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# Negligent Security Pre-Litigation Checklist

by Jordan D. Lebovitz

People have the right to be safe. Whether eating dinner, enjoying a night out with friends, or at the movie theatre, no one should have to worry about violence while patronizing a business. So when violence does strike, and a family member is catastrophically injured or killed, that family deserves answers.

This article is written as a checklist or outline on what to do when you get that call from a potential client whose family member was hurt or killed by a third party act of violence on a business owner's premises. This is the pre-suit checklist to determine if you have a case. And although some of the same principles/steps may apply to cases involving misconduct of private security guards, those cases are not the focus of this article.

The Supreme Court of Ohio instructs: "a business owner has a duty to warn or protect its business invitees from criminal acts of third parties when the business owner knows or should know that there is a substantial risk of harm to its invitees on the premises in the possession and control of the business owner."<sup>1</sup>

If the act was not foreseeable, you do not recover. Period. And you can't create "foreseeability" out of thin air just because the facts of the crime are so heinous. That's not going to work in Ohio. "The existence of a duty depends on the injury's foreseeability and the foreseeability of criminal acts of third parties depends on the business owner's superior knowledge of a danger relative to that of the invitee."<sup>2</sup>

So then what do you do when someone calls after their family member was shot and killed at a bar or restaurant?

First, conduct what I call the "free" (or nearly free) investigation. (This is important for a practical reason that will be discussed at the conclusion of this article). The free investigation should start with a site visit either the same day or soon after you sign up the case. Go yourself. Don't send someone. Take photos of the exterior of

the building, both facing the building and facing away from the building in all directions. Try to take photos of the interior, but avoid going inside so you are not even tempted to speak with the owners/employees (see Prof. Cond. R. 4.2, 4.3). The site visit will help you write your Preservation of Evidence letter with specificity: e.g., "Preserve any and all digital video recordings from the camera located on the Southeast corner of your building."

After walking the scene, go to the nearest businesses and speak with the customers, talk to the employees, and ask for the owner. It's amazing how often a shooting/stabbing/fight causes your neighboring business owners to spill the beans on how many times they called the police on shady characters in the area that were "all going to that bar/restaurant" and not theirs. These witnesses are also your starting point for other similar incidents in the surrounding area.

Second, after sending your Preservation of Evidence letter the same day, call the police. The non-emergency line, obviously, and ask to speak with the Supervisor for the District where the incident occurred. Don't try to speak with the investigating officer him/herself - if you got the case early enough, you're better off speaking with someone else. From the supervisor, or person uninvolved in *this specific investigation*, try to get information about the area; see if there are "hot spots" for crime, or frequent "calls of service" to the surrounding area where your client got hurt/killed. This avoids wasting time with an overbroad Public Records or FOIA request. You don't need "every call of service for the past twenty (20) years for the one-mile radius surrounding the bar/restaurant in question" - it's a waste of time and won't prove your case.

You need to be specific: the Court will look at the "totality of the circumstances" surrounding the third party criminal act that hurt or killed your client to determine whether you get to a jury. The totality of the circumstances test considers: prior similar incidents, the propensity for criminal

activity to occur on or near the location of the business, and the character of the business.<sup>3</sup> Foreseeability can also come in the form of "actual knowledge" of *this specific criminal actor or criminal act*, but you won't know that until you are knee-deep in discovery and depositions.

Your Public Records Request should ask for three (3) years of "calls for service" to the location of the business in question, three (3) years of "all police reports generated" from the location of the business in question, and body camera footage (if available) from the calls for service that necessitated a report. Although the business may have had a "call for service" for a fight/assault/homicide ten (10) years ago, many expert witnesses are reluctant to use that data to the plaintiff's advantage unless there was litigation from that incident - which would be incredibly helpful at this investigation stage. A caveat here: some rely on ordering a CAP Index, which is a privately funded "crime risk report" that can be purchased and helps business owners (and expert witnesses) identify high crime areas ([www.capindex.com](http://www.capindex.com)). Although some experts find this very useful in their analysis as to whether the area is "high risk," I'd stick to specific reports/calls for service.

Also, use the information you gathered in the "free" first step from neighboring businesses if there are "calls for service" to the neighboring businesses. Multiple prior similar incidents at nearby businesses can add up to help overcome the "totality of the circumstances" test.

Third, spend *some* money on a deeper investigation. Why? Because you need it; these cases are tough and you may need more than just reports of crime on the property to get to a jury. "Three main factors contribute to a court's finding the evidence insufficient to demonstrate the foreseeability of a crime as a matter of law: (1) spatial separation

between previous crimes and the crime at issue; (2) difference in degree and form between previous crimes and the crime at issue; and (3) lack of evidence revealing defendant's actual knowledge of violence."<sup>4</sup> A business owner must either have known or should have known that a substantial risk of such harm existed.<sup>5</sup>

Actual knowledge is best when it comes from *inside* the business. Find prior employees of the business and interview them. Yes, they are fair game.<sup>6</sup> You can do that in a few different ways: (1) hire a private investigator (may be the best \$2,000 you spend); (2) use "Sales Navigator" by LinkedIn (this allows you to search individuals by "past employment" [caveat - may not work for a dive bar]); or (3) use your new relationships with neighboring businesses to find prior employees. (Yes, this works). This is your opportunity to learn more about the clientele of the business: specifically, whether there have been fights/assaults that were never reported to the police, allowing you to argue that knowledge of those "incidents" can be imputed to the owner.

At this point, you should have a deep (enough) foundation and knowledge of the suspected business and its owner. But before you do anything else (that is, before you retain an expert witness, or spend any more money), you need a copy of the insurance policy. As if negligent security cases aren't hard enough, the insurance industry puts an even bigger potential roadblock in your road to recovery for your client: the "Deadly Weapons" exclusion.

As soon as you get the policy, look for a "Deadly Weapons" exclusion. The language often looks like this:

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of or resulting

from the possession, ownership, maintenance, use of or threatened use of a lethal weapon, including but not limited to firearms by any person.

Similar exclusions have been used to preclude coverage for any claims arising out of a gunshot, regardless of how the claims are pled.<sup>7</sup> This is why Steps 1 and 2 are the most important at the outset of the case from a law firm perspective.

If you follow this checklist, and do the heavy (and basically free) lifting from the moment you are retained, you'll know whether you have a viable case. There is nothing worse than having a conversation with a client after their family member was catastrophically injured or killed, only to tell them that there is no path to recovery because of the law in Ohio. You owe it to your client, and your firm, to do what it takes, within reason, to find out if what happened to their loved one was preventable. For most of our clients, money is secondary to making sure this never happens to another family. ■

#### End Notes

1. *Simpson v. Big Bear Stores Co.*, 73 Ohio St.3d 130, 135, 652 N.E.2d 702 (1995); *see also, Fed. Steel & Wire Corp. v. Ruhlin Constr. Co.*, 45 Ohio St.3d 171, 173, 543 N.E.2d 769 (1989).
2. *Brookshire v. Mayfield Boneyard, L.L.C.*, 8th Dist. Cuyahoga No. 100312, 2014-Ohio-1839, ¶ 9, citing *Proctor v. Morgan*, 8th Dist. Cuyahoga No. 97404, 2012-Ohio-2066, ¶ 7, citing *Haddad v. Kan Zaman Restaurant*, 8th Dist. Cuyahoga No. 89255, 2007-Ohio-6808, ¶ 18. *See also Heimberger v. Zeal Hotel Grp. Ltd.*, 10th Dist. Franklin No. 15AP-99, 2015-Ohio-3845.
3. *See Heimberger at ¶ 17*, quoting *Shivers v. Univ. of Cincinnati*, 10th Dist. Franklin No. 06AP-209, 2006-Ohio-5518.
4. *Heimberger at ¶ 18*, quoting *Shivers at ¶ 9*.
5. *Doe v. Beach House Dev. Co.*, 136 Ohio App. 3d 573, 582, 737 N.E.2d 141, 148 (8th Dist. 2000).
6. *See Advisory Opinion 2016-5*.
7. *See Robinson v. Hudson Specialty Ins. Group*, 984 F. Supp.2d 1199 (S.D. Ala. 2013); *Seneca Specialty Ins. Co. v. 845 North, Inc.*, M.D. Fla. Case No. 3:14-cv-922-J-34PDB, 2015 U.S. Dist. LEXIS 67791.