IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION
CASE NO.: 2018-21364 CA (22)

Jane Doe,

Plaintiffs,

v.

FINAL JUDGMENT OF DISMISSAL

University of Miami, a Florida not-for profit corporation,

Defendant.
_____/

I. INTRODUCTION

Plaintiff, Jane Doe ("Plaintiff" or "Doe"),[1] brings this action seeking to hold Defendant, the University of Miami ("Defendant" or "UM"), liable for damages she suffered as a result of being raped in her dormitory. UM seeks dismissal, insisting that it had no "duty" to protect her from the crime committed here because it was not "reasonably foreseeable" as a matter of law. It also claims that imposing a duty upon it in *this* case would, for all practical purposes, render institutions of higher learning strictly liability for student on student crimes committed on campus. The Court agrees.

[1] Though it is generally settled that "the identity of the party to a lawsuit should not be concealed," *Doe v. Deschamps*, 64 F.R.D. 652 (D. Mont. 1974), proceeding with a lawsuit under a pseudonym is appropriate in circumstances such as this where actual aggrieved parties desire confidentiality due to the sensitive nature of the case. *S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707 (5th Cir. 1979); *Doe v. Gonzalez*, 723 F. Supp. 690 (S.D. Fla. 1988).

II. FACTS

The allegations of Plaintiff's "Second Amended Complaint" ("SAC"), which at this stage of the proceedings must be taken as true, *see Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc.*, 842 So. 2d 204 (Fla. 3d DCA 2003), are disturbing. Plaintiff, who was raised in a "small town in Pennsylvania" arrived at UM in July 2014 as a seventeen (17) year old freshman and "student athlete in the sport of soccer." SAC, ¶¶ 36, 37. She, as well as other student athletes, were required to "report to campus before students who were not athletes" and she, together "with other student athletes," was placed in the "Mahoney-Pearson dormitory" – an "on campus dormitory owned and controlled by the University." SAC, ¶¶ 38, 41.

On July 5, 2014, after having been at the University "for only a few days," Plaintiff "went out with other student athletes she had recently met to several local establishments near" campus. SAC, ¶¶ 46. 47. Two of her student companions, Alexander Figueroa and Jawand Blue, were "members of the University's football team." SAC, ¶ 48. Plaintiff alleges that she became intoxicated and ill after being provided "alcohol by, among others, Figueroa and Blue," and that Figueroa and Blue "drugged" her and then escorted her "back to the Mahoney-Pearson dormitory, where they also resided." SAC, ¶ 51. When the three students returned to the dormitory a "Security Assistant who was an employee of the University was stationed at the entrance" and, according to Plaintiff, that Security Assistant knew

or should have known that: (a) she had "been on campus for only a few days"; and (b) she was obviously drunk and disoriented." SAC, ¶¶ 52-54. The Security Assistant also obviously saw that she was "accompanied by two male student athlethes," SAC ¶ 54, and that one of them (Figueroa) had "carried Plaintiff into the dormitory on his back." SAC, ¶ 55.

Upon their arrival the Security Assistant "interacted primarily with Figueroa and Blue," but noticed that Plaintiff "had difficulty maintaining a straight line as she walked," and that Figueroa "had to help Plaintiff to keep her steady on her feet." SAC, ¶¶ 56-60. The Security Assistant did not, however, "conduct an adequate or meaningful security check," but rather "engaged in only a short, rushed discussion without any meaningful questioning before admitting the male student athletes and Plaintiff into the dormitory – thereby allowing two male student athletes to carry an obviously drunk young woman to the dorm room." SAC, ¶ 62. The Security Assistant also "did not contact the Department of Housing and Residential Life on-duty personnel or campus police." SAC, ¶ 63.

After entering the building, Plaintiff alleges that Figueroa and Blue "took [her] to their room, where they sexually assaulted and raped her multiple times." SAC, ¶ 64. Though Plaintiff does not allege that either Figueroa or Blue had any criminal history, or had ever displayed any propensity for violence, (let alone a

history or propensity that UM was or should have been aware of), she insists that this crime was "reasonably foreseeable" because:

(a) "Male student athletes commit sexual assault at a higher rate than non-athletes, with between 15% and 20% of sexual assaults at colleges committed by male student athletes despite their representing 3% or less of the student population;" SAC ¶ 1;

(b) "Ten percent of sexual assaults involve a single victim and two or more attackers, and 40% of such incidents involve male student athletes"; SAC ¶ 12; and

(c) Statistics (but see footnote 2 below) demonstrate that "there are approximately 150 incidents of rape on the University's campus each year; approximately 22 to 30 incidents of sexual assault on the University's campus each year are committed by male student athletes; and approximately six incidents of sexual assault on the University's campus each year involve two or more male student athletes committing sexual assault on one victim." SAC, ¶ 20.[2]

Finally, Plaintiff alleges that UM – like every University – considers the "safety and security" of its students to be of "paramount importance," particularly

[2] These are not actual statistics. Rather, they are extrapolated from actual statistics based upon the allegation that "[f]ewer than 5% of college women who experience rape or attempted rape report the incident to law enforcement." SAC, ¶ 9. As for the actual statistics pled, less than 7 rapes on campus *and* student housing combined have been reported in years 2012(6) – 2013(4) – and 2014(6). And Plaintiff has not alleged that a single incident has ever been reported at the Mahoney-Pearson dormitory.

in the residential facilities "students call home," and that it tells students they can "rest assured knowing they are protected by a comprehensive and layered approach to their safety and security." SAC, ¶¶ 23-25, citing UM's "Safety and Security" webpage and its Department of Housing and Residential Life security program.

III. PLAINTIFF'S CLAIMS AND DEFENDANT'S MOTION TO DISMISS

Plaintiff's SAC advances three causes of action: (1) Negligent Security; (2) Vicarious Liability for the Negligence of the Security Assistant; and (3) Negligent Training of the Security Assistant. Defendant moves for dismissal with prejudice of each claim, insisting that: (a) it owed Plaintiff no "fiduciary duty" and had no "special relationship" with her based upon her "status as a student" or its "custody and control" of her, and (b) it owed her no "duty" of protection as an invitee because this crime was not "reasonably foreseeable" as a matter of law.

As for the first point, UM cites considerable precedent holding that a university does not owe any fiduciary duty to its students by virtue of "a typical student-university relationship." *Childers v. New York & Presbyterian Hosp.*, 36 F. Supp. 3d 292, 306 (S.D.N.Y. 2014); *Knelman v. Middlebury Coll., 898 F. Supp. 2d 697 (D. Vt. 2012)* (Vermont "has never recognized a fiduciary relationship between a student and a school or school official" and such fiduciary relationships generally do not exist in the school context); *Tunne v. Hendrick*, 5:10CV-00181-JHM, 2012 WL 3644825 (W.D. Ky. Aug. 24, 2012) (under Kentucky law a student-teacher

relationship does not generally give rise to a fiduciary duty); *Valente v. Univ. of Dayton*, 438 Fed. Appx. 381 ,387 (6th Cir. 2011) (under Ohio law, no fiduciary relationship exists between a university and its students); *Bass ex rel Bass v. Miss Porter's Sch.*, 738 F. Supp. 2d 307, 330 (D. Conn 2010) (finding no fiduciary relationship between a student and a private high school and noting that the court's research "has not revealed a single case in any state or federal court within the Second Circuit holding or even suggesting that a secondary school — public or private, boarding or day-session — or its employees owe a fiduciary duty to its students"); *Vurimindi v. Fuqua Sch. of Bus.*, CIV.A 10-234, 2010 WL 3419568 at *7 (E.D. Pa. Aug. 25, 2010) ("university personnel do not owe a fiduciary duty to students under Pennsylvania law"); *Leary v. Wesleyan Univ.*, CV055003943, 2009 WL 865679 at *12 (Conn. Super. Ct. Mar. 10, 2009) (declining to find a fiduciary relationship between a university and its students).

Similarly, UM cites persuasive authority standing for the proposition that it owed Plaintiff no "duty" of protection under the theory that students are under the "custody and control of a university," as "the view that these institutions stand *in loco parentis* – in place of the parent – with respect to the student . . . is now disfavored because it no longer represents contemporary values." *Sharick v. Se. Univ. of Health Scis., Inc.*, 780 So. 2d 142, 142 (Fla. 3d DCA 2001) (Ramirez, J. concurring); *Bradshaw v. Rawlings*, 612 F.2d 135, 138 -140 (3d Cir. 1979) ("[o]ur

beginning point is a recognition that the modern American college is not an insurer of the safety of its students. Whatever may have been its responsibility in an earlier era, the authoritarian role of today's college administrations has been notably diluted in recent decades . . .. At one time, exercising their rights and duties *in loco parentis*, colleges were able to impose strict regulations. But today students vigorously claim the right to define and regulate their own lives . . . Thus, for purposes of examining fundamental relationships that underlie tort liability, the competing interests of the student and of the institution of higher learning are much different today than they were in the past"); *Apffel v. Huddleston*, 50 F. Supp. 2d 1129, 1133 (D. Utah 1999) ("[c]olleges and universities are educational institutions, not custodial"); *Freeman v. Busch*, 349 F.3d 582, 587 (8th Cir. 2003) ("since the late 1970s, the general rule is that no special relationship exists between a college and its *own* students because a college is not an insurer of the safety of its students").

Finally, and as the Court said earlier, UM says it did not, as a landlord, owe Plaintiff a duty to protect against *this* crime because it was, as a matter of law, not reasonably foreseeable. *See, e.g., Ameijeiras v. Metro. Dade County,* 534 So. 2d 812 (Fla. 3d DCA 1988) ("[a] landowner has a duty to protect an invitee on his premises from a criminal attack that is reasonably foreseeable").

Fortunately the Court need not grapple with the first two sources of duty disclaimed by UM because Plaintiff now concedes that it owed her no duty based

upon any fiduciary or special relationship, or any custodial arrangement. *Compare*, *Jacobs v. Harlem Cab, Inc.*, 183 So. 2d 552 (Fla. 3d DCA 1966) (common carrier with custody owes passengers a duty to transport them safely); *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891 (11th Cir. 2004) (under Florida law cruise line that assumed custody of its passengers was strictly liable for a crew member's sexual assault, as "a common carrier [is] responsible for the willful misconduct of its employees" regardless of whether employee's acts fall outside the scope of employment). She instead says that the "duty" she was owed arose out of – and *only* out of – UM's status as her landlord and her status as its invitee. The only question therefore is whether this common law duty may be a basis to impose liability upon UM for failing to protect against *this* crime.

IV. GOVERNING LAW

There are perhaps few areas of jurisprudence that are more confusing, or that have been analyzed and debated more, than the element of duty in negligence cases. As first year law students are routinely taught, the presence of a duty is the *sine qua non* to any cause of action for negligence. *See Woodcock v. Wilcox*, 122 So. 789 (Fla. 1929) (to assert a claim for negligence plaintiff must prove a relationship which gives rise to a duty of care); *Williams v. Davis*, 974 So. 2d 1052 (Fla. 2007) (". . . establishing the existence of a duty under our negligence law is a minimum threshold legal requirement that opens the courthouse doors . . ."). In Florida a duty of care

may arise from: "(1) statutes or regulations; (2) common law interpretations of those statutes or regulations; (3) other sources in the common law; and (4) the general facts of the case." *Limones v. Sch. Dist. of Lee County*, 161 So. 3d 384, 389 (Fla. 2015). And the question of whether any of those four sources imposes a duty of care is one of law. *Id.*

When the common law of torts imposes a duty of care in a particular class of cases it distributes ". . . risks among those whom society, speaking through the courts, holds responsible for a particular unwelcome event . . ." *Poleyeff v. Seville Beach Hotel Corp.*, 782 So. 2d 422 (Fla. 3d DCA 2001). For this reason, finding the existence of a duty in a negligence case reflects a judicial policy choice, which is precisely why "[a] common law duty exists when a court says it does because it thinks it should." *Schuster v. Banco De Iberoamerica, S.A.*, 476 So. 2d 253 (Fla. 3d DCA 1985). Put simply, "'[d]uty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection [or not]." *Sewell v. Racetrac Petroleum, Inc.*, 245 So. 3d 822, 826 (Fla. 3d DCA 2017), citing *Gracey v. Eaker*, 837 So.2d 348, 354–55 (Fla. 2002).

Because the question of duty is one of law, litigants often believe (and defendants routinely argue) that all questions bearing on the issue are for the court to decide in its capacity as a (as UM's counsel put it) "gatekeeper." That is a gross

oversimplification. When an appellate court says the issue of duty is one of law it is referring to categorical duties of care owed by members of society in general, not necessarily the issue of whether a duty exists under the *facts* of a particular case. For example, in *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985) our Supreme Court held that a seller of a house has a duty to disclose "facts materially affecting the value of the property which are not readily observable and are not known to the buyer." *Id.* That duty was imposed by the court on homeowners in general and as a matter of law because, quite simply, the court believed such a duty should exist as a matter of public policy.

Similarly, our appellate courts have imposed two duties upon property owners or occupiers as a matter of law: (a) the duty to use reasonable care in maintaining the property in a reasonably safe condition; and (2) the duty to warn of latent or concealed damages which are or should be known to the owner and which are unknown to the invitee and cannot be discovered through the exercise of due care. *Grimes v. Family Dollar Stores of Florida, Inc.*, 194 So. 3d 424 (Fla. 3d DCA 2016). Finally, and as a third example, our Supreme Court has held that one who operates or controls a swimming area/facility on property they do not own "assumes the duty to do so safely and 'to warn the public of any dangers conditions of which it knew or should have known' including perils created by mother nature." *Gallo v. Ritz Carlton*, 26 Fla. L. Weekly Supp. 101 (11th Jud. Cir., April 6, 2018) (Hanzman, J.)

citing *Breaux v. City of Miami Beach*, 899 So. 2d 1059 (Fla. 2005); *Florida Dept. of Nat. Res. v. Garcia*, 753 So. 2d 72 (Fla. 2000).

These are but a few examples of *categorical* common law duties of care owed as a matter of law because our courts have concluded – as a matter of public policy – that such duties should be imposed. But that does not mean that in every particular case all issues bearing on the question of duty are for the court to decide. So for example, when a buyer sues the seller of a house alleging a failure to disclose material facts affecting the value of the property (*i.e., a Johnson v. Davis* case) a duty of disclosure only exists if the defects were not "readily observable and . . . not known to the buyer." *Johnson* at 629. But the question of whether a defect was "readily observable" or "known to a buyer" is obviously not one of law. Similarly, if an invitee sues a property owner for failure to warn of a latent or concealed danger, a duty to warn only exists if: (a) the hazard causing injury was latent or concealed; (b) the land owner knew or should have known about it; and (c) the invitee could not have discovered it through the exercise of due diligence. *Grimes, supra.* But these also are obviously not issues of law.

Aside from the general or categorical duties imposed as a matter of law, a duty of care also may arise from the "facts of the case." *Clay Elec. Co-op., Inc. v. Johnson*, 873 So. 2d 1182 (Fla. 2003) quoting *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992) (a duty may arise from multiple sources including "the

general facts of the case"). This is so because Florida, like other jurisdictions, "recognizes that a legal duty will arise whenever a human endeavor creates a generalized and foreseeable risk of harming others." *McCain, supra* at 502. So "[w]here a defendant's conduct creates a *foreseeable zone of risk,* the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses." *Kaisner*, 543 So.2d at 735 (citing *Stevens v. Jefferson*, 436 So.2d 33, 35 (Fla.1983)). This principle applies simple common sense: "each defendant who creates a risk is required to exercise prudent foresight whenever others may be injured as a result." *McCain, supra* at 503. *See, e.g., Dorsey v. Reider*, 139 So. 3d 860 (Fla. 2014) (by blocking plaintiff's ability to escape from an escalating situation defendant "created a foreseeable zone of risk . . ."); *Nova Se. Univ., Inc. v. Gross*, 758 So. 2d 86 (Fla. 2000) (university could be liable in negligence for assigning student to perform internship at a facility it knew was unreasonably dangerous and presented an unreasonable risk of harm).

Unlike the categorical duties imposed by courts as a matter of law, this type of duty is case specific, as "[t]he statute books and case law . . . are not required to catalog and expressly proscribe every conceivable risk in order for it to give rise to a duty of care." *McCain* at 503. And sometimes the facts bearing on whether the

danger which caused a plaintiff harm was "created" by the defendant are disputed and thus the issue of duty is not one of law.

The point is that the question of whether a duty exists in a given case will often turn on disputed facts. Was a defect in a home "readily observable" and not "known to buyer"? *Johnson, supra* at 629. Was a danger located on a defendant's property "latent or concealed"? Was the danger known – or should it have been known – to the property owner"? Could an invitee have discovered the danger "through the exercise of due care"? *Grimes, supra.* Did the defendant operate or control a swimming area? *Breaux, supra.* Or did the defendant create the risk that posed a danger and – as a result – assume a duty to "lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses." *Kaisner* at 735; *Lewis v. City of St. Petersburg*, 260 F.3d 1260 (11th Cir. 2001) ("when a defendant . . . by his or her conduct creates a foreseeable zone of risk, the law imposes a duty owed by the defendant to all individuals within the zone to act with reasonable care").

Put simply, whether a duty of care exists in a particular case is often a question that must be informed by the facts, and in many cases those facts are disputed. As Justice Holmes once said, "[g]eneral propositions do not decide concrete cases," *Lochner v. New York*, 198 U.S. 45, 76 (1905), and general categorical pronouncements of duty do not always decide concrete negligence cases.

To be sure, in some cases the legal question of whether one owes another a duty of care can be decided as a pure matter of law one way or the other, as often a duty is lacking *regardless* of the facts. *See, e.g.,* Prosser, Handbook and the Law of Torts, § 56 at 340-341 (4th Ed. 1971) (correctly noting that "[t]he expert swimmer, with boat and rope in hand, who sees another drowning before his eyes, is not required to do anything about it, but may sit on his dock, smoke his cigarettes, and watch a man drown"). On the other hand, there are circumstances where a court can easily conclude that a duty was owed as a matter of pure law because one always exists; the most obvious example being whenever someone gets behind the wheel of a car. *See, e.g., Nelson v. Ziegler,* 89 So.2d 780, 783 (Fla.1956) (a driver has a duty to exercise reasonable care while driving on a public roadway). But when the question of whether a particular defendant owed a particular plaintiff a duty of care turns upon disputed facts, a jury generally should resolve those factual disputes unless, of course, no reasonable jury could reach but one conclusion.

V. ANALYSIS

Mindful of these overarching legal principles the Court now turns to this case. The categorical duty Plaintiff relies upon here is a landowner's "duty to protect an invitee on his premises from a criminal attack that is reasonably foreseeable." *Ameijeiras, supra.* Cases applying this principle typically arise in circumstances where a plaintiff is a business invitee injured on or adjacent to a defendant's

commercial property. *See, e.g., Fernandez v. Miami Jai-Alai, Inc.*, 386 So. 2d 4 (Fla. 3d DCA 1980) (Miami Jai-Alai, Inc. and owner of adjacent parking lot could be held liable to patron stabbed by an attacker, as: (a) previously crimes of violence had occurred in the parking lot; (b) they had reason to anticipate that such crimes would occur in the future; (c) they knew a large percentage of patrons carried large sums of cash; (d) they knew premises were in a high crime area; and (3) they provided inadequate security). A duty of care is imposed in those circumstances where an invitee of a business was subjected to "dangers which the defendants might have reasonably foreseen." *Id.* at 5. *See also Admiral's Port Condo. Ass'n, Inc. v. Feldman,* 426 So. 2d 1054 (Fla. 3d DCA 1983) ("[t]he duty of care owed by a landowner to an invitee with respect to protection from criminal acts of a third person is dependent upon the foreseeability of that third party's activity").

Because a duty of care is imposed only when a peril is one a defendant "might have reasonably foreseen," *Fernandez, supra*, it is generally held that this duty of care arises only when the business owner "has actual or constructive knowledge of *similar* criminal acts committed on his premises." *Ameijeiras,* 534 So. at 813. *See also Paterson v. Deeb*, 472 So. 2d 1210 (Fla. 1st DCA 1985); *Sch. Bd. of Palm Beach County v. Anderson*, 411 So. 2d 940 (Fla. 4th DCA 1982). Absent proof of actual or constructive notice of similar criminal acts, an attack is, "as a matter of law," not

foreseeable. *Ameijeiras, supra.*[3] The reason a duty of protection arises only when a crime is "reasonably foreseeable" is obvious. As a general rule "a party has no legal duty to prevent the misconduct of third persons," *Dorsey v. Reider*, 139 So. 3d 860 (Fla. 2014); *Carney v. Gambel*, 751 So. 2d 653 (Fla. 4th DCA 1999). An exception exists when a defendant is in actual or constructive control of "the premises on which the tort [or crime] was committed." *Id.* Such control, however, does not give rise to an *absolute* duty of care. A possessor of property (*i.e.,* a landlord) only has a duty to protect an invitee "from a criminal attack that is reasonably foreseeable," *Ameijeiras, supra,* not a duty to protect invitees "from all crimes" resulting from "unpredictable behavior of a third party." *Fernandez, supra; Reynolds v. Deep S. Sports, Inc.,* 211 So. 2d 37 (Fla. 2d DCA 1968); *Drake v. Sun Bank & Tr. Co. of St. Petersburg*, 377 So. 2d 1013 (Fla. 2d DCA 1979). A landlord is not an "insurer" of tenant safety. *Emmons v. Baptist Hosp.*, 478 So. 2d 440, 442 (Fla. 1st DCA 1985).

Limiting liability to circumstances where the crime committed was "reasonably foreseeable" ensures that property owners do not become strictly liable for – or insurers against – unexpected criminal activity, and that they face exposure *only* when there was reason to suspect that a plaintiff would be victimized by the

[3] As pontied out in *Vazquez v. Lago Grande Homeowners Ass'n*, 900 So. 2d 587 (Fla. 3d DCA 2004), this general principle obviously has no application in a case where a defendant – like a security company – assumes a contractual duty or undertaking "to guard against crime" and is negligent in carrying out that assumed obligation.

perpetrator of the crime. So again, the question presented here is was this crime "reasonably foreseeable" or simply "unpredictable behavior" on the part of students who also occupied – and had a legal right to be in – the dorm where the attack took place.

Plaintiff alleges that the crime committed against her was "reasonably foreseeable" because: (a) rapes occur on college campuses; (b) male athletes are more inclined to commit rape than are non-student athletes, particularly when more than one athlete is present; and (c) females who are intoxicated are more vulnerable to assault. This constellation of facts – in Plaintiff's view – imposed upon UM a duty to protect her against this assault. The Court disagrees.

First, the Court has no doubt that rapes occur on college campuses and that rape on a college campus is generally foreseeable. *See, e.g., Stanton v. Univ. of Maine Sys.*, 2001 ME 96, 773 A.2d 1045 773 A.2d 1045, 1050 (S. Ct. Maine 2001) ("[t]hat a sexual assault could occur in a dormitory room on a college campus is foreseeable. . ."). Unfortunately the crime of rape has happened – and will happen again – wherever people reside, whether it be in a house, apartment, or college campus. It also occurs elsewhere. But while a prior similar incident may be necessary to impose a duty of care upon a business owner, *see, e.g., Ameijeiras*, the existence of a prior incident of rape on a college campus does not, by itself, make all future rapes by any perpetrator and under any circumstances reasonably

foreseeable. Nor does the fact that a student athlete may in the past have raped a co-ed make it "reasonably foreseeable" that every intoxicated co-ed in the presence of a male student athlete (or two) is at risk.

Nor is a defendant liable for all criminal attacks perpetrated upon an invitee simply because security was provided. Recognizing that crime occurs on campuses – and undertaking to provide students with security – does not render a university liable for *all* crimes occurring on campus regardless of whether they were "reasonably foreseeable." For example, no one could seriously argue that a co-ed unexpectedly assaulted by a family member or friend invited into her dorm in the middle of the day (or even at night) would have a cause of action against the university merely because it undertook to provide dormitory security. On the other hand, if security failed to lock a back door that should have been locked, or had clearly deficient protection in place, thereby permitting access by an intruder who then assaults a student, common sense and precedent tells us that liability could result. *See, e.g., Mullins v. Pine Manor Coll.*, 389 Mass. 47, 449 N.E.2d 331 (1983) (student raped by intruder who entered dorm through unlocked exterior gate that should have been secured had viable claim for negligence).[4] *Paterson v. Deeb*, 472

[4] The *Mullins* court observed that the college community "has recognized its obligation to protect resident students from the criminal acts of third parties" and that the defendant college had voluntarily assumed that duty. For that reason, "[p]arents, students, and the general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm." 449 N.E.2d at 336. The Court agrees, and – like the *Mullins* court – believes it is clearly foreseeable that a failure to properly secure a dormitory could result in an attack from a third-party intruder. That, however, is not the situation alleged *sub judice*.

So. 2d 1210 (Fla. 1st DCA 1985) ("[i]t has been held that a landlord's breach of an implied duty to provide locks and maintain common areas in a safe condition may serve as the legal basis for liability to the tenant for injuries resulting from unauthorized entry and criminal acts within the premises").

Similarly, this crime may have been "reasonably foreseeable" if UM was alleged to have knowledge (or reason to know of) prior violent crimes committed by Figueroa or Blue, thereby placing it on notice that Plaintiff may have been in danger in their company. It may also have been "reasonably foreseeable" if, after entering the building and in the Security Assistant's presence, either Figueroa or Blue did or said something (*i.e.,* we are going to take this . . . up to our room and show her a good time) thereby placing the guard on notice of a possible danger. And it may have been "reasonably foreseeable" if Plaintiff was able to – and had – alleged a history of student athlete rapes in this particular dorm.

There are of course countless other hypothetical scenarios which, if alleged, might have made *this* crime reasonably foreseeable, or at least present a question for the trier of fact. Here, however, Plaintiff returned to her dorm with two other

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Later, in *Stanton v. Univ. of Maine Sys.*, 773 A.2d 1045 (2001), the court applied the "duty" discussed in *Mullins* in a case where the student – like *Doe* here – was raped by a young man she met at a fraternity party and had walked her back to the dorm. In reversing summary judgment for the university, the *Stanton* court concluded that "University owed a duty to reasonably warn and advise students of steps they could take to improve their personal safety." 773 A. 2d at 1050. No Florida precedent would permit liability for a crime that was not "reasonably foreseeable" based upon the theory that a defendant university failed to counsel students of steps that could be taken to "improve their personal safety," and Plaintiff's theory, in this case, is that the Security Assistant "failed to conduct an adequate or meaningful security check." SAC, ¶ 61. In any event, the Court believes that *Stanton* is inconsistent with Florida law and that absent a "reasonably foreseeable" crime there can be no liability in these circumstances.

students she voluntarily went out with and who also lived in this dormitory. There is no allegation that either of these students had any criminal history or propensity for violence, and no allegation that either of them said or did anything which would have alerted security to the fact that Plaintiff was in harm's way. Rather, the suggestion that this crime was "reasonably foreseeable" is based on nothing more than extrapolated and speculative statistics, stereotyping, and the fact that Plaintiff – a college student – was intoxicated. That simply is not enough. *Cutler v. Bd. of Regents of State of Fla.*, 459 So. 2d 413 (Fla. 1st DCA 1984) (affirming dismissal of complaint by university student raped in her dorm room, as facts attempting to allege foreseeability were conclusory in nature). A university is not required to assume that all male student athletes are – as UM's counsel put it – "criminals lying in wait."

In fact, during oral argument Plaintiff conceded that absent her intoxication there would be no conceivable liability here. But if this crime was "reasonably foreseeable" what would prevent a female student who was not intoxicated from arguing that a rape was "reasonably foreseeable" simply because male student athletes commit this crime at a higher rate than male students who are not athletes? What if an intoxicated female is escorted back to her dorm by only one male athlete? How about two male non-athletes? How about two female athletes who commit an assault? What if the student assaulted was only a "little bit" intoxicated as opposed to totally inebriated? While the Court could go on and on it would serve no purpose

other than to lengthen this order. Suffice it to say that the facts pled did not place the security assistant on notice that these two students would commit this crime. *See, e.g., Wometco Theatres Corp. v. Rath,* 123 So. 2d 472 (Fla. 3d DCA 1960) ("[m]ere knowledge that a person may be a child molester is not knowledge that he would become violent, nor is it sufficient knowledge from which the defendant's employees could have reasonably anticipated violence which would or might result in injury to another patron").

Finding that this crime was "reasonably foreseeable," or even allowing the question to reach a jury, would also impose upon UM a duty it could not possibly fulfill. That duty would first require a Security Assistant to interrogate students returning to a dormitory anytime an intoxicated female was among them. Since no student would ever admit to an intent to assault another the Security Assistant would then have to make a judgment call as to whether the female student was in danger based upon nothing other than profiling or a gut reaction. They would then have to detain students who had a right to proceed to their room while the situation is further assessed. Or maybe a Security Assistant would have to escort every intoxicated female student to their room in order to fulfill this duty. And if they did, would liability attach if that student later left the room and was assaulted by the students she came back with? And why wouldn't intoxicated male students be entitled to the same protections?

The bottom line is that the duty Plaintiff seeks to impose here is completely unworkable and "unreasonable as a matter of law." *Winn-Dixie Stores, Inc. v. Johstoneaux,* 395 So. 2d 599, 600, n. 4 (Fla. 3d DCA 1981) ("[w]e have not implied . . . that when criminal activity is foreseeable it is invariably a jury question as to whether the duty of reasonable care has been discharged. In the case of a mom-and-pop store with one or two employees, for example, it might be unreasonable as a matter of law to require that a full-time guard be posted"). This again is *not* a case where UM is alleged to have created a zone of foreseeable risk, or a case where it failed to secure the dormitory and, as a result, literally "opened-the-door" for criminal activity. Nor is it a case where it had reason to know that these assailants were prone to violence or intended to harm Plaintiff, or a case where incidents of rape occurred with frequency in this dormitory. This is simply a case where two students who lived in a dormitory with the Plaintiff unexpectedly assaulted her, and she has pled no facts from which a jury could conclude that UM "could have reasonably anticipated" *this* crime. *Wometco, supra.*

VI. CONCLUSION

The Court is sympathetic to this Plaintiff and wishes that she had not endured this horrible experience. In a perfect world no college student (or anyone else) would be subjected to this type of assault and it is unfortunate (to say the least) that Plaintiff's tenure at UM commenced with such tragedy. But a landlord cannot

protect against all criminal activity occurring on its property, and in recognition of this practical reality the law only imposes a duty to protect against a crime that is "reasonably foreseeable."

Of course in this day and age any crime is "foreseeable" in the literal and lay sense of the word. Planes fly into buildings; deranged gunmen shoot concert goers from the perch of hotel rooms; disgruntled and obviously mentally disturbed students commit mass shootings on high school campuses; bigots and racists terrorize church and synagogue dwellers; co-workers commit mass executions at places of business; and homophobic terrorists wreak carnage on nightclubs frequented by members of the LGBTQ community. We are in no doubt living in violent and frightening times. But to impose liability on a defendant for failing to protect against a criminal attack by a third party, the law requires more – indeed far more – than a *possibility* that such a crime could happen because it has happened before. It requires that the crime be "reasonably foreseeable." This one was not and no reasonable jury could conclude otherwise. Rather, this crime was one of those unfortunate (indeed horrendous) events for which no human being or entity other than the perpetrator(s) should "be considered 'to blame,' deemed 'at fault' [and] therefore, held civilly liable." *Poleyeff,* 782 So. 2d at 425 (Schwartz, C. J concurring). So while this Court again sympathizes with Plaintiff – and is sorry that she has suffered – it must do its constitutional duty and dismiss this case.

For the foregoing reasons Defendant's Motion to Dismiss Plaintiff Second Amended Complaint is **GRANTED**, and this cause is dismissed with prejudice.[5] Plaintiff shall go hence without day.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida this 10th day of June, 2019.

MICHAEL A. HANZMAN
Circuit Court Judge

Copies furnished to:

Adam Richardson, Esquire
John F. Eversole, Esquire
Eric D. Isicoff, Esquire

[5] When the parties argued Defendant's Motion to Dismiss Plaintiff's Amended Complaint, Plaintiff asked for an opportunity to investigate the case for sixty (60) days and file a Second Amended Complaint alleging *all* facts that could inform the question of whether UM had a duty of care here. The Court granted that request. Plaintiff, in response to the current motion, now asks for leave to file a third pleading without attaching a proposed Third Amended Complaint or illuminating upon what additional material facts could be pled. If Plaintiff is aware of additional facts that could alter the outcome here, she may seek reconsideration of this dismissal with prejudice and attach a proposed Third Amended Complaint which contains those additional facts.