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Newsletters

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Big Box Retailers' Obligation to Provide AEDs On-site

Mary Ann Verdugo was shopping in a California Target store when she experienced a cardiac arrest. The store did not have an AED on the premises, and by the time paramedics arrived on the scene, Ms. Verdugo had died. Plaintiff argued that Target, as a commercial property owner, had a common law duty to maintain an AED on site. The district court dismissed Plaintiff's claim and Plaintiff appealed to the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit certified the question to the California Supreme Court which framed the issue as, "whether, under California law, the common law duty of reasonable care that defendant, Target Corporation, owes to its business customers includes an obligation to obtain and make available on its business premises an AED for use in an emergency." The California Supreme Court held that Target does not have this common law duty of care to its customers. The Ninth Circuit followed its guidance on the issue.

The applicable Health and Safety Code covering AEDs did not require buildings to install and maintain them, but the California Supreme Court did not rely on this. The Court instead drew a comparison with a business's common law duty to protect its patrons from third-party criminal conduct and take precautionary steps prior to the time such an injury or illness has occurred in light of the foreseeability that such an injury or illness may occur. The factors used to determine that no duty existed were:

- the degree of foreseeability of cardiac arrest and
- the burden that providing AEDs would place upon a business.

As to foreseeability, the risk of occurrence of cardiac arrest was found to be no greater at Target than any other location open to the public. As to the burden factor, the Court found that the burden was significant; Target itself sold AEDs for $1,200. Apart from the cost of the AED, there are obligations with regard to the number, placement, and maintenance of AEDs, as well as the need to regularly train personnel to properly utilize, service, and administer CPR. In

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addition, the California Legislature affords immunity from potential civil liability for businesses that make AEDs available to patrons. The Legislature's purpose of immunizing businesses was to encourage the voluntary acquisition of AEDs; therefore, if Target had a duty to make an AED available, the Court concluded that the Legislature was better suited to resolve that policy issue.

Furthermore, the Court significantly supported its opinion by following the precedent of every other state appellate court that had decided this issue. Namely, Florida, Georgia, Illinois and New York appellate courts all held that the common law did not impose an obligation on businesses to make available AEDs for the use of its patrons in a medical emergency.

Many other states have required health clubs, schools and government buildings to provide AEDs. However, only Oregon has required a retailer, such as Target, to make available AEDs to its patrons. Oregon requires that the owner of a "place of public assembly," which is defined as a single building that is at least 50,000 square feet, to have at least one AED available for use.

Verdugo v. Target Corp., 59 Cal. 4th 312 (2014)

For more information, please contact Paul J. Gamm.

Premises Liability – Florida Courts Differ on the Law of Foreseeable Crimes

Florida's appellate courts apply different foreseeability tests for the purposes of establishing premises liability despite the recent Second District Court of Appeal opinion that considered the issue of what constitutes foreseeable crime. *Bellevue v. Frenchy's South Beach Café, Inc*., 136 So. 3d 640 (Fla. 2d DCA 2013) held that a prior crime is admissible to prove the foreseeability of a future crime, even if the prior crime was of a different type and even if the prior crime occurred off the subject premises. This so-called "broad test" allows prior dissimilar crimes into evidence to prove foreseeability. There are nuances to the test because it contemplates three variables to determine whether the crime was foreseeable:

- similarity of prior crimes,
- geographical proximity of the prior crimes, and
- temporal proximity of the prior crimes.

Bellevue has adopted a broad test that would allow the jury to decide whether dissimilar crimes constitute sufficient notice to prove foreseeability. In accord is the First, Fourth and Fifth district courts. In contrast, the Third district applies the three factors strictly, which is the "narrow test." First, prior crimes must be similar. Second, prior crimes must have occurred on the premises to make the future crime foreseeable. Third, the prior crimes must have occurred within the previous two years.

Adding another layer to the discord is that courts also apply the factors differently, which blurs the line between "broad" and "narrow" jurisdictions. As to the similarity factor First, Second, Fourth and Fifth district courts allow prior dissimilar crimes; however, the Fourth has recently agreed with the Third's narrow approach which states that prior crimes should be similar to the future crime in order to be relevant.

As to geographical proximity, the First agrees with the Third that prior crimes must have occurred on the premises to be relevant. The Fourth has expressed agreement with the narrow test, but has allowed evidence of off-premises crime. The Fifth has taken a broad geographical approach.

As to the temporal proximity factor, the Fourth now is in line with Third which requires the prior crimes be no older than two years, as older crimes are not predictive of future crimes. The Fifth takes a broad approach. The First and Second have not discussed the time requirement, despite the *Bellevue* opinion.

In sum, attorneys should be aware of the different approaches being applied across Florida. There is a significant amount of authority which rejects the broad approach and treats prior crimes as irrelevant only if there is a strong nexus to the future crime. As the Fourth District now appears more in line with the narrow approach in the Third, it is likely that the tests for foreseeable crime will continue to evolve and hopefully be clarified.

Bellevue v. Frenchy's South Beach Café, Inc., 136 So. 3d 640 (Fla. 2d DCA 2013)

For more information, please contact Paul J. Gamm.

Florida Appellate Court Attempts to Clarify Facebook "Privacy" Arguments

Recently, in a January 7, 2015 opinion, Florida's Fourth District Court of Appeals denied a petition for writ of certiorari concerning access to Facebook social media discovery. Specifically in *Nucci v. Target Corp.*, No. 4D14-138 (Fla. 4th DCA January 7, 2015), a premises liability personal injury plaintiff maintained a Facebook social media page and designated privacy settings through the Facebook page options. The Facebook profile included over 1,200 pictures, but was not available for viewing by the attorney for the premises defendant. Discovery was initiated and objected to, resulting in an order from the trial court compelling certain areas of inquiry, including:

1. Identification of all social media memberships;
2. A list of cell phone carriers for plaintiff;
3. Copies of screenshots or photographs associated with each social networking site from two years prior to date of injury to the present;
4. Copies of screenshots or photographs associated with each cellular number from two years prior to date of injury to the present;
5. Copies of phone logs for all cellular phone calls made on the date of the incident.

Plaintiff argued that the order to compel the outlined discovery was an invasion of privacy. In its opinion, the Fourth district found that the discovery was not an invasion of privacy since there was no legitimate expectation of privacy.

Specifically, the court found that the photographs posted on the social networking site were neither privileged nor protected by any right of privacy regardless of the privacy settings selected. In fact, Facebook itself does not guarantee the privacy of the content. Since the content is often shared through networks of "friends," the expectation of privacy is not reasonable or legitimate. The Fourth district agreed with the federal court opinion in *Reid v. Ingerman Smith, LLP*, 2012 WL 6720752 (E.D. N.Y. Dec. 27, 2012) when that court indicated that there is no justifiable expectation that the "friends" would keep the plaintiff's profile private.

Finally, the Fourth district found that the discovery was narrowly tailored and not too broad as to infringe on the rule against *carte blanche* discovery.

Nucci v. Target Corp., No. 4D14-138 (Fla. 4th DCA January 7, 2015)

For more information, please contact Paul J. Gamm.

Supreme Court to Determine Abercrombie & Fitch's Fashion Sense

In a decision that will impact retailers nationwide, the United States Supreme Court has recently determined it will decide whether Abercrombie & Fitch Stores, Inc. (A&F) discriminated against a Muslim applicant for failing to accommodate her religious practice of wearing a head scarf in violation of Title VII of the Civil Rights Act.

The applicant, Samantha Elauf, interviewed for a sales position at A&F in Tulsa, Oklahoma, and she was recommended for hire. Elauf wore a hijab to the interview, and she received a passing grade for "style" by the interviewer. Even though she wore a hijab to the interview, Elauf made no mention of the head scarf during the interview, did not request permission to wear it at work, and did not mention that she was wearing it for religious reasons. After the interview, the assistant manager sought permission for Elauf to wear her hijab after she was hired, but the request was denied by her supervisor who said it violated the company's "Look Policy." As a result, Elauf was not hired, and in response she filed a claim for religious discrimination with the Equal Employment Opportunity Commission. The EEOC sued A&F, eventually winning a jury verdict and damages for Elauf. However, the 10th Circuit Court of Appeals in Denver reversed the jury award ruling that A&F could not be held liable for failing to accommodate Elauf's religious practices because she never made the company explicitly aware that she needed a religious accommodation under the look policy. The EEOC appealed to the U.S. Supreme Court, which has agreed to hear the case. The EEOC argues that companies should not be

able to discard religious rights by arguing it did not have "actual knowledge" of a request for accommodation. A&F asserts Elauf made no request for a religious accommodation so it had no obligation to address the issue during the hiring process.

The Supreme Court's decision about what companies need to be told or made aware of before they are obligated to discuss a possible accommodation for religious beliefs will have a profound impact on retailers' hiring and employee relations practices. In the meantime, companies should be careful to notice religious practice issues in the workplace (whether a specific accommodation has been requested or not) and engage in an interactive process with applicants and employees to accommodate their religious beliefs if it does not impose an undue hardship on their business.

EEOC v. Abercrombie & Fitch Stores, Inc., U.S. Supreme Court, No. 14-86 (Oct 2, 2014)

For more information, please contact your Hinshaw Attorney

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