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CASE NUMBER: 2020-CV-000224

Court: Shawnee County District Court

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Case Title: Estate of Robin Kuebler-by & through administrator, et al. vs. Alexis Nolte, et al.

Type: MEMORANDUM DECISION AND ORDER REGARDING DEFENDANT KANSAS VILLAGE AT OLD TOWN, LLC'S MOTION FOR SUMMARY JUDGMENT

SO ORDERED.

/s/ Honorable Mary E Christopher, District Judge

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION EIGHT

THE ESTATE OF ROBIN KUEBLER, by and through its duly appointed administrator, CYNTHIA COLEMAN, and CYNTHIA COLEMAN, heir at law of Robin Kuebler, deceased,	)	2020-CV-224
Plaintiffs,	)	
vs.	)	
ALEXIS NOTLE, *et al.*,	)	
Defendants.	)	

MEMORANDUM DECISION AND ORDER
REGARDING DEFENDANT KANSAS VILLAGE AT OLD TOWN, LLC'S
MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendant Kansas Village at Old Town, LLC's ("KVOT") Motion for Summary Judgment filed on June 9, 2021. Plaintiffs appear through Melinda Young. Defendant KVOT appears through Lawrence Logback and J. Wesley Smith.

Defendant KVOT filed its motion for summary judgment on June 9, 2021. The parties' have filed their briefs in response, with supporting and opposing exhibits and affidavits. The Court finds oral argument would not be helpful and, thus, is not necessary.

The question presented for the Court's determination is:

> **As a matter of Kansas law, does a business's duty to protect its tenants and guests from the criminal acts of third parties extend beyond the boundaries of the property within its control to a public alleyway or thoroughfare?**

After careful consideration, the Court concludes the answer is no, and finds KVOT's motion for summary judgment should be granted as more fully explained below.

I. BACKGROUND OF THE CASE

This action arises from a vehicular homicide the evening of April 3, 2018, that resulted in the death of a pedestrian, Robin Kuebler. Plaintiffs allege survival and wrongful death claims against multiple defendants, including: Alexis Nolte, the driver who struck Ms. Kuebler; Kylee J. King, the owner of the vehicle; and Kansas Village at Old Town, LLC, the owner of the apartment complex where Robin Kuebler (decedent) resided.[1]

II. UNCONTROVERTED FACTS

The following facts are uncontroverted:

1. "From June 1, 2017, to April 3, 2018, Decedent Robin Ann Kuebler resided with her fiancé, Jordan Green, at 715 SW Western, Apt. 13B, Topeka, Kansas 66603." (D. Mot., ¶ 1; P. Resp, ¶ 1.)

2. "Since its incorporation in 2017, KVOT owned and operated the Village at Old Town Apartments, a multi-family residential property located at 715 SW Western, Topeka, KS 66603." (D. Mot., ¶ 2; P. Resp, ¶ 2.)

3. "The Village at Old Town apartment complex consists of multiple buildings with different addresses: 715 SW Western, 900 SW 8th Street, 712 SW Western, 723 SW Taylor, and 822 SW 8th." (P. Resp. ¶ 25; D. Reply, ¶ 25.)

[1] Initially, State Farm Mutual Automobile Insurance Company, Robin Kuebler's insurer, was named as a defendant. Plaintiffs dismissed defendant State Farm shortly after filing this action, however. See 6-24-20 *Joint Motion; Order of Dismissal*.

4. “An alley separates the apartment buildings at 715 SW Western and the apartment buildings at 900 SW 8th.” (P Resp. ¶ 26; D. Reply, ¶ 26.)

5. “The portion of the complex at 715 SW Western contains multiple parking areas on the west and south perimeters of the property. Tenants and visitors have to access the parking areas through [the] alley to the south or west of the property.” (P. Resp. ¶ 27; D. Reply, ¶ 27.)

6. “As part of her lease agreement, Ms. Kuebler expressly acknowledged that neither the owner nor management had ‘made any representations, written or oral, concerning the safety of the community or the effectiveness or operability of any security devices or security measures.’” (D. Mot., ¶ 3; P. Resp. ¶ 3.)

7. In her lease agreement, “Ms. Kuebler expressly acknowledged her understanding ‘that neither Owner nor Management warrants or guarantees the safety or security of Residents, Occupants, or their guests or invitees against the criminal or wrongful acts of third parties. Each Resident, Occupant, guest and invitee is responsible for protecting his or her own person and property.’” (D. Mot., ¶ 4; P. Resp. ¶ 4.)

8. “At approximately 1940 hours on the evening of April 3, 2018, Ms. Kuebler and Ms. Green were called out of bed by a knock on their door from a neighbor, informing them that someone had hit their car.” (D. Mot., ¶ 5 and Ex. 4-1; P. Resp. ¶ 5.)

9. “Ms. Green, Ms. Kuebler, and the neighbor all exited the apartment building to investigate.” (D. Mot., ¶ 7 and Ex. 4-1; P. Resp. ¶ 7.)

10. “Upon exiting, a green Ford Explorer ‘came down the alley from west to east.’” (D. Mot., ¶ 8 and Ex. 4-1; P. Resp. ¶ 8.)

11. The Ford Explorer hit Ms. Kuebler and dragged her body for some distance. (D. Mot., ¶ 9 and Ex. 4-1; P. Resp., ¶ 9; D. Reply, ¶ 9.)

12. "After the impact, the Ford Explorer fled the scene, traveling northbound on SW Western Ave . . . Witnesses immediately called 911 and Ms. Green attended to Ms. Kuebler while waiting for emergency services." (D. Mot., ¶ 13 and Ex. 4-1.)

13. "Upon their arrival, police found Ms. Kuebler 'lying in the alley located south of 715 SW Western' . . . Sadly, she was pronounced dead at the scene by EMS." (D. Motion, ¶ 14.)

14. "The driver of the green Ford Explorer, defendant Alexis Nolte, was arrested shortly thereafter." (D. Mot., ¶ 15.)

15. "Alexis Nolte was never a tenant at KVOT." (D. Mot., ¶ 17.)

16. "In subsequent interviews, Ms. Green described the hit and run as 'random' and stated that neither she nor Ms. Kuebler had known Ms. Nolte." (D. Mot., ¶ 18.)

17. Plaintiffs maintain KVOT was negligent by:

a. "Failing to protect tenants and their guests from foreseeable risk of peril:

b. Failing to provide appropriate and adequate security;

c. Failing to provide access control to the property;

d. Failing to maintain the rental property for the health and safety of residents and visitors." (Petition, ¶¶ 29-30.)

III. ISSUES AND ANALYSIS

A. Plaintiffs' Motion to Continue to Enable Discovery

As a preliminary matter, the plaintiffs included a Motion to Continue to Enable Discovery in their responsive motion in opposition to KVOT's motion for summary judgment. In support, the plaintiffs claim KVOT's motion is premature because plaintiffs "have not yet completed the discovery of information vital to Plaintiffs' opposition to" KVOT's motion. (P. Resp., p. 3.) The plaintiffs request the Court dismiss KVOT's motion and permit KVOT to file another motion under K.S.A. 60-256 after the close of discovery.

Under K.S.A. 60-256(f), the Court may "order a continuance to enable affidavits or declarations to be obtained, depositions to be taken or other discovery to be undertaken" when the party opposing a summary judgment motion shows that it cannot present facts essential to justify its opposition. Notably, the party moving for additional discovery must justify its need using "specified reasons."

In support of their request, the plaintiffs state that "additional discovery will further substantiate Plaintiffs' claims." Plaintiffs indicate they intend to propound additional written discovery (interrogatories, requests for production, and requests for admissions) "on all discoverable subjects." Plaintiffs also state they will conduct depositions and disclose an expert, although there is no indication about what this expert will opine.

Plaintiffs filed this action in April 2020. On May 24, 2021, the Court filed a Notice for Further Action, finding "the Court file reflects no significant activity." The Court went on to find that the plaintiffs must take additional steps to prosecute the case or explain the lack of activity or face dismissal. Approximately two weeks later, KVOT filed its motion for summary judgment.

The plaintiffs are correct that there is no standing discovery conference order on file in this matter. However, the plaintiffs have not provided any specific justification for delaying a ruling on KVOT's summary judgment motion. Nearly 17 months have elapsed in this case, and it is unclear why plaintiffs require more time.

Therefore, the Court denies the plaintiffs' motion for a continuance because of the passage of time and lack of specific details to justify their request.

B. Standard of Review

On deciding whether summary judgment is appropriate, the court must resolve all facts and inferences drawn from the evidence in favor of the party against whom summary judgment is sought. *Saliba v. Union Pac. R. Co.,* 264 Kan. 128, 131, 955 P.2d 1189, 1192 (1998). "Summary judgment is appropriate when the pleadings . . . and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Troutman v. Curtis,* 286 Kan. 452, 454-55, 185 P.3d 930 (2008). A party opposing summary judgment must provide evidence to establish a dispute regarding a material fact. *Troutman,* 286 Kan. at 455. "Summary judgment should be granted with caution in negligence actions." *Legleiter v. Gottschalk,* 32 Kan. App. 2d 910, 913, 91 P.3d 1246 (2004) *citing Fettke v. City of Wichita*, 264 Kan. 629, 632, 957 P.2d 409 (1998).

C. Issue Before the Court

The Court must determine whether KVOT owed a duty to protect Ms. Kuebler from the criminal conduct of Ms. Nolte.

D. Arguments and Analysis

KVOT advances two arguments in support of its conclusion that it did not owe Ms. Kuebler a duty, thereby nullifying the plaintiffs' negligence claim against KVOT. First, KVOT maintains it had no right of control over the public alley where the event allegedly occurred. Second, KVOT argues it had no duty to protect against a random hit and run event. The Court will consider these arguments in turn.

1. Negligence

To be successful in alleging negligence, a plaintiff must establish the existence of a duty, a breach of that duty, an injury suffered by the plaintiff, and causation that the breach resulted in the injury. *D.W. v. Bliss,* 279 Kan. 726, 734, 112 P.3d 232 (2005). Whether a duty exists is a question of law. *Seibert v. Vic Regnier Builders, Inc.*, 253 Kan. 540, 547, 856 P.2d 1332 (1993).

Generally, no person has a duty to control the actions of a third party and prevent that party from injuring another unless there is a "special relationship" between the person and either the third party or the injured party. *Bliss,* 279 Kan. at 734-35. Examples of special relationships include parent/child, master/servant, landowners and licensees, persons caring for someone with a dangerous propensity, and those with custody of another. *Bliss,* 279 Kan. at 735; *Nero v. Kansas State Univ.,* 253 Kan. 567, 572, 861 P.2d 768 (1993).

The Kansas Supreme Court has recognized a special relationship in the context of land ownership: "A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to [their] invitation." *Bliss,* 279 Kan. at 737, *citing* Restatement (Second) of Torts § 314A(3). Under a theory of premises liability, a possessor or

owner of land owes a duty of reasonable care under all of the circumstances to both licensees and invitees, alike. *Bliss,* 279 Kan. at 739. In premises liability cases:

> Before a landowner may be held liable for an injury resulting from a dangerous condition, however, the plaintiff generally must show that the defendant had actual knowledge of the condition or that the condition had existed for such a length of time that in the exercise of ordinary care the landowner should have known about it. Bliss, 279 Kan. at 740, quoting *Brock v. Richmond-Berea Cemetery Dist.,* 264 Kan. 613, 620, 957 P.2d 505 (1998).

Kansas also recognizes that landlords owe a duty of reasonable care to their tenants. *Bliss,* 279 Kan. at 739. Whether a landlord has breached the duty of reasonable care owed to a tenant is a question of fact. *Nero,* 253 Kan. at 583. "Only when reasonable persons could arrive at but one conclusion may the court determine the question as a matter of law." *Nero,* 253 Kan. at 583.

2. Right of Control over the Alley

Having established that KVOT, as a landlord, owed Robin Kuebler, its tenant, a duty of reasonable care, the first question to consider is whether KVOT's duty extended to public property, namely the alley that ran adjacent to the apartment building and the building's parking spaces.

In its motion, KVOT argues the injury to Ms. Kuebler occurred in the public alley that runs adjacent to KVOT's property. The plaintiffs attempt to controvert KVOT's facts that illustrate Ms. Kuebler was in the alley when she was struck by Ms. Nolte. The evidence proffered by KVOT and the plaintiffs consist of the following:

a. KVOT's evidence regarding location of injury

1. An affidavit from the Topeka Police Department that includes the following

statements:

- "Upon arrival [police] found the victim . . . lying in the alley located south of 715 SW Western."
- "Reed stated she thought the victim was in the alley/driveway of the apartment building when struck."
- "The victim appears to walk [westbound] in the alley with her hands in the air. A short time later the victim is struck by the SUV . . . and pushed toward the street." (ACCH-002179-81.)

2. A Topeka Police Department "Supplemental Offense Report," which provides:

   - "Heather said that she saw the Explorer strike a pedestrian in the alley that runs east and west in the 700 block of SW Western."
   - "The pedestrian was in the alley on the west side of Western and the SUV was travelling eastbound in the alley."
   - "Smith said that the Explorer pulled into a parking stall next to a red car parked in the alley at the south end of 715 SW Western and then backed out and struck the red car which belonged to the victim . . . Smith said that when he got outside with the victim, that the Explorer was in the east/west alley facing east and that the victim was standing in the alley in front of the Explorer with her arms out questioning why the driver of the Explorer struck her car. Smith said that this is when the Explorer drove forward and struck the victim." (ACCH-002160; -002157.)

3. Another Topeka Police Department "Supplemental Offense Report," offers:

   - "Jordan stated she was by the driver's side taillight (of her Pontiac Grand AM) and Robin was in the middle of the road (alley) checking out the damage to her car."(ACCH-001953.)

4. An aerial image of the scene shows the red Pontiac parked in a spot directly abutting the alley in question. (ACCH-001983.)

5. A zoning map, of which KVOT asks the Court to take Judicial Notice pursuant to K.S.A. 60-409,[2] that shows KVOT's property surrounded by a turquoise line

[2] The Court does take Judicial Notice of this zoning map under K.S.A. 60-409. Plaintiffs' Exhibit 10 also shows the distinct property boundaries, which do not include the alley in question.

while the alleys and roadways remain distinct. (D. Exhibit 3.)

b. Plaintiffs' evidence regarding location of injury

1. Plaintiffs' Exhibit 14 is a Topeka Police Department "Supplemental Offense Report" that includes the statement:

   - "Jessie said that Robin stood in the middle of the driveway with her arms up in the air." (ACCH-002110.)

2. Plaintiffs' Exhibit 3 includes a lengthy police narrative that includes the statement:

   - "I told her . . . the general area where the victim appeared to be struck was free of visual obstructions and in fact I believed the area of impact would have placed the victim near the area of the lot where the alley/sidewalk intersect and I felt she should have been clearly visible to any vehicles travelling in the roadway." (ACCH-002099.)

3. Plaintiffs' Exhibit 2, which KVOT contends is inadmissible, is a hand-drawn sketch of the scene. The sketch indicates Robin's location as south of the Pontiac, in the alley.

All of KVOT's evidence supports the finding that the injury occurred in the public alley or right of way. Plaintiffs' Exhibit 14 merely provides a witness statement that Ms. Kuebler was in the middle of the "driveway." There is no "driveway" at the property location based on the maps provided by the parties, only an alley that runs adjacent to the parking spaces. This supports the finding that Ms. Kuebler was in the middle of the alley when she was struck. Plaintiffs' Exhibit 3 includes an officer's statement that he believed Ms. Kuebler was struck near where the alley and sidewalk intersect, **both of which are public property**. Finally, Plaintiffs'

Exhibit 2 also shows that Robin Kuebler was south of the Pontiac (Ms. Kuebler's car), which is where the alley is located.

The Court must resolve all facts and inferences drawn from the evidence in favor of the party against whom summary judgment is sought. The party opposing summary judgment bears the burden of providing evidence to establish a dispute regarding a material fact. Here, plaintiffs have not met that burden. There is no genuine issue and, taken together, all of the evidence supports a finding that the incident occurred on public property. The Court must now determine if KVOT owed a duty to Ms. Kuebler while she was on public property.

The plaintiffs maintain it does not matter if the injury occurred on public property because KVOT assumed control over the alley. According to the plaintiffs, KVOT made "special use of the alley" based on the fact that "tenants and visitors have access to the parking areas through alley[s] to the south or west of the property." (P. Resp., pp. 18-19.) To support their contention, the plaintiffs only cite caselaw from jurisdictions outside of Kansas. It is not uncommon for a business to make use of public roadways so that customers and employees can enter parking areas. Plaintiffs' conclusory argument, without more evidence, is unpersuasive.

A comparison of Kansas cases with factual similarities will aid in the Court's analysis of whether Ms. Kuebler was owed a duty by KVOT while on public property. In *Legleiter v. Gottschalk,* patrons of a tavern erupted into a fight on the public sidewalk and street after leaving the tavern. 32 Kan. App. 2d 910, 91 P.3d 1246 (2004). The tavern employee/owner forcibly escorted an unruly patron outside, when others followed and began fighting, resulting in the plaintiff's serious injuries. The tavern employee was not involved in the fight but allegedly saw it

occurring and did nothing, not even dialing 911. The trial court granted summary judgment on behalf of the tavern after finding the plaintiff's injuries occurred on a public sidewalk and the tavern had no duty to protect the plaintiff from a third party.

On review, the Kansas Court of Appeals found that business owners, generally, "are not responsible to protect their customers from the acts of third parties outside the premises of the business." *Legleiter,* 32 Kan. App. 2d at 918. The Court supported its decision to affirm the granting of summary judgment on behalf of the defendant by also finding there were no circumstances indicating the defendant knew of a "risk of peril to the customers beyond the ordinary." *Legleiter,* 32 Kan. App. 2d at 918.

While *Legleiter* involved a business establishment rather than a housing facility, in *Nero,* the Kansas Supreme Court confirmed that a landlord owes a "duty to use reasonable care under the circumstances in protecting the occupants of the [apartment] from foreseeable criminal conduct *while in a common area*." 253 Kan. at 588 (emphasis added). The Court has already determined the alley is not part of KVOT's property and, therefore, is not part of the common area.

Plaintiffs cite *Hammond v. San Lo Leyte VFW Post #7515,* 311 Kan. 723, 466 P.3d 886 (2020), for the proposition that a landlord can be liable for a breach of a duty if the breach occurs on the landlord's property, despite the resulting injury occurring offsite. In *Hammond,* a man was physically attacked on public property directly outside a private establishment where the altercation began. The defendant property owner claimed no liability because the injury occurred on a public sidewalk, arguing any duty owed by the defendant ceased when the plaintiff left the

premises. The plaintiff countered that the duty to protect him arose while the men were still inside the establishment, so even though the injury occurred outside the defendant was still liable. The Kansas Supreme Court agreed a duty existed. It remanded the case to the trial court for answers on whether the injury suffered by the plaintiff was foreseeable and whether a breach of the duty—i.e., a failure to warn against or otherwise prevent the injury—occurred. Put simply, the Court found that it was "enough that the duty arises and breach occurs on [defendant's] property, even if the actual resulting physical harm takes place entirely outside the boundaries of its land." *Hammond*, 311 Kan. at 730-31.

There are factual distinctions between *Hammond* and *Legleiter*, as well as the facts of this case. In *Legleiter*, the employee escorted a person outside alone based on Legleiter's refusal to comply with the employee's mandate that it was closing time. There was no evidence of ill-will between Legleiter and other patrons nor was there any evidence indicating a fight might ensue.

In contrast, in *Hammond*, the business employee, Nease, had conversed with Blackwood, the man who later caused Hammond's injuries, directly before telling Hammond to leave the bar. While Nease was telling Hammond to leave, Blackwood and his companions crowded around and began helping Nease escort Hammond outside. Additionally, while Nease was still outside, he witnessed Blackwood make initial physical contact with Hammond. Thus, in *Hammond*, the appellate courts reasoned that a duty to protect Hammond arose because Nease could have foreseen the consequences of permitting Blackwood and his friends to aid in escorting Hammond outside. In issuing its remand, the Kansas Supreme Court found:

> [A] reasonable person might conclude that this harm was foreseeable. Blackwood clearly had contact with Nease and said something that prompted Nease to kick

> Hammond out without explanation. Nease was present for the hometown crowd cheering and jeering as Hammond was kick out. Nease was even present to see Blackwood shove Hammond against the wall of the VFW once Hammond had been ejected. *Hammond*, 311 Kan. at 730.

Hammond is more akin to *Gould v. Taco Bell*, 239 Kan. 564, 722 P.2d 511 (1986). In *Gould*, the plaintiff was attacked after a brief verbal exchange by a group of other individuals, all of which took place inside a Taco Bell. The plaintiff and her friend called for help from the assistant manager and asked the manager to call the police, but the manager did not intervene in any manner. The plaintiff's friend eventually called the police. Evidence introduced at trial indicated the same group had been involved in a similar altercation at the Taco Bell two weeks before attacking the plaintiff and management had considered hiring security due to a history of "rowdyism" at the store. The case was allowed to go to a jury, which found in favor of the plaintiff.

Here, there is no evidence that any individual or representative from KVOT was present to witness or otherwise intervene in the events of April 3, 2018. There is no evidence KVOT or its representatives somehow contributed to Ms. Kuebler's injuries. Instead, Ms. Kuebler was standing in a public right of way when she was struck and killed by a vehicle driven by Alexis Nolte. There is no evidence KVOT had any control over the alley.

As a result, the Court does not need to decide whether KVOT could have reasonably foreseen the criminal intent or conduct originating from Nolte, a third party, because it had no duty to protect Ms. Kuebler while she was in the alley.

3. Foreseeability of Injury

Despite already finding that KVOT did not owe Ms. Kuebler a duty while she was in the alley, the Court will, nonetheless, consider whether KVOT had any duty to protect Ms. Kuebler from the criminal acts of Nolte.

The Kansas Court of Appeals has held that "foreseeability," in the context of negligence, "is defined as a common-sense perception of the risks involved in certain situations and includes whatever is likely enough to happen that a reasonably prudent person would take it into account." *Cupples v. State*, 18 Kan. App. 2d 864, 879, 861 P.2d 1360 (1993). Kansas courts have considered cases dealing with foreseeability of injury in relation to criminal activity, as discussed next.

In *Seibert*, the Kansas Supreme Court considered a premises liability argument regarding criminal activity. 253 Kan. at 541. In *Seibert*, the plaintiff was shot in the head by a robber after exiting a vehicle in the parking garage of a shopping establishment. She then brought a negligence claim against the property owner, arguing the owner was negligent by not providing security when the crime against her was foreseeable. Specifically, the plaintiff maintained that the past criminal activity in the shopping center's parking areas and nature of the underground parking area placed a burden on the property owner to provide security. The plaintiff presented evidence of three robberies and one theft at the property in the two years prior to the crime against the plaintiff, none of which occurred specifically in the underground parking area. The trial court ruled in favor of the defendants, finding "the criminal act which resulted in plaintiff's injuries . . . was not foreseeable." *Seibert,* 253 Kan. at 543.

On review, the Kansas Supreme Court considered two general rules in its determination of whether a duty was owed:

> **The owner of a business is not the insurer of the safety of its patrons or customers. The owner ordinarily has no liability for injuries inflicted upon patrons or customers by the criminal acts of third parties in the business' parking lot**, as the owner has no duty to provide security. Such a duty may arise, however, where circumstances exist from which the owner could reasonably foresee that its customers have a **risk of peril above and beyond the ordinary and that appropriate security measures should be taken**. *Seibert*, 253 Kan. at 548 (emphasis added).

The Court then determined whether foreseeability should be determined based on evidence of only prior acts or by considering the totality of the circumstances. In choosing the totality of the circumstances, the Court held the circumstances must "have a direct relationship to the harm incurred." *Seibert*, 253 Kan. at 549.

The totality of the circumstances analysis includes prior incidents, as well as other factors, like the level of crime in the area and the nature of the physical space itself. In recognizing that criminal activity is not rare, particularly in the shopping center context, the Court noted that "[i]t is only where the frequency and severity of criminal conduct substantially exceed the norm or where the totality of the circumstances indicates the risk is foreseeably high that a duty should be placed upon the owner of the premises to provide security." *Seibert*, 253 Kan. at 549-50. The duty to provide security—and the level of the security—must be reasonable. *Seibert*, 253 Kan. at 550.

In *Gragg v. Wichita State Univ.*, a woman was shot and killed by a gang member at a fireworks display held on campus. 261 Kan. 1037, 934 P.2d 121 (1997). The woman's children brought a negligence action against the university and the event sponsors, arguing the defendants

failed to provide adequate security or warn about the risk of criminal activity. Evidence of other crimes included one shooting two years prior at another location on campus. Law enforcement for the university was also aware of gang activity near campus, as well as the higher incident of criminal activity in the area west of campus. There was also evidence that a subcommittee in charge of planning the fireworks display discussed the concern of gang activity. On review from an appeal by the plaintiffs, the Supreme Court of Kansas quoted the comments of the Restatement (Second) of Torts § 344 (1964) as follows:

> *Duty to police premises.* Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. *Gragg*, 261 Kan. at 1046.

Compare *Nero*, 253 Kan. at 584-85 (reversing summary judgment for university after finding reasonable people could find university failed in its duty to female student tenant who was sexually assaulted when university permitted male student tenant to live in co-ed dorm despite facing rape charges).

In *South ex rel. South v. McCarter*, the Kansas Supreme Court considered whether the landlord of a mobile home park was liable for the criminal acts of a third party. 280 Kan. 85, 119 P.3d 1 (2005). In *South*, one boy was injured during a physical altercation with two other boys, only one of whom also lived on the multi-family property. The Court had little difficulty in finding the harm suffered by the plaintiff was not foreseeable, negating any liability on the part of the landlord. *South*, 280 Kan. at 106. Specifically, the Court noted the lack of specific

evidence of the defendant's past conduct and the actual risk involved as well as the landlord's lack of knowledge of any existing problems between the parties or that a fight might occur. *South,* 280 Kan. at 106.

Here, the plaintiffs argue the apartment complex was in an area of high crime and was subject to many criminal incidents, which should have put KVOT on notice that added security was required.

Even assuming the plaintiffs' arguments about the foreseeability of criminal acts are accurate, the Court fails to understand how general criminal activity or domestic disputes put KVOT on notice that its tenants were exposed to *a risk of peril above and beyond the ordinary* with respect to a hit and run or vehicular homicide. This was an act of entirely random timing. Further, the plaintiffs' own evidence indicates Ms. Kuebler and her fiancé, Jordan Green, made two of the fourteen incident reports found in Exhibit 11. In fact, Ms. Green's report dealt with a truck driving on the sidewalk that almost hit a pedestrian. This indicates that, at the very least, Ms. Kuebler was aware that her neighborhood might be a little rough around the edges.

Plaintiffs concede that this tragic event was a "random" accident. No evidence indicates that the hit and run vehicular manslaughter was foreseeable, or that there were any preventative measures defendant could have taken since the incident occurred on public property. As KVOT points out, it "had no right or ability to put up gate access, speed bumps, or any other types of control measures." (D. Motion, p. 8.) See *Cupples,* 18 Kan. App. 2d at 879 (labeling claims of inadequate security "spurious" when security required to prevent harm would have been unfeasible or unreasonable).

In sum, the Court finds under Kansas law, KVOT did not owe a duty to Ms. Kuebler such that it could be held liable for negligence under the facts presented. Based on the factual and legal conclusions herein, the Court finds no reason to allow subsequent amendment of plaintiffs' petition.

CONCLUSION

For the reasons stated above, the Court GRANTS defendant KVOT's Motion for Summary Judgment (6-9-21).

This Memorandum Decision and Order shall constitute the Court's entry of judgment when filed with the Clerk of this Court. Defendant KVOT is dismissed as a party defendant, and no further journal entry is required.

IT IS SO ORDERED.

This Order is effective on the date and time shown on the electronic file stamp.

HON. MARY E. CHRISTOPHER
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was filed electronically on the date stamped on the order, providing notice to the following:

Melinda Young
Attorney for Plaintiffs

Lawrence Logback
J. Wesley Smith
Attorneys for Defendants

/s/ Vicky Haynes
Vicky Haynes, Div. 8
Administrative Assistant