Missouri Law Review

Volume 65
Issue 1 *Winter 2000*

Article 12

Winter 2000

Here's Your Burrito and Watch Your Back: Does Missouri Really Want to Hold Businesses Liable for Attacks on Patrons

Timothy A. Reuschel

Here's Your Burrito and Watch Your Back: Does Missouri Really Want to Hold Businesses Liable for Attacks on Patrons?

Stroot v. Taco Bell Corp.[1]

I. INTRODUCTION

In the late 1980s, Missouri altered a longstanding common law rule and found that businesses sometimes owe a duty to their patrons to protect against or warn about criminal attacks by third parties.[2] This new rule generally applies when a business has experienced prior incidents that are reasonably recent and similar to the attack in question.[3]

In *Stroot v. Taco Bell Corp.*, the Missouri Court of Appeals for the Eastern District of Missouri upheld a summary judgment entered in favor of a business for an attack that occurred in the business's parking lot even though the victim alleged that prior violent incidents had occurred in the parking lot and filed supporting affidavits.[4] Perhaps *Stroot* represents a shift away from the modern trend of premises liability law and a return to a "take care of yourself" approach. Even more surprising is the court's apparent willingness to ignore the rescue doctrine in favor of protecting businesses from potential liability.

II. FACTS AND HOLDING

Timothy Stroot was waiting in line to place his order at Taco Bell when he heard that a woman was being attacked in the parking lot.[5] After informing Taco Bell employees and asking them to call the police, Stroot went to the parking lot to confront the attacker.[6] Stroot spoke briefly to the attacker before a third party, Ryan Parker, attacked and severely beat Stroot.[7] No Taco Bell employees attempted to assist Stroot.[8]

Stroot brought a negligence action against Taco Bell in the City of St. Louis Circuit Court.[9] He alleged that Taco Bell was negligent in that Taco Bell failed to: (1) provide adequate security and lighting in the parking lot area; (2) take

---

1. 972 S.W.2d 447 (Mo. Ct. App. 1998).
2. *See* Madden v. C & K Barbecue Carryout, Inc., 758 S.W.2d 59, 62 (Mo. 1988).
3. *See* Keesee v. Freeman, 772 S.W.2d 663, 669 (Mo. Ct. App. 1989).
4. *Stroot*, 972 S.W.2d at 448.
5. *Id.*
6. *Id.*
7. *Id.* Stroot suffered extensive injuries as a result of the beating and spent two weeks in a coma.
8. *Id.*
9. *Id.* at 447.

adequate precautions to make the premises safe; and (3) warn Stroot about danger on its premises.[10] Stroot argued that Taco Bell had a duty to protect him from foreseeable criminal danger because of his status as a business invitee,[11] and that Taco Bell's employees' failure to call for police assistance or intervene created a situation where Stroot felt compelled to assist the woman in distress.[12]

Taco Bell moved for summary judgment, arguing that: (1) Stroot failed to prove specific incidents of prior violent crimes on Taco Bell premises; that (2) Taco Bell owes no duty to customers who willingly intervene in fights on Taco Bell premises; and that (3) even if Taco Bell owed a duty to Stroot, Taco Bell's negligence was not the proximate cause of Stroot's injuries.[13]

The circuit court granted summary judgment in favor of Taco Bell on the ground that no genuine issue of material fact existed with respect to Taco Bell's actions being the proximate cause of Stroot's injuries.[14]

III. LEGAL BACKGROUND

A. Parking Lots and Criminal Acts of Third Parties

Recently, plaintiffs around the country have sued business proprietors and parking facilities for injuries they have suffered when attacked by third parties in parking areas.[15] The common law rule was that a private property owner generally had no duty to protect another from a criminal attack by a third person.[16] A "special circumstances" exception to the common law rule imposes a duty of care upon business owners to maintain their premises safely and to exercise ordinary care to protect their business invitees from criminal attack.[17] However, this "special circumstances" exception applies only where the attack was foreseeable, and the patron's injuries occurred as a result of the proprietor's act or omission.[18]

---

10. *Id.* at 448.

11. *Id.* Stroot contended that Taco Bell was aware of many previous occasions where people had fought in the Taco Bell parking lot, and that the area in which this particular franchise was located was known for criminal activity. *Id.*

12. *Id.* at 449.

13. *Id.* at 448.

14. *Id.*

15. *See generally* William M. Corrigan, Jr. & Timothy W. Van Ronzelen, *Liability for Criminal Acts of Third Parties*, 52 J. Mo. B. 359 (1996); James L. Isham, Annotation, *Parking Facility Proprietor's Liability for Criminal Attack on Patron*, 49 A.L.R. 4th 1257 (1986).

16. Corrigan & Van Ronzelen, *supra* note 15, at 358; *see also* Madden v. C & K Barbecue Carryout, Inc., 758 S.W.2d 59, 61 (Mo. 1988).

17. *See* Isham, *supra* note 15, § 2[a].

18. *Id.* A proprietor can also be found liable for the criminal acts of third parties when the patron and proprietor have a special relationship, such as that of innkeeper-

In a typical negligence cause of action against a business, a plaintiff bears the burden of showing duty, breach, causation, and damages.[19] The major battlegrounds in the premises liability cases have centered primarily around duty[20] and, more recently, causation.[21]

Before a proprietor can be said to owe a duty to an invitee, there must be some showing that the proprietor knew or had reason to know that there was a potential danger to invitees.[22] Courts around the country have disagreed about the appropriate standard to apply in determining whether a proprietor knew or had reason to know of a danger.[23] Some courts have applied the strict "prior violent crimes" or "prior similar incidents" test, which requires that prior similar crimes have occurred on the premises before a duty upon the business to take steps to protect its patrons is triggered.[24] Other jurisdictions have adopted the "totality of circumstances" test, which allows a court to look at additional factors, such as the crime rate in a particular area or whether the business had taken any security measures, in determining the relative foreseeability of an attack on its invitees.[25]

Missouri first recognized the "special circumstances" exception in *Madden v. C & K Barbecue Carryout, Inc.*[26] In *Madden*, a woman was abducted at gunpoint, then physically and sexually assaulted.[27] Madden contended that the

---

guest, common carrier-passenger, or employer-employee. However, Missouri courts have consistently held that a general business invitee does not stand in any special relationship with a proprietor and therefore a full discussion is beyond the scope of this Note. *See, e.g.*, Nappier v. Kincade, 666 S.W.2d 858, 861 (Mo. Ct. App. 1984); Meadows v. Friedman R.R. Salvage Warehouse, 655 S.W.2d 718, 721 (Mo. Ct. App. 1983).

19. *Madden*, 758 S.W.2d at 61.

20. *Id.* at 62; *see also* Brown v. Schnuck Mkts., Inc., 973 S.W.2d 530, 532 (Mo. Ct. App. 1998); Groce v. Kansas City Spirit, Inc., 925 S.W.2d 880, 884 (Mo. Ct. App. 1996); Bowman v. McDonald's Corp., 916 S.W.2d 270, 277 (Mo. Ct. App. 1995); Keenan v. Miriam Found., 784 S.W.2d 298, 301 (Mo. Ct. App. 1990).

21. *See generally* Krause v. U.S. Truck Co., 787 S.W.2d 708, 710 (Mo. 1990); Vann v. Town Topic, Inc., 780 S.W.2d 659, 661 (Mo. Ct. App. 1989).

22. Keenan v. Miriam Found., 784 S.W.2d 298, 302 (Mo. Ct. App. 1990).

23. *See generally* Corrigan & Van Ronzelen, *supra* note 15, at 359; Isham, *supra* note 15, at 1257.

24. Henley v. Pizitz Realty Co., 456 So. 2d 272, 276 (Ala. 1984); Selektor v. Smiles Parking Co., 618 N.Y.S.2d 813, 813 (N.Y. App. Div. 1994).

25. Isaacs v. Huntington Memorial Hosp., 695 P.2d 653, 658 (Cal. 1985); Stevens v. Jefferson, 436 So. 2d 33, 35 (Fla. 1983); Siebert v. Vic Regnier Builders, Inc., 856 P.2d 1332, 1339 (Kan. 1993); Knor v. Parking Co. of America, 596 N.E.2d 1059, 1065 (Ohio Ct. App. 1991); Small v. McKennan Hosp., 403 N.W.2d 410, 413 (S.D. 1987).

26. 758 S.W.2d 59, 62 (Mo. 1988). *Madden* was consolidated with *Decker v. Gramex Corp.*, a case in which a husband and wife were abducted from a shopping center parking lot and murdered.

27. *Id.* at 60.

defendant failed to provide adequate security and warn patrons of danger even though the restaurant had been the scene of similar violent crimes in the three years before she was attacked.[28] The Missouri Supreme Court acknowledged that the common law rule imposed no liability for the criminal acts of third parties but stated:

> [Missouri now] recognizes that business owners may be under a duty to protect their invitees from the criminal attacks of unknown third persons depending upon the facts and circumstances of a given case. The touchstone for creation of a duty is foreseeability. A duty of care arises out of the circumstances in which there is a foreseeable likelihood that particular acts or omissions will cause harm or injury.[29]

Based on the foregoing rule, the court held that a plaintiff may establish and maintain a cause of action by making a prima facie showing of facts that would establish the foreseeability of harm to the plaintiff.[30]

In *Madden*, the court did not explicitly adopt the "totality of circumstances" test or the "prior similar incidents" test for foreseeability. Although one Missouri case has interpreted *Madden* as espousing the "totality of circumstances" test,[31] every other Missouri case addressing the issue has held that *Madden* requires the adoption of the "prior similar incidents" test.[32] Thus, it seems well settled that a plaintiff must establish the existence of prior crimes on the premises that were sufficiently recent and similar to the events at issue so as to have put the defendant on notice of the danger to its invitees.[33]

In *Brown v. Schnuck Markets, Inc.*,[34] the plaintiff was injured during an assault in a grocery store parking lot.[35] She brought suit against Schnucks and claimed that Schnucks breached its duty to make its premises reasonably safe.[36] The jury returned a verdict for the plaintiff, but the trial court entered judgment

---

28. *Id.*

29. *Id.* at 62.

30. *Id.* at 62-63.

31. Becker v. Diamond Parking, Inc., 768 S.W.2d 169, 170-71 (Mo. Ct. App. 1989).

32. *See* Brown v. Schnuck Mkts., Inc., 973 S.W.2d 530, 533 (Mo. Ct. App. 1998); Groce v. Kansas City Spirit, Inc., 925 S.W.2d 880, 885 (Mo. Ct. App. 1996); Bowman v. McDonald's Corp., 916 S.W.2d 270, 277 (Mo. Ct. App. 1995); Miller v. South County Ctr., Inc., 857 S.W.2d 507, 510-11 (Mo. Ct. App. 1993); Claybon v. Midwest Petroleum Co., 819 S.W.2d 742, 746 (Mo. Ct. App. 1991); Keenan v. Miriam Found., 784 S.W.2d 298, 302 (Mo. Ct. App. 1990).

33. *See Keenan*, 784 S.W.2d at 303.

34. 973 S.W.2d 530 (Mo. Ct. App. 1998)

35. *Brown*, 973 S.W.2d at 532.

36. *Id.*

notwithstanding the verdict[37] because it felt that the plaintiff produced insufficient evidence of facts creating a duty of care attributable to the grocery store.[38] On appeal, the Missouri Court of Appeals for the Eastern District of Missouri applied the "special circumstances" test for imposing liability on a business for the criminal acts of a third party.[39] According to the court, in order to establish a defendant's duty of care, a plaintiff must show:

> (1) [T]he necessary relationship between the plaintiff and the defendant; (2) the prior specific incidents of violent crimes on the premises that are sufficiently numerous and recent to put a defendant on notice, either actual or constructive, that there is a likelihood that third persons will endanger the safety of the defendant's invitees; and (3) the incident causing the injury is sufficiently similar in type to the prior specific incidents occurring on the premises that a reasonable person would take precautions against that type of activity.[40]

The court upheld the trial court's decision, focusing primarily on the fact that only two prior crimes were shown to have occurred on the lot and that those crimes (a purse snatching and a juvenile robbery) were not similar enough to the attack on the plaintiff to establish a duty on Schnucks to take reasonable steps to protect its patrons.[41]

Proximate cause has also become an important issue in recent premises liability cases.[42] Obviously, the biggest hurdle for most plaintiffs is connecting the defendant's actions or lack thereof with the injuries sustained by the plaintiff.[43] A popular theory for defendants has been that some act taken by the plaintiff, such as leaving a restaurant,[44] represents an intervening cause that cancels the duty owed to the plaintiff.[45] In *Vann v. Town Topic, Inc.*,[46] a restaurant patron was injured in the street during an altercation with some people who had been ejected from the restaurant.[47] The Missouri Court of Appeals for the Western District of Missouri held that the attack on the plaintiff was unforeseeable as the attack occurred beyond the defendant's premises and

---

37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* (citing Keenan v. Miriam Found., 784 S.W.2d 298, 303 (Mo. Ct. App. 1990)).
41. *Id.* at 534.
42. *See* Vann v. Town Topic, Inc., 780 S.W.2d 659, 661 (Mo. Ct. App. 1989).
43. *Id.*
44. *Id.* at 661-62.
45. *Id.* at 662.
46. 780 S.W.2d 659 (Mo. Ct. App. 1989).
47. *Id.* at 661.

because the plaintiff voluntarily interjected himself into a fracas.[48] The court also noted that while comparative fault principles are generally applicable in premises liability cases,[49] there can be no apportionment of fault when there has been a finding of no proximate cause between the plaintiff's injuries and the defendant's supposed negligence.[50] *Vann* illustrates the need for a plaintiff to establish that the defendant's negligence caused the plaintiff's harm or else face the prospect of having his case dismissed at the summary judgment stage.

B. The Rescue Doctrine and Its Role in Premises Liability Cases

The rescue doctrine developed in this country as a way to promote rescue attempts by removing traditional proximate cause barriers to recovery.[51] In the famous words of Judge Cardozo, "[d]anger invites rescue."[52] The rescue doctrine provides one injured during the course of a rescue with recourse against the original tortfeasor on the grounds that rescue attempts are deemed foreseeable for purposes of proximate cause analysis.[53]

In 1884, Missouri first recognized the rescue doctrine in *Donahoe v. The Wabash, St. Louis & Pacific Railway Co.*[54] As the doctrine developed in Missouri, courts held that a rescuer may recover from the original tortfeasor as long as the rescue attempt was not rash or reckless.[55] In *Lowrey v. Horvath*,[56] the Missouri Supreme Court considered a case in which a rescuer was asphyxiated while trying to rescue a person who had become trapped while attempting to clean a well.[57] The court affirmed the general premise of the rescue doctrine and found that: (1) it is not negligent to knowingly and voluntarily place oneself in a position where the likelihood of injury is great when carrying out a rescue,[58] and (2) the negligence of the defendant that imperiled the rescuee is deemed to be the proximate cause of the rescuer's injuries.[59]

The traditional barrier to rescue cases in Missouri was the harsh contributory negligence principle that barred recovery for rescue attempts

48. *Id.* at 662.

49. *Id.*

50. *Id.*

51. Gray v. Russell, 853 S.W.2d 928, 931 (Mo. 1993).

52. Wagner v. International Ry. Co., 232 N.Y. 176, 180 (1921).

53. Krause v. U.S. Truck Co., 787 S.W.2d 708, 710-11 (Mo. 1990).

54. 83 Mo. 560, 563 (1884).

55. *See, e.g.*, Lowrey v. Horvath, 689 S.W.2d 625, 626 (Mo. 1985); Welch v. Hesston Corp., 540 S.W.2d 127, 129 (Mo. Ct. App. 1976).

56. 689 S.W.2d 625 (Mo. 1985).

57. *Id.* at 626.

58. *Id.* at 627; *see also* McConnell v. Pic-Walsh Freight Co., 432 S.W.2d 292, 300 (Mo. 1968).

59. *Lowrey*, 689 S.W.2d at 627.

considered to be rash or reckless.[60] However, in 1983, in *Gustafson v. Benda*, Missouri abrogated contributory negligence and replaced it with comparative fault.[61] To date, the only reported Missouri case to address the effect of comparative fault on the rescue doctrine is *Allison v. Sverdrup & Parcel & Associates, Inc.*[62]

In *Allison*, a rescuer died as a result of inhaling noxious fumes while attempting to aid a man trapped in a grain bin.[63] The court examined the history of comparative fault and concluded that the principles of comparative fault are applicable to rescue cases in which the rescuer's conduct is rash or reckless.[64] Consequently, if the rescuer's conduct is deemed rash or reckless, a court should determine the plaintiff's degree of fault and reduce her damages accordingly.[65] As long as the rescue attempt was not reckless or rash, comparative fault analysis does not come into play because the rescue doctrine clearly states that a rescue attempt is not considered per se negligent.[66]

IV. THE INSTANT DECISION

In *Stroot*, the court began by setting forth the elements necessary to make a submissible claim for negligence.[67] Since the trial court based its grant of summary judgment for Taco Bell on its finding that no proximate cause existed, the reviewing court looked only at the issue of whether Stroot had made a prima facie showing of causation so as to allow Stroot to take his case to a jury.[68] Before discussing the general rules of proximate and intervening causes, the

---

60. *See* Allison v. Sverdrup & Parcel & Assocs., Inc., 738 S.W.2d 440, 450 (Mo. Ct. App. 1987); *Welch*, 540 S.W.2d at 129.

61. 661 S.W.2d 11, 16 (Mo. 1983). Missouri's comparative fault scheme has been characterized as "pure" in that a plaintiff can recover (subject to reduction by her own percentage of fault) even if her fault exceeds 50%. *See* Lippard v. Houdaille Indus., Inc., 715 S.W.2d 491, 493 (Mo. 1986).

62. 738 S.W.2d 440, 451 (Mo. Ct. App. 1987).

63. *Id.* at 447-48.

64. *Id.* at 451.

65. *Id.*

66. *Id.* A vast majority of other jurisdictions that have adopted comparative fault follow Missouri in holding that comparative fault is not triggered if a rescue was not rash or reckless. If the rescue attempt was rash or reckless, then comparative fault applies, and the plaintiff's recovery is reduced in proportion to his percentage of fault. *See* Sweetman v. State Highway Dept., 357 N.W.2d 783, 789 (Mich. Ct. App. 1984); Pachesky v. Getz, 510 A.2d 776, 783 (Pa. 1986); Jeffrey F. Ghent, Annotation, *Rescue Doctrine: Applicability and Application of Comparative Negligence Principles*, 75 A.L.R. 4th 875 (1990).

67. Stroot v. Taco Bell Corp., 972 S.W.2d 447, 448 (Mo. Ct. App. 1998).

68. *Id.* at 448-49.

court noted that although proximate cause is normally an issue for the jury,[69] a trial court can take the issue when the evidence reveals a potential intervening cause of damage.[70] The court also found that the test for proximate cause is whether the negligence of the defendant caused the plaintiff's injury or whether the plaintiff's injury was a natural and probable consequence of the defendant's actions.[71]

The court relied heavily on *Vann*[72] and found that Stroot's injuries, like Vann's, were the result of Stroot's voluntary interjection into a situation.[73] The court also found that Stroot's voluntary interjection was an intervening cause, negating the effect of the defendant's conduct.[74] The court noted that Stroot's intervention was independent of any negligence on the part of Taco Bell,[75] and that Stroot would not have been injured if he had stayed inside the restaurant.[76] The court next concluded with the observation that Stroot was not entitled to have a jury assess his comparative negligence since he did not make the required showing of the elements of negligence.[77] More specifically, the court found that Stroot failed to make a prima facie showing of causation because of his intervention in the fight.[78]

V. COMMENT

A. Should Liability Be Imposed for the Criminal Acts of Others?

The first question that needs to be addressed is whether a duty should be placed on business owners to protect their patrons from the criminal acts of third parties. Both plaintiffs and defendants have found fault with the *Madden* rule's imposition of a duty of reasonable care upon a business when a plaintiff can establish that "prior similar incidents" have occurred on the premises.

Plaintiffs dislike the "prior similar incidents" test for foreseeability because until a similar crime has occurred, the defendant business is insulated from any liability, even if it knows that it may be located in a dangerous neighborhood. The situation is somewhat analogous to animal liability cases, in which a dog

---

69. *Id.* at 449.

70. *Id.*

71. *Id.*

72. Vann v. Town Topic, Inc., 780 S.W.2d 659 (Mo. Ct. App. 1989).

73. Stroot v. Taco Bell Corp., 972 S.W.2d 447, 449 (Mo. Ct. App. 1998).

74. *Id.*

75. *Id.* This conclusion by the appellate panel completely ignored the question of whether Stroot's intervention was precipitated by Taco Bell's negligence in failing to make the premises reasonably safe for its patrons.

76. *Id.*

77. *Id.* at 449-50.

78. *Id.*

gets "one free bite" before its owner becomes liable for injuries caused by the dog.[79] It seems patently unfair that a business owner who knows that his premises are dangerous, and does nothing to increase security for his patrons (or at least warn them), has a get out of jail free card good as long as no similar crimes have occurred on the premises.

Another problem encountered by plaintiffs is that even if there have been prior crimes on the premises, the "prior similar incidents" test requires that the prior crimes be reasonably similar to the present crime.[80] But what if the prior crimes were purse snatches and the present crime is assault and battery? Under Missouri's approach, the prior purse snatches would be irrelevant for purposes of imputing a duty to the defendant to protect the safety of its patrons because the characteristics of the two incidents are not substantially similar.[81]

This logic seems flawed because the real issue is the foreseeability of the crime given what the defendant knows about the relative danger of his parking lot. One could surmise that even purse snatches would be sufficient to put a defendant on notice that some additional security measures could or should be taken. Just because the severity of a particular crime is somewhat different than that encountered in the past, a business owner should not be absolved of liability when he knows that crimes have occurred on his property. Adoption of the "totality of circumstances" test would alleviate the problems of "one free bite" and make business owners pay attention to conditions on and around their premises so that steps could be taken to reasonably protect people from danger.

Defendants and business groups also have doubts about the vitality of Missouri's approach to liability for the criminal acts of others.[82] Some are concerned that the burden of crime-fighting is being improperly shifted from publicly funded police forces to private businesses, and that this change will eventually mean higher prices for consumers.[83] Others have stated that placing an additional financial burden upon business owners represents a significant public policy choice outside the province of the judicial branch and better handled by the legislature.[84] Another argument against the imposition of liability on business is that a customer assumes the risk of attack by going into a neighborhood that the customer knows may be dangerous. This argument is somewhat tenuous for several reasons. The doctrine of assumption of risk is based upon the premise that an actor knowingly and voluntarily accepts a known risk and has made a conscious choice. But do some patrons, particularly in the

---

79. *See* RESTATEMENT (SECOND) OF TORTS § 509 (1965).

80. *See supra* note 41 and accompanying text.

81. Keesee v. Freeman, 772 S.W.2d 663, 669 (Mo. Ct. App. 1989).

82. For an excellent discussion of policy rationales against the Missouri rule imposing liability for foreseeable acts of third parties, see Madden v. C & K Barbecue Carryout, Inc., 758 S.W.2d 59, 66-67 (Mo. 1988) (Welliver, J. & Donnelly, J., dissenting).

83. *Madden*, 758 S.W.2d at 66-67.

84. *Id.*

inner city, have any real choice about where they do business? Many people are severely limited by economic and other factors that mandate that they do their business in some of the less prosperous and more dangerous neighborhoods in town. If a choice really exists, it seems to come down to a choice between possibly being robbed at the store or not eating. It is also important to remember that all of the business's patrons are *invited* onto the premises, and that a significant number of these patrons may have been enticed by the business's advertising to ignore possible dangers.[85]

Furthermore, it seems fairer to place the burden on the business under assumption of risk principles. The business owner (unlike many inner city residents) does have a real choice. The business owner can conduct business in high crime areas, or he can choose to invest his money elsewhere. The business owner who chooses to invite customers into high crime areas should be made to take reasonable steps to keep his patrons safe. Since the business owner gets the benefit of having the opportunity to make profits, he should also bear the cost of security for making the choice to engage in business where customers may be endangered.

Some have speculated that requiring businesses to take precautions and threatening liability for criminal attack will result in fewer business ventures in high risk areas so that the losers will be the inner city residents left without a place to shop. This does not seem to be a serious concern since the precautions necessary to prevent the imposition of liability, such as adequate lighting or the hiring of a security guard, are fairly nominal. No one is asking that business owners become insurers against every possible criminal contingency, but they should be forced to take simple steps to make their premises reasonably safe. Even though adding lighting or one extra employee costs relatively little, businesses can always pass these extra costs to their customers through the form of slightly higher prices.[86] Even with higher prices for added security, many customers will still find that shopping near home is less expensive and less burdensome than going to a safer neighborhood. Furthermore, even if some businesses pull out of a given area, there seems to be no shortage of entrepreneurs willing to go into inner city areas (even with the higher overhead costs brought on by extra security) and open up shop where there is an obvious demand for services.

B. Was Stroot Entitled to Reach a Jury?

In order to survive a motion for summary judgment on a negligence claim, a plaintiff must make a prima facie showing on the elements of negligence:

---

85. This point was articulated in Judge Robertson's concurring opinion in *Madden*, 758 S.W.2d at 65.

86. *Madden*, 758 S.W.2d at 65.

duty, breach, causation, and damages.[87] In *Stroot*, the court did not reach the question of whether Stroot established that Taco Bell had a duty to protect him.[88] Instead, the court focused on the fact that Stroot's involvement in the altercation was an intervening cause that canceled any duty that Taco Bell may have owed him.[89]

The problem with the decision in *Stroot* is that it fails to recognize and incorporate the rescue doctrine into the body of Missouri law dealing with liability for attacks in parking lots by third parties. Stroot's appeal failed because Stroot was unable to show that Taco Bell's negligence caused his injuries.[90] However, Stroot went to the parking lot in an attempt to assist a woman he reasonably believed was in need of assistance.[91] The proper analysis of these facts should have started with an inquiry into whether Taco Bell owed a duty of care (based on the previous incidents) to take reasonable steps to protect from, or warn its patrons about, the possibility of criminal attack. If Taco Bell owed a duty to the female patron that Stroot went to assist, Stroot's actions could not be deemed negligent (under the rescue doctrine) so long as they were not rash or reckless.[92] One can assume that Taco Bell owed a duty to protect or warn the female patron as well as all of its customers based on the facts alleged in the petition and its supporting affidavits.[93] In any event, under the rescue doctrine, a prima facie case of duty would clearly have been shown for purposes of surviving a summary judgment motion.[94]

As previously discussed, the rescue doctrine serves as a method whereby a plaintiff may escape the causation problems attendant to any rescue situation.[95] In this case, Taco Bell's failure to provide adequate security after receiving notice of prior similar incidents should have been deemed the proximate cause of Stroot's injuries. Even if Stroot's intervention was considered rash and reckless, Missouri's comparative fault scheme should have applied, and the jury

87. Krause v. United States Truck Co., 787 S.W.2d 708, 710 (Mo. 1990).

88. Stroot v. Taco Bell Corp., 972 S.W.2d 447, 450 (Mo. Ct. App. 1998). Although the court did not discuss whether a duty existed, Stroot produced affidavits from Taco Bell employees indicating that there had been a long history of fights and other violent activities in the parking lot similar to the one that resulted in Stroot's injuries. *Id.* at 448. One could probably conclude that by pleading the previous incidents, as well as producing supporting affidavits, Stroot met his burden of production as to the duty of Taco Bell (based upon the framework laid out in *Madden*) so as to survive Taco Bell's motion for summary judgment.

89. *Id.* at 449.

90. *Id.*

91. *Id.* at 448.

92. Lowrey v. Horvath, 689 S.W.2d 625, 627 (Mo. 1985).

93. *See supra* note 88.

94. *See supra* note 88.

95. *See supra* note 42 and accompanying text.

should have been able to apportion the percentage of fault it deemed proper.[96] Stroot properly pled his cause of action and Taco Bell's motion for summary judgment should have been denied at the trial level or at least reversed by the appellate court. Perhaps unintended, this case could have the effect of chilling rescue attempts because an original tortfeasor's negligence will not be considered if the rescue attempt is classified as an "intervening cause."

VI. CONCLUSION

Plaintiffs face many hurdles in bringing an action for damages against a defendant when the actual injury was inflicted by a third person. Traditionally, plaintiffs have had difficulty proving causation, and cases such as *Stroot* illustrate the need for plaintiffs to find some independent causation doctrine (like rescue) in order to reach a jury.

Since before our country was founded, courts have had a difficult time determining when one person should be found to have a duty to protect others from third party criminal acts. Modern courts seem to be moving away from the rigid common law approach that barred liability completely and have slowly been replacing it with a standard based on foreseeability. The main battleground seems to be shaping up around how one defines foreseeability. For the time being, Missouri courts have interpreted *Madden* to require that prior criminal acts be substantially similar to the acts complained of by the plaintiff. The merits of this standard can be debated, but it seems that foreseeability of criminal activity in a location should not be strictly limited to the exact types of crimes that have previously occurred. It remains to be seen whether the "totality of circumstances" test for the imposition of a duty on a commercial defendant will ultimately prevail.

Most troubling about the *Stroot* decision is that it suggests that Missouri courts are moving away from the well settled principles of the rescue doctrine. If a court is willing to characterize a man's attempt to assist a woman in distress as an independent "intervening cause," without consideration of the underlying negligence of the business that necessitated the rescue, one must wonder if the rescue doctrine is in need of rescue.

TIMOTHY A. REUSCHEL

96. Allison v. Sverdrup & Parcel & Assocs., Inc., 738 S.W.2d 440, 450 (Mo. Ct. App. 1987).