

# IN THE SUPREME COURT OF TEXAS

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No. 97-1187  
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MELLON MORTGAGE COMPANY, PETITIONER

v.

ANGELA N. HOLDER, F/K/A ANGELA N. HAMILTON, INDIVIDUALLY AND A/N/F FOR  
NICHOLAS C. LASKE, RESPONDENT

=====  
ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS  
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**Argued on January 12, 1999**

JUSTICE BAKER, concurring.

As a general rule, a landowner has no legal duty to protect another from the criminal acts of a third party who is not under the landowner's control or supervision. *See Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex. 1998); *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996). To the extent that the law does impose a duty, the threshold issue is whether the risk of harm was foreseeable. *See Timberwalk*, 972 S.W.2d at 756; *Walker*, 924 S.W.2d at 377. I conclude as a matter of law that, under the record here, Mellon could not foresee the risk that a sexual assault would occur in its employee parking garage. Therefore, I agree with the plurality's conclusion that Mellon did not owe Holder a duty. I cannot agree, however, with the plurality's duty analysis. Therefore, I concur in the judgment and write separately.

## I. THE PLURALITY

The plurality relies on *Palsgraf v. Long Island Railroad*, for its two-prong foreseeability test for duty. *See Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928). But even the plurality's cited

authorities recognize that, contrary to the opinion's claim, *Palsgraf*'s two-prong duty analysis has not been "widely embraced." \_\_\_ S.W.2d \_\_\_, \_\_\_; see RESTATEMENT (SECOND) OF TORTS § 281 Reporter's Notes (1966) (noting that *Palsgraf* is "controversial" and that, as late as 1966, the decisions on facts that are at all analogous to *Palsgraf*'s facts are "few and divided."); Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 3 (1998) ("Leading scholars treat *Palsgraf* as a proximate cause case . . . . Cordozo's own reasoning in *Palsgraf* is typically ignored or derided."); see also Powers, *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. 1699, 1702-03 (1997) (explaining that Dean Keeton's approach to duty and proximate cause, in which questions about whether a defendant's liability extends to a particular type of plaintiff are questions of proximate cause and not duty, has prevailed in Texas). Further, as the plurality concedes, the Texas cases it cites for the two-prong foreseeability analysis discuss foreseeability only in the context of proximate cause, not duty. See *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 549-50 (Tex. 1985); *Texas Cities Gas Co. v. Dickens*, 168 S.W.2d 208, 212 (Tex. 1943); *Carey v. Pure Distrib. Corp.*, 124 S.W.2d 847, 849-50 (Tex. 1939); *San Antonio & A.P. Ry. v. Behne*, 231 S.W. 354, 356 (Tex. 1921). Moving the determination of whether harm to a certain class of potential plaintiffs is foreseeable from the proximate cause analysis to the duty analysis changes Texas law in this type of case. It also changes the law in every negligence case that requires a duty analysis as a threshold issue. More importantly, it shifts the allocation of power in such cases. See Powers, *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. at 1703. Traditionally, duty is a threshold legal issue the court properly decides. See *Walker*, 924 S.W.2d at 377; Powers, *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. at 1703. Proximate cause is usually a jury issue. See *Clark v. Waggoner*, 452 S.W.2d 437, 440 (Tex. 1970); *City of Houston v. Jean*, 517 S.W.2d 596, 599 (Tex. Civ. App.--Houston [1<sup>st</sup> Dist.] 1974, writ ref'd n.r.e.); see also *Flores v. Sullivan*, 112 S.W.2d 321, 323 (Tex. Civ. App.--San Antonio 1937), *rev'd on other grounds*, 132 S.W.2d 110 (Tex. 1939); Powers, *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. at

1703. Consequently, changing the duty analysis to include the traditional proximate cause foreseeability test allocates more power to trial judges, as well as appellate judges, to decide questions traditionally and properly reserved for the jury.

Rather than change the law of duty to add a second-prong foreseeability analysis, we need only consider the *Timberwalk* factors -- similarity, proximity, recency, frequency, and publicity -- to analyze foreseeability within the duty context as it arises here. *See Timberwalk*, 972 S.W.2d at 759.

## II. FORESEEABILITY

Common-law negligence consists of these elements: (1) a legal duty; (2) a breach of that duty; and (3) damages proximately resulting from the breach. *See El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987). Duty is the threshold inquiry, which is a question of law for the court to decide. *See Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). As a general rule, a landowner has no duty to prevent criminal acts of third parties who are not under the landowner's control or supervision. *See Timberwalk*, 972 S.W.2d at 756; *Walker*, 924 S.W.2d at 377; *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 21 (Tex. 1993). To the extent that the law does impose a duty, foreseeability is the initial analysis. *See Timberwalk*, 972 S.W.2d at 756; *Walker*, 924 S.W.2d at 377. Only after foreseeability is established must we determine the parameters of the duty. *See Timberwalk*, 972 S.W.2d at 757.

In *Timberwalk*, this Court stated the factors courts should consider in determining if criminal conduct on a landowner's property is foreseeable: (1) whether any criminal conduct previously occurred on or near the property; (2) how recently it occurred; (3) how often it occurred; (4) how similar the conduct was to the conduct on the property; and (5) what publicity the occurrences received to show that the landowner knew or should have known about them. *See Timberwalk*, 972 S.W.2d at 757-58. We summarize these foreseeability factors as similarity, proximity, recency, frequency, and publicity of previous criminal conduct. *See Timberwalk*, 972 S.W.2d at 759. Courts

must consider all the factors together. *See Timberwalk*, 972 S.W.2d at 759.

Past crimes must be sufficiently similar, though not identical, to the crime at issue to put the landowner on notice of the specific danger. *See Timberwalk*, 972 S.W.2d at 758. For example, automobile vandalism in an apartment complex does not put the landowner on notice of the likelihood of a sexual assault. *See Timberwalk*, 972 S.W.2d at 758.

Proximity requires evidence of other crimes on or in the property's immediate vicinity. *See Timberwalk*, 972 S.W.2d at 757. Evidence of criminal activity occurring farther from the landowner's property is less relevant than past criminal activity in the specific area at issue. *See Timberwalk*, 972 S.W.2d at 757.

Foreseeability also depends on the recency of past criminal conduct. *See Timberwalk*, 972 S.W.2d at 757-58. A significant number of crimes occurring in a short time period on or near the property makes the crime in question more foreseeable. *See Timberwalk*, 972 S.W.2d at 758.

Publicity of prior crimes strengthens the claim that a particular crime was foreseeable because a property owner can be expected to have knowledge of such criminal activity. *See Timberwalk*, 972 S.W.2d at 758. Landowners, however, have no duty to inspect criminal records to determine the risk of crime in the area. *See Timberwalk*, 972 S.W.2d at 759.

### III. ANALYSIS

Mellon is entitled to summary judgment if it can establish as a matter of law that the sexual assault in Mellon's parking garage was not foreseeable. Foreseeability requires an analysis of frequency, recency, publicity, and similarity of previous criminal activity. *See Timberwalk*, 972 S.W.2d at 759. In reviewing a summary judgment, we assume all evidence favorable to the nonmovant to be true. *See Nixon*, 690 S.W.2d at 548-49.

Mellon's garage is in downtown Houston. In the twenty-two months before Holder's assault, 190 violent crimes had occurred within a one-quarter mile radius of the garage. The year that Holder

was sexually assaulted, 88 violent crimes occurred in the area surrounding the garage: 4 sexual assaults, 57 robberies, and 27 aggravated assaults. Indeed, Holder's expert, relying on police reports, testified that there were high crime rates in the area surrounding Mellon's garage. But "[t]he frequent occurrence of property crimes in the vicinity is not as indicative of foreseeability as the less frequent occurrence of personal crimes on the landowner's property itself." *Timberwalk*, 972 S.W.2d at 759. The only evidence of criminal activity in Mellon's garage is evidence of vagrancy and automobile theft. There is no evidence of personal crimes occurring in the garage.

On the publicity of criminal activity in the area, Holder complains that Mellon did not regularly check Houston police records. But landowners have no duty to regularly inspect criminal records to determine the risk of crime in the area. Nevertheless, two Mellon employees had written memos to Mellon in response to auto thefts occurring when the garage was occupied by employees' vehicles. One of the memos discussed a crime increase in the area surrounding the garage. But its author testified that he based his information on rumors he had heard from other Mellon employees. Mellon responded to these memos by employing armed security guards during hours that Mellon employees would be using the garage. Mellon also provided security escorts for Mellon employees going to and from the garage.

The fact that there may have been frequent and recent criminal activity in the area surrounding the garage and that Mellon knew about certain criminal activities occurring in its garage does not alone mean that a sexual assault in the garage was foreseeable. We have stated that the frequency of previous crimes necessary to show foreseeability lessens as the similarity of the previous crimes to the incident at issue increases. *See Timberwalk*, 972 S.W.2d at 759. The converse is also true -- the less similar previous crimes are to the one at issue, the frequency necessary to show foreseeability increases. Thus, we must consider whether such criminal activity was similar to the crime at issue. There is no summary judgment evidence that violent or personal crimes had occurred in Mellon's garage. The evidence only shows that automobile thefts during

business hours and vagrancy had occurred in the garage. Automobile thefts and vagrancy do not suggest the likelihood of sexual assault. *See Timberwalk*, 972 S.W.2d at 758. Nor is there summary judgment evidence that any of the four reported sexual assaults in the area surrounding the garage occurred in either a public or private parking garage or were otherwise similar to Holder's.

Considering the summary judgment evidence here and all the *Timberwalk* factors, I conclude that although there is evidence of frequent and recent criminal activity in the area surrounding Mellon's garage, and evidence that Mellon knew of vagrancy and automobile thefts in the garage itself, it was not foreseeable to Mellon that a sexual assault would occur in its garage.

#### IV. THE DISSENT

The dissent misstates our view when it claims we discount the two employee memos. To the contrary, the memos are relevant to show that the nature of the crimes reported in Mellon's garage were auto thefts and vagrancy, not violent crimes against persons. The dissent also argues that we completely disregard the nature and character of the premises at issue. Although the *Timberwalk* factors are not exclusive, nothing in *Timberwalk* suggests that a court must take into account the nature and character of the premises at issue. By citing *Gomez v. Ticor*, the dissent argues that all parking garage owners should inherently foresee rapists lying in wait for unsuspecting victims at all hours of the day and night. \_\_\_ S.W.2d \_\_\_, \_\_\_ (citing *Gomez v. Ticor*, 145 Cal. App. 3d 622, 628 (1983)). In effect, the dissent would make all property owners insurers of the general public. This is not the rule in Texas. *See Lefmark Management Co. v. Old*, 946 S.W.2d 52, 59 (Owen, J., concurring); *see also Timberwalk*, 972 S.W.2d at 756; *Walker*, 924 S.W.2d at 377. The flaw in the dissent's analysis is that the dissent fails to properly consider all the *Timberwalk* factors together. *See Timberwalk*, 972 S.W.2d at 759.

## V. CONCLUSION

Because I would hold that Holder could not foresee a sexual assault in its garage, and therefore, did not owe Mellon a duty as a matter of law, I concur in the judgment.

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James A. Baker  
Justice

OPINION DELIVERED: September 9, 1999