

N E W S

S&S

S&S Recent Developments in the Law[©]

L E T T E R

Special Issue

August 2010

S&S Successfully Defends Commercial Establishment in Major Case Alleging Liability for the Criminal Acts of Third Parties

Donald Sigmund v. Starwood Urban Retail VI, LLC, et al., No. 08-7137 (D.C. Cir. August 17, 2010).

Recent Developments in the Law

Jeffrey R. Schmieler, Esquire
Saunders & Schmieler, P.C.
The Montgomery Center
Suite 1202
8630 Fenton Street
Silver Spring, Maryland 20910
(301) 588-7717
(fax) (301) 588-5073
www.sslawfirm.com

© Saunders & Schmieler, P.C.
2010. In order to keep you
abreast of recent developments
in the law, Saunders &
Schmieler's *S&S Recent
Developments in the Law*
reports on the significance of
current decisions of major

import in the jurisdictions of
Maryland, the District of
Columbia, Virginia, and the
federal Fourth Circuit.

*This material is being provided for
your general information only,
and is not a substitute for
obtaining legal advice. The
information provided is not
provided as legal advice, or in the
course of an attorney-client
relationship. You should always
consult an attorney for advice
about the specific circumstances
of your case.*

United States Court of Appeals for the District of Columbia Circuit

LIABILITY FOR CRIMINAL ACTS OF THIRD PARTIES

Saunders & Schmieler, P.C. is
pleased to announce that the
United States Court of
Appeals for the District of
Columbia Circuit, in a
well-reasoned decision, has
affirmed the decision of the
United States District Court's
judgment in favor of its client
Standard Parking II as well as
the other Appellees Cassidy &
Pinkard Inc. and Starwood
Urban Retail VI, LLC, in a

case defended by Jeffrey R. Schmieler and Brian E. Hoffman of Saunders & Schmieler, P.C. In doing so, Judge Garland followed the clearly-defined law in the District of Columbia as enunciated by the D.C. Court of Appeals in a number of prior cases involving liability for the criminal acts of third persons including *Bruno v. Western Union Financial Services, Inc.*, 973 A.2d. 713, 721-22 (D.C. 2009), a case in which the firm of Saunders & Schmieler represented the successful defendant insured on appeal to the D.C. Court of Appeals. The *Bruno* Court held that the injuries sustained by the plaintiff during a robbery inside the defendant's gas station were not foreseeable, applying the "heightened foreseeability" standard.

The Court's decision is a significant leading case with respect to the law in the District of Columbia regarding liability of a commercial establishment and business for the criminal acts of third parties. The D.C. Circuit has now clearly recognized the import of the decisions of the D.C. Court of Appeals in its pronouncements of law focused on the "heightened foreseeability standard" required by the D.C. Court of Appeals.

This case, *Sigmund v. Starwood Urban*, arose out of an incident on July 12, 2002 in which the Plaintiff Donald Sigmund was seriously injured in a car bombing in a parking garage. The bomb had been planted by Sigmund's half-brother, who intended to kill their father by planting a bomb in his father's car. Sigmund had gone to retrieve his father's car from the garage of the building in which they worked when the bomb detonated.

The half-brother had also worked in the same building, and had keys to their father's car. The half-brother knew their father kept his car in the building's garage, which was open to the public. The garage was ordinarily secured by an overhead rolling steel garage door and guarded by attendants until about 10 p.m. The garage was also accessible from a staircase in the building's lobby, which was open to the public every day until midnight. On the day the half-brother planted the bomb, the garage door was stuck in the open position, and had been for some time. The half-brother noticed that the garage door was broken the day before the bombing and would later describe it as "the . . . opportunity he had been looking for." He drove into the garage on July 10 and planted the bomb in his father's car, which then sat untouched until two days later,

when Sigmund retrieved it and suffered the blow intended for his father.

A year later, Sigmund filed suit in federal court against the garage's owners, managers, and operators. After the close of discovery, Standard Parking, represented by Saunders & Schmieler, filed a Motion for Summary Judgment, arguing that under the clearly-defined law of the District of Columbia there was no liability for the criminal acts of a third party. The district court granted summary judgment for all defendants, finding that the plaintiff could not "meet the legal standard of a heightened showing of foreseeability that is applied when an injury is caused by the intervening act of a third party." Sigmund then appealed.

The primary issue before the United States Court of Appeals for the District of Columbia Circuit was whether the specific criminal act committed against the plaintiff was foreseeable. Relying on the standard of heightened foreseeability established by the D.C. Court of Appeals, the D.C. Circuit held that the bombing was not foreseeable as a matter of law, and therefore affirmed the trial court's grant of summary judgment in favor of the

defendants.

The D.C. Circuit began its analysis by citing the standard applicable when an injury is caused by the intervening criminal act of a third party as explained by the D.C. Court of Appeals in *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, “liability depends upon a more heightened showing of foreseeability than would be required if the act were merely negligent. In such a case, the plaintiff bears the burden of establishing that the criminal act was so foreseeable that a duty arises to guard against it. Because of the extraordinary nature of criminal conduct, the law requires that the foreseeability of the risk be more precisely shown.”

The D.C. Circuit then referred to three cases cited by Beretta as demonstrating the “tight boundaries” within which a claim of common-law negligence must be framed in the context of an intervening criminal act. The cases, *Potts v. District of Columbia*, 697 A.2d 1249 (D.C. 1997); *Bailey v. District of Columbia*, 668 A.2d 817 (D.C. 1995) and *Clement v. Peoples Drug Store*, 634 A.2d 425 (D.C. 1993), all involved shootings on the defendants’ property by a third party. In all three, the D.C. Court of Appeals ruled for the defendants because, while the

plaintiffs offered some evidence of prior crimes, there was no evidence of shootings or gun-related violence at the specific venues where the crimes occurred.

The D.C. Circuit then turned to opinions issued by the D.C. Court of Appeals after *Beretta*. Significantly, one of those cases was *Bruno v. Western Union Financial Services, Inc.*, *supra*, which was successfully argued by Saunders & Schmieler in 2009. In that case, the D.C. Court of Appeals held that injuries the plaintiff sustained during a robbery inside the defendant’s gas station were not foreseeable because there was no evidence that any offense in the nature of an assault had occurred previously inside the gas station (although there was evidence of a theft inside and of an armed assault just outside within the previous two years).

The second case, and the D.C. Court of Appeals’ most recent decision on this issue, was *Board of Trustees of the University of the District of Columbia v. DiSalvo*, 974 A.2d 868 (D.C. 2009), which involved a student who was attacked by armed assailants in a university parking garage. For the plaintiffs to succeed, it was not sufficient to establish a general possibility that the crime would occur; the mere possibility of crime is easily envisioned and heightened

foreseeability requires more precision. Rather, plaintiffs had to establish the university had an increased awareness of the risk of a violent, armed assault in the parking garage. The court held the plaintiffs failed to meet that standard as a matter of law. Although plaintiffs alleged security in the garage was inadequate, they proffered no evidence that the university had received any complaints about the security of its parking garage. And while they pointed to several previous on-campus crimes, including three assaults, none were committed with a weapon, none were in a campus parking garage, and none resulted in any serious injury to the victim.

Additionally, *DiSalvo* noted that, in the few cases in which D.C. courts have held that a defendant had a duty to protect the plaintiff from a criminal act, the facts in evidence established the defendant had reason to anticipate the type of particular criminal attack that actually occurred. In those cases, *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970), *District of Columbia v. Doe*, 524 A.2d 30 (D.C. 1987), and *Doe v. Dominion Bank, N.A.*, 963 F.2d 1552 (D.C. Cir. 1992), the same or similar crimes had occurred at the same or nearby locations. As

the D.C. Court of Appeals put it, “the common thread is that the facts demonstrating heightened foreseeability showed . . . close similarity in nature or temporal and spatial proximity to the crime at issue.”

Turning to the case at hand, the D.C. Circuit held that Plaintiff Sigmund could not satisfy the heightened foreseeability standard required by the D.C. Court of Appeals because there was no history of car bombings at the parking garage, nor of homicides, or assaults with intent to kill, and the evidence of crimes in the area was insufficient, particularly when most crimes were minor and none resulted in any serious injury.

Sigmund argued that heightened foreseeability could be met instead by a combination of factors which give defendants an increased awareness of the danger of a particular criminal act. He pointed to the overhead garage door that had been stuck open for approximately three weeks, as creating “a gaping hole in the building’s security” and satisfying the requirement of heightened foreseeability when taken in combination with the history of criminal incidents in the area.

The D.C. Circuit rejected those

arguments because it found no evidence of crime in the garage while the door was broken, and no evidence that tenants had complained about the door’s condition. Moreover, as the district court pointed out, the fact the garage was ordinarily readily accessible through the lobby undercut plaintiff’s argument that the broken garage door made the bombing more foreseeable.

Finally, Sigmund argued that there was a “special relationship” between himself and the defendants that justified application of the “sliding scale” described by the D.C. Court of Appeals in *DiSalvo*. There, the court wrote, “the relationship between the defendant and plaintiff and the defendant’s liability to the plaintiff can be viewed on a ‘sliding scale,’ whereby a relationship entailing a greater duty of protection may require a lesser showing of foreseeability in order for liability to attach.”

The D.C. Circuit dismissed that argument as well because *DiSalvo* expressed doubt that the defendant university in that case owed its “adult, commuter students” such a “heightened duty of protection.” The relationship Sigmund claimed to the defendants seemed no more significant than the relationship between a university and its c o m m u t e r s t u d e n t s .

Furthermore, *DiSalvo* held that, “even if the relationship . . . did entail a greater duty of protection,” finding the defendant liable “would still require a heightened showing of foreseeability greater than” the *DiSalvo* plaintiffs had shown. The D.C. Circuit found that Sigmund had made a weaker showing than those plaintiffs did, and therefore held that there was no genuine issue as to any material fact and the defendants were entitled to judgment as a matter of law.