



S.C. Hospitality-Related Businesses Have Obligations to Protect Guests

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I read with great interest an article this week in the Beaufort Gazette entitled “Bride attacked on wedding’s eve sues Beaufort hotel.” Being a lawyer in Columbia with a focused practice on retail/hospitality/entertainment, we defend South Carolina companies operating in these sectors. One of the big areas we deal with is liability for third party assault. This article reminded me about a case-law update I published about a South Carolina Supreme Court ruling that created new requirements for operators to protect guests from foreseeable harm.

As the summer travel/vacation season begins, South Carolina hotels and other hospitality-related businesses need to be aware of this opinion, as it puts new obligations on businesses like hotels to protect their guests. The opinion concerns guest safety and third party assault. Here is the original article.

Case Creates New Duties for Operators to Protect Guests from Foreseeable Harm: Supreme Court adopts “Balancing Test” for trial courts analyzing hospitality operator liability in third party assault cases, By Christian Stegmaier

The South Carolina Supreme Court has issued an important opinion concerning guest safety and third party assault, which hoteliers and other hospitality-related operators should take note of.

In *Bass v. Gopal*, a guest of an Orangeburg motel was shot in the leg by a third party assailant. The guest had answered the door to his room after the assailant had knocked on it three separate times over the course of 15 minutes. The assailant - a stranger to the guest - had asked for money from the guest, which was met by the guest’s refusal. After shooting the guest with a small caliber pistol, the assailant fled from the property - an exterior-corridor style motel - on foot.

The guest filed suit against both the franchisee and the franchisor, alleging negligence. Specifically, the guest maintained the defendants owed him a duty to protect him from the criminal act of a third party, which the guest asserted had been breached.

At the trial court stage, the motel’s owner moved for summary judgment, averring he was not aware of any criminal activity at the motel prior to the night the guest was shot. The owner also testified in a discovery deposition that he was not aware of any criminal complaints filed by anyone in the general area. Additionally, the guest admitted in his deposition that he had been staying at the motel for a few months prior to the shooting and he had not noticed any criminal activity at the motel during this time period.

The guest hired a security expert to aid in his prosecution of his case against the motel. This expert admitted that if no significant criminal activity had occurred at the motel for a period of time prior to the guest's shooting, then the motel's management would have no reason to expect the shooting to occur or to spend money to enhance security. The security expert also conceded that: the motel's perimeter lighting was appropriate; the motel's room doors were appropriate and met statutory requirements; the guest would have stayed safe in his motel room had he not opened the door; he should have stayed in his motel room; and he should have telephoned for assistance.

The circuit judge concluded neither the franchisee nor the flag had a duty to protect the guest because they did not know or have reason to know the shooting would occur. The Circuit Court also held the guest's negligence in opening the door to the stranger exceeded any negligence on the part of the franchisee or the flag. Additionally, the trial judge found there was no evidence the franchisor owned or operated the motel. Therefore the flag could not be held legally responsible for the motel's operation on the date of the shooting.

On appeal to the Court of Appeals in Columbia, the appellate tribunal upheld the Circuit Court's grant of summary judgment. See *Bass v. Gopal*, 384 S.C. 238, 680 S.E.2d 917 (Ct. App. 2009).

Aggrieved by the Court of Appeals' decision, the guest took his case to the Supreme Court. Following briefing and argument to the five justices, the Court affirmed the decision of the Court of Appeals. However, in doing so, the Court adopted a new legal test for trial courts to apply in future cases when analyzing the existence of operator liability for injuries to guests and patrons as a result of third party assault. This new analysis, known as the "Balancing Test," creates a completely different measure for determining liability in these types of cases.

In South Carolina, while a hospitality-related entity is not the insurer of the safety of its guests, it has been well settled that such an entity is under a legal duty to its guests to take reasonable action to protect them against unreasonable risk of physical harm. The extent of this duty may be determined with an analysis of whether the property owner knew or had reason to know of a probability of harm to its guests following an incident. Specifically, the courts have held a business owner

has a duty to take reasonable action to protect its invitees against the foreseeable risk of physical harm.

As it pertains to third party assault, South Carolina has historically applied the "Imminent Harm Rule." Under this rule, the landowner owes no duty to protect patrons from the violent acts of third parties unless the owner is aware of specific and imminent harm about to befall the guest or patron. As noted by the Supreme Court in this opinion, this standard has been criticized by courts around the country as imposing too minimal a duty on business owners to protect patrons.

The "Balancing Test" is an approach, which acknowledges that duty is a flexible concept and seeks to balance the degree of foreseeability of harm against the burden of the duty imposed. Under this test, the presence or absence of prior criminal incidents is a significant factor in determining the amount of security required of a business owner; however, the absence of such incidents does not excuse the property owner from the duty to provide some level of security if other factors support a heightened risk. Such factors may include: the type of operation run by the owner; the location of the business; use of the business by guests and patrons at night, etc.

In adopting a balancing approach, the Court writes that such an analysis appropriately weighs both the economic concerns of businesses and the safety concerns of their patrons. In replacing the Imminent Harm Rule with a Balancing Test, the Court states it "hope[s] to encourage a reasonable response to the crime phenomenon without making unreasonable demands."

The bottom line for operators is this: Based on the adoption of the Balancing Test, hotels, restaurants, clubs, and other hospitality-related operations cannot rely on the absence of past criminal incidents alone to determine their duty to protect guests and patrons from third party harm in the present day and in the future. Operators must recognize and respond to the "crime phenomenon" that exists in our modern society. Accordingly, these establishments must acknowledge the foreseeability of such crimes occurring on their premises and take reasonable steps to protect the safety of guests and patrons from such harm. These steps may include both the implementation of both preventative and responsive measures and protocols.

As well, identifying the foreseeability of such harm and developing the proper safeguards and responses may involve the necessity to consult with a security expert, legal counsel, and other professionals specializing in premises and patron safety. This new legal standard obviously will create additional cost for operators; however, not doing anything in response to the Supreme Court's holding will arguably cost the operator more if a third party assault yields a civil lawsuit.

About Christian Stegmaier

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