STATE OF OHIO	) IN THE COURT OF COMMON PLEAS
	) SS.
COUNTY OF CUYAHOGA	) Civil Case No. 463420
	)
	) **JOURNAL ENTRY AND**
	) **OPINION**
TYRONE BLACK, et al.,	)
	)
Plaintiffs	)
	)
Vs.	)
	)
MIRAGE ON THE WATER, INC., et al.,	)
	)
Defendants	)

Kathleen Ann Sutula, J:

IT IS SO ORDERED:

Defendant, Mirage on the Water, Inc. (hereinafter "Defendant" or "Mirage"), moves this court to grant summary judgment in its favor. Defendant filed its brief, asserting that there are no genuine issues of material fact, on October 24, 2002. Plaintiffs Tyrone Black ("Black") and LeRon Jones ("Jones") filed their brief in opposition to Defendant's motion on December 9, 2002. Defendant subsequently filed a reply brief on December 30, 2002.

Having construed the facts of the case in the light most favorable to the non-moving party, the Court sets forth the facts, for purposes of the motion for summary judgment, as follows:

1. Defendant is a nightclub, with drinking and dancing, located in the area of Cleveland known as the West Bank of the Flats. Plaintiffs' Brief in Opposition, p.3.

2. Defendant employs security personnel, some of whom are uniformed, off-duty Cleveland Police Officers. These off-duty officers are under the direct control

and supervision of Defendant when serving as security for Defendant. Plaintiffs' Brief in Opposition, p.4.

3. Plaintiffs patronized the Mirage on February 24, 2000. Complaint, ¶¶1, 8.

4. Plaintiffs were present at the club that night to celebrate Black's birthday. Accompanying the Plaintiffs were Jones's wife, Shavaun Davis ("Davis"), and Plaintiffs' friend, Rico Morgan ("Morgan").[1] Black Deposition, pp.12-13.

5. Sometime between 2:30 a.m. and 4:00 a.m., Plaintiffs left the Mirage. As they were leaving, Plaintiffs passed by some of the security Defendant employed that night. Black Deposition, p.21.

6. As Plaintiffs were leaving, a group of approximately fifteen to twenty males, who were on the sidewalk, located on the other side of a fence that runs along Defendant's property, initiated a conversation with Plaintiffs and Plaintiffs' friends. This group of males had not been in the Mirage that night, and neither Plaintiffs, nor Defendants, were familiar with them in any way. Black Deposition, p.23; Jones Deposition, p.30.

7. Plaintiffs' assailants made a comment concerning Jones's wife, to which Jones responded by saying, "That's my wife." Following Jones's response, the male who had made the original remark said, "Fuck you," and then attacked Jones. Jones Deposition, p.28-29

8. This unidentified group of males proceeded to come around the fence and entered the driveway of the Mirage's parking lot. Jones Deposition, p.34.

9. At this point, the males began physically assaulting Jones and his wife. Black came up from behind the group of males in an attempt to assist Jones. Jones Deposition, p.28-29

10. Jones and Black eventually fled the scene, and later reported to Cleveland Metro Health Hospital. Jones suffered a broken jaw, and Black suffered a broken ankle.[2] Neither Plaintiff recalls filing a police report. Plaintiffs' Brief in Opposition, p.5; Black Deposition, p.42; Jones Deposition, p.42.

11. At no time did Defendant's security personnel, or any of Defendant's other employees, provide assistance to Plaintiffs during the altercation. Plaintiffs' Brief in Opposition, p.5.

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[1] Plaintiffs' status at the club that night, seeing as how they were patronizing the Mirage, was unquestionably that of invitees.

[2] As of the filing of these motions and briefs in opposition, Black has incurred at least $6,300 in medical expenses. Jones has incurred expenses in excess of $24,181. Plaintiffs' Brief in Opposition, p.5

A. Standard for Summary Judgment

When ruling on motions for summary judgment, Rule 56(C) of the Ohio Rules of Civil Procedure guides the Court. Rule 56(C) permits the Court to grant summary judgment when (1) there are no genuine issues of material fact; (2) reasonable minds can come to only one conclusion, and the conclusion adversely affects the non-moving party; and (3) the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 65-66, 365 N.E.2d 46; see also Civ.R. 56(C); *Holliman v. All State Ins. Co.* (1998), 86 Ohio St.3d 414, 715 N.E.2d 532; *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 524 N.E.2d 881.

Since summary judgment is such a drastic measure, cutting off a party's right to present its case at trial, courts should grant summary judgment motions sparingly. *Dupler v. Mansfield Journal* (1980), 64 Ohio St.2d 116, 120, 413 N.E.2d 1187; see also *Viock v. Stowe-Woodward Co.* (Erie App. 1983), 13 Ohio App.3d 7, 14-15, 467 N.E.2d 1378. By the same token, however, courts can, and should, grant summary judgment motions when the case has been fully developed by discovery and the record demonstrates that, after construing all the facts and inferences in the non-movant's favor, the non-moving party is not entitled to judgment as a matter of law. *Dupler*, 64 Ohio St.2d at 120.

In order for the Court to grant summary judgment, the moving party has the burden of demonstrating through the evidence detailed in Civ.R. 56(C) that the opposing party cannot establish any elements of its claims.[3] *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. If the movant fulfills its burden, the burden will then shift to

[3] The evidence to be used includes the pleadings, depositions, interrogatory answers, admissions, affidavits, transcripts of evidence, and written fact stipulations. Civ.R. 56(C).

the non-moving party to produce evidence to establish the elements of its claims. *Id.*, 75 Ohio St.3d at 282. If the non-movant fails to satisfy its burden, a court's granting of summary judgment is not only proper- it is mandated. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317.

B. Standard for Establishing Duty Between an Invitee and a Business

In Count Three in the complaint against Defendant, Plaintiffs allege that Defendant was negligent in not coming to Plaintiffs' aid during the fight that occurred on February 24, 2000. Complaint, ¶18. Plaintiffs contend that this failure to act constituted a breach of duty that Defendant owed them. Complaint, ¶18. Plaintiffs assert that their injuries, medical expenses, and other related damages are the result of Defendant's negligence. Complaint, ¶19.

In order to prevail on a claim of negligence, a party must show that there is a duty owed from one party to another, a breach of that duty, and an injury proximately resulting from the alleged negligence. *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 142, 539 N.E.2d 614. Generally, there is no duty to prevent a third party from imposing harm on another, unless there is a special relationship between the parties. *Simpson v. Big Bear Stores Co.* (1995), 73 Ohio St.3d 130, 133; see also *Littleton v. Good Samaritan Hosp. & Health Ctr.* (1988), 39 Ohio St.3d 86, 92, 529 N.E.2d 449. It is left for the courts to decide on a case-by-case basis if a duty exists. *Hickman v. Warehouse Systems, Inc.* (1993), Ohio App.3d 271, 273, 620 N.E.2d 949.

Between a business and its patrons a special relationship can exist. As a result, "a business may be subject to liability for harm caused to such a business invitee by the conduct of third persons that endangers the safety of such invitee." *Howard v. Rogers*

(1969), 19 Ohio St.2d 42, paragraph one of the syllabus. This does not mean, however, that a business must insure its customers' safety. *Reitz v. May Company Dept. Stores* (Cuyahoga App. 1990), 66 Ohio App.3d 188, 191, 583 N.E.2d 1071.

In fact, the duty that a business does owe its patrons depends upon the harm's foreseeability. *Simpson* (1995), 73 Ohio St.3d at 133. In determining foreseeability, courts in this jurisdiction remain guided by the 8th District's holding in *Reitz*. See *Sayles v. SB-92 Ltd. Partnership* (Cuyahoga App. 2000) 138 Ohio App.3d 476, 741 N.E.2d 613; *State Auto Mut. Ins. Co. v. Steverding* (Cuyahoga App. June 1, 2000) 2000 WL 709021; *Collins v. Down River Specialties, Inc.* (1998), 128 Ohio App.3d 365, 715 N.E.2d 189.[4]

The main holding of *Reitz* is that courts must look to the totality of the circumstances when assessing whether or not a business enterprise has breached a duty to protect its invitees. The circumstances, however, "must be somewhat overwhelming before a business will be held to be on notice of and therefore under the duty to protect against the criminal acts of others." *Reitz*, 66 Ohio App.3d at 193-94.

In *Collins*, a case decided after *Simpson*, the 8th District utilized *Reitz* in determining that a club owner did not breach a duty to patrons who were shot while ***inside*** the establishment. In that case, several gay men were dancing in the club. One of these males, Tyler, had rejected advances from one of the other males, Brown. While at the club, Brown dragged Tyler from the dance floor and told him, "I don't want you dancing with that bitch." At that point, Brown pulled a gun and threatened Tyler and his partner. Tyler went back to dancing with the other male and told him about Brown and the gun. *Collins*, 128 Ohio App.3d at 366.

[4] The number of cases from the Eighth District, only a few of which are cited here, that still employ *Reitz's* totality of the circumstances test is indicative that *Reitz* remains good law, despite Plaintiffs' insinuations to the contrary. *See* Plaintiffs' Brief in Opposition, p.15-16.

Later, when Tyler was dancing once again with the other male, Brown approached the couple. He pulled the gun out and shot Tyler's dance partner in the face, killing him. Tyler then fought with Brown in an attempt to get the gun. As they fought, Brown shot another male who was present at the club. *Id.*, 128 Ohio App.3d at 366.

The trial court entered a directed verdict, finding that the club did not have a duty to protect Brown's victims. The appellate court upheld the trial court, concluding that the club did not have notice of the risk Brown posed to other customers, and it could not have foreseen Brown's actions. The club, therefore, did not have a duty to protect against those criminal acts. *Id.*, 128 Ohio App.3d at 369.

C. The Totality of the Circumstances Favors Defendant

In this case, with facts far less heinous than those in *Collins*, the totality of the circumstances surrounding the assault are not overwhelming enough to say that Defendant owed a duty to protect Plaintiffs from the independent, unforeseeable, and tortious acts of the third party.

First, the altercation between Plaintiffs and their assailants was not foreseeable, and reasonable minds can reach only this conclusion. The attack perpetrated by the group of unknown males was not a premeditated attack on Plaintiffs. Instead, the altercation was spontaneous, and proceeded to escalate into a physical confrontation only after words had been exchanged between Plaintiffs and their assailants. *See* Black Deposition, p.23; Jones Deposition, pp.28-29. This is too tenuous a link with which to claim that the event was foreseeable.

In effect, Plaintiffs would have Defendant's employees judge the speech of non-patrons to determine whether or not the words may lead to a fight.[5] Then, after considering whether or not the words are such that they would cause an ordinary person to respond physically, Defendant's employees still would have to judge the responses of those persons the initial comments were directed to. Only then, perhaps, could the employees act accordingly if in their estimation, a fight was going to occur[6].

In this case, even if Defendant's employees were to assess whether or not the group of unknown males or Plaintiffs spoke fighting words, it is not foreseeable that a single comment directed towards Jones and his wife, followed by Jones's shrugging off of that comment, would result in a fight. *See* Jones Deposition, p.28-29. This assumes too, for the sake of argument, that the security guards even heard the conversation that preceded the assault.[7]

Plaintiffs have not produced any evidence that Defendant's employees heard what was said between Plaintiffs and their assailants. Moreover, the assailants were not on Defendant's premises at the time the verbal conversation began.[8] *See* Black Deposition, p.23. According to Plaintiffs, Defendant was aware only of the physical assault. *See*

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[5] The test for determining if words are, in fact, "fighting words" is whether the words used would reasonably incite the average person to retaliate. *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568, 573, 62 S.Ct. at 770. While Plaintiffs may believe that Defendant's security personnel are under a duty to act as a type of Orwellian thought police, passing judgment on the thoughts and speech of patrons and non-patrons alike, this Court does not agree.

[6] Even then the employees may still have to wait to see how the first speaker would respond.

[7] It would be unreasonable to suggest that Defendant's employees should have reacted if they *could not* have overheard what was being said between Plaintiffs and their assailants.

[8] It is also telling that Plaintiffs do not provide any evidence that the group of males would not have struck up a conversation with Plaintiffs if Defendant had supplied more security. The reason for this could very well be that the U.S. Supreme Court has held, in addressing an issue of proximate cause, "[w]hether one or more additional guards would have prevented the killing is in the highest degree speculative…the jury should not have been permitted to conjecture what might have happened if any additional guard had happened to be present." *St Louis-San Francisco R.R. Co. v. Mills* (1926), 271 U.S. 344, 347. While this is an old case, it remains good law.

Complaint, ¶16. This means, therefore, that the security guards were unaware of the content of the conversation between Plaintiffs and their attackers. Without any notice of the verbal confrontation, Defendant could not have foreseen the ensuing physical altercation.

Furthermore, Plaintiffs do not provide any evidence that creates an issue of material fact as to whether or not Defendant's security actually refused to assist Plaintiffs. Plaintiffs simply allege this fact, but a brief in opposition to summary judgment requires more than just mere allegations. See *Dresher*, 75 Ohio St.3d at 293. Plaintiffs have not proffered any evidence, or have stated otherwise, that they called upon the Mirage's security to come to Plaintiffs' aid. The evidence supplied illustrates that this is not a case where Defendant's employees simply looked the other way and ignored Plaintiffs' cries for help.

Second, Plaintiffs have not established that Defendant had notice for the propensity of the particular crime involved in the action before the Court.[9] Plaintiffs attempt to establish that the area surrounding the Mirage is a high crime area.[10] *See* Plaintiffs' Brief in Opposition, p.11; Exhibit G; Exhibit L. Construing these facts in the light most favorable to Plaintiffs, the evidence does show a large number of crimes occurring in the surrounding area.

What the evidence does not demonstrate, however, is that the type of assault perpetrated on Plaintiffs is something that occurs often enough in the surrounding area,

[9] Plaintiffs allege that Defendant had knowledge but do not support it beyond Plaintiffs own conclusory statements. *See* Plaintiffs Brief in Opposition, pp. 10, 12. In opposing a motion for summary judgment, a moving party must do more than rely on its own allegations. *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798; *see also* Civ.R. 56(E).

[10] Plaintiffs utilize crime statistics from within a 1000 feet radius from the Mirage, as well as crime statistics that occurred at the Mirage's address.

let alone at the Mirage itself, to give notice to Defendant. The number of assaults occurring at the Mirage and reported to the police is a relatively low number, so Plaintiffs attempt to bolster their argument by including crimes occurring 1000 feet from Defendant's address.[11]

While increasing the scope of the area in Plaintiffs' analysis undoubtedly shows an increase in the number of crimes that are committed, the increased rate of crime found within the larger area does not affect Defendant's duty.[12] As the Ohio Supreme Court noted in *Simpson*, "At what geographic point would…liability end?…Would all businesses in the center be liable for the attack, or only those visited by plaintiff?" *Id.*, 73 Ohio St.3d at 134.

The number of crimes reported in the vicinity surrounding Defendant, therefore, is not sufficient to attach a duty to Defendant. Furthermore, assuming *arguendo* that there was notice, Plaintiffs rely solely on this one facet in their attempt to establish liability. This solitary factor, however, does not show that the totality of the circumstances are overwhelming enough to show that Defendant breached a duty to protect Plaintiffs from the independent, criminal acts of third parties. *Reitz*, 66 Ohio App.3d at 193-94.

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[11] From January 1 through March 31, 2000 there were three assaults (simple and felonious combined) reported at the Mirage; in 1999 there were two assaults and one simple assault; in 1998 there were eleven simple assaults and one felonious assault; in 1998 there were fifteen simple assaults and eight felonious assaults. *See* Plaintiffs' Brief in Opposition, Exhibit G. If anything, the decreasing number of assaults from 1997 through 2000 indicates that the Mirage had less reason to expect an assault occurring.

[12] At what point should a line of demarcation be drawn so that a business knows that it has no duty to protect its customers? If Plaintiffs' argument is followed to its logical end, the Defendant would have a duty to protect its patrons up to 1000 feet away from the Mirage. If there is a duty to protect at 1000 feet, then why should the duty not be extended to 1500 feet or 2000 feet? Surely, there are more crimes that occur within a 2000 feet radius from the Mirage than at 1000 feet. Would this mean that the crimes being committed 2000 feet away are foreseeable to Defendant? Surely, the answer must be that these crimes are not foreseeable.

D. Plaintiffs cannot Establish the Remaining Elements for a Negligence Claim

Even assuming that Plaintiffs can demonstrate that there is an issue of material fact regarding whether Defendant owed and breached a duty to them, Plaintiffs argument fails as a matter of law since Defendant was not the proximate cause of Plaintiffs' injuries.

First, as the Court has previously noted, Plaintiffs do not provide any evidence that the group of males would not have struck up a conversation with Plaintiffs if Defendant had supplied more security. *Supra*, Footnote 7. In addressing the issue of proximate cause, however, the U.S. Supreme Court has held, "[w]hether one or more additional guards would have prevented the killing is in the highest degree speculative…the jury should not have been permitted to conjecture what might have happened if any additional guard had happened to be present." *St Louis-San Francisco R.R. Co. v. Mills* (1926), 271 U.S. 344, 347. As a result, the question of whether more security personnel should have been present at the Mirage is not a question of material fact for a jury to decide.

Moreover, the acts of Plaintiffs' assailants are an intervening cause. Plaintiffs' injuries were the result of an independent assault. This assault, however, was not foreseeable. Generally, if there is a willful, criminal act, committed by a third person, occurring in the time between a party's negligence and the injury caused by the third party, but the criminal act was not intended by and was not foreseeable by the original negligent party, the causal chain between the negligence and the injury is broken. *Bilicic v. Brake* (Ashtabula App. 1989), 64 Ohio App.3d 304, 307, 581 N.E.2d 586.

This is precisely the situation currently before the Court because Plaintiffs' attackers acted in an independent and malicious manner. Their actions, as has been shown, were not foreseeable, and it cannot be stressed enough that reasonable minds can only conclude that the assault was not foreseeable. In addition, the assault was not something that Defendant intended, even if it is assumed that Defendant was negligent. As a result, the attack constitutes an intervening cause, which destroys any causal link between Defendant's supposed negligence and Plaintiffs' injuries.

Since the totality of the circumstances are not overwhelming, there are no questions of material fact showing that Defendant had, or breached, a duty to Plaintiffs. Defendant, therefore, cannot be liable for the acts of independent third parties. *Reitz*, 66 Ohio App.3d at 193-94.

Furthermore, there are no questions of material fact concerning the proximate cause prong of Plaintiffs' claim of negligence. Accordingly, Defendant's motion for summary judgment is well taken.

The Court hereby holds, for good cause shown, that Defendant has established that there are no genuine issues of material fact, reasonable minds can come to only one conclusion, and the Defendant is entitled to judgment as a matter of law.

DATE: March ____, 2003

_____

KATHLEEN ANN SUTULA, JUDGE

SERVICE

A copy of the foregoing Journal Entry and Opinion has been sent via regular U.S. mail on this _____ day of March, 2003, to the following:

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