Condo Associations–New Cop on the Beat: Martinez v. Woodmar IV Condominiums Homeowners Association

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CONDO ASSOCIATIONS—NEW COP ON THE BEAT: MARTINEZ V. WOODMAR IV CONDOMINIUMS HOMEOWNERS ASSOCIATION

INTRODUCTION

Traditionally in property law, landlords were shielded from tort liability due to the law’s treatment of a lease as a sale and the doctrine of caveat emptor. Over time, exceptions to the nonliability rule developed which essentially eroded the general rule. Some jurisdictions became dissatisfied with the nonliabil-

1 See, e.g., Gabaldon v. Erisa Mortgage Co., 949 P.2d 1193, 1203-04 (N.M. Ct. App. 1997) (stating that because a lease was treated as a sale at common law, a landlord escapes tort liability for harm suffered during tenancy), cert. granted, 949 P.2d 282 (N.M. 1997). See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 63, at 434-35 (5th ed. 1984); Olin L. Browder, The Taming of a Duty—The Tort Liability of Landlords, 81 MICH. L. REV. 99, 101 (1982) (noting that a landlord’s tort liability was derived from property law’s notion that a tenant effectively became owner of the leased premises). Landlord immunity had its origins in feudal property law. See Javins v. First Nat’l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir. 1970). The treatment of a lease as a conveyance of real property was logical at a time when the country was primarily an agrarian society in which lessees were concerned with the land itself. See id. The lessee, as “owner” of an interest in an estate, became “subject to all of the responsibilities of one in possession, to those who enter[ed] upon the land and those outside of its boundaries.” KEETON ET AL., § 63, at 434. As a result, the burden of maintaining the land was placed upon the lessee. See, e.g., Borders v. Roseberry, 532 P.2d 1366, 1368 (Kan. 1975).

2 Caveat emptor, “let the buyer beware,” or “caveat lessee,” further protected the lessee from liability despite any defects in the property at the time the parties entered into the lease. See KEETON ET AL., supra note 1, § 63, at 434-35. See, e.g., Old Town Dev. Co. v. Langford, 349 N.E.2d 744, 760 (Ind. Ct. App. 1976) (noting that caveat emptor applies to the relationship between a landlord and tenant absent any fraudulent behavior or dealings); King v. Moorehead, 495 S.W.2d 65, 69 (Mo. Ct. App. 1973) (explaining that as a buyer of land, a tenant is subject to the rule of caveat emptor); see also Browder, supra note 1, at 101 (noting that there were no implied warranties or duties at the time of delivery regarding the condition of the land).

3 See Pagelsdorf v. Safeco Ins. Co. of Am., 284 N.W.2d 55, 59 (Wis. 1979); KEETON ET AL., supra note 1, § 63, at 435-46. The Supreme Court of Kansas, in Borders v. Roseberry, summarized the six traditional exceptions to the nonliability rule. See Borders, 532 P.2d at 1369-72. First, liability may be imposed upon the landlord

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ity doctrine altogether and instead imposed upon the landlord a general duty to exercise ordinary care. For the most part, the expansion of landlord liability was directly related to physical defects on the premises. In the past few decades, however, courts have had to determine the liability of a possessor of land for criminal acts of third parties occurring on the premises. Various theories and competing justifications have been utilized by the courts in finding a landlord negligent for failure to protect tenants from third party criminal attacks. A new issue facing courts today is the liability, if any, of a condominium association for criminal acts of third parties. Courts have had to grapple with applying existing law to a new form of ownership, namely,

for latent conditions known to the lessor. See id. at 1369. Second, liability may stem from injuries caused by dangerous conditions outside the premises. See id. at 1369-70. Third, an affirmative duty to use reasonable care to inspect the premises arises when the lessor leases the premises for admission to the public. See id. at 1370. Fourth, a lessor may be liable for dangerous conditions on a part of the premises that remains under the lessor's control which the lessee is permitted to use. See id. at 1370-71. Fifth, tort liability may follow where a lessor contracts to repair and the disrepair causes injury. See id. at 1371-72. Finally, liability may be imposed when the lessor is negligent in making repairs. See id. at 1372.

4 See Sargent v. Ross, 308 A.2d 528, 532, 534 (N.H. 1973) (criticizing the general nonliability doctrine for its inflexibility and instead, imposing a duty upon the landlord to use ordinary care); Pagelsdorf, 284 N.W.2d at 59 (stating that public policy supports imposing a duty to use reasonable care upon the landlord with respect to maintaining the land).

5 See Cramer v. Balcor Property Management, Inc., 848 F. Supp. 1222, 1225 (D.S.C. 1994) (stating that with respect to the "common areas exception," South Carolina has only imposed liability for injuries resulting from a dangerous physical condition of the premises); Cooke v. Allstate Management Corp., 741 F. Supp. 1205, 1211 (D.S.C. 1990) (same); Sargent, 308 A.2d at 531 (noting that the duty of reasonable care pertains to maintaining the premises); Pagelsdorf, 284 N.W.2d at 59 (same).


7 See discussion infra Part II.

8 See Morgan v. 253 East Delaware Condominium Ass'n, 595 N.E.2d 36, 38-39 (Ill. App. Ct. 1992) (holding that a condominium association was not liable for plaintiff's injuries resulting from the criminal acts of another because of the absence of a special relationship).
the condominium. Recently, in Martinez v. Woodmar IV Condominiums Homeowners Ass'n, the Supreme Court of Arizona held that, in general, a condominium association is analogous to a landlord with respect to the common areas and, therefore, the association has a duty of due care to maintain the physical condition of the premises as well as protect the unit owners and guests from dangerous activities, including criminal acts, on the premises.

In Martinez, the guest of a unit owner was shot by a gang
member in the parking lot of the condominium complex. The gang frequently congregated in the condominium's parking lot prior to the incident. The association had previously employed two security guards to patrol the complex, however, due to budget constraints, the association could only afford to keep one guard on duty. Generally, the security guard on duty would disperse the gang. On the day in question, while the plaintiff was checking his car in the condominium's parking lot, an argument arose between the plaintiff and the gang, resulting in the plaintiff being shot. The shooting took place approximately one hour before the security guard was to come on duty. The plaintiff brought a negligence action against the condominium association claiming that no injury would have occurred but for the lack of security. The trial court found that there was no special relationship between the plaintiff and defendant that would impose a duty upon the defendant to protect the plaintiff from harm. The court of appeals affirmed summary judgment for the defendant on the same grounds.

In reversing summary judgment for the association, the Supreme Court of Arizona, conceding that no special relationship existed, nevertheless held that the association was under a

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12 See id. at 219.
13 See id. While the court stated that the gang was known to participate in illegal activities such as drug dealing, the opinion fails to mention whether there had been any prior shootings in the condominium complex. See id.
14 See id.
15 See id.
16 See id.
17 See id.
18 See id.
19 See RESTATEMENT (SECOND) OF TORTS § 315 (1965) which states in relevant part that "[t]here is no duty . . . to control the conduct of a third person as to prevent him from causing physical harm to another unless . . . (b) a special relation exists between the actor and the other which gives to the other a right to protection." Id.
21 See Martinez v. Woodmar IV Homeowners Condominium Ass'n, 930 P.2d 485, 488 (Ariz. Ct. App. 1997), rev'd, 941 P.2d 218 (Ariz. 1997). Both the trial court and the court of appeals based their decisions on the status of the plaintiff. As "a social guest/licensee . . . he did not have the type of special relationship with Woodmar which would impose on it a duty to protect him from harm caused by third parties." Id. at 486 (citation omitted).
22 See Martinez, 941 P.2d at 220. The court did not base its decision, however, on the status of the plaintiff. See id. at 219 n.1, 220.
duty of care to make the premises safe from criminal activity. Before reaching its ultimate conclusion that the association owed a duty of care to the plaintiff, the court established certain necessary bases underlying its decision. First, the court established that the association owed a duty to a unit owner similar to the duty owed by a landlord to a tenant. The court found that the duty also extended to those using the common areas with consent. Control over the common areas was a major factor in the determination. The court then held that a condominium association has a duty to maintain the safety of the common areas with respect to the physical condition and to dangerous activities on the premises.

According to the court, the relationship between a condominium association and its unit owners, and/or those within the common areas with consent, "imposed an obligation on [the association] to take reasonable precautions for the latter's safety." This duty was imposed without regard to whether criminal activ-

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23 See id. at 222, 224.
24 See id. at 221. (relying on Frances T. v. Village Green Owners Ass'n, 723 P.2d 573 (Cal. 1986)). The court also relied on the RESTATEMENT (SECOND) OF TORTS, section 360, which states in relevant part that a "possessor of land" who retains control over part of the land which the lessee is entitled to use may be subject to liability "for physical harm caused by a dangerous condition ... if the lessor by the exercise of reasonable care could have discovered the condition" and made the area safe. Id. at 220 (quoting RESTATEMENT (SECOND) OF TORTS § 360) In a footnote, the court also referred to the RESTATEMENT (SECOND) OF PROPERTY section 17.3 (1977) which states essentially the same rule as RESTATEMENT (SECOND) OF TORTS section 360. See Martinez, 941 P.2d at 221 n.4.
25 See Martinez, 941 P.2d at 221.
26 See id. at 222. From the court's perspective, "if the association owes no duty of care over the common areas of the property, no one does because no one else possesses the ability to cure defects in the common area." Id. The court stated that the law would not recognize such a lack of responsibility. See id. Moreover, Arizona law expressly states that a condominium "association is responsible for maintenance, repair and replacement of the common elements." ARIZ. REV. STAT. ANN. § 33-1247(A) (West 1990).
27 See Martinez, 941 P.2d at 222. In reaching this conclusion, the court stated that a condominium is like a business and as such, can be liable under RESTATEMENT (SECOND) OF TORTS section 344. See id. at 222 n.7. Section 344 imposes liability on "[a] possessor of land who holds it open to the public" and fails to use reasonable care to protect guests from, inter alia, intentional acts of a third party for which the possessor could have prevented. RESTATEMENT (SECOND) OF TORTS § 344. The court also found support in the RESTATEMENT (SECOND) OF PROPERTY section 17.3 cmt. a. See Martinez, 941 P.2d at 222.
23 Martinez, 941 P.2d at 223. This relationship alone seemed to justify imposition of a duty. See id.
ity was foreseeable. With respect to dangerous activities, the court stated that "[t]he category of danger neither creates nor eradicates duty; it only indicates what conduct may be reasonable to fulfill the duty." Thus, according to the court, foreseeability does "not dictate the existence of duty."

It is submitted that the Supreme Court of Arizona erred in its holding that a condominium association owes a duty to unit owners and guests to make the premises safe from criminal activity without regard to foreseeability. The court failed to conduct an examination of the law and various issues as decided by other jurisdictions. While it is conceded that a condominium association functions as a landlord with respect to the common areas, this comparison alone neither dictates nor justifies imposing a general duty on the condominium association. The court's analysis and conclusion with respect to duty is flawed and contrary to the law in virtually every other jurisdiction. Imposing a general duty upon a condominium association without a consideration of foreseeability expands the potential liability of an association beyond any reasonable boundary. By doing so, the Martinez court failed to acknowledge the unique form and characteristics of a condominium and its association.

This Comment examines the various bases for imposing a duty on a condominium association to protect unit owners and guests from criminal activities of third parties. Part I discusses how courts have begun to treat a condominium association as a landlord with respect to the common areas of the complex. Using Part I as an underlying foundation, Part II discusses and analyzes the various competing theories for imposing a duty to protect upon landlords, and where applicable, condominium associations. This Comment criticizes imposing a general duty on a condominium association due to its unique form and, rather, proposes that a duty arises when the condominium association has voluntarily assumed a duty or the association's acts or omissions foreseeably cause or enhance criminal activity on the premises.

See id.

Id. The court stated that it "disapprove[d] of attempts to equate the concepts of duty with specific details of conduct." Id.

Id. Rather, in Arizona, foreseeability will only define the limits of an already existing duty. See id.
I. CONDOMINIUM ASSOCIATION AS LANDLORD

In the past few decades, this country has experienced a tremendous growth in condominium ownership. Because of the condominium's relatively brief existence, the issue of the tort liability of a condominium association has challenged our legal system. Although the condominium itself is a statutory creature, most statutes do not address the tort liability of the association.

The first case discussing whether a condominium association should be held to the same standard as a landlord with respect to a criminal attack by a third party was Frances T. v. Village Green Owners Ass'n. In Frances T., a unit owner was raped and robbed in her condominium unit. At the time of the incident, the plaintiff's exterior lights, which were maintained by the association, were not operating.

In determining this case of first impression, the Supreme Court of California reasoned that "for all practical purposes" the condominium association acted
like a landlord. The court emphasized the control the association had over the common areas and elements, and the overall purpose of an association in general. Similarly, the Supreme Court of Arizona found that with respect to the common areas, a condominium association is analogous to a landlord. Other jurisdictions have since followed California's lead on this particular issue. Based on certain similarities between a condominium association and a landlord, especially with respect to the issue of control in the common areas, this analogy seems reasonable and appropriate in many circumstances.

II. DETERMINING DUTY

American jurisprudence has followed the notion that, gen-

59 Id. at 576.
60 See id. at 576-77. Ordinarily, control by itself has "no meaning absent an estate in the property in question." VINCENT DI LOREZNO, THE LAW OF CONDOMINIUMS AND COOPERATIVES § 1.02[2][b], at 1-9 (1990). Whereas a landlord owns the common areas, technically, the association does not "own" the common elements. See id. However, as a result of the unit owners lack of control, the association is treated by the courts as a "de facto owner." Id. at 1-10.

In Frances T., the unit owner "had no 'effective control over the operation of the common areas.'" Frances T., 723 P.2d at 577 (quoting White v. Cox, 95 Cal. Rptr. 259, 263 (Ct. App. 1971). As evidence, the Frances T. court pointed out that when the plaintiff attempted to improve her outside lighting on her own, the association forced her to stop because they had exclusive control over the common elements which included exterior lights. See Frances T., 723 P.2d at 579.

61 See Frances T., 723 P.2d at 578. The condominium association does not merely "'mow[ ] lawns,'" but instead, "'the association in reality has a far broader and more businesslike purpose.'" Id. at 577 (quoting O'Connor v. Village Green Owners Ass'n, 662 P.2d 427, 431 (1983)).

62 See Martinez, 941 P.2d at 221. This holding was based on the association's exclusive control over the area. See id.

63 See Pamela W. v. Millsom, 30 Cal. Rptr. 2d 690 (Ct. App. 1994) (discussing the liability of a condominium association in terms of landlord-tenant law); Morgan v. 253 East Del. Condominium Ass'n, 595 N.E.2d 36 (Ill. 1992) (same); Czerwinski v. Sunrise Point Condominium, 540 So. 2d 199 (Fla. Dist. Ct. App. 1988) (per curiam) (same); see also Rubinstein & Walsh, supra note 9, at 131 (stating that in determining condominium association liability, courts have relied upon doctrine established at common law in the context of landlords and possessors of land).

64 Differences between a condominium association and a landlord do exist, however. While a landlord generates profit from the arrangements with the tenants, an association rarely does. See Katharine Rosenberry, Theories on Liability, in CONDOMINIUM AND HOMEOWNER ASSOCIATION LITIGATION: COMMUNITY ASSOCIATION LAW §§ 3, 59, 73 (Wayne S. Hyatt et al. eds., 1987). A landlord's goals generally differ from those of the tenant. See Freyfogle, supra note 9, at 888. It has also been argued that in the context of criminal attacks by third parties, it is ambiguous whether "condominium and landlord-tenant labels truly signify the same thing." Payne, supra note 9, at 368.
erally, there is no duty to protect another from harm caused by a
third party. Every rule, however, has its exceptions. In the
context of condominium associations and landlord-tenant law,
liability for injuries caused by third party criminal attacks may
be based on one or more of a variety of theories. Plaintiffs have
been most successful in bringing negligence suits. Within neg-
ligence actions however, there is no common theme with respect
to the ways in which courts analyze the existence of a duty.

Determining whether a condominium association or landlord
is negligent begins with an analysis of duty. Analyzing
whether a duty exists is a question of law for the court to de-
cide. In deciding the existence of duty with respect to a con-
dominium association or landlord for criminal acts of third par-
ties, "[t]he wide range of approaches taken by courts . . .

45 See, e.g., Centeq Realty, Inc. v. Siegler, 899 S.W.2d 195, 197 (Tex. 1995)
(stating general rule that an individual has no legal obligation to protect another
person from a third party criminal attack). Courts have applied this general rule to
landlords, see Berg v. Allied Sec., 697 N.E.2d 769, 776 (Ill. App. Ct. 1998), as well as
business owners, see Van Duyn v. Cook Teague Partnership, 694 N.E.2d 779, 781
(Ind. 1998).

46 See generally Glesner, supra note 6, at 686-88 (describing how tenants have
brought suits against a landlord based on, inter alia, implied warranty of habitabil-
ity, contract, and tort claims). For example, in Frances T., the plaintiff brought
three causes of actions: negligence, breach of contract, and breach of fiduciary duty.
See Frances T., 723 P.2d at 574.

47 See, e.g., Frances T., 723 P.2d at 587 (reversing dismissal of plaintiff's negli-
gence claim while affirming dismissal of her breach of contract and breach of fiduci-
ary claims); Pamela W., 30 Cal. Rptr. 2d at 692 n.1 ("[T]he entire complaint stands
or falls with the determination of the negligence cause of action."); see also Glesner,
supra note 6, at 688.

48 See, e.g., Cooke v. Allstate Management Corp., 741 F. Supp. 1205, 1207-09
(D.S.C. 1990) (explaining that the duty imposed by the South Carolina Residential
Landlord and Tenant Act is a question of law); Ann M. v. Pacific Plaza Shopping
Ctr., 863 P.2d 207, 212 (Cal. 1993) (in bank) (explaining that the contours of the
duty owed by landlors to maintain their land in a reasonably safe condition is a
1983) (stating that a duty exists only to prevent foreseeable injuries and that
whether such a duty exists is a question of law); Walls, 633 A.2d at 104 (noting
whether exceptions to the general rule that individuals will not be held liable for the
criminal acts of third parties is a question of law); Holt v. Reproductive Servs., Inc.
946 S.W.2d 602, 606 (Tex. App. 1997) (same); Miller v. Whitworth, 455 S.E.2d 821,
establishes only that support can be found for practically any position." In *Martinez*, the Arizona Supreme Court relied only on the Restatement, overlooking the conflicting positions on this very issue.

A. Special Relationships

While generally an individual is not legally obligated to act for the benefit of another, the existence of a special relationship may give rise to such a duty. The rationale for imposing an affirmative duty to protect another from harm stems from one party's dependence on the other. Examples of special relationships are common carrier-passenger, innkeeper-guest, business owner-invitee, and employer-employee. Once a special relationship has been established, one party receives a right of protection from the other.

1. Landlord-Tenant

Prior to 1970, courts did not view the landlord-tenant rela-

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61 *Cooke*, 741 F. Supp. at 1209 n.1. "The entire issue [of liability] turns on questions of what is the association's duty to third parties and to its members. The issue is not one that is clearly established." *Hyatt*, supra note 9, at § 6.03(n), at 346-47. Moreover, "courts within a single jurisdiction may differ as to the appropriate basis for liability; even appellate courts have misinterpreted or ignored their own state supreme court's analysis of the issue." Glesner, *supra* note 6, at 688 (footnotes omitted).

62 When Arizona courts face a question of first impression, the courts typically follow the *Restatement (Second) of Laws*. *See* *Martinez* v. Woodmar IV Condominium Homeowners Ass'n, 941 P.2d 218, 220-21 (Ariz. 1997). Relying solely on the Restatement has been questioned, however. *See Keeton et al., supra* note 1, § 3, at 17 ("The form of the Restatement is perhaps unfortunate, in that it seeks to reduce the law to a definite set of black-letter rules or principles, ignoring all contrary authority... "). Furthermore, courts may tend to "cite the Restatement when they are already in agreement with it, and... ignore it when they are not." *Id*.

63 *See* Davenport v. Community Corrections, Inc., 962 P.2d 963, 967-68 (Col. 1998) (en banc); Shields v. Wagman, 714 A.2d 881, 886 (Md. 1998); *Restatement (Second) of Torts* § 315.

64 *See* Faheen *ex rel.* Hebron v. City Parking Corp., 734 S.W.2d 270, 272 (Mo. Ct. App. 1987) ("The concept of a special relationship exists when one entrusts himself to the protection of another and relies upon that person to provide a place of safety."); *Hyatt*, supra note 9, § 6.03(n), at 348 (noting that where courts have found a special relationship, one party lacked control and was dependent upon the other).

65 *See Restatement (Second) of Torts* § 314A. *See generally* Glesner, *supra* note 6, at 703.

66 *See Restatement (Second) of Torts* § 315. *See generally* Glesner, *supra* note 6, at 704.
tionship as a special relationship that would warrant the imposition of a duty on the part of the landlord to protect tenants from criminal activity. In the landmark case of *Kline v. 1500 Massachusetts Avenue Apartment Corp.*, the Court of Appeals for the District of Columbia imposed a duty upon landlords, at least in the context of multiple-family urban dwellings, to provide protection from unreasonable and foreseeable harm based on the landlord-tenant relationship. The court reasoned that the landlord-tenant relationship existing in a large modern day apartment complex is analogous to an innkeeper-guest relationship. Thus, based on the facts of the case, the court imposed an affirmative duty upon landlords to protect tenants. The court in *Kline* indicated that this duty may extend not only to areas exclusively under the landlord's control, but to the entire premises. Since the *Kline* decision, a number of courts have ruled that the landlord-tenant relationship constitutes a special relationship.

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57 See, e.g., Goldberg v. Housing Auth. of Newark, 186 A.2d 291, 292 (N.J. 1962) (declining to impose a general duty to protect tenants from criminal activity based on the relationship).


59 See id. at 483. The *Kline* court found that the defendant landlord breached his duty as a matter of law. See id. at 486-87. The court emphasized the fact that the landlord was aware of criminal activity taking place on the premises. See id. at 481. In its rationale, the court discussed the implied warranty of habitability and the notion of analyzing leases as contracts that had recently been espoused in *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970). See *Kline*, 439 F.2d at 481-82. The *Kline* court found that, based upon the analysis of a lease as a contract, there was an implied obligation on the part of the landlord to provide protective measures. See id. at 485.


Furthermore, it should be noted that courts have consistently rejected applying the warranty of habitability to condominiums. See, e.g., Richard Siegler, *An Update of the Warranty of Habitability*, N.Y. L.J., Jul. 1, 1998, at 3 (1998) (discussing how the warranty of habitability has been applied only to cooperatives by virtue of the lease).

60 See *Kline*, 439 F.2d at 485.

61 See id. at 484.

62 See id. at 482.

Despite the recent expansion by some jurisdictions to classify the landlord-tenant as a special relationship, courts have, for the most part, been unwilling to require a landlord to be an insurer of a tenant's safety.\(^6\) For this reason, most courts have refused to categorize the landlord-tenant relationship as a special relationship.\(^6\) Thus, while a duty may arise based on specific circumstances, no duty is imposed based on the existence of the relationship alone.\(^6\)

A few jurisdictions that have directly confronted the issue in the context of condominium associations have stated that no special relationship exists between a condominium association and the unit owner.\(^6\) In *King v. Ilikai Properties, Inc.*,\(^6\) the Intermediate Court of Appeals of Hawaii first found that the landlord-tenant relationship was not a special relationship.\(^6\) The court then stated that "[w]ith respect to the Association, it is

224 N.W.2d 843 (Mich. 1970). *See generally* Glesner, *supra* note 6, at 703-04. In *Francis T.*, the court did not explicitly recognize or reject the existence of a special relationship between a condominium association and a unit owner. Instead, the court discussed whether "a condominium association may properly be held to a landlord's standard of care as to the common areas under its control" as opposed to the entire premises. *Francis T.* v. Village Green Owners Ass'n, 723 P.2d 573, 577 (Cal. 1986) (emphasis added).

\(^6\) See, *e.g.*, Walls v. Oxford Management Co., 633 A.2d 103, 106 (N.H. 1993); Miller v. Whitworth, 455 S.E.2d 821, 826 (W. Va. 1995). *But see* *Kline*, 439 F.2d at 481 ("The landlord is no insurer of his tenants' safety, but he certainly is no bystander.").


\(^6\) See, *e.g.*, Duncavage v. Allen, 497 N.E.2d 433, 438 (III. App. Ct. 1986) (stating that while a landlord will not be held liable for every crime, prior incidents connected to the premises may impose a duty of reasonable care upon the landlord).

\(^6\) See, *e.g.*, Morgan v. 253 East Delaware Condominium Ass'n, 595 N.E.2d 36, 39 (Ill. App. Ct. 1992) (holding no special relationship exists between a landlord and tenant or condominium association and unit owner).

\(^6\) 632 P.2d 657 (Haw. Ct. App. 1981). In *King*, the plaintiffs were assaulted in a condominium unit. *See id.* at 659. The plaintiffs brought a negligence action against the condominium association and other defendants alleging that defendant's failure to keep the premises safe proximately caused their injuries. *See id.*

\(^6\) *See id.* at 661. The *King* court distinguished *Kline* in that the landlord in *Kline* significantly reduced security from the time the plaintiff entered into the lease. *See id.* at 661-62.
even further removed from the chain [of potential liability] and suffice to say it had no ‘special relationship.’ In light of the fact that the majority of courts have expressly rejected the idea that the landlord-tenant relationship is a special one, it is reasonable to conclude that the relationship between a condominium association and a unit owner should not constitute a special relationship, especially when the few courts that have addressed the issue in the context of condominiums have reached the same conclusion.

2. Business Owner-Invitee

The Martinez court justified imposing a duty on the condominium association to make the premises safe from criminal activity in part on the assumption that a condominium development is a business. This reasoning seems to be analogous to the logic behind attaching liability to the business owner in a business owner-invitee relationship. The court relied on the Restatement (Second) of Torts section 344 which imposes a duty on “[a] possessor of land who holds it open to the public for entry for his business purposes.” Application of this theory of liability by the Martinez court was a broad leap that the court failed to support.

The Martinez court also stated that the relationship between a condominium association and its common areas was similar to that of a landlord and his/her common areas. If that is so, there is doubt as to whether a condominium association/landlord can also be characterized as “a possessor of land who holds it open to the public” within the meaning of section 344 of the Restatement. Further, the common areas of an apartment or condominium complex are “not open to the public” and the general public is not “expected or invited to gather there for other pur-

70 Id. at 662.
71 See Martinez v. Woodmar IV Condominium Homeowners Ass’n, 941 P.2d 218, 222 n.7 (Ariz. 1997) (in banc). The court noted the applicability of section 344 of the Restatement and laid out the responsibilities and obligations of a business owner to the invited public. Specifically, the common areas of a condominium complex are to be free of harm to the “unit owners, their tenants, and their guests.” Id.
72 Restatement (Second) of Torts § 344. Under the Restatement, liability will be imposed for injuries resulting from criminal attacks if the possessor of land failed to exercise reasonable care in discovering the danger or failed to warn of the danger. See id.
73 See Martinez, 941 P.2d at 221.
74 Restatement (Second) of Torts § 344.
poses than to visit tenants." Finally, tenants and unit owners "do not live where the world is invited to come. . . . An apartment building is not a place of public resort." Because the common areas of an apartment complex are not considered open to the public, it is doubtful that the common areas of a condominium complex can be construed as a place where the public is invited.

B. Violent Crimes Exception

A relatively new basis of landlord liability for criminal acts of third parties is the violent crimes exception. The violent crimes doctrine is an exception to the general rule of immunity for the landlord in jurisdictions that do not recognize the landlord-tenant relationship as a special relationship. Foreseeability is the key to establishing a duty and liability.

The Missouri Court of Appeals, in Faheen ex rel. Hebron v. City Parking Corp., articulated the elements of the doctrine. First, some kind of relationship between the plaintiff and defendant must exist. Second, the defendant must have been put on notice as a result of "prior specific incidents of violent crimes on the premises." Finally, the injury to the plaintiff must be of a

75 Feld v. Merriam, 485 A.2d 742, 745 (Pa. 1984). The Restatement expressly states that liability will be imposed when a member of the public is on the premises for a business purpose. See RESTATEMENT (SECOND) OF TORTS § 344. It is doubtful that Martinez, as a social guest who was attending a party at the condominium, came to the complex with a business purpose in mind. But see KEETON ET AL., supra note 1, § 63, at 439 (stating that a business purpose is not necessarily required).

76 Feld, 485 A.2d at 745.


78 See Faheen, 734 S.W.2d at 272-73 (recognizing the violent crimes exception as a viable basis for liability in Missouri).

79 See Glesner, supra note 6, at 703. Foreseeability determines the imposition of a duty and it establishes proximate cause. See id. Duty is determined by a judge, thus many cases arising under this exception are dismissed at the outset. See id.

80 734 S.W.2d 270.

81 See id. at 273. This relationship does not have to be a special relationship. While Missouri does not recognize the landlord-tenant relationship to be a special one, the court recognized that a landlord and tenant situation constitutes a "relationship" for the purposes of the violent crimes exception. See id. at 272. Thus, that relationship, coupled with other factors, may create a duty to protect from harm. See id.

82 Id. at 273. The notice can be actual or constructive. See id. at 273-74.
similar nature to the prior incidents.\(^5\) The justification for imposing a duty in these circumstances is that the prior incidents would lead a reasonable person to take precautions to avoid any future injury.\(^6\) Thus, if the elements are satisfied, a duty arises to take protective measures.

Numerous courts have either criticized or expressly rejected the violent crimes exception.\(^8\) Courts have been apprehensive in imposing an affirmative duty based on foreseeability alone.\(^9\) Furthermore, this doctrine seems to be extremely limited in its application. It only applies to instances in which violent crimes have occurred and the injury to the plaintiff is similar to the injury suffered by others in prior incidents.

**C. Voluntary Assumption**

Generally, when a party agrees to affirmatively act for the benefit of another, the actor has a duty to perform with reasonable care.\(^7\) This traditional exception to the common law non-liability rule still carries force today.\(^8\) In the context of landlord liability, the question is not whether a landlord owes a general duty to protect tenants and guests from criminal attacks but, rather, whether the landlord has assumed a duty to protect.\(^9\) Courts have had to determine whether certain initial security measures taken by landlords constitute a voluntary undertaking.\(^10\) In assessing the scope of the duty, courts generally limit the duty by the extent of the undertaking.\(^11\)

\(^{5}\) See id. at 274.
\(^{6}\) See id.
\(^{7}\) See Walls v. Oxford Management Co., 633 A.2d 103, 107 (N.H. 1993) (rejecting overriding foreseeability doctrine as a basis of liability); see also Glesner, supra note 6, at 706 (noting the scarce usage of this doctrine).
\(^{8}\) See, e.g., Miller v. Whitworth, 465 S.E.2d 821, 827 (W. Va. 1995) ("A landlord's general knowledge of prior unrelated incidents of criminal activity occurring in the area is not alone sufficient to impose a duty on the landlord.") (emphasis added).
\(^{10}\) See Pagelsdorf v. Safeco Ins. Co. of Am., 284 N.W.2d 55, 59 (listing as the fifth exception to the general common law rule of non-liability, instances in which the landlord contracted to make repairs and, in doing so, created a duty).
\(^{11}\) See Walls, 633 A.2d at 106-07 (recognizing imposition of a duty on the landlord to act with reasonable care when the landlord undertakes to provide security); Miller, 465 S.E.2d at 825 (stating that affirmative acts give rise to a duty).
The question of whether the hiring of security guards is a voluntary assumption of a duty for which liability may be imposed has received mixed treatment. In *Dailey v. Housing Authority for Birmingham District*, the Supreme Court of Alabama refused to hold that the defendant "voluntarily assumed the duty to provide a totally crime-free environment," with respect to ensuring the tenant's safety, by hiring a security guard. The court reasoned that holding the defendant liable would "discourage" landlords from hiring guards. In *Cross v. Wells Fargo Alarm Services*, however, the Illinois Supreme Court stated that when the Chicago Housing Authority undertook to hire security guards, it had a duty not to increase the danger to tenants when the guards were not on duty.

In *Martinez*, the court failed to discuss the possibility of imposing a duty on the condominium association based on a voluntary undertaking theory. In light of the fact that other jurisdictions have considered this issue based on the hiring of security guards, the Supreme Court of Arizona should have at least discussed the issue. The voluntary assumption doctrine is a viable, acceptable, and reasonable basis for imposing a duty on a negligent actor and has been widely recognized in the legal community.

(ILL. APP. CT. 1992). In 253 East Delaware, the defendants had hired a doorman to screen visitors. See id. at 39. When the plaintiff entered the building one evening, she observed a man talking to the doorman. See id. at 37. The same man attacked the plaintiff a short time later. See id. at 38. The plaintiff brought suit alleging breach of a duty based on the defendant's voluntary undertaking to provide security to its unit owners/tenants. See id. The Appellate Court of Illinois ruled in the defendant's favor as a matter of law. See id. at 39. To support its conclusion, the court stated that even if the defendants had voluntarily undertaken a duty, that duty was limited to the extent of the undertaking. See id. Because the doorman was employed only to screen guests, there was no duty to protect owners/tenants from criminal attacks. See id.


639 So. 2d 1343.

Id. at 1346.

Id. See also *Glesner*, supra note 6, at 699 (noting that if liability is imposed based on the hiring of security guards, landlords may be discouraged from providing security).

412 N.E.2d 472.

See id. at 475.

See, e.g., *The Hindoo*, 74 F. Supp. 145, 151 (S.D.N.Y. 1947) (supporting the
D. Common Areas

Condominium associations have a duty to maintain the common areas of the complex. Similarly, landlords and landowners have a duty to maintain the physical conditions in areas within their exclusive control. Whether this duty to maintain the common areas encompasses a duty to make the premises safe from foreseeable criminal activity for tenants, unit owners, and guests is an issue in which there is considerable debate throughout the country. In Martinez, the court held that the association was under a duty of reasonable care to make the premises safe from dangerous activities.

1. General Duty to Protect Based on Foreseeability

Since 1970, a number of jurisdictions have imposed upon a landlord a general duty to make the common areas safe from foreseeable criminal activity, independent of the existence of any structural defects on the premises. These courts have found the landlord's control over the common areas to be a decisive factor. For example, the court in Frances T. found the association is responsible for maintenance, repair and replacement of the common elements.

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101 See Keeton et al., supra note 1, § 63, at 440-42.


104 See, e.g., Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 482 (D.C. Cir. 1970) (imposing a duty to protect against criminal activity in, inter alia, areas within the landlord's control); Keeton et al., supra note 1, § 63, at 442-43 (noting an increase in the number of courts imposing a duty to protect tenants from foreseeable criminal activity).

105 See Lefmark Management Co. v. Old, 946 S.W.2d 52, 53 (Tex. 1997) (stating that a duty to use reasonable care to protect invitees is imposed on the party who controls the premises); Centeq Realty, 899 S.W.2d at 197 (explaining that the right
tion's exclusive control over the common elements, coupled with the association's awareness of prior crimes, to be dispositive.\textsuperscript{106} Courts retaining the traditional classifications of visitors\textsuperscript{107} impose a duty on landowners to protect invitees from unreasonably dangerous conditions on the land.\textsuperscript{108}

Courts using this doctrine must first decide the issue of foreseeability.\textsuperscript{109} In determining whether a criminal act was foreseeable, a court generally has two options: "prior similar incidents" rule or "totality of the circumstances."\textsuperscript{110} When a court applies the "prior similar incident" rule, the past events must "bear a sufficient relationship to the incident at issue such that it could be said that defendants should have known of the likelihood of its occurrence."\textsuperscript{111} Other courts have criticized the prior incident doctrine as being too restrictive in its application.\textsuperscript{112} Instead,

to control is a factor in determining the issue of whether there is a duty to protect against unreasonable and foreseeable harm); Holt v. Reproductive Servs., Inc., 946 S.W.2d 602, 606 (Tex. Ct. App. 1997) (emphasizing the right to control the premises as an important factor in determining whether a duty will be imposed).

\textsuperscript{106} See Frances T v. Village Green Owners Ass'n, 723 P.2d 573, 579 (Cal. 1986) (in bank) (concluding that the association, with the same duty as a landlord, was in control of the premises and therefore owed a duty to protect against crimes of which the association had notice); see also Kline, 439 F.2d at 483-84 (reasoning that in a large urban apartment complex, the landlord is in the only and best position to take protective measures to ensure the safety of his/her tenants).

\textsuperscript{107} Traditionally, in property law, the liability of a landowner was dependent upon the status of the visitor. See KEETON ET AL., supra note 1, § 58, at 393. Different duties were imposed depending on whether the individual was an invitee, licensee, or trespasser. See id. Based on a "rough sliding scale," a landowner owed an invitee the highest standard of care followed by a licensee, and finally, a trespasser. Id. Recently, however, a growing number of courts have abolished the distinction among visitors and instead, imposed a general duty of reasonable care. See id. § 62, at 432-34.

\textsuperscript{108} See Stanley v. Town Square Coop., 512 N.W.2d 51, 53, 55 (Mich. Ct. App. 1993) (finding that a cooperative association is analogous to a landlord, and thus, has a duty to protect against unreasonably dangerous conditions of land and to protect both tenants and invitees from criminal acts of third parties); at 54 (discussing visitors as invitees of landlords because part of the rent paid to landlord's is consideration for permission to have visitors on the premises).

\textsuperscript{109} See, e.g., Frances T., 723 P.2d at 578-79 (discussing the importance of foreseeability for the determination of liability).


\textsuperscript{111} Polomie v. Golub Corp., 640 N.Y.S.2d 700, 701 (App. Div. 1996) (finding that prior incidents of solicitation and harassment were not sufficient to put the defendant on notice to prevent the robbery and sexual assault that caused plaintiff's injuries); see also Kline, 439 F.2d at 481 (emphasizing defendant's knowledge of prior similar assaults and robberies).

\textsuperscript{112} See Isaacs v. Huntington Mem'l Hosp., 695 P.2d 653, 665 (Cal. 1985)
these jurisdictions apply the "totality of the circumstances" doctrine and look at other factors in addition to prior incidents to determine whether the plaintiff's injury was foreseeable. For example, courts may take into account prior crimes of a lesser nature than the one plaintiff alleges.

Courts must also determine whether foreseeability relates to duty, proximate cause, or both. The Martinez court stated that foreseeability is irrelevant as to whether a duty exists. Rather, foreseeability, according to the court, only defined the scope of the duty. While jurisdictions agree that foreseeability does partly determine the scope of a duty of care, most jurisdictions would probably disagree with Arizona's conclusion that foreseeability is not relevant in determining if a duty should be im-

(criticizing the prior similar incident rule because victims initially injured are precluded from recovery).

See id. at 655-56 (noting that the premises was in a high crime area, the lights were not working, and prior crimes of a different nature had occurred). It should be noted that the California Supreme Court has changed its position since the Isaacs decision. See Ann M., 863 P.2d at 214-16. Because of increased criminal activity regularly occurring in society, the court felt the rule in Isaacs needed "refinement." Id. at 215. In deciding whether the defendant had a duty to provide security guards, the court "conclude[d] that the requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises." Id.; see also Pamela W. v. Millsom, 30 Cal. Rptr. 2d 690, 695 (Ct. App. 1994) (requiring a "high degree of foreseeability" to be proven before imposing a duty to hire security guards upon the landlord and condominium association).

See Frances T., 723 P.2d at 579 (emphasizing the defendant's knowledge of burglaries that occurred prior to the plaintiff's rape); Czerwinski v. Sunrise Point Condominium, 540 So. 2d 199, 201 (Fla. Dist. Ct. App. 1989) (stating that proof of lesser crimes is relevant in determining foreseeability). When courts analyze prior incidents, location becomes important. Compare Admiral's Port Condominium Ass'n, Inc. v. Feldman, 426 So. 2d 1054, 1055 (Fla. Dist. Ct. App. 1983) (declaring that prior crimes committed off the premises, while similar, are not probative with respect to foreseeability) with Czerwinski, 540 So. 2d at 201 (explaining that prior crimes need not be in the same location as the later crime in order to be probative on the issue of foreseeability).

See Martinez v. Woodmar IV Condominiums Homeowners Ass'n, 941 P.2d 218, 223 (Ariz. 1997) ("The type of foreseeable danger did not dictate the existence of duty but only the nature and extent of the conduct necessary to fulfill the duty.").

See id.

See, e.g., Ann M., 863 P.2d at 215 (explaining that in determining the scope of duty, foreseeability is weighed against the burden the duty imposes); Lefmark Management Co. v. Old, 946 S.W.2d 52, 58-59 (Tex. 1997) (Owen, J., concurring) (noting that foreseeability is a factor in determining the nature of a duty); Pamela W., 30 Cal. Rptr. 2d at 695 ("[A] high degree of foreseeability is required in order to find ... the scope of a landlord's duty.").
posed. For example, in Admiral’s Port Condominium Ass’n v. Feldman, a Florida District Court of Appeal stated that the duty of care to protect against criminal acts of third parties is dependent upon the foreseeability of criminal activity. Furthermore, in Knauss v. DND Neffson Co., an Arizona case following Martinez, the court questioned Martinez’s conclusion regarding duty and foreseeability. The court noted, under “Martinez, foreseeability is not a relevant factor in the threshold legal determination of duty.” The court also stated “[i]f our interpretation [of Martinez] is correct, however, that proposition seems to conflict with prior pronouncements of the [Arizona] supreme court and court of appeals. It also varies from the approach other states have taken in similar cases.” Given the great weight of authority indicating that foreseeability is a necessary factor in determining the existence of a duty, it is contended that the Martinez court erred in its analysis.

2. Duty to Maintain is Limited to Physical Condition of Premises

At the other end of the spectrum, there are a number of

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118 See, e.g., Lefmark, 946 S.W.2d at 59 (Owen, J., concurring) (“Foreseeability is a consideration to be weighed by the court in determining if a duty is owed...

119 Ann M., 863 P.2d at 214 (emphasis added). See Lefmark, 946 S.W.2d at 59 (Owen, J., concurring) (“[W]hatever duty a lessor may have, there can be no duty in the absence of a foreseeable risk of harm from violent crime on the premises”) (quoting Walker v. Harris, 924 S.W.2d 375, 377 (Tex. 1996)); KEETON ET AL., supra note 1, § 63, at 443 n.16 (“There is of course no duty to prevent criminal attacks that are unforeseeable...

121 See id. at 1054.
123 See id. at 275 n.4. In Knauss, the decedent was abducted from the shopping mall parking lot where she worked. See id. at 272-73. A wrongful death action was brought against the mall owners/operators, as well as others. See id. at 272 Although the defendants claimed they owed no common law duty because the crime was not foreseeable, the court, relying on Martinez, stated “[n]otwithstanding the allegedly unforeseeable criminal acts against her, Martinez compels the conclusion that... the mall defendants owed her a common law duty to use ‘reasonable care to prevent harm from criminal intrusion’ while using the mall’s common area.” Id. at 275 (quoting Martinez v. Woodmar IV Condominiums Homeowners Ass’n, 941 P.2d 218, 222 (Ariz. 1997).
124 Id. at 275 n.4.
125 Id. (citations omitted).
courts that do not impose a general duty on landlords to make the common areas safe from foreseeable criminal activity. Instead, these jurisdictions state that the landlord's duty to maintain the common areas is limited to the physical condition of the land. The rationale generally given is that a landlord does not have the duty to police the premises and a landlord is not an insurer of safety. Some courts reason that expanding the duty to maintain the physical conditions "to include a duty to protect against criminal activity would stretch it well beyond its current limits and change the landlord/tenant relationship dramatically."

Even within these jurisdictions, however, liability may be imposed upon the landlord if a physical defect caused or enhanced criminal acts on the premises. Under this theory, a duty to use reasonable care may arise when "prior incidents similar to the one complained of and which are connected with the physical condition" occur on the premises. The prior inci-

126 Id; Cooke v. Allstate Management Corp., 741 F. Supp. 1205, 1211 (D.S.C. 1990) (stating that the landlord's duty to maintain common areas involves keeping premises in good repair and liability only arises for injuries resulting from dangerous conditions of the premises); Gulf Reston, Inc. v. Rogers, 207 S.E.2d 841, 844 (Va. 1974) (same).
128 Cooke, 741 F. Supp. at 1211; see also Cramer, 848 F. Supp. at 1225. The court in Cooke distinguished structural defects in the premises and criminal activity by third persons. See Cooke, 741 F. Supp. at 1211 ("Criminal activity is a completely different type of danger than rotting stairways.").
129 See generally Glesner, supra note 6, at 690-93 (cataloguing defects that different jurisdictions have used as the basis of imposing liability).
130 Duncavage v. Allen, 497 N.E.2d 433, 438 (Ill. App. Ct. 1986). See Stribling v. Chicago Hous. Auth., 340 N.E.2d 47 (Ill. App. Ct. 1975). In Stribling, the plaintiff-tenant alleged negligence on the part of the landlord, Chicago Housing Authority, for failing to secure the two vacant apartments adjacent to the tenant. The plaintiff had become aware that individuals had gained access to the vacant apartments without authority. See id. at 48-49. Plaintiff's requests to secure the apartments went unheeded and plaintiff's apartment was subsequently burglarized. See id. at 49. The criminals had gained access to plaintiff's apartment via the adjacent apartments. See id. Because the defendants did not remedy the problem after notice of the first burglary, plaintiff's apartment was burglarized two more times. See id. The Appellate Court of Illinois held that while defendant did not owe plaintiff a duty
Liability may also arise when a landlord's acts or omissions foreseeably increase the risk of crime. This duty stems from the general rule that an individual whose acts or omissions have created the possibility of harm must take steps to reduce the risk. Courts have been most willing to impose a duty when the landlord's negligent acts or omissions facilitated unauthorized entrance. For example, the Appellate Court of Illinois in Dun-cavage v. Allen reversed dismissal of plaintiff's complaint where exterior lights of the apartment complex were burned out; the landlord had permitted weeds to grow so high as to allow an individual to hide; and a ladder was left out which had previously been used to gain entry to another tenant's apartment which was burglarized. The court found these factors were sufficient to allege breach of the landlord's duty to maintain the common areas which may have proximately caused plaintiff's injury.

It is contended that a duty should be imposed on a condominium association when there is a physical defect in the common areas that causes criminal activity, the association's act or

with respect to the first burglary, a duty to protect subsequently arose, making the landlord liable for the second and third burglaries. See id. at 50.

See Petrauskas v. Wexenthaller Realty Management, Inc., 542 N.E.2d 902, 906 (Ill. App. Ct. 1989) (noting that while the present and past crimes need not be identical, the risk causing plaintiff's injury must have been present during the prior crimes); Glesner, supra note 6, at 707 (explaining that the majority of jurisdictions only require that the prior incidents be sufficient to "provide notice of future criminal activity" to the landlord).


See Walls v. Oxford Management Co., 633 A.2d 103, 106-07 (N.H. 1993) (pointing out that "a landlord who undertakes . . . to provide security will thereafter have a duty to act with reasonable care").

See, e.g., Rowe, 531 N.E.2d at 1369 (finding that defendant's knowledge of missing keys, coupled with prior criminal activity, may give rise to a duty); Glesner, supra note 6, at 691 ("Conditions such as broken or missing locks, missing pass keys and easily accessible ladders or fire escapes seem more likely to produce liability. . . .") (footnotes omitted).


See id. at 437.

See id.
omissions enhances criminal activity, or the association voluntarily assumes a duty to protect. Given the condominium’s unique form of ownership, these are the most appropriate bases for imposing liability on a condominium association. The Supreme Court of Arizona should have adopted one of these theories, rather than imposing an extremely broad rule on the association. The court would have probably reached the same conclusion in this specific case.

CONCLUSION

Through the Martinez decision, the Supreme Court of Arizona “has rushed headlong into an unnecessary expansion of tort duties that adds to the already dubious reach of this infinitely expandable part of our common law.” Given the nature and form of a condominium, and in light of the fact that a significant number of jurisdictions have refused to expand the liability of a landlord in the context of protecting tenants and guests, it seems unreasonable and illogical to expand a condominium association’s liability in such a broad manner. Unlike a tenant, a unit owner has the opportunity, through statutory rights and voting power, to effect desired changes. Moreover, viable alternatives are available for plaintiffs in situations where an association is negligent. The Martinez decision reaches beyond any reasonable standard. A decision that has such significant ramifications should not be made by a court of law but, rather, by the legislature or the parties themselves.

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