

***UDR Texas Properties, L.P. et al. v. Petrie*, No. 15-0197, 2017 WL 382426 (Tex. Jan. 27, 2017)**

On January 27, 2017, the Supreme Court of Texas considered whether evidence that establishes a criminal act committed by third parties was foreseeable, standing alone, could support a finding of liability against an apartment complex for failing to prevent the criminal act. The court held evidence concerning foreseeability alone is insufficient. Rather, a claimant must also prove that the burden of preventing the criminal act is reasonable. The court's opinion clarified that the *Timberwalk* factors, which previously served as a guidepost for Texas courts considering premises liability cases involving criminal acts, only gauge foreseeability. The *Timberwalk* factors are not determinative of whether requiring a landowner to prevent foreseeable criminal acts by third parties would be reasonable.

This case arose out of an assault and robbery committed against Plaintiff Alan Petrie while in the visitor's parking lot of The Gallery apartment complex. Petrie arrived at the complex at two o'clock in the morning to attend a party and parked in the visitor lot, which was located outside the complex's gates and accessible to the public. After Petrie parked his vehicle, he attempted to make a phone call. Shortly thereafter, another vehicle parked immediately behind Petrie's vehicle. Two men emerged from the second vehicle and approached Petrie's vehicle. One man pointed a shotgun at Petrie and ordered him to exit his vehicle. Petrie complied and, when requested, surrendered his wallet and keys. Petrie was then ordered to lie down on the ground. When Petrie hesitated, Petrie was shot in the knee, which caused him to fall on the ground. The shooter then placed the shotgun to Petrie's head and pulled the trigger, but the weapon did not fire. Petrie crawled under an adjacent vehicle while the assailants fled.

Petrie sued The Gallery and its owners, alleging The Gallery knew or should have known about the high crime rate on its premises and in the surrounding area yet failed to make the apartment complex safe. Both parties presented expert witnesses at a two-day evidentiary hearing focusing mainly on whether the crime against Petrie was foreseeable. The trial court concluded The Gallery owed no duty to Petrie and signed a take nothing judgment.

The trial court's decision was reversed on appeal. The court of appeals concluded that, under the factors identified by the Supreme Court of Texas in *Timberwalk Apartments, Partners, Inc. v. Cain*, evidence of foreseeability existed sufficient to overturn the take nothing judgment. While The Gallery argued Petrie never established that the risk of harm from the criminal act was unreasonable, the court of appeals concluded that unreasonableness and foreseeability "is considered as a whole, not as separate elements requiring independent proof." In other words, the court of appeals determined that "whether the risk of criminal conduct is both unreasonable and foreseeable is determined by assessing the five *Timberwalk* factors."

The Supreme Court of Texas disagreed, clarifying that the *Timberwalk* factors only serve to establish foreseeability, not whether the risk of harm was unreasonable. In making its determination, the *Petrie* court recognized while "foreseeability has received the lion's share of attention" from Texas courts in similar cases, "[f]oreseeability is the beginning, not the end, of the analysis in determining the extent of the duty to protect against criminal acts of third parties."

The unreasonableness factor "turns on the risk and likelihood of injury to the plaintiff . . . as well as the magnitude and consequences of placing a duty on the defendant." In other words, "[a] risk is unreasonable when the risk of a foreseeable crime outweighs the burden placed on property owners—and society at large—to prevent the risk." Thus, because Petrie failed to put forth any evidence establishing that he faced an unreasonable risk of harm, the court determined the take nothing judgment was proper.

Interestingly, while the court admitted that no post-*Timberwalk* case had been disposed of on

unreasonableness grounds, the court nevertheless determined that Petrie was “without excuse” for not offering evidence of this factor and sided with The Gallery.