

The Felon Next Door and an Association's Duty to Protect

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A safe living environment is generally an important factor in an individual's decision to purchase a home. In a condominium or townhome association, the board of directors often have rules, regulations and procedures for maintaining secure surroundings for its members. These safety measures can range from the installation of speed bumps, to establishing procedures for making timely repair of the property. In that vain, boards may have considered how the members of their communities can be protected from the criminal acts of others. Before delving down this road, however, the board should be aware of the potential ramifications such a path may have on its own liability for these acts.

Minnesota courts have not specifically addressed the issue of whether an association can be held liable for the criminal acts of others committed against members of its community. However, courts in other jurisdictions that have addressed this issue have viewed an association's relationship with its members as analogous to a landlord-tenant relationship, finding that the association owed its members a duty similar to that of a landlord to his tenants. *Frances T. v Village Green Owners Assn.*, 723 P.2d 573, 576 (Cal. 1986) but see *Moody v. Cawdrey & Assoc., Inc.*, 721 P.2d 707 (Haw. 1986). It is not known whether Minnesota courts will adopt the landlord-tenant analysis in determining an association's liability with respect to the criminal acts of others, however, associations should be mindful of the legal standards applied to a landlord in determining what safety rules and regulations to implement.

Generally, in a landlord-tenant relationship, a landlord does not ensure a tenant's safety against the criminal acts of others, and liability against the landlord needs to be predicated on a showing of negligence, or on a breach of an obligation imposed by statute or contract.

Under a negligence theory, one element that the plaintiff will need to show in order to establish liability on behalf of an association for the criminal acts of others is that the association had a duty to protect the individual from the harmful conduct of another. *Spitzak v. Hylands, Ltd.*, 500 N.W.2d 154, 156 (Minn. Ct. App. 1993). In other words, the plaintiff or injured party needs to show that a special relationship existed between the association and the injured party and that the harm was foreseeable.

At this time, there are no set factors for an association to follow in order to ensure that a special relationship is not created between itself and a third party. Whether a special relationship exists, and whether the harm was foreseeable, are determined on a case-by-case basis by the court. Defining the scope of an association's duty and what measures are required to meet that duty is often a difficult task. As stated by the Court in *Vasquez v. Residential Investments, Inc.*, 118 Cal. 4th 269, 283 (Cal. Ct. App. 2004) (internal quotations omitted), "[i]t is an easy matter to know whether a stairway is defective and what repairs will put it in order. . . . [B]ut how can one know what measures will protect against the thug, the narcotic addict, the degenerate, the psychopath and the psychotic?" As such, while there are no definitive factors that can be outlined for an association to take, or not to take, in order to avoid a duty being imposed on it for the criminal acts of others, associations can take guidance from courts' previous decisions in establishing its rules and regulations.

Where an item is in disrepair on the property, and the association or landlord has the responsibility to maintain the item, courts have found that a duty existed on behalf of the association or landlord. For example, in *Residential Investments, Inc.*, 118 Cal. 4th at 283, the landlord failed to replace a broken window pane in the front

door which was used as a means of entry by an intruder, resulting in the murder of the occupant of the apartment. The Court found that the degree of foreseeability of a criminal intruder through the weakened front door by the landlord was high, compared with the minimal burden on the landlord to replace the glass pane supported imposition of a duty on the landlord.

What associations can take from this case, and cases like this one, is that for those items the association has agreed to maintain on the association's premises, such as lighting in the common areas, the association should make sure procedures are in place to ensure these items are in a working condition in order to lessen its potential for liability of the criminal acts of others.

In addition to asserting a claim against an association for the criminal acts of others, based on a negligence theory, a claim against an association for the criminal acts of others can be based on a breach of contract theory. Courts, however, have generally been reluctant to impose liability against associations on a breach of contract basis unless there is evidence of a specific contractual provision between the association and the harmed unit owner. In the absence of a showing that the association's declaration or bylaws required the association to take, or refrain from taking, certain actions that may have prevented the criminal activity to its member, courts have found that no contractual duty existed on which liability against the association could be based.

For example, in *Frances T.*, 723 P.2d at 575, a unit owner asked the association to install additional lighting on her unit

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Summer Safety Tips for Your Homeowners Association

by Jessica Shepherd, Westport Properties

Summer is here, and adrenaline is high. The excitement of spending time outdoors is felt by many. Coming and going becomes routine for those who hibernated all winter. Even with all of this enthusiasm, homeowners must remain in control and take precautions to ward off dangers within their association. Take a few minutes to review the following

precautions that will help you maintain your own safety, and the safety of those in your community:

- Don't talk on cell phones or look pre-occupied when walking into the building. This allows anyone who may be waiting to enter the building the opportunity to do so when you are not paying attention. It is a good idea to keep

your cell phone visible to show that you do have immediate access to 911.

- Look behind you when you walk in and notice who is coming and/or going. Someone who does not belong in your community may try to enter immediately after you, acting as if they belong there. If you are concerned about that person entering, and are not sure what to do, return to your car and lock the doors. Wait for that person to leave.
- When pulling into a parking garage, always look in your rear view mirror to make sure no one followed you in. Wait until the garage door is closed behind you to proceed. If you do see someone suspicious slip into the garage on foot behind you, do not get out of your vehicle. Instead make sure your car doors are locked and call 911.
- Be mindful of all blind spots. This includes around pillars and corners in hallways, garages and stairwells.
- Take in your newspapers and packages daily. Predators tend to gain personal information from newspapers and packages, such as unit numbers and names.
- Be sure only last names and/or initials are on mailboxes. Most mail carriers only require a name to be placed on the inside of the mailbox.
- Report any lighting concerns both inside and outside. Make sure any lights that are on a timer are adjusted to day light savings time.
- Report any shrubbery that is not trimmed around the entrances. Strangers can easily hide behind, or in bushes or trees that are overgrown and wait for the opportunity to make a quick entrance.
- Do not ever prop doors open or let anyone in that you do not know. A suspicious person can gain access in seconds. If you leave the door propped

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after her unit was burglarized. When the association did not install the requested additional lighting, the unit owner installed her own lighting, which the association demanded that she immediately remove. Removal of the additional lighting resulted in the unit having no exterior lighting, her unit was broken into, and the unit owner was raped and robbed. The Court dismissed the unit owner's breach of contract claim against the association, finding that there was no specific contractual provision between the association and the unit owner in the association's governing documents obligating the association to install additional lighting. And, in fact, the declaration expressly prohibited installation of lighting without prior approval.

To the contrary, in *Vazquez v. Lago Grande Homeowners Association*, 900 So.2d (Fla. Dist. App. 2004), the developer of the association advertised the complex on the basis of safety, and part of the association's dues were for safety provisions offered by the complex. Security guards were retained by the association, and the association gave the security guards specific instructions on the duties they were to perform, which included, but were not limited to, turning away visitors who were not granted permission to enter. A unit owner instructed the security guards to not let a particular individual into the property. Shortly after the instruction by the unit owner, the individual who was to be precluded from the premises entered

the association, shot the unit owner and killed her guest. The Court found that the association was liable for the criminal act because the association had specifically undertaken the obligation to prevent criminal activity from occurring. What associations can take from these cases, and other like them, is that when establishing rules and regulations for the safety of its members, associations should be careful of the language being used, because the specificity of, or lack of specificity of, the alleged contract provision will be determinative of the association's liability for the criminal acts of others under a contract liability theory.

Because an association or its board of directors may face potential liability if a criminal act is committed against one of its members does not mean that an association should take a hands-off approach to ensuring the safety of its members. An association should be mindful, however, of its potential for liability when considering implementing any rules or regulations that are beyond what may be characterized as normal maintenance to the property, such as criminal background checks. While a felon may be living next door, from a criminal acts liability viewpoint, the association may not want to know. ■

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