Premises Liability after *Williams v Cunningham Drug Stores*: Is There Anything Left for the Plaintiff?©

By *Jonathan R. Moothart*

In May of 1979, Willie Williams, while a customer at a Cunningham Drug Store, was shot during the course of an armed robbery. He sued Cunningham Drug Stores, Inc., claiming that it had breached its common law duty to maintain a reasonably safe premises for its customers. Among the specific breaches alleged were the failure to provide armed, visible security guards and the failure to intercede in an armed robbery in progress.

In January of 1988, the Michigan Supreme Court[1] held that the trial court had properly granted defendant's motion for a directed verdict.[2] The holding in *Williams* was that "a merchant's duty of reasonable care does not include providing armed, visible security guards to deter criminal acts of third parties."[3] The court did not, however, stop at this simple holding; it went on at length with *dicta* suggesting that a plaintiff alleging anything close to a duty on the part of a business owner to provide police protection should necessarily have a very long row to hoe.[4]

Since the decision in *Williams*, various panels of the Michigan Court of Appeals, despite the pessimism expressed by the Supreme Court,[5] have wrestled with the application of the holding and the *dicta* of *Williams* to particular situations.

In *Theis v Abuldoor*,[6] plaintiff was mugged in defendant's parking lot. She alleged that the attack was foreseeable because defendant's business was located in a high crime area, and that defendant breached its duty to provide a reasonably safe premises because it did not adequately light the premises, did not make sure that competent security was present to maintain "constant control and surveillance over the premises,"[7] and did not intervene in the assault. The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(8), holding that the plaintiff's claim was unsupportable as a matter of law. The Court of Appeals affirmed, finding *Williams* dispositive, and stating flatly that "there is no legal duty to provide protection from criminal attacks..."[8]

The holding in* Williams *was that "a merchant's duty of reasonable care does not include providing armed, visible security guards to deter criminal acts of third parties."

Other cases employed similarly broad readings of *Williams*.[9] Under this line of cases, it began to appear as though business owners were no longer to be held liable for any act of any third party which could be considered to be "criminal"—premises liability actions would, apparently, be limited to slip and fall and attractive nuisance.

The first ray of hope for plaintiffs in the post-*Williams* decisions came with *Mills v White Castle System, Inc.*[10] In *Mills*, plaintiffs alleged that the defendant had breached its duty of care by allowing unruly patrons to congregate in its parking lot and by failing to eject intoxicated, unruly patrons from its premises. Noting that the manager at the business in question had allegedly refused even to call the police or to let plaintiffs' companion use the restaurant's telephone for that purpose, the court held that the fact situation at the bar was "easily distinguished" from *Williams*,[11] and reversed the trial court's C(8) dismissal of plaintiffs' complaint.

Since *Mills*, other panels of the Court of Appeals have similarly limited *Williams* to its specific holding.[12]

UNDERSTANDING THE PROGENY OF *WILLIAMS*

Although the Supreme Court's *dicta* can be read to indicate the contrary, the panels of the Court of Appeals applying *Williams* to various fact situations have not unanimously read *Williams* as abolishing tort liability for third party criminal acts on business premises, as is evidenced by cases such as *Mills*. Sorting through these seemingly conflicting cases can be a frustrating and time-consuming task.

One problem, especially with the cases that interpret *Williams* broadly, is that there is often little or no discussion of the facts giving rise to the plaintiff's complaint. This method of analysis is consistent with the proposition that there is simply no longer any duty to take steps to lessen the likelihood of or to intervene in criminal acts of third parties, no matter how foreseeable or preventable. In light of decisions such as *Mills*, however, the facts of the "no duty" cases are of vital importance to the practitioner in analyzing untested fact situations.

Another problem is that the courts have oftentimes confused the standards for summary judgment under MCR 2.116(C)(8)—failure to state a claim upon which relief can be granted, i.e., legal insufficiency of a claim, with MCR 2.116(C)(10)—no genuine issue as to any material fact, i.e., a claim which is legally recognized but which does not have sufficient factual support.

In premises liability cases, this confusion can result in an improper failure to distinguish between the business owner's duty—which must be pleaded—and the precise acts or omissions claimed to be breaches of the duty—which need not be pleaded in detail and which, in fact, may not even be known until discovery is complete.[13] This problem has probably arisen because of the Supreme Court's imprecise characterization of its holding in *Williams* that "the duty of reasonable care . . . does not extend to providing armed, visible security guards to protect customers from the criminal acts of third parties."[14] A more exact statement of the holding would be that the failure to provide these guards is *not a breach* of the duty to maintain reasonable safety for business invitees.

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The confusion between duty and breach was apparent in *Papadimas v Mykonos Lounge*,[15] in which the Court of Appeals, relying on *Williams*, affirmed the trial court's C(10) dismissal of plaintiff's complaint, noting that the trial court had "relied on . . . documentary evidence in holding that there was not a duty to prevent the sudden and unexpected criminal activity."[16] Likewise, in *Raymore v Thomas & Najor Enterprises Inc*,[17] the court held that C(10) dismissal was proper and said that because the plaintiff had alleged only a general duty to maintain the premises in a reasonably safe condition, "it would have been impossible for the claim to be supported by the evidence at trial."[18]

Obviously, an understanding of the trial court's application of these standards and its expectations with respect to the pleadings in any given case is crucial to the defendant in the successful pursuit of a summary judgment motion as well as to the plaintiff wishing to avoid a situation in which he or she is called on to defend such a motion based essentially on MCR 2.116(C)(10) with nothing more than his or her complaint.

I recently represented a plaintiff in a case which the judge dismissed based on MCR 2.116(C)(8). In his opinion, based solely on the pleadings, he said that he had found "nothing *in the pleadings* . . . which would indicate to this court that there was a legal duty *which was breached*." (Emphasis added.) I then filed a motion for leave to amend under MCR 2.116(I)(5) and a proposed amended complaint alleging every fact I could think of which had been uncovered during the course of discovery which tended to prove that the defendants had breached their duty to maintain a reasonably safe premises by failing to stop a fight in their bar in which my client had been injured. The judge vacated his prior order and allowed the amended complaint to be filed.

Although some courts are more liberal in their application of the modern principles of "notice pleading" under MCR 2.111(B),[19] post-*Williams* decisions have still required "specific"

allegations of duty, holding that "general" allegations of failure to maintain security are insufficient under *Williams*.[20] Until *Williams* is further clarified, the prudent plaintiff's attorney must adopt a fact pleading approach in premises liability cases and plead what ordinarily might be considered *breaches* of the duty to maintain a reasonably safe premises as *duties* in and of themselves (e.g., duty to eject patron John Doe when he became drunk and disorderly). Defendants would be well advised to file early summary judgment motions and rely on the "no duty" language of *Williams* and subsequent cases.

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Even after being deciphered, the case law is frankly of limited usefulness to the practitioner in evaluating particular fact situations. However, common sense should be the guiding light—was an attack either foreseeable, or preventable, or both? Factors which should, in a perfect world, come into play here include the following:

Location of Attack

Obviously, an attack in the parking lot of a large department store in an upscale neighborhood is both less foreseeable and less preventable than an attack inside a bar[21] in a high crime area.[22] Note that Willie Williams was leaving a drug store when shot.

Type of Attack

It is also significant that Willie Williams was shot and not beaten up. Obviously, shootings are both more difficult to foresee and more difficult to prevent, even after the threat is known. Personal intervention by the merchant is rarely an option. Moreover, *Williams* provides clearly that the failure of the merchant to provide armed, visible security guards is not a breach of the merchant's duty to maintain reasonable safety. Therefore, an attack by shooting may not be actionable unless, of course, the suit is based on a failure to properly inform police authorities of the presence of a gunman prior to the shooting.[23] Injuries resulting from fights or attacks not involving guns, knives, or the like, are more preventable, more interruptable, and less likely to occur without warning.[24]

Merchant's Opportunity to Prevent

This category overlaps with the previous two, but it is independently important in analyzing a premises liability case.

In order for a business owner to be responsible for preventing an attack, it must be shown that the hazardous condition of his or her premises was of such a character or such duration that it would have been discovered by a reasonably careful person.[25]

Therefore, the obviousness of the danger and the length of time the danger was apparent prior to the attack are essential fact issues for both plaintiff and defendant. The recent decision of the Michigan Court of Appeals in *Wagner v Regency Inn Corp*[26] confirms the validity of this analysis; in fact, creation or allowance by a merchant of "continuing patterns of criminal activity on his premises" may even give rise to a separate and independent cause of action for nuisance, perhaps completely outside the purview of *Williams*.[27] *Wagner* is particularly important authority due to its "first-out" status on these issues; arguably, it overturns prior Appeals Court decisions.[28]

ASSUMED DUTY/IMPLIED CONTRACT/THIRD PARTY BENEFICIARY THEORY

In *Sierocki v Hieber*,[29] the Michigan Court of Appeals recognized the principle that "where one voluntarily assumes the performance of a duty, one is required to perform that duty carefully."[30] This would seem to be especially apt where the duty was assumed for the purpose of furthering business. For example, hiring a "bouncer" in a bar or security guards to patrol a parking lot might at least raise the implication of foreseeability. It may also follow that a patron is impliedly contracting with the merchant for protection, or is a third-party beneficiary of a contract for security services.[31] Michigan courts have, however, generally been reluctant to apply these theories.[32]

CONCLUSION

Williams has undoubtedly changed the face of premises liability in Michigan. Until a more precise standard is issued by the Supreme Court, however, practitioners must take great pains to plead with precision, read their advance sheets, and emphasize the "common sense" elements described above in each fact situation. ■

Footnotes

1. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495 (1988).
2. MCR 2.515.
3. *Williams*, 429 Mich at 501.
4. "[A]lthough defendant can control the condition of its premises by correcting physical defects that may result in injuries to its invitees, it cannot control the incidence of crime in the community." *Id.* at 502. The court also stated: "To shift the duty of police protection from the government to the private sector would amount to advocating that members of the public resort to self-help. Such a proposition contravenes public policy." *Id.* at 503-504.
5. "Even if a merchant were not required to prevent all crime, defining a reasonable standard of care short of that goal might well be impossible." *Id.* at 503.
6. 174 Mich App 247 (1988).
7. *Id.* at 248.
8. *Id.* at 250.

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9. E.g., *Williams v Nevel's-Jarrett Associates, Inc*, 171 Mich App 119 (1988) (shooting in the parking lot of a night club); *Holland v Delaware McDonald's Corp*, 171 Mich App 707 (1988) (shooting in a crowded McDonald's restaurant); *Horn v Arco Petroleum*, 170 Mich App 390 (1988) (suit against lessor of property for assault in the course of theft of plaintiff's car at service station); *Marr v Yousif*, 167 Mich App 358, 364 (1988) (assault on plaintiff while delivering merchandise to defendant's market; court stating that "[p]laintiff would have us create a duty on the part of store owners to turn their stores into fortresses"); *Milo v Guardian Guard Services, Inc*, 176 Mich App 657 (1988) (shooting by armed robber on the premises of defendant's store, in the presence of unarmed security guard provided by defendant).
10. 167 Mich App 202 (1988)
11. *Id.* at 208.
12. *Green v Shell Oil Co*, 181 Mich App 439, 444 (1989) ("defendant['s] employees were in a position to control the unruly situation [and] to eject the instigator from the premises..."); *Diomedi v Total Petroleum, Inc*, 181 Mich App 789, 793 (1989) ("[b]ecause plaintiff alleged the corporate defendants had devices with which their employees could have summoned the police or attempted to frighten off plaintiff's attackers,... the allegations fit within the mold of *Mills*, rather than the facts in *Williams*..."); *Johnson v Olde Colonial Restaurant, Inc*, Dkt. No. 102685, April 6, 1989 (court holding that "[the gunman's] conduct may have been unforeseeable,... but once defendant became aware of the fight between... two of defendant's patrons, defendant had the duty to act immediately to protect its other patrons from injury...") (unpublished slip opinion, p 3).
13. MCR 2. 111(B).
14. *Williams* at 504.
15. 176 Mich App 40 (1989).
16. *Id.* at 42-43.
17. Unpublished, Michigan Court of Appeals Dkt. No. 105201, August 2, 1989.
18. Slip opinion at page 2.
19. *Schuster v Sallay*, 181 Mich App 558, 565 (1989) (Court of Appeals holding that "[t]o whatever extent the lower court determined [C(8)] summary disposition was appropriate because there had been no *breach* of a duty, this was error") (emphasis added).
20. *Id.* at 564-565.
21. See, e.g., *Manuel v Weitzman*, 386 Mich 157, 164 (1971): "The proprietor of such a place has the undoubted right to exclude therefrom drunken and disorderly persons [and also the right to expel them]... Being clothed with such power and authority, a corresponding duty [is imposed] in the interests of law and order and for the protection of his other guests...." Local ordinances and administrative regulations may also provide some guidance. See, e.g., 1985 AACS, R 436.1011, which prohibits liquor licensees from allowing fights, brawls, or the annoying or molesting of customers by other customers. Although ordinances and administrative regulations do not *per se* impose a duty or define the standard of care, their violation is evidence of negligence. *Beals v Walker*, 416 Mich 469 (1982). The court may take judicial notice of ordinances and regulations, MRE 202, but the safest course of action is to plead them. See *Brockschmidt v Verwys*, 73 Mich App 144 (1977).
22. But see *Williams* at 502: "Today a crime may be committed anywhere and at any time. To require defendant to provide armed, visible security guards to protect invitees from criminal acts in a place of business open to the general public would require defendant to provide a safer environment on its premises than its invitees would encounter in the community at large." The court also commented: "When the dangerous condition to be guarded against is crime in the surrounding neighborhood,... there is little the merchant can do to remedy the situation, short of closing his business." *Id.* at Note 17.
23. *cf. Askew v Parry*, 131 Mich App 276 (1983), a pre-*Williams* case in which "an intruder" entered the Peyton Place Bar and announced a robbery. Plaintiff's decedent swore at the robber and "directed an obscene gesture in his direction," *Id.* at 278. The robber then shot and killed plaintiff's decedent. Said the court: "We believe that defendant [the bar] did in fact owe a duty of care to plaintiff's decedent...." *Id.* Although the Court of Appeals was technically correct in this holding, it also went on to hold that the *pleadings* raised jury questions as to foreseeability and proximate cause—an invalid analysis unless the pleadings were factually detailed and verified by affidavit or other supporting documentation. MCR 2.116(G). Obviously, defendants can also be victimized by a court's confusion regarding summary judgment standards.
24. See, e.g., *Mills*, where plaintiffs were attacked by drunken and disorderly persons who had been present on defendant's premises for 40 minutes.
25. Mich SJI2d 19.03.
26. 186 Mich App 158, 163 (1991).
27. Liability may, however, be imposed only on defendants having "possession or control" of the land. *Id. Cf. Goldsworthy v McCausland*, 187 Mich App 253 (1991) (lessor of commercial property held not liable despite Plaintiff's allegation that lessor "knew or should have known of an ongoing pattern of violence" on the property). And one panel of the Court of Appeals has stated that "...*Williams* is a policy decision applicable to all property relationships [including attractive nuisance]." *Gouch v Grand Trunk Western Railroad*, 187 Mich App 413 (1991).
28. Adm Order No. 1990-6, 436 Mich xxxi (1990).
29. 168 Mich App 429 (1988).
30. *Id.* at 436. See also *Terrell v LBJ Electronics*, ___ Mich App ___ (May 6, 1991), Dkt. No. 124973.
31. See, e.g., *Rhodes v United Jewish Charities of Detroit*, 184 Mich App 740 (1990).
32. See, e.g., *Tame v A L Damman Co*, 177 Mich App 453, 457 (1989) where the court stated: "We... decline to adopt a policy that imposes liability on a merchant who, in a good faith effort to deter crime, fails to prevent all criminal activity on its premises...." The court qualified this statement, however, saying "[w]e do not intend... to preclude claims of negligent supervision or vicarious liability for negligence on the part of security guard services." See also *Douglas v Elba, Inc*, 184 Mich App 160 (1990).