IN THE SUPREME COURT OF TEXAS

NO. 07-0091

TRAMMELL CROW CENTRAL TEXAS, LTD., PETITIONER,

v.

MARIA GUTIERREZ, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF LUIS GUTIERREZ; AND KAROL FERMAN AS NATURAL PARENT AND AS NEXT FRIEND OF LUIS ANGEL GUTIERREZ, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

Argued January 17, 2008

CHIEF JUSTICE JEFFERSON, joined by JUSTICE HECHT, JUSTICE BRISTER, and JUSTICE JOHNSON, concurring.

The narrow question is whether this premises owner had a duty to protect this plaintiff from a third party's criminal act. The broader dispute concerns the extent to which a decision affirming the judgment below would require "conspicuous security" at every point of potential contact between a patron and a criminal. The Court's approach would impose on the Quarry Market (and others similarly situated) an obligation to adopt extraordinary measures to prevent a similar occurrence in the future. It holds that "[b]ecause the attack on Luis was so extraordinarily unlike any crime previously committed at the Quarry Market," Trammell Crow could not have foreseen it and thus owed no duty to protect Gutierrez from the attack. While I agree that Trammell Crow had no such duty, I would conclude not

that the attack was unforeseeable, but that the risk of its occurrence was not unreasonable, and that the consequences of requiring premises owners to prevent this type of crime would require a measure of deterrence that is neither feasible nor desirable. Accordingly, I concur in the Court's judgment.

Because a jury found for Gutierrez[1] on disputed facts, Gutierrez contends we must affirm the courts below. Trammell Crow, however, asserts it has no duty under the circumstances, even when all the facts are viewed in favor of the verdict. But the Court must determine whether giving a jury the option to require premise owners to insure against brazen criminal attacks appropriately shifts law enforcement to the private sector. In *Timberwalk*, we held that "[a] duty exists only when the risk of criminal conduct is so great that it is both *unreasonable* and *foreseeable*." *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex. 1998) (emphasis added). The Court's focus solely on the latter is misplaced. There were ten violent crimes at the Quarry Market within the two years preceding Gutierrez's death; all were robberies, some involved deadly weapons. Given this evidence, it was foreseeable that a robbery and murder could occur.

Granted, it seems trite to say that crime is foreseeable solely because it has occurred in the past, but part of the difficulty in assessing foreseeability lies in the inability to quantify how many prior crimes make a particular attack predictable. *See, e.g.,* Robert Weisberg, *Preventing Crime: Private Duties, Public Immunity*, 2 J.L. ECON. & POL'Y 365, 374 (2006) (noting that the prior-similar-incidents test "has been criticized as arbitrary, or at least unpredictable, because it sets out no metric for the frequency of crimes and the degree of similarity required"). Moreover, focusing solely on foreseeability

[1] For brevity, we use "Gutierrez" to refer to both Luis Gutierrez and the respondents in this case.

overlooks other factors we have held are pertinent to the existence and scope of a duty. *Timberwalk*, 972 S.W.2d at 756 ("'Foreseeability is the beginning, not the end, of the analysis in determining the extent of the duty to protect against criminal acts of third parties.'" (quoting *Lefmark Mgmt. Co. v. Old*, 946 S.W.2d 52, 59 (Tex. 1997) (Owen, J., concurring))). We must also balance risk, likelihood of injury, and the consequences of placing the burden on the defendant. *General Elec. Co. v. Moritz*, ___ S.W.3d ___, ___ (Tex. 2008) ("[D]uty depends on a legal analysis balancing a number of factors, including the risk, foreseeability, and likelihood of injury, and the consequences of placing the burden on the defendant.").

While the prior-similar-incidents inquiry includes some consideration of risk and likelihood of injury, it does not consider the attendant burdens of requiring premises owners to prevent all crimes that are similar to prior attacks, nor does it account for crimes that may have been eminently foreseeable despite their never having occurred at a particular place before. *See, e.g.,* Michael J. Yelnosky, Comment, *Business Inviters' Duty to Protect Invitees from Criminal Acts*, 134 U. PA. L. REV. 883, 905 (1986) (observing that the test produces "extraordinarily arbitrary results" and "deni[es] . . . compensation to the first victim"); *see also Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 214-15 (Cal. 1993); *Posecai v. Wal-Mart Stores*, *Inc.*, 752 So.2d 762, 767 (La. 1999) (adopting balancing test, which "seeks to address the interests of both business proprietors and their customers by balancing the foreseeability of harm against the burden of imposing a duty to protect against the criminal acts of third persons"); *Whittaker v. Saraceno*, 635 N.E.2d 1185, 1188-89 (Mass. 1994) (noting that "[t]he possibility of criminal conduct occurring is present in almost every aspect of daily life" and "[i]n that sense the possibility of a violent attack is always able to be foreseen," but holding that "society should

not place the burden of all harm caused by random violent criminal conduct on the owner of the property where the harmful act occurred, without proof that the landowner knew or had reason to know of a threat to the safety of persons lawfully on the premises against which the landowner could have taken reasonable preventive steps"); *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891, 899, 902 (Tenn. 1996) (adopting a balancing test that considers "both the economic concerns of businesses and the safety concerns of customers who are harmed due to the negligence of one seeking their business," in lieu of the "fatally flawed" prior-similar-incidents test). A duty analysis should include consideration of these factors as well.

Gutierrez argues (and Trammell Crow's expert agreed) that had there been a conspicuous security officer posted at the time and place of this fatal attack, the crime may not have taken place. I would hold that the number of similar crimes here, however, while perhaps sufficient to make the attack foreseeable, would not require, in response, snipers on the roof or uniformed officers on every corner. The question is the extent to which we should require premises owners—even those who have experienced crime in the past—to provide the same level of security that airports enlist to prevent terrorism. Life in a free society carries a degree of risk. That risk can be virtually eliminated by a pervasive military presence, but the burdens—both in terms of the economic cost to premise owners and in the oppressive climate a police state spawns—would be prohibitive.

Because the relatively few incidents of violent crime at the Quarry Market during the two-year period before Gutierrez's death did not pose an unreasonable risk of harm, and in light of the tremendous burden that would be required to prevent such brazen attacks, I would hold that Trammell Crow owed Gutierrez no duty to prevent this crime. *See Timberwalk*, 972 S.W.2d at 756 ("[C]riminal

conduct of a specific nature at a particular location is never foreseeable merely because crime is increasingly random and violent and may possibly occur almost anywhere, especially in a large city. If a landowner had a duty to protect people on his property from criminal conduct whenever crime *might* occur, the duty would be universal. This is not the law."). I agree with the dissenting justices below that recognizing such a duty would "replace [*Timberwalk* and *City of Keller*] with a rule of strict liability for premises owners." 220 S.W.3d at 43 (Duncan, J., dissenting). I concur in the Court's judgment.

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: August 29, 2008