

## WASHINGTON SHOOTING AT PRIVATE DANCE ON PARK DISTRICT PREMISES

### WILBERT v. METROPOLITAN PARK DISTRICT OF TACOMA COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION II February 6, 1998

In this case, plaintiff Oscar Wilbert Jr. and other family members (the Wilberts) sued defendant Metropolitan Park District of Tacoma (Metro) following the shooting death of Derrick Wilbert during a private dance on Metro's premises. The facts of the case were as follows:

Metro rented part of its South Park Community Center hall on August 29, 1992, to Ghetto Down Productions to put on a private dance. Metro had been told that the dance was to raise money for charity. On the same night, a wedding reception occupied the second room available at the facility. Metro assigned a single employee, Tom Serrano, to assist the renters with set-up for their events and to monitor the events.

At the time, Metro's alcohol policy provided: "Any violation of conditions set forth by the Washington State Liquor Control Board Banquet Permit ordinance, or by the regulations and conditions of the Metropolitan Park District, will automatically and immediately terminate the rental."

In addition, the rental agreement required, as did the alcohol policy, that Ghetto Down obtain a Washington State banquet permit. The only mention of the alcohol policy in the rental agreement was an admonition to "read the additional liquor sheet carefully."

Michelle White, the bride in the wedding party that rented the second room at the facility, stated in an affidavit that numerous teenagers acted belligerently. The Ghetto Down patrons allegedly argued, scuffled, pushed, and became very aggressive. She testified that a fight first occurred at approximately 10:30 p.m. in the hallway, and that other fights occurred during the evening. White also said the teenagers were vulgar and rowdy and blocked vehicles in the parking lot. Mrs. White's brother, Duane Demangelaere, stated in an affidavit that a fist fight occurred at 10:00 p.m. None of these disputes involved the use or threatened use of deadly force.

At approximately 12:30 a.m., a fight began. Minutes later, Derrick Wilbert was shot by two assailants. The assailants were caught and convicted of the murder.

Serrano, the Metro employee on the premises, testified during his deposition that he was unaware of any violence before the 12:30 a.m. fight. **As soon as that fight began, he called 911 and requested police assistance.**

Wilbert's family (the Wilberts) sued Metro alleging theories of premises liability and voluntarily-assumed duty based on an alcohol policy of Metro. The **trial court granted Metro's**

**motion for summary judgment, finding that "Metro owed no legal duty to protect Wilbert from the criminal activities of third parties."** The Wilberts appealed.

As noted by the appeals court, the Wilberts had sued Metro, "alleging theories of negligence, including premises liability and the voluntary assumption of an independent duty, i.e., Metro had a duty to enforce its alcohol policy, presumably to terminate the event, and its failure to do so caused Wilbert's death." On the issue of premises liability, the Wilberts argued on appeal that "Metro is liable because Wilbert was a business invitee and Metro was the owner or occupier of business premises."

As described by the appeals court, **landowner liability for criminal activity by third parties is generally limited to situations where the criminal misconduct was reasonably foreseeable.**

[A] business owner has a special relationship with his or her business invitees, creating a duty to protect those invitees from criminal conduct by third parties. But the **duty extends only to harm that is reasonably foreseeable.**

Ordinarily, foreseeability is a jury question and a criminal act can only be held unforeseeable as a matter of law if the occurrence is so highly extraordinary or improbable as to be wholly beyond the range of expectability. But the pertinent inquiry is not whether the actual harm was of a particular kind which was expectable. Rather, the question is **whether the actual harm fell within a general field of danger which should have been anticipated.**

The Washington cases **analyzing foreseeability have focused upon the history of violence known to the defendant. Where no evidence is presented that the defendant knew of the dangerous propensities of the individual responsible for the crime, and there is no history of such crimes occurring on the premises, the courts have held the criminal conduct unforeseeable** as a matter of law.

On the other hand, **where there is a history of similar violence on the premises or the defendant knew of the dangerous propensities of the individual responsible, foreseeability has been established, at least sufficient to create a jury question.**

As noted by the appeals court, the Wilberts had offered the following testimony by an expert in "security and crime prevention practices" (Kennedy) to establish the fact that the deadly event in question was foreseeable."

Kennedy based this conclusion on the "well established theory of criminal victimization called the Lifestyle Exposure Theory." This theory states that when certain "circumstances present themselves, there is a risk of personal victimization which is three to four times greater than normal." The "circumstances" listed by Kennedy are: 1) Groups of people 15 to 24 years of age; 2) In public places; 3) With strangers; 4) With alcohol or drugs present; 5) With inadequate supervision.

Kennedy also opined that the risk of deadly violence was foreseeable to Metro because it provided a rental monitor and retained the authority to terminate the event for violations of the alcohol policy. This "retention of authority," according to Kennedy, is a "recognition" on the part of Metro that there is the possibility of a "loss of control" at such events.

Applying these principles to the facts of the case, the appeals court **found no evidence that "Metro should, on the basis of the events earlier in the evening, have anticipated a fatal assault with a deadly weapon."**

Here, the Wilberts offered **no evidence that Metro knew of the violent propensities of the assailant or that there had been similarly violent episodes at the Center in the past.** Instead, the Wilberts offered the wedding party affidavits. These showed that there were a number of unruly, aggressive, vulgar young people at the dance and that fights occurred as early as 10:30 p.m. But the affidavits did not describe when the fights were, how long they lasted, how many people were involved, whether they occurred in the presence of Serrano, whether the victim or assailants were involved, or, most importantly, whether any of the fights involved the use or threatened use of deadly force.

**Evidence of antisocial, unruly, or even hostile behavior is generally insufficient to establish that a defendant with a supervisory duty should reasonably have anticipated a more serious misdeed.**

Moreover, the appeals court found that declarations by the **Wilberts' security expert did not provide "specific evidence that the defendant knew of the dangerous propensities of the individual assailant or previous acts of similar violence on the premises."**

Although Kennedy spoke of "loss of control," he did not equate such "loss of control" with an outbreak of deadly violence. In addition, Kennedy spoke of an increase in the risk of personal victimization "three to four times greater than normal." But without knowing what the baseline risk is, the statistic is not helpful.

More importantly, Kennedy does not supply the prerequisites of foreseeability required by the Washington cases: specific evidence that the defendant knew of the dangerous propensities of the individual assailant or previous acts of similar violence on the premises.

The appeals court, therefore, held that **"the criminal event in question was not foreseeable as a matter of law." Accordingly, the appeals court found "Metro owed Wilbert no duty of prevention."**

On appeal, the Wilberts had also argued that "Metro's alcohol policy puts it in the same position as a tavernkeeper for purposes of premises liability." Specifically, the Wilberts contended that, "because of the alcohol policy, Metro became an innkeeper and, therefore, had a duty to protect

Wilbert from the harm caused by other patrons at the dance." Once again, the appeals court found the Wilberts had failed to establish the requisite foreseeability.

Assuming, without deciding that this is so, the same foreseeability problem arises. A tavernkeeper is liable to his patrons for the criminal conduct of others only if the harm is foreseeable. As we have seen, the criminal conduct here was not foreseeable as a matter of law.

The appeals court then addressed the Wilberts' contention that AMetro affirmatively undertook a duty to enforce its alcohol policy, and that its failure to cancel the event because of violations of the alcohol policy proximately caused Wilbert's death." Specifically, the Wilberts cited numerous alleged violations of the alcohol policy which included the following:

(1) late application by Ghetto Down for its banquet permit, (2) public advertising of the event, (3) opening the event to the public, (4) selling alcohol by Ghetto to patrons, (5) consuming alcohol outside the room rented, (6) consuming alcohol by minors, and (7) allowing more patrons (300) than estimated in the application (150). And the alcohol policy clearly gave Metro the right to cancel the event "immediately" upon discovery of a violation of the policy.

As a general rule, the appeals court acknowledged that "one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." However, under the circumstances of this case, the appeals court found the Wilberts had "failed to show that Metro's violation of its alcohol policy proximately caused the outbreak of deadly violence."

The record contains no evidence that either the victim or the assailants were drinking or otherwise violating Metro's alcohol policy. The record also fails to show that the earlier fights, the escalation of fighting or the final fight were caused by any violation of Metro's alcohol policy. The Wilberts argue simply that if Metro had closed the facility earlier, the deadly assault would not have occurred. While this may be sufficient to establish cause in fact, proximate cause requires in addition a showing of legal causation.

Having found insufficient evidence of foreseeability, and/ or that any violations of Metro's alcohol policy were not the proximate cause of Wilbert's death, the appeals court affirmed the summary judgment of the trial court in favor of Metro.