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L E T T E R

Special Issue

June 2009

**S&S Successfully
Defends Another Million-
Dollar Appeal!**

Marilyn Bruno v. Western Union Financial Services, Inc. et al., No. 06-CV-64 (D.C. June 18, 2009)

***Recent Developments
in the Law***

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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.

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**District of Columbia Court
of Appeals**

**LIABILITY FOR
CRIMINAL ACTS OF
THIRD PARTIES**

Case Summary: In another
major decision involving
millions of dollars, Saunders
& Schmieler, P.C., Jeffrey R.
Schmieler and Samuel N.
Shapiro successfully defended
Western Union Financial
Services, Inc. (Western Union)
and First Data Corporation
(First Data) in what has
become the leading case on the

liability of business/premises owners in the District of Columbia for the criminal acts of third parties.

The case arose out of an assault on the Plaintiff in the course of a purse-snatching by an unknown third party assailant that took place in the evening hours of June 13, 2000 at a gas station operated by the Defendant Apex Petroleum Corporation (Apex), located at 2830 Sherman Avenue, N.W., Washington, D.C. The Plaintiff, an attorney, visited the Apex gas station to send money via a Western Union wire transfer to her daughter, who had been robbed while in Spain. The Plaintiff sustained serious injuries during the assault. The Plaintiff's complaint alleged negligence as to Apex, Western Union, and First Data.

After the close of discovery, Western Union and First Data, 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 the unknown third party. The trial court granted summary judgement in favor of Western Union and First Data, and at a later point, in favor of Apex as well. Plaintiff Bruno appealed the decisions, arguing that the trial court erred in its ruling.

The primary issue before the Court of Appeals was whether

the criminal assault on Bruno was foreseeable to Apex, Western Union, and First Data. The Court held that the assault was not foreseeable as a matter of law, and therefore affirmed the trial court's grant of summary judgment in favor of Defendants Western Union and First Data.

As to the issue of foreseeability, the Court wrote that when "a plaintiff suffers injury due to an intervening criminal act committed by a third party, 'the requisite duty of care required for negligence is a function of foreseeability,'" and further wrote that when "a plaintiff is injured by the intervening criminal act of a third party, *liability is dependent 'upon a more heightened showing of foreseeability than would be required if the act were merely negligent . . .* If the intervening criminal act 'can be fairly said to be that which could not have been reasonably anticipated, plaintiff may not look beyond the intervening act for his recovery'" (citations omitted) (emphasis added). Marilyn Bruno v. Western Union Financial Services, Inc. et al., No. 06-CV-64, slip op. at 9-10 (D.C. June 18, 2009).

Here, there were several factors that contributed to the Court's opinion that the criminal act of the unknown assailant was not foreseeable. First, the Plaintiff presented evidence of only two previous crimes that

had been committed at that location at any point in the past. Second, the Court distinguished Viands v. Safeway Stores, Inc., 107 A.2d 118 (D.C. 1954), which had been heavily relied upon by Plaintiff, because that case did not involve a criminal act by a third party and the heightened foreseeability standard associated with such acts.

Third, the Court sought guidance from three recent decisions involving the liability of business/ premises owners for the criminal acts of third parties.

In Clement v. Peoples Drug Store, 634 A.2d 425 (D.C. 1993), the plaintiff's husband was shot and killed in the parking lot of the drug store in which he worked. The Court of Appeals upheld a directed verdict in favor of the Defendants, holding that, despite the 29 crimes that had been committed in the area of the drug store within the three years preceding the shooting, the plaintiff did not overcome the standard of heightened foreseeability because none of the previous crimes involved weapons or resulted in serious injury.

Likewise, in Bailey v. District of Columbia, 668 A.2d 817 (D.C. 1995), the plaintiff was hit by a stray bullet when leaving her daughter's cheerleading competition at Evans Junior

High School. The Court granted summary judgment for the District of Columbia, holding that the plaintiff had not presented any evidence of any other shooting incidents, assaults or any other gun related violence at any cheerleading competition or other event held at the school.

Finally, in Potts v. District of Columbia, 697 A.2d 1249 (D.C. 1997), the plaintiffs were shot while leaving a boxing match at the Washington Convention Center. The Court similarly held that the plaintiffs had not met the heightened foreseeability standard required in such a case, writing that the plaintiff had not proffered any evidence of prior gun-related violence at any event hosted by the Washington Convention Center.

Fourth, the Court distinguished Doe v. District of Columbia, 524 A.2d 30 (D.C. 1987), a case in which the Court held that the plaintiffs prevailed in meeting the heightened foreseeability standard. There, a ten-year-old girl was assaulted by a criminal intruder in her public school. The Bruno Court, first noting that the Doe opinion was the "high water mark, as it were, of a showing of facts sufficient to create a duty to protect against [intervening criminal] conduct," wrote that Doe was distinguishable because, in that case, the landowner was aware

of the high rate of past criminal activity in and around the school, including sexual assaults, was aware of the deficient school security, and was aware that adult men frequently walked freely throughout the school. Marilyn Bruno v. Western Union Financial Services, Inc. et al., No. 06-CV-64, slip op. at 14 (D.C. June 18, 2009).

The Court further distinguished Doe based on the nature of the relationship between school officials and young children – care greater than an invitor-invitee relationship is required by school officials when the safety of young children is involved. Finally, the Court wrote that Doe was also distinguished because of the nature of the failed security measures. There, it was likely that if the school had place proper security measures, the assault would have been prevented. In Bruno, however, the store was open to the public, and there was no evidence that security cameras would have deterred the assault.

Ultimately, this case clarifies the Court's analysis of the liability of a business invitor/commercial enterprise for the criminal acts of third parties in the District of Columbia and is predicated upon the Courts trilogy of cases, namely Clement, Bailey and Potts. It clearly distinguished the Doe case (which the Court

described as the "high water mark" in terms of liability) and also answered some unanswered questions left unresolved by the Court's recent decision of District of Columbia v. Beretta U.S.A., Corp., 872 A.2d 633 (D.C. 2005) (en banc).

This case demonstrates the Court of Appeals' commitment to and reliance upon the heightened foreseeability standard that is required in cases involving the criminal acts of third parties. In particular, the Court displayed that *the plaintiff in such cases, is required to demonstrate that "the foreseeability of the risk be more precisely shown"* than in a case of ordinary negligence, and must present evidence that the defendants could have reasonably anticipated the *particular type of harm that caused the plaintiff's injuries*. Marilyn Bruno v. Western Union Financial Services, Inc. et al., No. 06-CV-64, slip op. at 9.

To appeal at this juncture, Plaintiff would be required to be granted certiorari to the United States Supreme Court, which is extraordinarily unlikely given that the Court's decision was based on an adequate an independent issue of Washington, D.C. law.