**ORAL ARGUMENT — 1/7/98**
**97-0475**
**TIMBERWALK APTS. V. CAIN**

LAWYER: I speak for the petitioners today regarding what we perceive to be the need for clarification to assist trial judges and courts of appeals in resolving an issue that comes before them constantly and about which they continue to issue decisions that I believe are at variance with the guidance that has been given so far today by this court.

There seems to be a constant tension between the distinction issued in the proximate cause cases regarding foreseeability and the foreseeability issue in duty cases. Courts particularly including at the appellate level and it seems particularly in Houston are ______ or equating the foreseeability that is required for proximate cause with the foreseeability that is required to establish a duty.

I believe that courts particularly in this case, but by no means limited to this case, as subsequent decisions in *Holder v. Mellon Mortgage* in Houston; and in *Silva* in Corpus Christi indicate courts consistently appear to fail to recognize that the very thing that must be foreseen to create a duty is not merely crime, but an unreasonable risk of harm from crime. The language of the court in this case is very similar to the language of the court in *Holder* because they were written by the same judge, Justice Fowler. Justice Fowler, although an excellent justice is in the same situation as so many other judges are seeming to rely on *Nixon* in the absence of clarification from this court that *Nixon* isn't the relevant security case. *Nixon* however being this court's most clearly discussed security case, this court's greatest exposition in the law of security, is favored by the courts of appeals even though it is inapplicable.

This court's holding in *Walker* is actually much more ______, although it is quite limited. In *Cain* and in *Holder*, Justice Fowler discussed the duty to provide security in terms of the prevention of what seems to be the mere possibility of crime. Her language in *Cain* was with regard to the duty of a premises occupier to provide adequate security measures to protect invitees or people on the property. Her language in *Holder* was very similar, and was addressing the duty of the owner of a parking garage to provide security not even for the people who were intended to use the parking garage, but for people who might be as the court called it "gratuitous licensees". In that case a woman who was brought against her will by an on duty Houston police officer to that garage and sexually assaulted in his police car at a time when the garage was not open for anyone intended to use it because all of the employees of *Mullen Mortgage* had long since gone home. It was during the middle of the night.

The basis for the imposition of the duty in that case was seemingly even less significant than the duty that was imposed in this case, that being that there were no locks on the parking garage. And in the absence of a chain and a lock that caused the entrance to the parking garage it was foreseeable that someone might drive into the parking garage, might commit a crime

And the mere fact that this Houston police officer had that parking garage as the best available cite for his depredations was chosen by the court as sufficient reason to impose a duty on the owner of the parking garage to guard against crime in a situation when it never had any reason to believe that it had a duty to protect anyone invited onto its property would ever be in that garage.

ENOCH: Why shouldn't a commercial landlord have a duty to provide reasonable security?

LAWYER: I believe the landlord does have a duty to provide reasonable security beginning at the point at which there is a condition that's unreasonably dangerous.

ENOCH: Let's start with that. An individual homeowner could choose any level of security they wish. They can choose to accept the risk with no security. They can choose to accept some risk with some security. They can choose to have no risk and a tremendous amount of security. A tenant in an apartment complex can't make those choices. They could lock their door. They perhaps could do their own intrusion alarm, but they couldn't prevent people from coming onto the common areas. They couldn't prevent their neighbor, who is a rapist, to move in next door to them. There's a number of things that a tenant in a housing complex could not do that an individual homeowner could do to protect themselves. Why isn't it appropriate to move that duty of the choice of security to the landlord not the foreseeability of crime, but the issue being the reasonableness of the security precautions taken as it relates to the crime in the area?

LAWYER: I believe your hypothetical relates to the availability and opportunity to protect against crime. And my answer would be, that the landlord isn't under an obligation to do that just as the homeowner isn't under an obligation to do it. Yes, the option exists, but I would say that most residences don't have controlled access gates.

ENOCH: The homeowner could choose to do that, but a tenant couldn't choose to do that.

LAWYER: Well the tenant's choice exist and it's exercised admittedly subject to serious financial constraints for many people by the ability of the tenant to choose to live in a complex that offers that. And complexes do offer that based on the market demand. And the market demand however is set in relation to price. It's possible to live in an extraordinarily well protected multi-family dwelling: a high rise or a place with gates and security. But you have to pay for them. And that's no different from the requirement that if you or I wish to have a gate and security system, we must also pay for it. And so I see the issue as cost verses benefit. And the reality that so many judges on the courts of appeals and trial judges and juries don't want to face is that crime is everywhere and not everyone can afford the same way to protect themselves against crime. And sympathy often leads juries although in Houston our problem is not so much juries as judges, to declare this duty I think out of sympathy without a hardheaded recognition that everyone has to pay money and devote resources to protect themselves against crime, and multi-family dwellers who are

tenants have that same opportunity. And the answer may be as in the case of this unfortunate lady, she and her roommate could afford $500 a month, that was their limit. And it may very well be true that you can't pay $500 a month and get what your honor is describing. And that probably is the case, and that relates to the allocation of resources in society. And I don't think that's really properly a subject for anything but legislation. Because if the legislature for example were to address that problem, they would be singling out security as a special area for socialization and they would be saying that everyone in society shall pay for this minimum standard of security.

OWEN: Do statutes require that they have locks on exterior doors?

LAWYER: Yes.

OWEN: And isn't there some evidence in the record that the apartment complex knew that sliding glass doors could be opened even if locked by being pushed up and back?

LAWYER: That was highly disputed.

OWEN: Even though it was disputed there is evidence to that effect in the record?

LAWYER: There is evidence in the record from the security expert for the plaintiff that it is possible to rock sliding glass doors as a general proposition. There is no evidence that this particular sliding glass door was opened that way. That was the plaintiff's argument, but the security experts went out and they couldn't do it.

GONZALEZ: How about the fingerprints that were very low?

LAWYER: The fingerprints were actually about palm level and they were the rapist's fingerprints, no question. That would indicate an attempt. It might indicate that he was just trying to slide it open to see if it was locked. Of course it could also be consistent with trying to rock it open. But the bottom line is that the experts couldn't open it. The truth is no one really knows how he got in, and that was indeed a fact issue. But fortunately we stand here with the jury verdict in our favor, and so that fact issue has been resolved our way. And the only issue we bring to this court is a charge issue. And the charge we insist was appropriate on this court's unprecedent. On the basis of *Tidwell*, *Walker v. Harris*, this court has clearly indicated that we're dealing with a premise condition.

HECHT: How do we know when there is unreasonable risk?

LAWYER: At present, we don't. And my suggestion is that this court address that. I've talked about the Restatement §344. I perceive the problem to be that courts are referring to §448 as discussed in *Nixon* regarding the fairly minimal level of foreseeability that must exist when statute has defined the duty and the breach as in *Nixon*. I'm not suggesting that this court adopt Comment

F. But I do believe it would be a major step forward in terms of clarification for everyone as to where they stand if this court were to take something like Comment F as a starting point, and tell the jury. I know that this court and others _____ what are thought of as comments on the evidence, but when this court writes something and says this is what the jury should be said, trial judges won't regard that as a comment. They will say, "uh, thank heavens the Supreme Court has told me I can do this." And if this court were to write a modified version of comment F, the court would be giving jurors tremendous assistance and trial judges at the summary judgment level tremendous assistance in saying: You're not an insurer. Now to Comment F doesn't go far enough because it's hard to reconcile Comment F with the concept that duty is a question of law for the court. And I believe that the court can harmonize the rule that duty is a question of law for the court with the general concept that the jury gets to resolve disputed fact issues bearing on the existence of duty by emphasizing that foreseeability of crime requires an above average level of crime. It requires crime of the type that suggest that there's a danger. In other words, not break-ins of cars. Perhaps not even property crime at all. But if we're talking about a violent assault like a rape, there needs to be some evidence of crime on or next to the premises as the court discussed in *Walker* that suggests the possibility of a rape.

GONZALEZ: But here there was evidence of 11 sexual assaults within a 1 mile radius where the attack occurred according to the CA's opinion.

LAWYER: And the court is wrong in that, because the court overstated the record. The record was "a rape call." And the difference between "a rape call" and "an actual rape" is the difference between whatever a police dispatcher takes down and what the investigation shows. When the investigation was done by the defense experts it turned out that those 11 rape calls were in a broad area. But when you shrank it to the apartment community of some 8 or 11 apartments of which ____________ was a part, it was reduced to 1 rape call in the entire preceding year, and that turned out not to be a rape at all. It turned out to be sexual touching, unwanted sexual touching by one adult of another.

ABBOTT: You're saying here where the rape was committed by one of the tenants, it doesn't matter how many rape calls or actual rapes occurred outside of the apartment complex?

LAWYER: I think it does not, because the tenant was there and was in a position to commit any kind of crime that he wanted subject only to his fear that he would be caught breaking and entering into someone's apartment. The access case for example, which I don't agree there's any duty to provide certainly wouldn't stop somebody who lives there nor would any kind of security officer who is at the gate saying, "Coming in, don't come in." He wouldn't have stopped a resident. So pretty much residents are free to roam at will, and the only thing that will prevent them from breaking in is their fear that they will be observed and caught if they are of the criminal mind and they are going to break in if they can.

PHILLIPS: You're saying that an apartment owner has no duty to provide any security

whatsoever as long as at trial someone who sues you can always...

LAWYER: I believe that needs to be the law because the alternative is that the statement in Comment F after the restatement, which has been followed widely by courts across the country, including some since I wrote my brief, the comment that you're not an insurer as a property owner becomes a dead letter.

As the matter of the common law, I am suggesting to the court, that another court has to develop the common law, and I know the court makes a choice when you rule in a case like this either way you are making a choice, and I'm not suggesting the court abandon its role in developing the common law. But when the court develops it in a very causative manner in terms of imposing duties that haven't previously existed, I am suggesting that the people through the legislature are the ideal determiners of how broad that duty should be and especially what burden it should be.

OWEN: What's the duty in an above-average crime area? Suppose that you don't meet that criteria, that you had a higher than average...

LAWYER: That is the hardest question for me to answer. Because I feel that courts across the nation give short shrift to the issue of burden. And I simply don't agree that a duty arises because crime is above average and even significant.

OWEN: I thought that was the duty you were just asking us to adopt?

LAWYER: I am suggesting that that's the threshold before there is even an issue of duty. I personally believe that the result of that kind of duty being imposed will be to drive stores out of areas where people are relatively poor and they need the grocery store, they need the washateria, they need all the stores that we all take for granted across town, but which in any higher crime area are going to be higher crime locations. And the result in imposing a duty simply based on the incidence of crime upon people who provide those mom and pop type operations or small operations will be to drive their insurance to the point where they can't afford it.

OWEN: Let me ask you about the instruction that was given in this case. And again going back to the sliding glass door. Assuming for the moment that there was a statutory duty or ordinance that required the apartment complex to secure exterior doors. Why was this instruction not error when the jury was told the tenant had to complain about it? In this instance there is at least seems to me some evidence that the apartment complex knew the door didn't properly close and the tenants didn't know that. Wouldn't this instruction improperly skew that factual determination by the jury?

LAWYER: I don't believe so because the latch was provided. It isn't a situation where the apartment complex didn't provide a door...

OWEN: But they knew that in some instances the latches would not prevent entry, that the latch could be circumvented by pushing the door open. Isn't there evidence in the record that they knew that?

LAWYER: Yes it is in the record that they are generally aware that people have opened sliding glass doors in that manner.

OWEN: In that complex?

LAWYER: Yes. But that does not mean that that's because that's inherent in the design of a sliding glass door. The statute requires that there be a lock on the sliding glass door, and there was a lock. In any given apartment unit, the landlord has to be put on notice that there's a problem before it has any kind of statutory duty to remedy it.

OWEN: But that's my point. Here they knew the lock was not functioning to actually secure the door. In some apartments at least.

LAWYER: In some apartments, yes, but I am suggesting it's got to be resolved in a unit by unit basis. The mere general knowledge that these locks can go bad is no different from any door lock that can go bad.

OWEN: That was something that the apartment complex might have had knowledge about that you wouldn't expect the tenant necessarily to know.

LAWYER: I see your point. On the contrary, I am suggesting that the heart of the case with respect to the door lock is that only Tammy Cain and Phyllis Scott as tenants in that unit had any way of knowing whether that latch would open freely even when it was supposed to be locked. They are the only ones who could know that, and they didn't communicate that.

HECHT: In fact they used a broom handle to help secure the door from time to time?

LAWYER: They did which is prudent to do even if the latch works. And there was not a legal requirement that there be a so called "charley bar," provided, which the theory behind a "charley bar" is that you can't open a sliding glass door in that manner. But there was no requirement that there be any kind of charley bar provided and to the extent they thought they needed that, they had a broom handle. And they admitted that they weren't very good about putting their broom handle there. The record is clear that there was no written notice by them to the apartment complex that there was a problem with the door. There is no evidence by the plaintiff.

OWEN: But there is evidence that even in apartments where the door latches worked, that you can circumvent the door latch; isn't that correct?

LAWYER: There was evidence that that has occurred. Everything wears out. And that would reflect no more than the inevitability that with time depending on differential settlement in a location like Houston where you have gumbo soil, sometimes you could have something get out of alignment and yes it would be possible to work it out in that manner. But if the apartment complex isn't placed on notice by the tenant during her tenancy that that happens they have no way of knowing. And the whole purpose of that statute is to require the tenant to make the owner aware. This isn't a case where they never provided the lock to begin with.

SPECTOR: The management had actual notice. Whether they had written notice or not they had actual notice.

LAWYER: That's disputed, and it was resolved by the jury in favor of the petitioners.

PHILLIPS: The issue is that the charge that's read to the jury, we can't say we can't look at that because of any factual issues are resolved in favor...

LAWYER: This is true, and that's why I did extensively address the evidence for the purpose of the court's harmless error analysis.

HECHT: There is an indication in respondent's papers below that the respondent has a terminal illness. Do you know anything about the status of that?

LAWYER: I was not trial counsel, but I believe she may have died. She was close at the time of trial. She was definitely on an irreversible downward slope.

GONZALEZ: Was that a result of this assault?

LAWYER: No. It was uncontradicted that she had the disease before the assault.

HECHT: Does that make this case moot?

LAWYER: No. Her estate certainly has an interest the same interest that she had, although she won't be around to see the result, which could be a good or a bad thing. I don't know that that affects this court's approach at all. I wouldn't want to say that my opposing counsel didn't do what he was supposed to do. I am actually not certain of that. It was never significant to anything that I did in the case.