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ARKANSAS COURT OF APPEALS

DIVISIONS III & IV
No. CV-16-441

PARK PLAZA MALL CMBS, LLC, AND ERMC II, LP APPELLANTS V. KIMBERLY MARIE POWELL INDIVIDUALLY AND AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF CHRISTIAN HAYES, DECEASED APPELLEE	**Opinion Delivered:** January 24, 2018 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, THIRTEENTH DIVISION [NO. 60CV-14-791] HONORABLE W. MICHAEL REIF, JUDGE SUBSTITUTED OPINION ISSUED ON GRANT OF REHEARING; REVERSED AND DISMISSED

RITA W. GRUBER, Chief Judge

On February 28, 2013, Christian Hayes was tragically murdered by Deonte Edison and Tristan Bryant. At the time of his death, Hayes was working as an assistant manager at the Sbarro restaurant in Little Rock's Park Plaza Mall. Edison and Bryant murdered Hayes in Sbarro's leased, private space after the close of business.

Kimberly Powell, on behalf of Hayes's estate, sued numerous parties for his wrongful death, and the case went to trial on her claims against Park Plaza Mall CMBS, LLC (Park Plaza); ERMC II, LP (ERMC), the entity that provided security services to Park Plaza; Edison; and Bryant. A Pulaski County jury returned a verdict in favor of Powell, and Park Plaza and ERMC appealed.[1] Because we hold that the circuit court erred as a matter of law

[1]The International Council of Shopping Centers also filed an amicus brief in support of reversal.

by determining that Park Plaza and ERMC had a duty to protect Hayes from foreseeable criminal acts of third parties, we reverse and dismiss.

I. *Background*

Sbarro leased space in Park Plaza. Park Plaza contracted with ERMC to provide security to the common areas of the mall. Pursuant to the contract, ERMC was responsible for observing and reporting safety issues in common areas of the mall to police.

On February 28, 2013, Hayes and Jashonta Thomas, another Sbarro employee, were closing the restaurant when Edison and Bryant entered the restaurant through an employee door.[2] Edison confronted Hayes, asked for money, and ultimately shot and killed him inside Sbarro's leased, private space. Thomas was shot nine times but survived her injuries.[3]

Kimberly Powell, the administratrix of Hayes's estate, sued numerous parties whom she deemed responsible for his death. She filed her initial complaint on February 24, 2014. She amended her complaint several times—adding and subtracting certain parties. The operative complaint, the fourth amended complaint, was filed on August 7, 2015, against Park Plaza; ERMC; QC & SF Enterprises, Inc.; Edison; Bryant; Sbarro, LLC; Sbarro America, Inc.; Sbarro Franchise Co., LLC; and several John Doe defendants.[4]

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[2]Edison was an employee of Sbarro, and Bryant worked for Great Steak, a business adjacent to Sbarro. Bryant previously worked for Sbarro but was terminated about a month before Hayes's murder.

[3]Thomas has filed her own lawsuit over the incident.

[4]Sbarro Franchise Co., LLC, was dismissed without prejudice from the litigation, and Sbarro, LLC, and Sbarro America, Inc., were dismissed with prejudice from the litigation. The John Doe defendants were also dismissed. The circuit court dismissed Powell's claims against QC & SF Enterprises, Inc., in an order granting summary judgment.

Before the filing of the fourth amended complaint, Park Plaza and ERMC sued Sbarro, LLC; Sbarro America, Inc.; Sbarro Franchise Co., LLC; Kahala Franchising, LLC; and QC & SF Enterprises, Inc., for contribution and indemnity. An order was entered severing Park Plaza and ERMC's cross-claims against Sbarro, LLC, and Sbarro America, Inc., with a trial to be held on the cross-claims in the event Powell obtained a judgment against Park Plaza and ERMC.[5] The cross-claim against QC & SF Enterprises, Inc., was dismissed with prejudice, and the cross-claims against the remaining parties—Sbarro Franchise Co., LLC, and Kahala Franchising, LLC—were dismissed without prejudice.

The case proceeded to a jury trial with Powell seeking relief from Park Plaza, ERMC, Edison, and Bryant. Powell sought relief from Edison and Bryant for battery and assault. She sought relief from Park Plaza and ERMC for negligence. Powell asserted that Hayes was a business invitee of Park Plaza and ERMC; accordingly, Park Plaza and ERMC had a duty to protect Hayes from criminal acts of third parties. Park Plaza and ERMC vigorously challenged the claim that Hayes was their business invitee. They insisted that he was a tenant whom they had no duty to protect from criminal acts of third parties. Powell prevailed on this issue, and the circuit court instructed the jury that Park Plaza and ERMC owed Hayes a duty as a business invitee on the premises.

The jury returned a $2,771,000 verdict in Powell's favor finding that Park Plaza and ERMC were 33 percent at fault, Edison was 34 percent at fault, and Bryant was 33 percent at fault. The jury's verdict was reduced to judgment. Later, Park Plaza and ERMC filed a

[5]Severed claims become independent actions, each of which would yield a final order upon completion. *Ellis v. Agriliance, LLC*, 2012 Ark. App. 549.

motion for judgment notwithstanding the verdict and alternatively a motion for new trial, which was denied. They also filed a motion to certify the judgment. The circuit court entered an amended judgment that included a Rule 54(b) certificate. Park Plaza and ERMC timely appealed.

On appeal, Park Plaza and ERMC contend that the circuit court erred by denying their motion for directed verdict and their motion for new trial. They argue that it was error to deny the directed-verdict motion because (1) they owed no duty to protect Hayes against harm resulting from criminal acts of third parties, (2) there was no substantial evidence that they breached any duty to Hayes, and (3) there was no substantial evidence that any breach caused Hayes's murder. They also argue that the circuit court erred in denying their motion for a new trial because (1) the circuit court erred as a matter of law in determining that Hayes was a business invitee, (2) substantial evidence did not support the verdict that Park Plaza and ERMC shared equal fault with the murderers, and (3) the circuit court erred in allowing evidence of irrelevant crimes that had previously occurred at the mall.

II. *Jurisdiction*

On September 20, 2017, our court dismissed this appeal for lack of jurisdiction due to the absence of a final order, reasoning that Park Plaza and ERMC's dismissals without prejudice of their cross-claims against Sbarro Franchise Co., LLC, and Kahala Franchising, LLC, acted as a bar to jurisdiction. Park Plaza and ERMC filed a petition for rehearing, and on November 8, 2017, we granted the petition. After due consideration, we concluded

that the dismissals without prejudice of these cross-claims did not preclude our court from exercising jurisdiction.

We reiterate the general rule that the dismissal of a claim without prejudice does not create finality. *Beverly Enters.–Ark., Inc. v. Hillier*, 341 Ark. 1, 3, 14 S.W.3d 487, 488 (2000). By contrast, the dismissal of a party to an action, with or without prejudice, is sufficient to obtain finality and invest jurisdiction in an appellate court. *Driggers v. Locke*, 323 Ark. 63, 913 S.W.2d 269 (1996).

The rationale for these rules provides important context. The dismissal without prejudice of a party is sufficient to create finality because "nothing requires a plaintiff to sue the prospective defendants simultaneously." *Driggers*, 323 Ark. at 66, 913 S.W.2d at 270. However, the dismissal of fewer than all claims against a party is insufficient because our courts seek to avoid piecemeal appeals. *Id.*

The plain language of the circuit court's dismissal orders as to Sbarro Franchise Co., LLC, and Kahala Franchising, LLC, provides only that the cross-claims—not the parties—are dismissed. However, there were no other pending claims against either entity. Thus, the practical effect of the nonsuits of these claims was to fully dismiss Sbarro Franchise Co., LLC, and Kahala Franchising, LLC, as parties to this litigation and put them in a position as though they had never been sued. *See, e.g.*, *Advanced Envtl. Recycling Techs., Inc. v. Advanced Control Solutions*, 372 Ark. 286, 275 S.W.3d 162 (2008). Accordingly, we proceed to the merits of the appeal.

III. *Duty*

The circuit court found that Hayes was a business invitee of Park Plaza and ERMC and that Park Plaza and ERMC owed him a duty to use ordinary care to maintain the premises in a reasonably safe condition. Park Plaza and ERMC contend that the circuit court erred by imposing this duty on them. We agree.

The issue of whether a duty exists—and what duty exists—is a question of law. *Yanmar Co., Ltd. v. Slater*, 2012 Ark. 36, 386 S.W.3d 439. Accordingly, we conduct a de novo review of whether Park Plaza and ERMC owed a duty to Hayes. *Gulfco of La. v. Brantley*, 2013 Ark. 367, 430 S.W.3d 7.

It is a general principle that a party is not liable in tort for harm resulting from the criminal acts of a third party absent certain special relationships. *First Commercial Tr. Co. v. Lorcin Eng'g*, 321 Ark. 210, 214–15, 900 S.W.2d 202, 204 (1995). One such special relationship is that of a business invitee, and a business may be held liable for foreseeable criminal acts committed against its patrons by third parties. *Boren v. Worthen Nat'l Bank*, 324 Ark. 416, 921 S.W.2d 934 (1996).

The parties fiercely contest whether Hayes was a tenant or a business invitee of Park Plaza and ERMC, and the evidence is as follows. At the time of the murder, Hayes was present in the mall in his capacity as an assistant manager of Sbarro, a tenant of Park Plaza. Sbarro's lease with Park Plaza included a provision that required Sbarro to pay a portion of its revenues to Park Plaza as rent.

Arkansas courts have squarely addressed the issue of whether a tenant is an invitee on his or her landlord's premises and have held that a tenant is not an invitee but has a right

equal to that of the landlord to exclusive possession of the property. *Wheeler v. Philips Dev. Corp.*, 329 Ark. 354, 947 S.W.2d 380 (1997). In addition, Arkansas has long adhered to the rule that a landlord has no duty to protect a tenant from criminal acts of third parties. *Bartley v. Sweetser*, 319 Ark. 117, 120, 890 S.W.2d 250, 251 (1994). Furthermore, our supreme court has also addressed the issue of whether a landlord has a duty to protect an employee of a tenant and has determined that, as a general principle, it does not. *See Lacy v. Flake & Kelley Mgmt.*, 366 Ark. 365, 235 S.W.3d 894 (2006).

The *Lacy* case is instructive. Lacy, an employee of a United States bankruptcy trustee that had offices in a building managed by Flake & Kelley, was abducted, robbed, and raped in the building's parking lot when she was leaving her office. She sued Flake & Kelley, and our supreme court held that Lacy was a tenant—not an invitee. Thus, Flake & Kelley had no duty to protect Lacy from criminal acts of third parties.

This appeal is substantially similar to *Lacy* insofar as Hayes was murdered while working for his employer, a tenant on the premises. However, Powell argues that this case is distinguishable because Sbarro's lease with Park Plaza included a provision that a portion of Sbarro's revenues would be paid to the mall. She focuses her argument on the definition of a business invitee providing that an invitee is "one induced to come onto property for the business benefit of the possessor." *Kay v. Kay*, 306 Ark. 322, 323, 812 S.W.2d 685, 686 (1991). Powell argues that the lease provision requiring Sbarro to pay a portion of its revenues as rent made Hayes a business invitee because his presence as an employee of Sbarro served as an economic benefit for Park Plaza and ERMC.

The Restatement (Second) of Torts § 332 (1965), which has been cited with approval by our courts, suggests that it is important that courts look at the purpose of a visit and the possessor's invitation when determining the relationship between a possessor of land and a visitor. *Tucker v. Sullivan*, 307 Ark. 440, 444, 821 S.W.2d 470, 472 (1991). Here, the purpose of Hayes's presence on the premises was because of his employment at Sbarro. Any benefit Park Plaza and ERMC derived from Hayes's presence was merely incidental, and all tenants provide some incidental economic benefits to their landlords in that they lease the space and potentially bring in business that makes the space attractive to other lessees.

When considering whether the incidental benefits Park Plaza and ERMC received from Hayes's presence in the mall were sufficient to make Hayes a business invitee, another important consideration is the public policy of our state. Arkansas courts have long recognized that "it is unfair to impose such a high duty of protection on the landlord absent an agreement or statute." *Lacy*, 366 Ark. at 369, 235 S.W.3d at 897 (citing *Bartley v. Sweetser*, 319 Ark. at 121, 890 S.W.2d at 251). The rule imposing no duty on a landlord to protect a tenant from criminal acts of third parties persists because of

> judicial reluctance to tamper with the common law concept of the landlord-tenant relationship, the notion that the act of a third person in committing an intentional tort or crime is a superseding cause of harm to another . . .; the often times difficult problem of determining foreseeability of criminal acts; the vagueness of the standard which the landlord must meet; the economic consequences of the imposition of the duty; and the conflict with public policy allocating the duty of protecting citizens from criminal acts to the government rather than the private sector.

Id.

To hold that the incidental benefit Park Plaza and ERMC received from Hayes's presence in the mall was sufficient to make Hayes a business invitee would be contrary to

the established law and also contrary to our state's public policy. Accordingly, we hold that the circuit court erred as a matter of law when it found that Hayes was a business invitee of Park Plaza and ERMC.

We must also briefly address three other possible bases for affirmance. Specifically, we consider whether (1) ERMC's liability to Hayes arose out of his status as ERMC's business invitee, (2) Hayes was a business invitee of Park Plaza and ERMC because he made a purchase in the mall on the day of his murder, and (3) Park Plaza and ERMC either expressly agreed to a duty to Hayes or assumed a duty to Hayes.

First, we address Powell's argument that ERMC was not Hayes's landlord and that its liability arises out of its failure to perform its contract for security services. We do not reach the merits of this argument because it is not properly before our court.

Powell criticizes the circuit court for treating Park Plaza and ERMC as one entity, but this criticism is misplaced. The circuit court treated Park Plaza and ERMC as the same entity because that is how Powell presented her case to the circuit court. Throughout the litigation, the parties operated as though Park Plaza and ERMC were the same. They are represented by the same counsel, and they defended this lawsuit using the same arguments. Most significantly, the jury was instructed that Park Plaza and ERMC owed Hayes a duty as an invitee on the premises. This instruction was neither objected to nor was an alternative offered. Even if the instructions given the jury were incorrect, it is well settled that under the doctrine of invited error one may not complain on appeal of an erroneous action of a circuit court if he or she had induced or acquiesced in that action. *J.I. Case Co. v. Seabaugh*, 10 Ark. App. 186, 189, 662 S.W.2d 193, 195 (1983). Furthermore, our court cannot affirm

based on a theory of liability never considered by the jury. *Am. Ry. Express Co. v. Davis*, 152 Ark. 258, 238 S.W. 50 (1922). Accordingly, we summarily dispose of this argument.

Powell also claims that Hayes was a business invitee because he purchased almonds at a business in the mall on the day of his murder. Powell argues that Hayes's purchase made him a patron of the businesses contained in the mall and that it was illustrative of the interrelatedness of the mall and its tenants. Once again, we easily dispose of this argument—this time because the evidence does not support it. A mall employee testified that she "pulled a bag full and took it to him." There is no evidence that he purchased the almonds.

A final issue presented in this appeal is whether Park Plaza and ERMC either expressly agreed to a duty to Hayes or assumed a duty to Hayes. An express agreement or assumption of duty can supersede the general rule that a landlord has no duty to protect tenants or guests from criminal acts of third parties. *Lacy*, 366 Ark. at 365, 235 S.W.3d at 897.

The circuit court's jury instructions drive our analysis of this issue. The jury was not instructed on whether Park Plaza and ERMC expressly agreed to a duty to protect Hayes or whether they assumed this duty. The jury was instructed only that their duty to Hayes arose out of his status as their business invitee. Once again, even if the instructions given to the jury were incorrect, it is well settled that under the doctrine of invited error one may not complain on appeal of an erroneous action of a circuit court if he or she had induced or acquiesced in that action. *J.I. Case Co.*, 10 Ark. App. at 189, 662 S.W.2d at 195. We hold that this issue is not preserved for our review.

IV. *Conclusion*

The question of whether a duty exists is always a question of law, and we hold that the circuit court erred as a matter of law by finding that Park Plaza and ERMC owed a duty to Hayes as a business invitee. Accordingly, we reverse and dismiss without considering the remaining arguments on appeal.

Substituted opinion issued on grant of rehearing; reversed and dismissed.

ABRAMSON, GLOVER, WHITEAKER, and HIXSON, JJ., agree.

BROWN, J., dissents.

WAYMOND M. BROWN, Judge, dissenting. The central issue in this case concerns whether Park Plaza owed Hayes a duty to protect him from the criminal acts of third parties. The majority, relying on our supreme court's holding in *Lacy v. Flake & Kelley Management, Inc.*, 366 Ark. 365, 235 S.W.3d 894 (2006), holds that the circuit court erred as a matter of law when it found that Hayes was a business invitee of Park Plaza and ERMC. I, finding the case at bar distinguishable from the facts in *Lacy*, must respectfully dissent.

As an initial matter, Park Plaza and ERMC repeatedly insist that to affirm the circuit court's decision would require this court to overturn a century of Arkansas law that draws a clear distinction between tenants and their employees on one hand, and business invitees on the other. This contention is simply untrue. First, the so-called long-standing, well-settled law on the issue is comprised of one case. One single case. One stand-alone case hardly well-settled law makes. Second, that one case, *Lacy*, is easily distinguishable from the facts presented here.

Although the relevant facts of *Lacy* are provided in the majority's opinion, for purposes of clarity and refreshment, I will supply them herein. Lacy was an employee of the bankruptcy system that had offices in the Mercantile Bank Building, which was subsequently acquired by U.S. Bank and managed by Flake & Kelley Management, Inc. When leaving the office one afternoon, Lacy was abducted from the parking lot, robbed, and raped by four men. She filed a complaint against Flake & Kelley as the managing/leasing agent, U.S. Bank as the landlord, and others, alleging that they were negligent in their failure to provide adequate security. The court held that Lacy was a tenant, and not an invitee; therefore, U.S. Bank had no duty to ensure that the premises were safe.

An "invitee" is "one induced to come onto property for the business benefit of the possessor." *Bader v. Lawson*, 320 Ark. 561, 564, 898 S.W.2d 40, 42 (1995). There are two types of invitees—public and business. *Lively v. Libbey Mem'l Physical Med. Cent., Inc.*, 311 Ark. 41, 841 S.W.2d 609 (1992). A public invitee is invited to enter or remain on the property as a member of the public for a purpose for which the property is held open to the public. Id. A business invitee is invited to enter or remain on the property for a purpose directly or indirectly connected with the business dealings of the possessor of the property. Id. While our long-standing general rule is that, absent a statute or agreement, a landlord is under no legal obligation to a tenant for injuries sustained in common areas, this general rule does not apply to injuries sustained by business invitees on business premises. *Boren v. Worthen Nat'l Bank*, 324 Ark. 416, 921 S.W.2d 934 (1996).

In its reliance on *Lacy*, the majority places little importance on the factor that distinguishes it from the case at hand. Lacy never alleged that she was on the premises for

the economic benefit of the landlord. However, Powell has contended from the outset that Hayes was indeed on the mall's premises for the benefit of the landlord. To support this contention, Powell directs the court to a provision in the lease between Park Plaza and Hayes's employer, Sbarro. The relevant provision requires Sbarro to pay Park Plaza a percentage of its gross proceeds in addition to rent. Provisions of this kind provide landlords with benefits beyond what is normally derived from a fixed rent.

Although the lease also contains a provision that states that the aforementioned gross profit rental calculation does not change the parties' status in any way, Hayes was not a party to the lease. So while the provision may be binding as between Park Plaza and Sbarro, it is not binding between Park Plaza and Hayes, as Hayes was not a signatory on the lease agreement.

In holding that Lacy was a tenant and not a business invitee, the *Lacy* court refrained from going a step further and opining that an individual could not have dual statuses—i.e., it stopped short of holding that an employee of a tenant could not also be a business invitee. In fact, the court appears to have implied the opposite, specifically noting that "Lacy has made no allegations that she was on the property for the benefit of U.S. Bank," which leaves the door open for the precise situation presented here.

The majority opinion refers to any benefit Park Plaza and ERMC derived from Hayes's presence on the premises as an 'incidental benefit" insufficient to convert Hayes's status to a business invitee. Citing *Tucker v. Sullivan*, the majority states the importance of looking to the purpose of a visit when determining the relationship between a possessor of land and a visitor. 307 Ark. 440, 821 S.W.2d 470 (1991). In *Tucker*, our supreme court held

that a woman, who was living with her fiancé, was a licensee and not an invitee when she was burned in a household accident. The court opined that although she paid some of the bills, the main purpose of her presence was for social reasons and not business. Any economic benefit acquired through the living arrangement was incidental. Here, there has been no allegation that Hayes was on the mall's premises for social reasons. His presence was for purely business purposes. Therefore, this weighing test suggested in *Tucker*, is irrelevant.

Park Plaza and ERMC contend, and the majority so holds, that any benefit obtained from Hayes's presence was merely incidental, and all tenants provide some incidental economic benefits to their landlords. However, as Powell points out, the very nature of an office building, as in *Lacy*, is vastly different from the nature of a mall. People do not go to an office building to shop around at all the other offices. People go to office buildings for very specific reasons and to see specific individuals in specific offices. It is a fixed task. No one is likely to be enticed to patronize other offices in a building because of the proximity to their original destination.

The only connection between offices in an office building is due to geography. They do not depend on one another to attract business. A shopping mall is much more interrelated than an office building. People may go to a mall for a specific purpose, but while there, may be tempted to visit other stores or businesses. The success of individual businesses in a mall brings increased traffic flow to the mall and leads to more spending. That is one of the reasons businesses choose to place stores in shopping malls, to derive an economic benefit from the stores around them. Therefore, a good employee, or for instance, a dedicated

assistant manager of Sbarro's, may lead to a thriving restaurant, which in turn provides an economic benefit to a landlord when the rental rate is based on a percentage of profits.

Briefly addressing the foreseeability issue, due to the hostile climate of the country, in general, and the increasingly violent climate of Little Rock, in particular, no one would be shocked to hear that there was a robbery, rape, kidnapping, or murder at Park Plaza. A review of recent news headlines makes clear that no place in America is safe anymore— not even the most sacred of institutions, such as churches, mosques, or synagogues, and not even the most innocent of our population, our children, are safe as daycares and schools have been targets for multiple, recent horrendous acts of violence. No place is off limits. Consequently, denying foreseeability is becoming harder to do.

Park Plaza and ERMC were negligent in failing to take reasonable steps to protect patrons of the mall and other invitees. Better security must be provided. Competent security guards must be hired. Guards must be trained to do more than "observe." Security guards should do more than provide the appearance of safety. Merely observing criminal acts is insufficient and has costs, not only in terms of economics, but also in terms of human lives. While I recognize that not all violence can be prevented, even with the most stringent of security protocols in place, there is no excuse for the failure to utilize any safety measures whatsoever.

In summation, due to the easily distinguishable facts, I cannot agree that *Lacy* is dispositive of the exact case before this court. It is my understanding that the *Lacy* court contemplated that there could have been a different outcome, had Lacy alleged that she was on the premises for the economic benefit of her landlord. Why else would the court have

found it important to note that she made no such allegation? For these reasons, I would affirm the circuit court's finding that Park Plaza and ERMC owed Hayes a duty as a business invitee.

Munson, Rowlett, Moore & Boone, P.A., by: *Mark Breeding*; and *Husch Blackwell LLP*, by: *Mark G. Arnold, pro hac vice*, and *JoAnn T. Sandifer*, *pro hac vice*, for appellants.

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