[Cite as *Vidovich v. Little Joe, L.L.C.*, 2024-Ohio-4606.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

KATE O. VIDOVICH, ADMINISTRATOR	:	
	:	C.A. No. 2024-CA-6
Appellant	:	
	:	Trial Court Case No. 22CV0308
v.	:	
	:	(Civil Appeal from Common Pleas
LITTLE JOE LLC dba LITTLE JOES RESTAURANT, ET AL.	:	Court)
	:	
Appellees	:	

. . . . . .

O P I N I O N

Rendered on September 20, 2024

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PAUL W. FLOWERS, KENDRA DAVITT, ROGER SOROKA, & MATTHEW BODEMAN, Attorneys for Appellant

MITCHELL M. TALLAN & KIM SCHELLHAAS, Attorneys for Appellee

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WELBAUM, J.

{¶ 1} Plaintiff-Appellant, Kate Vidovich, administrator for the Estate of Deshon

Benton ("Vidovich"), appeals from a summary judgment granted in favor of Defendant-Appellee, Little Joe, LLC, dba Little Joes Restaurant ("Little Joe"). According to Vidovich, the trial court erred in applying a subjective test to the risk of foreseeable harm of injury to Benton, a business invitee, and in requiring that Little Joe foresee a substantial risk of the precise harm that occurred.

{¶ 2} We conclude that the trial court did not err in granting summary judgment to Little Joe, which owned a convenience store at which a third party shot and killed Benton. Business owners do have a duty to warn or protect business invitees from criminal acts of third parties when they know or should know of substantial risks of harm to invitees on premises the owner possesses and controls. However, the third party's acts must be foreseeable for a duty to arise. To assess this, courts use a totality of the circumstances test in which they consider the location and character of the business and past crimes of a similar nature. Under this test, the totality of the circumstances must be somewhat overwhelming before an owner will be held to be on notice of and therefore under a duty to protect against the criminal acts of others. Here, applying this test and construing the facts in Vidovich's favor, Little Joe did not have a duty to protect Benton from the gunman's criminal actions. Accordingly, the trial court's judgment will be affirmed.

I. Facts and Course of Proceedings

{¶ 3} As noted, this action arose from the murder of Deshon Benton. In July 2022, Racquel Fowler, as administrator of Benton's estate, filed a wrongful death and survival action against Little Joe, William Portis II, and John Doe. The complaint alleged that

Little Joe owned and operated a convenience store on Center Street in Springfield, Ohio, that violent crimes like murder, shootings, assaults, and other violent acts had been committed on Little Joe's premises in the months before December 2020, and that Little Joe was aware of this and could have reasonably foreseen that other violent crimes would be committed on its premises. The complaint further alleged that on December 12, 2020, Benton was a business invitee on Little Joe's premises, was struck by bullets Portis fired, and ultimately died as a result. Complaint, ¶ 10-14 and 23.

{¶ 4} Fowler alleged various negligent, reckless, and wanton acts on Little Joe's part independent of the shooting, including: failing to provide security staff for the store; failing to provide employees with proper training; failing to check patrons for firearms; allowing Portis to enter its premises with a firearm; failing to hire or retain a proper number of employees to operate the store; and failing to warn patrons of potential danger. *Id*. at ¶ 16, 18, 20, 21 and 34. Fowler sought monetary damages and also requested punitive damages based on the actions of Little Joe and Portis.

{¶ 5} In September 2022, Little Joe filed an answer to the complaint and included a cross-claim against Portis. The parties then filed an agreed scheduling order in October 2022, which set a November 2023 trial date, a March 2023 deadline for disclosing experts, a July 2023 deadline for dispositive motions, and an August 31, 2023 discovery deadline. In February 2023, a notice of suggestion of Fowler's death was filed, and Vidovich was later substituted as administrator.

{¶ 6} Based on the parties' joint motion, the court continued the deadline for identifying experts and disclosing expert reports to June 2, 2023. In July 2023, Little Joe

moved for a default judgment on its cross-claim against Portis because Portis had failed to file an answer to either the complaint or the cross-claim. Little Joe then asked the court to let it file a motion for summary judgment on or before the discovery cut-off date; Vidovich opposed the motion, since the deadline for filing dispositive motions had passed. On August 21, 2023, Little Joe filed a reply supporting its request and also attached the proposed summary judgment motion. The trial court, without discussion, found good cause and extended the deadline for filing dispositive motions to August 31, 2023. Subsequently, Little Joe filed its summary judgment motion, and Vidovich responded. After Little Joe filed a reply memorandum, the trial court granted summary judgment to Little Joe on November 13, 2023. The following day, Vidovich filed a motion seeking a default judgment against Portis. However, the trial court failed to rule on the motion, and Vidovich then, on December 21, 2023, dismissed the remaining claims without prejudice. This timely appeal followed.

II. Alleged Error in Granting Summary Judgment

{¶ 7} Vidovich's sole assignment of error states that:

> The Trial Court Erred, as a Matter of Law, by Granting Summary Judgment upon Plaintiff-Appellant's Wrongful Death and Survivorship Claims.

{¶ 8} Vidovich makes two primary claims: (1) the trial court adopted a subjective "somewhat overwhelming" test for deciding foreseeability and ignored Ohio Supreme Court authority which only requires "knowledge of 'a substantial risk of harm to the invitees

on the premises' "; and (2) the court incorrectly required her to meet the impossible standard of showing that Little Joe should have foreseen the "precise harm," i.e., a premeditated murder, when all that was required was that " '*some* risk of harm would be foreseeable to the reasonably prudent person.' " (Emphasis in original.) Vidovich Brief, p. 17-18, quoting *Simpson v. Big Bear Stores Co*., 73 Ohio St.3d 130 (1995), and *Cromer v. Children's Hosp. Med. Ctr*. *of Akron*, 2015-Ohio-229, ¶ 24. Before we address these points, we will outline relevant summary judgment standards.

A. Summary Judgment Standards

{¶ 9} In Ohio, summary judgment law and applicable review standards are well-settled. "The procedure set forth in Ohio Civ.R. 56 is modeled after the federal rule that authorizes summary judgment in appropriate cases." *Byrd v. Smith*, 2006-Ohio-3455, ¶ 10. " 'Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.' " *Id*. at ¶ 11, quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

{¶ 10} "Summary judgment is appropriate if (1) no genuine issue of any material fact remains, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and construing the evidence most strongly in favor of the nonmoving party, that conclusion is

adverse to the party against whom the motion for summary judgment is made." *State ex rel. Duncan v. Mentor City Council*, 2005-Ohio-2163, ¶ 9, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977). " 'As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.' " *Turner v. Turner*, 67 Ohio St.3d 337, 340 (1993), quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986).

{¶ 11} When reviewing summary judgment decisions, appellate courts apply a de novo standard of review. *A.J.R. v. Lute*, 2020-Ohio-5168, ¶ 15. In this type of review, appellate courts independently review evidence without deferring to a trial court's findings. *Smathers v. Glass*, 2022-Ohio-4595, ¶ 30, citing *Wilmington Savs. Fund Soc., FSB v. Salahuddin*, 2020-Ohio-6934, ¶ 20 (10th Dist.). Thus, a reviewing court "examines the evidence available in the record, including deposition or hearing transcripts, affidavits, stipulated exhibits, and the pleadings, *see* Civ.R. 56(C), and determines, as if it were the trial court, whether summary judgment is appropriate." *Id.*, citing *Wilmington* at ¶ 19. With these standards in mind, we turn to Vidovich's arguments.

B. Foreseeability

{¶ 12} In granting summary judgment to Little Joe, the trial court found insufficient evidence for a jury to reasonably conclude that Little Joe should have foreseen Benton's murder. In this regard, the court stated: "The culture of drugs and weapons in this urban area, without evidence of substantially similar violent crime(s) occurring on (not across

the street) Little Joe's premises may amount to foreseeability of some general risk of harm, but does not amount to foreseeability of a substantial risk of the precise harm that befell Mr. Benton." Decision Entry & Order Granting Defendant's Motion for Summary Judgment and Default Judgment ("SJ Decision") (Nov. 13, 2023), p. 5.

{¶ 13} Before reaching this conclusion, the court mentioned several facts related to foreseeability, including: (1) lots of activity involving drug dealing occurred "directly **outside**" the store; (2) drug dealing took place "in the **neighborhood**" and appeared to be generally accepted; (3) persons smoked marijuana "**outside**" the store; (4) while a detective described the area as one of high crime, he only generally referenced incidents of a violent nature "**outside**" the store, like shots fired in a 2001 shootout that began elsewhere, and shots fired in the area around the store; (5) another detective said he could not say the south end (where the store was located) had higher rates of crime – instead, crime was all over the city; (6) patrons openly brandished weapons inside the store as shown in videos; (7) shootings, assaults, and drug-dealing were common in the neighborhood where the store was located; (8) as the result of an altercation, a murder involving a different person occurred across the street seven months before Benton's shooting; and (9) Little Joe contacted the police department in April 2017 to have Portis removed from its property. (Emphasis in original.) *Id*. at p. 2-3.

{¶ 14} As noted, Vidovich argues that the court erred in adopting a subjective "somewhat overwhelming" test for deciding foreseeability and ignored Ohio Supreme Court authority which only requires an owner to have knowledge of a substantial risk of harm to invitees on the owner's premises. To this point, the trial court did apply a test

which required the totality of the circumstances to be "somewhat overwhelming" in order to create a duty for the owner of a premises. SJ Decision at p. 3.

{¶ 15} For purposes of establishing actionable negligence, a party "must show the existence of a duty, a breach of the duty, and an injury resulting proximately therefrom." *Menifee v. Ohio Welding Products, Inc*., 15 Ohio St.3d 75, 77 (1984). " 'Duty, as used in Ohio tort law, refers to the relationship between the plaintiff and the defendant from which arises an obligation on the part of the defendant to exercise due care toward the plaintiff.' " *Wallace v. Ohio Dept. of Commerce*, 2002-Ohio-4210, ¶ 23, quoting *Commerce & Industry Ins. Co. v. Toledo*, 45 Ohio St.3d 96, 98 (1989).

{¶ 16} "Generally, under Ohio law, there is no duty to prevent a third person from causing harm to another absent a special relation between the parties." *Simpson*, 73 Ohio St.3d at 133. In *Simpson*, the court also stated that "[a] business owner has a duty to warn or protect its business invitees from criminal acts of third parties when the business owner knows or should know that there is a substantial risk of harm to its invitees on the premises in the possession and control of the business owner." *Id*. at syllabus. However, "[a]n occupier of premises for business purposes is not an insurer of the safety of his business invitees while they are on those premises." *Howard v. Rogers*, 19 Ohio St.2d 42 (1969), paragraph two of the syllabus.

{¶ 17} "Even when a special relationship exists, a defendant is not liable unless the actions of the third party were foreseeable." *LaMusga v. Summit Square Rehab, LLC*, 2017-Ohio-6907, ¶ 15 (2d Dist.), citing *Maier v. Serv-All Maintenance, Inc.*, 124 Ohio App.3d 215, 221 (8th Dist. 1997). " 'The test for foreseeability is whether a reasonably

prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act. . . . The foreseeability of harm usually depends on the defendant's knowledge.' " *Westfield Ins. v. Chapel Elec. Co. LLC*, 2024-Ohio-2736, ¶ 63 (2d Dist.), quoting *Menifee* at 77. "Until specific conduct involving an unreasonable risk is made manifest by the evidence presented, there is no issue to submit to the jury." *Menifee* at 77, citing *Englehardt v. Philipps*, 136 Ohio St. 73 (1939).

{¶ 18} To assess the foreseeability of third-party criminal acts, Ohio courts have used two different tests. One focuses on whether "prior *similar* acts" occurred, and the other uses "a 'totality of the circumstances' approach." (Emphasis in original.) *Hickman v. Warehouse Beer Sys., Inc*., 86 Ohio App.3d 271, 274-275 (2d Dist. 1993), discussing *Reitz v. May Co. Dept. Stores*, 66 Ohio App.3d 188, 192 (8th Dist. 1990) (totality), and *Taylor v. Dixon*, 8 Ohio App.3d 161 (10th Dist. 1982) (prior similar acts).[1] Our district did not adopt either approach in *Hickman* but found the landowner was not liable under either theory. *Id.* at 278.

{¶ 19} In two later cases, we employed the "totality of the circumstances approach" to evaluate foreseeability. *See Silvers v. Clay Twp. Police Dept*., 2018-Ohio-2970, ¶ 57 (2d Dist.) (negligent hiring or retention case); *M.B. v. Spence*, 2014-Ohio-1280, ¶ 23 (2d Dist.) (negligence claim against school district for student rape that occurred off premises). Ohio appellate districts using the totality approach, other than those already mentioned, include: *Wheatley v. Marietta College*, 2016-Ohio-949, ¶ 65 (4th Dist.);

[1] In later cases, the Tenth District Court of Appeals has used the totality of the circumstances approach. *E.g., Davis v. Hollins*, 2019-Ohio-1789, ¶ 13 (10th Dist.); *Wheeler v. Ohio State Univ.*, 2011-Ohio-6295, ¶ 17 (10th Dist.).

McLaughlin v. Speedway, L.L.C., 2016-Ohio-3280, ¶ 19 (5th Dist.); *Clark v. BP Oil*, 2005-Ohio-1383, ¶ 11 (6th Dist.); *Howze v. Carter*, 2009-Ohio-5463, ¶ 20 (9th Dist.); *Mack v. Ravenna Men's Civic Club*, 2007-Ohio-2431, ¶ 19 (11th Dist.); and *Colwell v. Hamilton Cty. Anglers, Inc*., 2007-Ohio-4644, ¶ 12 (12th Dist.) In contrast, the First and Third Districts use the "prior similar acts" test. *See Whisman v. Gator Invest. Properties, Inc.*, 149 Ohio App.3d 225, 234 (1st Dist. 2002), and *Alexander v. The Pub, Inc*., 1999 WL 378375, *2-3 (3d Dist. May 14, 1999), citing *Rush v. Lawson Co.*, 65 Ohio App.3d 817, 820 (3d Dist. 1990). The Seventh District has also described both tests as "generally accepted." *McCullion v. Ohio Valley Mall Co*., 2000 WL 179368, *5 (7th Dist. Feb. 10, 2000). Nonetheless, the majority of districts use the totality of the circumstances approach.

{¶ 20} "Under the totality of the circumstances test, a court may examine relevant evidence that includes the location and character of the business and past crimes of a similar nature." *Clark* at ¶ 11, citing *Reitz,* 66 Ohio App.3d at 193-194 (8th Dist.). In applying the similar prior acts test, courts must decide whether an owner could have anticipated the event due to "prior similar activities on its premises." *Whisman* at 234, citing *Montgomery v. Young Men's Christian Assn. of Cincinnati*, 40 Ohio App.3d 56, 57 (1st Dist.1987).

{¶ 21} Both tests have been criticized, and courts have even questioned whether foreseeability should be used to evaluate duty. Because the Supreme Court of Ohio has not yet weighed in on this point and Ohio appellate districts use different approaches, we will briefly outline additional views.

{¶ 22} Some courts in other jurisdictions have rejected both "totality" and "similar prior acts" in favor of a third test, which states that "the foreseeability of harm and the gravity of harm must be balanced against the commensurate burden imposed on the business to protect against that harm." *McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d 891, 902 (Tenn. 1996). This has been described as a middle approach between the prior incidents test, which is "too broad, insulating businesses with a 'one free assault rule,' " and the "totality of the circumstances approach," which "has been criticized as too broad, creating an 'unqualified duty to protect customers' and being even 'less predictable' than the prior incidents rule." *Cullum v. McCool*, 432 S.W.3d 829, 834, fn. 4 (Tenn. 2013), quoting *McClung* at 899-900.

{¶ 23} The Supreme Court of Indiana has adopted yet another approach, due to its conclusion that "foreseeability" differs depending on whether it is used to analyze duty or proximate cause, since foreseeability is part of both concepts. See *Goodwin v. Yeakle's Sports Bar & Grill, Inc*., 62 N.E.3d 384 (Ind. 2016). In *Goodwin*, the court discussed the fact that foreseeability is a question of law in the context of duty but is a question of fact for purposes of proximate cause. In this regard, the court noted the following comments from a lower court decision, which had said that:

> "[T]he foreseeability component of the duty analysis must be something different than the foreseeability component of proximate cause. More precisely, it must be a lesser inquiry; if it was the same or a higher inquiry it would eviscerate the proximate cause element of negligence altogether. If one were required to meet the same or a higher burden of proving

> foreseeability with respect to duty, then it would be unnecessary to prove foreseeability a second time with respect to proximate cause. Additionally, proximate cause is normally a factual question for the jury, while duty is usually a legal question for the court. As a result, the foreseeability component of proximate cause requires an evaluation of the facts of the actual occurrence, while the foreseeability component of duty requires a more general analysis of the broad type of plaintiff and harm involved, without regard to the facts of the actual occurrence."

Goodwin at 390, quoting *Goldsberry v. Grubbs*, 672 N.E.2d 475, 479 (Ind.App. 1996).

{¶ 24} In view of this distinction, the Supreme Court of Indiana rejected the totality of the circumstances test (which focused on a case's particular circumstances) as "ill-suited to determine foreseeability in the context of duty." *Id*. at 392. The court, therefore, adopted *Goldsberry's* approach and concluded that " 'the foreseeability component of duty requires a more general analysis of the broad type of plaintiff and harm involved, without regard to the facts of the actual occurrence.' " *Id*. at 393, quoting *Goldsberry* at 479. Regarding the case before it, which involved a shooting at a bar, the court found "[t]he broad type of plaintiff here is a patron of a bar and the harm is the probability or likelihood of a criminal attack, namely: a shooting inside a bar." *Id*. Believing that bar owners did not "routinely contemplate" that one patron might shoot another and that imposing a duty of protection on bar owners would make them insurers of patrons' safety, the court found that "a shooting inside a neighborhood bar is not foreseeable as a matter of law." *Id*. at 394.

{¶ 25} In a companion case decided the same day, the court conducted the same type of analysis and considered "(1) the broad type of plaintiff and (2) the broad type of harm" for purpose of deciding a landowner's duty for activities on the premises. *Rogers v. Martin*, 63 N.E.3d 316, 325 (Ind. 2016). In that case, which involved a brawl at a party, the court considered whether a homeowner should "take precautions to prevent a co-host from fighting with and injuring a house-party guest." *Id*. at 326. In this vein, the court commented that: "Although house parties can often set the stage for raucous behavior, we do not believe that hosts of parties routinely physically fight guests whom they have invited. Ultimately, it is not reasonably foreseeable for a homeowner to expect this general harm to befall a house-party guest; rather, to require a homeowner to take precautions to avoid this unpredictable situation would essentially make the homeowner an insurer for all social guests' safety. Accordingly, [the homeowner] had no duty to take reasonable precautions to protect" the victim from others' conduct. *Id*.

{¶ 26} In yet another approach, some jurisdictions have held that: "Foreseeable risk is an element in the determination of negligence, not legal duty. In order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence." *A.W. v. Lancaster Cty. School Dist. 0001*, 280 Neb. 205 (2010), paragraph 12 of the syllabus.

{¶ 27} *A.W.* involved a sexual assault of a student on school premises by an unauthorized person whom employees had seen in the building and failed to remove. *Id*. at 207-208. The trial court granted summary judgment to the school, finding the sexual assault was not foreseeable and that incidents in police reports the plaintiff provided were

insufficiently similar to place the school on notice of the possibility of an intruder's sexual assault. *Id*. at 209.

{¶ 28} In considering this matter, the Supreme Court of Nebraska remarked that it previously had treated foreseeability of particular injuries as a legal question because "existence of a legal duty is a question of law." *Id*. at 211. The court then said: "This places us in the peculiar position, however, of deciding questions, as a matter of law, that are uniquely rooted in the facts and circumstances of a particular case and in the reasonability of the defendant's response to those facts and circumstances." *Id*. In this regard, the court stated:

> For that reason, the use of foreseeability as a determinant of duty has been criticized, most pertinently in the recently adopted Restatement (Third) of Torts. The Restatement (Third) explains that because the extent of foreseeable risk depends on the specific facts of the case, courts should leave such determinations to the trier of fact unless no reasonable person could differ on the matter. Indeed, foreseeability determinations are particularly fact dependent and case specific, representing "a [factual] judgment about a course of events . . . that one often makes outside any legal context." So, by incorporating foreseeability into the analysis of duty, a court transforms a factual question into a legal issue and expands the authority of judges at the expense of juries or triers of fact.

A.W. at 212, quoting *Fazzolari By & Through Fazzolari v. Portland School Dist. No. 1J*, 303 Or. 1, 4 (1987), and discussing Restatement of the Law (3d), Torts: Liability for

Physical and Emotional Harm, § 7, Comment j (2010).

{¶ 29} The court found incorporating foreseeability into duty "specially peculiar because decisions of foreseeability are not particularly 'legal,' in the sense that they do not require special training, expertise, or instruction, nor do they require considering far-reaching policy concerns. Rather, deciding what is reasonably foreseeable involves common sense, common experience, and application of the standards and behavioral norms of the community – matters that have long been understood to be uniquely the province of the finder of fact." *Id*. In addition, the court stressed that "[d]uty rules are meant to serve as broadly applicable guidelines for public behavior, i.e., rules of law applicable to a category of cases. But foreseeability determinations are fact specific, so they are not categorically applicable, and are incapable of serving as useful behavioral guides. And, as the Arizona Supreme Court explained, '[r]eliance by courts on notions of "foreseeability" also may obscure the factors that actually guide courts in recognizing duties for purposes of negligence liability.' " *A.W.* at 212-213, quoting *Gipson v. Kasey*, 214 Ariz. 141 (2007).

{¶ 30} As a result, the Supreme Court of Nebraska found "the clarification of the duty analysis contained in the Restatement (Third) of Torts, § 7, to be compelling" and adopted it. *Id*. at 218. The court then "expressly" held "that foreseeability is not a factor to be considered by courts when making determinations of duty." *Id*. Some other jurisdictions have also taken this approach. *See Gipson* at 144; *Thompson v. Kaczinski*, 774 N.W.2d 829, 835 (Iowa 2007); *DeSousa v. Iowa Realty Co*., 975 N.W.2d 416, 420 (Iowa 2022) (noting that after its decision in *Thompson*, the court would "consider only

two factors in making a duty determination: (1) the relationship between the parties and (2) public policy . . . 'In short, a lack of duty may be found if either the relationship between the parties or public considerations warrants such a conclusion' ") (Citation omitted.); *Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P.*, 2014-NMSC-014, ¶ 1.

{¶ 31} Under the Restatement (3d) of Torts,

> (a) An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.
>
> (b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.

Restatement (Third) of Torts: Physical and Emotional Harm at § 7

{¶ 32} Further, Comment j to § 7 explains the proper role of foreseeability as follows:

> Foreseeable risk is an element in the determination of negligence. In order to determine whether appropriate care was exercised, the factfinder must assess the foreseeable risk at the time of the defendant's alleged negligence. The extent of foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is foreseeable. Thus, for reasons explained in Comment i, courts should leave such determinations to juries unless no reasonable person could differ

on the matter.

A no-duty ruling represents a determination, a purely legal question, that no liability should be imposed on actors in a category of cases. Such a ruling should be explained and justified based on articulated policies or principles that justify exempting these actors from liability or modifying the ordinary duty of reasonable care. These reasons of policy and principle do not depend on the foreseeability of harm based on the specific facts of a case. They should be articulated directly without obscuring references to foreseeability.

Courts do appropriately rule that the defendant has not breached a duty of reasonable care when reasonable minds cannot differ on that question. *See* Comment i. These determinations are based on the specific facts of the case, are applicable only to that case, and are appropriately cognizant of the role of the jury in factual determinations. A lack of foreseeable risk in a specific case may be a basis for a no-breach determination, but such a ruling is not a no-duty determination. Rather, it is a determination that no reasonable person could find that the defendant has breached the duty of reasonable care.

Despite widespread use of foreseeability in no-duty determinations, this Restatement disapproves that practice and limits no-duty rulings to articulated policy or principle in order to facilitate more transparent explanations of the reasons for a no-duty ruling and to protect the traditional

function of the jury as factfinder.

Id., Comment j. For a full discussion of this point, *see* Reporters' Note to Comment j.

{¶ 33} An example of such a policy would be a liquor distributor who sells alcohol to a casino. The casino then sells liquor to a patron who later, while intoxicated and driving, injures another. The reason for finding no duty in that instance is that "the 'legislature wanted to limit liability for alcohol-related injuries and deaths resulting from the sale or service of alcohol to those who actually exercised some degree of control over the service or consumption of alcohol.' " *Rodriguez*, 2014-NMSC-014, at ¶ 10, quoting *Chavez v. Desert Eagle Distributing Co. of N.M*., 2007-NMCA-018, ¶ 31, *overruled in part on other grounds in Rodriguez*.

{¶ 34} Another approach to the duty issue is to deem "foreseeability a question for the jury, at least when varying inferences are possible." *Scott v. Dyno Nobel, Inc.*, 967 F.3d 741, 746 (8th Cir. 2020) (interpreting Missouri law).

{¶ 35} We have not been asked to adopt a particular approach, and would not do so anyway, because our district has used the totality of the circumstances test for many years. Part of this approach is to include the "somewhat overwhelming" component, as we noted in *Spence*, i.e., where we said that " 'the totality of the circumstances must be somewhat overwhelming before a [defendant] will be held to be on notice of and therefore under the duty to protect against the criminal acts of others.' " *Spence*, 2014-Ohio-1280, at ¶ 23 (2d Dist.), quoting *Reitz*, 66 Ohio App.3d at 193-194 (8th Dist.). Consequently, the trial court did not err in "adopting" this approach. Vidovich Brief, p. 17. The approach the court used was already the law.

{¶ 36} Furthermore, while arguments can be made about considering facts of individual cases, "[t]he fact that a question of law involves a consideration of the facts or the evidence, does not turn it into a question of fact or raise a factual issue; nor does that consideration involve the court in weighing the evidence or passing upon its credibility." *O'Day v. Webb*, 29 Ohio St.2d 215 (1972), paragraph two of the syllabus.

{¶ 37} As noted, Vidovich further argues that the trial court erred in focusing on whether Little Joe should have foreseen a substantial risk of the "precise harm" that befell Benton. According to Vidovich, this is inconsistent with Supreme Court of Ohio authority, which does not require proof of "precise harm," but requires only that " 'some risk of harm be foreseeable to the reasonably prudent person.' " Vidovich Brief at p. 18, quoting *Cromer*, 2015-Ohio-229, at ¶ 24.

{¶ 38} In its decision, the trial court said, "It is not enough for an invitee to show that a premises owner should have foreseen a substantial risk of general harm, but instead the invitee must demonstrate that a premises owner should have foreseen a substantial risk of the **precise harm** that befell the invitee." (Emphasis in original.) SJ Decision at p. 4, citing *Hemp v. Wal-Mart Stores E., LP*, 2018 WL 4539444, (S.D.Ohio Sept. 21, 2018), citing *Wheatley*, 2016-Ohio-949 (4th Dist.). Vidovich argues that the reference to "precise harm" in both *Hemp* and *Wheatley* cannot be reconciled with preexisting authority such as *Cromer*. Vidovich Brief at p. 19.

{¶ 39} What Vidovich fails to recognize, however, is that *Wheatley* specifically discussed *Cromer*. *Wheatley* even included the same quote from *Cromer* regarding "some risk" of harm being foreseeable. *Wheatley* at ¶ 62, quoting *Cromer* at ¶ 24.

Wheatley also quoted from another case on which Vidovich relies, Q*ueen City Terminals, Inc. v. Gen. Am. Transp. Corp.*, 73 Ohio St.3d 609 (1995). *Compare* Vidovich Brief at p. 18-19 with *Wheatley* at ¶ 62. The quotation in question is that " '[a] particular defendant need not foresee the specific harm caused by its negligence.' " *Id*.

{¶ 40} In *Wheatley*, a former student attended a fraternity party in 2009, where he consumed a great deal of alcohol. On leaving the party, he searched for a person he could sexually assault. Eventually, he climbed a first-floor exterior balcony at a residence hall, hoisted himself up to the second level, found the victim's suite room door, and entered through the unlocked door. He entered the victim's bedroom and found her asleep. After deciding he needed a condom, the assailant left the suite, purchased a condom, returned, and raped the victim. *Id*. at ¶ 2-3. The victim then sued the college, maintaining it had negligently failed to protect her by having inadequate security in place and by unsafely and dangerously maintaining the residence hall. She also brought a breach of contract claim on the same grounds. *Id*. at ¶ 4.

{¶ 41} Ultimately, the trial court granted summary judgment in the college's favor, finding that a 1992 rape in the residence hall was too far in the past to show foreseeability and did not involve similar circumstances. The court further found a 2008 rape had occurred under dissimilar circumstances and discounted incident reports of various other crimes because they were also dissimilar. *Id.* at ¶ 27-29.

{¶ 42} In deciding if summary judgment was proper in *Wheatley*, the court considered general principles of negligence and duty and cited various cases on these points. *Id*. at ¶ 51-62. We have cited a number of the same cases here.

{¶ 43} Continuing its analysis, the court remarked in *Wheatley* that "Ohio courts appear to have taken a strict approach to the foreseeability analysis: ' "To show foreseeability [of a third person's criminal act], one must demonstrate that the specific harm at issue was foreseeable." ' " *Id*. at ¶ 63, quoting *Heimberger v. Zeal Hotel Group, Ltd.*, 2015-Ohio-3845, ¶ 25 (10th Dist.). (Other citation omitted.) After a bit of further discussion in the same paragraph, the court referred to foreseeability of the "precise harm." *Id*. We see little difference between "precise" and "specific" harm; in fact, precise is a synonym of specific. *See* https://www.merriam-webster.com/dictionary/specific#synonyms (accessed Aug. 23, 2024) [https://perma.cc/66WH-LQF5].

{¶ 44} *Wheatley* noted that the Supreme Court of Ohio had not weighed in on this issue. It stressed, however, that the court's prior authority suggested "foreseeability of criminal acts is judged by whether the premises owner should have foreseen the specific harm that the invitee suffered." *Wheatley,* 2016-Ohio-949, at ¶ 63 and fn. 5, citing *Simpson*, 73 Ohio St.3d at 132. The court also remarked that "Comment f to Section 344 of the Restatement of the Law 2d, Torts (1965) seems to support the theory that the foreseeability of criminal conduct should be assessed by examining whether the premises owner should have seen a substantial risk of general harm." *Id*. at fn. 6. Finally, *Wheatley* concluded that under any foreseeability analysis (either general or specific), the evidence failed to show that a reasonable person would have anticipated a substantial risk of harm to the victim. *Id*. at ¶ 63. For purposes of its foreseeability analysis, the court then applied the same test our district uses, i.e., totality of the circumstances. *Id*. at ¶ 66.

{¶ 45} In light of the previous discussion, we find no error in the trial court's reference to "precise" harm. Authority of the Supreme Court of Ohio has referenced "specific" harm. Nonetheless, whether one considers either "general" or "specific" harm, the outcome here is the same. "General" harm is quite generic and broad and could mean almost anything. The fact is that a murder occurred in this case, and even if one generalizes the harm in question to be some type of serious violence, that factor must still be considered under the test we have traditionally applied, i.e., in the context of the totality of the circumstances.

{¶ 46} Returning then to the trial court's conclusion, the record reveals that the totality of the circumstances was not "somewhat overwhelming" such that Little Joe had notice of and a duty to protect others against criminal acts. *Spence*, 2014-Ohio-1280 (2d Dist.), at ¶ 23.

{¶ 47} The trial court had before it various evidence, including several depositions and exhibits. According to the evidence, Fadi Khasib owned and operated Little Joe, a convenience store located on Center Street in Springfield, Ohio. The store, which was founded in 2016, was open from 9:00 a.m. to 11 p.m. every day but Sunday, when it was open from 9:00 a.m. to 8:00 p.m. Fadi Khasib Deposition ("Khasib"), 9-12; Amanee Ali Deposition ("Ali"), 12. Ali, Khasib's wife, had prior training in operating a convenience store, as her family had owned multiple businesses like gas stations and convenience stores. Ali worked essentially as the store manager and was there on a limited basis. She dealt more with vendors and occasionally ran the store if Khasib had to go somewhere. *Id.* at 14 and 16-17.

{¶ 48} The store had a phone with outside access and programmed emergency numbers, surveillance cameras inside and outside the store that operated 24/7, and, in a back office, an alarm system with a button that would contact a security company. After being contacted, the company would notify the police. Khasib at 14-16 and 18. The store did not have a panic button that directly altered police. Ali at 51. Khasib also had a gun next to the cash register for his safety. Khasib at 28. According to Khasib, customers were not allowed to stand in front of the store for any reason. *Id*. at 18. A sign at the door also informed customers that they were being recorded. However, the store did not have a security guard. Ali at 77 and 89.

{¶ 49} Little Joe had not experienced any violent crime in the three years before the murder, and Khasib was not aware of any violent crimes committed in the area around Little Joe, either inside the store or outside. He was aware that someone had been robbed outside the store in 2017 and was also aware that, in May 2020, a murder had occurred about a block or half-block away on the other side of the street. *Id*. at 14, 22, and 24-25; Ali at 95-96. After that murder, Little Joe got a new video recording system, and additional cameras were placed outside the building. These cameras provided more views from the sides of the store, across the street, and all the way up to the corner. *Ali* at 97. This had nothing to do with the murder; Little Joe had planned to do it previously, but the camera installer had not been available to do the work. *Id*. at 97-98.

{¶ 50} There were bars on the store windows because a drunken kid had broken a window in 2015. That person did not take anything, but bars were installed because the window had been expensive to replace. The bars were also for security. *Id*. at 62.

Ali indicated that Little Joe had no instances of patrons bringing weapons or drugs into the store, nor did violent customers come in. *Id.* at 89-90.

{¶ 51} On the day of the murder, Khasib had worked but had gone home for lunch. His employee, D.P., had remained at the store. *Id*. at 27; Khasib at 27. Khasib had given D.P. a job because he needed one, but D.P., while courteous to customers, did not do well. At the time of the incident, D.P. had worked at the store for four or five months but was still in training because he continued to make mistakes with the credit card and lottery machines. D.P. was timid, could not run the lottery, and had to be babysat; Ali and Khasib could not leave him alone for more than an hour. While Ali considered the job to be easy, D.P. was worried he would mess up the lottery or cash register. Ali at 29-30, 32, and 39-41.

{¶ 52} Little Joe did not train workers in conflict resolution or non-violent responses to threatening situations. Khasib at 16. However, Ali had instructed D.P. that if anything happened, he should call the police the first thing; a police substation was right around the corner. D.P. had also been told that if someone came in to rob him, he should just give the robber what was wanted. D.P. was not trained on the camera system because he did not operate it. Ali at 38 and 41-42. Ali had never seen anyone walk into the store with a handgun. *Id*. at 48. She did not believe working in the store was dangerous; although Khasib had a gun, he had owned it before the store was purchased and had a concealed carry permit. Usually the gun was in a holster on Khasib's hip, but he sometimes put it beside or under the register. *Id*. at 54-55. Other than the 2020 murder, Ali was unaware of violent crimes committed at or near the store. *Id*. at 99.

{¶ 53} D.P., who lived in the area, also did not consider the store dangerous and had not observed any danger or violence inside the store during the time he had worked there. In addition, D.P. had not seen any guns inside the store. He said that he had never had to call the police and felt safe inside the store. D.P. Deposition ("D.P."), 11, 25, 30, and 46. D.P. further said that while the south side of Springfield (where the store was located) was dangerous, the area where Little Joe was located was not because mostly elderly people lived there. *Id*. at 51-52. He believed many places on the south side were more dangerous. *Id*. at 52.

{¶ 54} Khasib knew that Portis (Benton's murderer) was a regular customer but did not know him personally. According to Ali, Portis came in to buy diet soda and cigarettes and did not seem violent. Instead, Portis was nice and courteous with them. Khasib at 25; Ali at 101-102.

{¶ 55} On the day of the murder, D.P. came to work at around noon and was supposed to work until 6:00 p.m. Ali at 44. During his deposition, D.P. stated that he had virtually no recollection of the murder. D.P. at 37-38. According to the video footage, Portis walked into the store with a gun in his hand, looked around briefly, and walked out. He then came back in after Benton entered the store, and within 10 seconds, he shot Benton at point-blank range at the front of the store. It appeared Portis was there to harm someone. Detective Jordan Deposition ("Jordan"), 8-9. Det. Jordan had been with the Springfield Police Department for more than 20 years and had investigated a fair number of murders in Springfield over the years. *Id*. at 7-8 and 11-12. Jordan was not able to formulate a motive for Benton's murder. As indicated, the murder was captured

on video, and Portis turned himself in to police within a day or two. Portis immediately asked for a lawyer, never gave a statement, and pled guilty. *Id*. at 17.

{¶ 56} Benton's mother, Racquel Fowler, lived around the corner from Little Joe and went there every day for several years to buy cigarettes and drinks. She was also at the next-door restaurant about three to four times a week. Fowler Deposition, 40, 42 49, and 50. On weeknights, Fowler saw 20 people hanging out in front of Little Joe, across the street from the store, in the alley, and at the restaurant next door; on weekends, 25 to 50 people hung out. People were going equally in and out of the restaurant and the store. *Id*. at 47-49. Fowler said she had never felt physically threatened when she was inside Little Joe, had not seen anyone being threatened, and had not witnessed any crimes. *Id*. at 50-52. She was aware that Tyler Fullen had been murdered seven months before her son's death. That murder was across the street from Little Joe. However, Fowler also said she was not aware of any other murder or any other crime that occurred within two or three business locations of Little Joe before her own son's murder. *Id*. at 53-54.

{¶ 57} According to Det. Jordan, he had not been called to investigate any crimes that occurred inside Little Joe before Benton's December 2020 murder, and nothing stood out about any crimes in the area within one block or another during the past five years. Jordan at 42-43. Jordan stated that he had seen a few people outside the store when he passed by but had not seen large crowds and did not believe the surrounding area was saturated with crime. *Id*. at 49-50 and 60-61.

{¶ 58} Det. Massie had previously patrolled the south end of Springfield before

returning to investigations in 2019. He was called to investigate Benton's murder. According to Det. Massie, the south end of Springfield, where Little Joe was located, did not necessarily have a higher crime rate as compared to other parts of the city. While the south end had more robbery, drug-related robbery, and shooting, there were no borders to that area, and crime was all over the city. Massie Deposition, 8, 13, and 65. According to Det. Massie, gun crimes had skyrocketed since he came back to investigations in 2019. He further said that during the past five years, random shooting between rival gangs or opposition groups had hugely increased all over the city. *Id*. at 27-28 and 65.

{¶ 59} Det. Massie did describe the block on which Little Joe was located as a high-crime area and that it would be listed as a hot-spot for complaints. Little Joe and another store called Mini Mart were places where people congregated, and this sometimes brought opposition groups to the location. *Id*. at 96-97 and 104. Det. Massie had seen people congregating outside Little Joe, but much of the time, this consisted of cars pulled up to the curb with doors open and large groups of people standing around the cars. *Id*. at 30.

{¶ 60} Det. Massie described several hip-hop rap videos posted on social media that involved persons dancing and brandishing weapons inside Little Joe. However, he was only able to specifically testify as to one video. Det. Massie recognized the store in the video because he had been inside Little Joe. *Id*. at 23-25.[2] However, he could not

[2] There was some dispute about this, as Little Joe's expert testified that he had seen all the social media videos described in Det. Massie's deposition, and they were not from Little Joe's location. Gregory Bappler Deposition, 67-68. Bappler also noted that the person who made the videos had said on the website that he only used replica weapons.

recall any violent activity that occurred within Little Joe between 2016 and the 2020 murder. *Id*. at 57.

{¶ 61} Another Springfield police officer, Zachary Massie (Det. Massie's brother) testified. Off. Massie worked out of the Johnny Lytle substation, which was located about a half-block away from Little Joe. The substation is part of a community outreach program designed to facilitate good relationships between the city and people who live in the community; it is not open at all times like the police station. In this capacity, Off. Massie dealt with quality of life issues like code enforcement, and he was oriented to try and help others rather than give fines or tickets. The substation was closed in March 2020 due to COVID-19, and Off. Massie was then returned to patrol duty for quite some time. When Off. Massie was on patrol, the types of incidents he responded to for Little Joe were complaints of noise and disorderly conduct. Zachary Massie Deposition, 7-10, 22, 25-26, and 38.

{¶ 62} Off. Massie stated that he had seen drug-dealing outside his substation office, which unfortunately occurred everywhere in the city. There had also been robberies outside his office, and he was aware of shootings in the area. *Id*. at 17-18 and 21-22. However, he also said he did not consider it to be a high-crime area. He stressed that many older people who were "fabrics of the community" lived in the same block and around the substation. A lot of people had lived there for many, many years; they all knew each other, were very good people, and helped each other when needed.

Id. at 68-69. However, for summary judgment review, we assume at least one video was made inside the store with someone brandishing guns and that the guns could have been real. There was no testimony indicating that anyone connected to Little Joe saw this activity occur.

Id. at 19 and 29-30.

{¶ 63} T.D. (Benton's brother) also testified by deposition. T.D. had been released from prison in 2016, went back to prison in 2018, and was still in prison when Benton was murdered. According to T.D., Little Joe was a meeting point on the south side; everyone knew where Little Joe was located, and it was easy to meet up with people there. T.D. said he stopped going to Little Joe before he went to prison because there was a lot going on. People pulled up to sell drugs there, and more than 20 shootings had occurred in the neighborhood. T.D. further testified that he had never witnessed a shooting or a fight in Little Joe before he went to prison. However, he claimed to have seen drug transactions take place in the store at least five times. T.D. Deposition, 13-15, 47, and 59.

{¶ 64} In response to the summary judgment motion, Vidovich submitted Ex. C, a compilation of certified police records pertaining to alleged crimes that occurred between June 24, 2015, and December 12, 2020, at or near Little Joe. The parties argued over whether these reports were reliable or could be considered, as they contained no explanation of what was being reported. Assuming for the sake of argument that the reports contained some relevant or decipherable information, they showed 20 incidents over about five-and-a-half years.

{¶ 65} Before we address Ex. C, we note that Vidovich's Brief refers to 47 calls for service at the Little Joe location between April 9, 2018, and December 12, 2020. Vidovich Brief at p. 9, citing p. 16 of Ex. A attached to Vidovich's summary judgment response. Ex. A is an unauthenticated May 23, 2023 report of Vidovich's expert, Russell

Kolins. Kolins refers to an "estimated 47 Calls for Service (CFS) and reports listing Little Joe's as the documented location" during the April 2018 to December 2020 period. *Id*. at 16.

{¶ 66} Kolins did not identify the source of this "estimate," nor was any further information provided about this claim. An "estimate" without identification of any source does not quality as evidence that can be considered under Civ.R. 56(C). Instead, Vidovich submitted only Ex. C, and this is what might be considered for purposes of Civ.R. 56(C), which refers to "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." This part of the rule stresses that: "No evidence or stipulation may be considered except as stated in this rule." [3]

{¶ 67} Returning to Ex. C, it referenced two reports in 2020 before the December 12 murder of Benton. One was for the May 30 murder across the street, and the other involved a juvenile on a different street. In 2019, there was only one report, which involved an altercation between a male and female outside the store. None of these crimes had involved violence inside the store or even robberies or thefts inside or outside the store.

{¶ 68} Six of the total of 20 incidents had occurred when the store was closed.

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[3] On appeal, the parties have also argued about whether Ex. A (Kolin's report) can be considered because it was not properly authenticated in the trial court. However, Little Joe failed to object in the lower court, and appellate courts refuse to consider alleged error or argument in that situation. *E.g., Schade v. Carnegie Body Co*., 70 Ohio St.2d 207, 210 (1982). Nonetheless, we need not decide this issue. Even if the report were properly authenticated, it does not, therefore, follow that the content must be accepted. As indicated, "estimates" without identification of their source or lacking documentation have no evidentiary weight.

Five of the 20 incidents involved crimes committed elsewhere or a traffic stop, and three related to after-hours breaking and entering at Little Joe or a false alarm. Thus, only 11 incidents had possible relevance.

{¶ 69} The year with the most reports was 2017, when there were ten. These included the following incidents: robbery or theft (2); assault (2) (one of which was violent); crime occurring elsewhere (1); a traffic stop (1); an after-hours break-in (1); situations where a person saw a gun being put in a car trunk or being pointed out a window (2); and a call to ask that a person be removed (1). Again, none of these crimes occurred inside the store. An exception might be the last, but the record Vidovich provided was a dispatch and the facts were not clear.

{¶ 70} Thus, of 20 incidents over a five-year span, only 11 took place outside of 2017, and only two happened in the year and a half before Benton's murder. One was Fallon's murder (which occurred as the result of an altercation on the other side of the street), and the other was an incident on a different street involving a 16-year old who was thought to be carrying a gun, but actually had only a BB gun.

{¶ 71} Having reviewed the totality of the circumstances, we agree with the trial court that the totality of these incidents was not "somewhat overwhelming" so as to put Little Joe on notice and under a duty to protect Benton against the criminal acts of others. *See Spence*, 2014-Ohio-1280, at ¶ 23 (2d Dist.). While there was certainly crime in the area, none of it took place inside Little Joe, and the crime that occurred in 2017 was attenuated (three years earlier) and dissimilar. Consequently, a reasonably prudent person would not have foreseen that a patron would intentionally shoot someone inside

the store. Even under a more general standard, a reasonable person would not have foreseen that a patron would commit violence against another person inside the store. Little Joe therefore owed no duty to protect Benton from the risk of harm, and summary judgment was properly granted. Accordingly, Vidovich's sole assignment of error is overruled.

III. Conclusion

{¶ 72} The judgment of the trial court is affirmed.

. . . . . .

TUCKER, J. and LEWIS, J., concur.