John Jacobs ("Jacobs") to serve divorce papers on his client's husband, Ali Al-Ibrahim Abid ("Abid"). When the private investigator attempted to serve Abid, Abid shot and killed him. Three days later, police found Brown's body in

the trunk of Abid's car. Mr. Brown's widow asserted that attorney Jacobs had a special relationship with her deceased husband and as a result, Jacobs had a duty to warn Brown that Abid was armed and dangerous. In support of her position, Plaintiff cited *A.H. v. Rockingham Publishing Co.*, 255 Va. 216, 495 S.E. 482 (1998), a Virginia Supreme Court decision in which the Court upheld the existence of a special relationship for an independent contractor. In *A.H.*, the Court addressed whether a newspaper publisher owed a duty to warn a thirteen-year-old newspaper carrier "of the danger of being attacked" while delivering papers on his assigned route. *Id.* at 219, 495 S.E.2d at 484. For several years prior to A.H.'s assault, there had been several other sexual assaults in the same general area. Although the newspaper publisher knew of the other assaults, it did not inform A.H. or his parents. *Id.* at 219, 495 S.E.2d at 486. In *A.H.*, the Court determined that a special relationship existed because the publisher prescribed a route and delivery schedule for the juvenile newspaper carrier. The Court also noted that the carrier's age may have imposed a "greater degree of care on Rockingham [the publisher] than it would have owed an adult" in the same circumstances. *Id.* at 221, 495 S.E.2d at 486.

The *Brown* Court distinguished the circumstances from those in *A.H.*, finding that the private investigator was not particularly vulnerable given his age and experience. Additionally, the Court found that the attorney Jacobs did not prescribe any specific means by which the Brown should perform his duties. The *Brown* Court found these distinctions to be controlling in finding that no special

relationship existed between Jacobs and the private investigator.

HARRINGTON V. REGIONAL MARKETING CONCEPTS, INC.

The Circuit Court of the City of Charlottesville, Virginia also was recently called upon to delineate the scope of the duties imposed for third-party criminal acts in *Harrington v. Reg'l Mkt. Concepts, Inc.*, 2014 Va. Cir. LEXIS 59. *Harrington* stemmed from the death of Morgan Harrington, who was killed sometime after attending a concert at the John Paul Jones Arena on the grounds of the University of Virginia in Charlottesville. The defendant, Regional Marketing Concepts, Inc. ("RMC") provided various services during the concert at the Arena and had several employees present the evening of the concert. According to facts presented in an amended complaint, Ms. Harrington was seen by several RMC employees in an incapacitated state with visible injury to her face. When she left the Arena, RMC refused Ms. Harrington's request to reenter. Sometime after this refusal, Ms. Harrington was killed.

The plaintiff, Ms. Harrington's mother, alleged that her daughter had been a business invitee of RMC and, thus, a special relationship existed between Ms. Harrington and RMC. The Supreme Court of Virginia has recognized that a special relationship can exist between a business owner and invitee in *Kellerman v. McDonough*, 278 Va. 478, 492, 694, 684 S.E.2d 786, 793 (2009). The trial court in *Harrington*, correctly recognized, however, that even establishing the threshold question of whether a special relationship exists is not necessarily enough to impose liability for the criminal acts of a third party. Instead, the trial court



held that “the scope of the duty to protect a business invitee from the criminal actions of third persons or to warn an invitee of the potential of an assault depends on the degree of the foreseeability of the harm.” *Harrington*, at *5; citing *Commonwealth of Virginia v. Peterson*, 286 Va. 349, 749 S.E.2d 307 (2013).

The Virginia Supreme Court has recognized two separate levels of foreseeability of harm. The first is where the risk of harm is known or reasonably foreseeable. *Taboada v. Daly Seven, Inc.*, 271 Va. 313, 325-326, 626 S.E.2d 428 (2006). The second level is an “imminent probability of harm,” a heightened degree of foreseeability, where a defendant “knows that criminal assaults against persons are occurring or are about to occur on the premises.” *Peterson*, 286 Va. at 357. When the special relationship is that of a business owner and business invitee, as alleged by Harrington, the duty to warn

or to protect is only imposed at the second level of foreseeability. *Harrington*, at *7 citing *Yuzefovsky v. St. John’s Wood Apartments*, 261 Va. 97, 109, 540 S.E.2d 134 (2001).

To support her argument that RMC had a duty to warn Ms. Harrington from harm by third parties, Plaintiff alleged that there was evidence of a number of assaults that occurred in the vicinity of the Arena from 2005 through the date of Ms. Harrington’s disappearance from the Arena. The trial court found, however, that even assuming the allegations were true, they were insufficient as a matter of law to create a duty on RMC to “protect or to warn plaintiff’s decedent that there was a risk of ‘an imminent probability of injury’ from a third party criminal act.” *Id.* at *8 citing *Dudas v. Glenwood Golf Club, inc.*, 261 Va. 133, 140, 540 S.E.2d 129 (2001).

CONCLUSION

It is evident from recent cases that Plaintiffs will continue to pursue claims for injury arising from the criminal acts of third parties. Each case, however, must be evaluated from its own individual circumstances as the nuanced case law makes clear that these cases are very fact sensitive.



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