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Frances T. v. Village Green Owners Association: Liability of Condominium Associations and Boards of Directors for Criminal Acts of Third Persons

In *Frances T. v. Village Green Owners Association*,[1] the owner of a condominium unit sued the condominium association[2] and the individual members of the board of directors of the association after being raped and robbed inside her own unit.[3] The plaintiff alleged negligence, breach of contract, and breach of fiduciary duty.[4] She contended that the failure of the association to install sufficient exterior lighting, and the refusal of the association to permit her to install additional lighting outside her unit was the cause of her injuries.[5] The California Supreme Court dismissed her causes of action for breach of fiduciary duty and breach of contract,[6] but remanded the negligence claim for trial.[7]

Part I of this note will discuss the legal background of *Frances T.*[8] Part II sets forth the facts and decision of the case. Part III will examine the legal ramifications of the opinion.

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1. 42 Cal. 3d 490, 723 P.2d 573, 229 Cal. Rptr. 456 (1986).
2. The condominium association was a non-profit corporation. *Id.* at 496, 723 P.2d at 574, 229 Cal. Rptr. at 457. Homeowners associations may be either incorporated or unincorporated. An incorporated homeowners association is incorporated and governed under the Nonprofit Mutual Benefit Corporation Law. *See* CAL. CORP. CODE §§ 7110-8910 (West 1977 & Supp. 1987). 11 D. HAGMAN & R. MAXWELL, CALIFORNIA REAL ESTATE LAW AND PRACTICE § 385.03 (1986) [hereinafter D. HAGMAN & R. MAXWELL].
3. *Frances T.*, 42 Cal. 3d at 495-96, 723 P.2d at 574, 229 Cal. Rptr. at 457.
4. *Id.*
5. *Id.* at 496-98, 723 P.2d at 574-76, 229 Cal. Rptr. 457-59.
6. The breach of the contract claim was dismissed on the grounds that the conditions, covenants, and restrictions, and the bylaws were incorporated in the contract, recorded in the grant deed for plaintiff's condominium, and no provisions were in the writing which imposed any contractual obligation on the defendants to install additional lighting. *Id.* at 512-13, 723 P.2d at 586-87, 229 Cal. Rptr. at 469. The breach of fiduciary duty claim was also dismissed. The court stated that the directors owe a fiduciary duty to the corporation to exercise due care and to maintain undivided loyalty to the corporation. A fiduciary duty does not normally arise between landlords and tenants, and the plaintiff alleged no facts showing the directors had a duty to serve as the Village Green Association's landlords. *Id.* at 513, 723 P.2d at 587, 229 Cal. Rptr. at 470.
7. *Id.* at 514, 723 P.2d at 587, 229 Cal. Rptr. at 470.
8. 42 Cal. 3d 490, 723 P.2d 573, 229 Cal. Rptr. 456 (1986).

I. Legal Background

A. Landlord Liability

Under the early common law when a property owner leased to a tenant, the lessor surrendered both possession and control of the land to the lessee and merely retained a reversionary interest in the premises.[9] The lessee acquired a present possessory estate in the land during the term of the lease, with the attendant responsibilities of maintaining the premises and correcting dangerous conditions which developed while the tenant was in possession.[10] The landlord's responsibilities, therefore, were transferred to the lessee and the landlord had no duty to safeguard the physical security of tenants.[11]

Distinct exceptions to this general rule of nonliability have evolved when a "special relationship" exists.[12] These exceptions prompted the creation of a special relationship between landlords of urban

9. W. Prosser & W. Keeton, Prosser and Keeton on the Law of Torts 434 (W. Keeton, D. Dobbs, R. Keeton & D. Owen 5th ed. 1984) [hereinafter Prosser & Keeton].

10. *Id.*

11. R. Schoshinski, American Law of Landlord and Tenant § 4:14 (1980). This rule continues in recent cases in some circumstances. *See* Powell v. United Oil Corp., 160 Ga. App. 810, 287 S.E.2d 667 (1982) (lessor of service station not liable for emotional distress of plaintiff when third person watched her using restroom facilities through peep hole); Seago v. Roy, 97 Ill. App. 3d 6, 424 N.E.2d 640 (1981) (even though landlords made minor repairs, landlords had no duty to keep safe premises under tenant's control); Moore v. Muntzel, 231 Kan. 46, 642 P.2d 957 (1982) (lessor retained no control over premises for determination of liability for fire damage).

12. R. Schoshinski, *supra* note 11, § 4:14. Certain relationships are protective by nature and give rise to an affirmative duty to render aid. *Id.* A "special relationship" exists between common carriers and passengers. *See, e.g.*, McPherson v. Tamiami Trail Tours, Inc., 383 F.2d 527 (5th Cir. 1967); Bullock v. Tamiami Trail Tours, Inc., 266 F.2d 326 (5th Cir. 1959) (liability for physical attacks); Robinson v. Southern Ry. Co., 40 U.S. 549 (1913); Pullman Palace-Car Co. v. Adams, 120 Ala. 581, 24 So. 921 (1898) (liability for thefts of property). The courts have also deemed the relationship between innkeepers and guests to be "special." *See, e.g.*, Fortney v. Hotel Rancroft, 5 Ill. App. 2d 327, 125 N.E.2d 544 (1955); McFadden v. Bancroft Hotel Corp., 313 Mass. 56, 46 N.E.2d 573 (1943); Jenness v. Sheraton-Cadillac Properties, Inc., 48 Mich. App. 723, 211 N.W.2d 106 (1973) (hotel guest was struck with tire iron by a woman the manager earlier suspected of loitering in the lobby to turn a trick). A special relationship is also present between employers and employees. *See, e.g.*, Walker v. Rowe, 535 F. Supp. 55 (N.D. Ill. 1982); David v. Missouri P. Ry., 328 Mo. 437, 41 S.W.2d 179 (1931). The relationship between jailers and prisoners is also special. *See, e.g.*, Taylor v. Slaughter, 171 Okla. 152, 42 P.2d 235 (1935); Breaux v. State, 326 So. 2d 481 (La. 1976). Hospital-patient relationship is also considered special. *See, e.g.*, Sylvester v. Northwestern Hosp., 236 Minn. 384, 53 N.W.2d 17 (1952). The relationship is also "special" between schools and pupils. *See, e.g.*, Schultz v. Gould Academy, 332 A.2d 368 (Me. 1975); Brahatcek v. Millard School Dist., 202 Neb. 86, 273 N.W.2d 680 (1979). A special relationship also exists between business establishments and customers. *See, e.g.*, Winn-Dixie Stores, Inc. v. Johnstoneaux, 395 S.2d 599 (Fla. App. 1981).

dwellings and their tenants.[13] The landlord-tenant exception departed from the early common law rule that the landlord was not required to take measures to protect the tenant from criminal acts of third persons absent the imposition of a duty by contract or statute.[14] The development of an exception to the common law rule was founded on the traditional innkeeper-guest exception under which a duty was imposed upon innkeepers to protect their guests.[15] The rationale of this rule was that patrons, and hence tenants, had limited ability to take measures for their own protection in situations where the landlord controlled the premises.[16] Since the conditions of modern day urban leasing bear little resemblance to the early common law setting, the law shifted to favor tenants with the right to expect protection from their landlords in certain situations.[17]

Perhaps the most problematic issue in those cases where a tenant has been injured by the criminal act of a third person is that of causation.[18] Both courts and commentators have debated whether to treat the landlord's failure to take protective measures as the proximate cause of the tenant's injury,[19] or to consider the third party's

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13. R. SCHOSHINSKI, *supra* note 11, at 216; PROSSER & KEETON, *supra* note 9, at 383. A special relationship did not arise in the agrarian setting of the early common law because the tenant was generally in total control of leased property and the ability of tenants to provide for their own protection was unimpaired. Haines, *Landlords or Tenants: Who Bears the Costs of Crime?*, 2 CARDOZO L. REV. 299, 309 (1981).

14. R. SCHOSHINSKI, *supra* note 11, at 216. *See* Goldberg v. Housing Auth. of Newark, 38 N.J. 578, 186 A.2d 291 (1962) (court followed traditional view and found no duty by landlord to protect others from criminal acts). The Restatement (Second) of Property section 17.3 is contrary to the traditional rule:

> A landlord who leases a part of his property and retains in his own control any other part the tenant is entitled to use as appurtenant to the part leased to him, is subject to liability to his tenant and others lawfully upon the leased property with the consent of the tenant or a subtenant for physical harm caused by a dangerous condition upon that part of the leased property retained in the landlord's control, if the landlord by the exercise of reasonable care could have: (1) discovered the condition and the unreasonable risk involved therein; and (2) made the condition safe.

RESTATEMENT (SECOND) OF PROPERTY § 17.3 (1952). Comment l to section 17.3 adds that the unreasonable risk of harm from criminal intrusion constitutes a dangerous condition. Furthermore, if the landlord could have discovered the unreasonable risk of criminal intrusion by the exercise of reasonable care, the landlord is subject to liability for physical harm caused by such intrusion if the landlord failed to take necessary precautions. *Id.* at Comment l.

15. R. SCHOSHINSKI, *supra* note 11, at 216.

16. *Id.*

17. *Id.* at 216-18.

18. Haines, *supra* note 13, at 309. *See Goldberg*, 38 N.J. at 590, 186 A.2d at 297 (the issue of causation is uncertain and nearly indeterminable because of the extraordinary speculation inherent in deterring criminal ventures of third persons).

19. Haines, *supra* note 13, at 310. *See* Sherman v. Concourse Realty Corp., 47 A.D. 2d 134, 139, 365 N.Y.S.2d 239, 244 (1975) (proximate cause represents a policy decision by which

intervening criminal act as a superseding cause.[20] The first divergence from the common law nonliability of landlords for third party criminal acts occurred in 1970 in the case of *Kline v. 1500 Massachusetts Avenue Apartment Corp.*,[21] which declared that a landlord has a duty to protect tenants from foreseeable criminal acts committed by third parties.[22] The court in *Kline* reasoned that a special

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it is determined how far removed an effect may be from its cause in fact for the actor to be held legally responsible).

20. Haines, *supra* note 13, at 310. *See* Applebaum v. Kidwell, 12 F.2d 846, 847 (D.C. Cir. 1926) (landlord not responsible for independent criminal acts of third parties); Kline v. 1500 Massachusetts Ave., 439 F.2d 477, 481 (1970) (an act of third person in committing intentional tort traditionally viewed as a superseding cause); Isaacs v. Huntington Memorial Hosp., 38 Cal. 3d 112, 131, 695 P.2d 653, 662, 211 Cal. Rptr. 356, 365 (1985) (an injury due to the criminal acts of a third person was of no consequence in the determination of liability). Restatement (Second) of Torts section 448 provides that a third person's act in committing an intentional tort or crime is a superseding cause unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might use the opportunity to commit such a tort or crime. RESTATEMENT (SECOND) OF TORTS § 448 (1965). Restatement (Second) of Torts section 302B provides: "An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal." *Id.* § 302B (1965). The Restatement (Second) of Torts section 449 states that if the likelihood that a third person may act in a particular manner is the hazard which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby. *Id.* § 449. Many courts have held that a third party criminal act severs the chain of causation between the landlord's failure to protect and the harm suffered by the tenant. Haines, *supra* note 13, at 310. *See, e.g.*, Applebaum v. Kidwell, 12 F.2d 846 (D.C. Cir. 1926) (criminal act is superseding cause); *Goldberg*, 38 N.J. at 590, 186 A.2d at 297 (1962) ("It would be quite a guessing game to determine whether some unknown thug of unknowable character and mentality would have been deterred if the owner had furnished some or . . . additional policemen."). *But c.f.* Lillie v. Thompson, 332 U.S. 459 (1947) (foreseeable danger was irrelevant when employer knew of likelihood of danger of possible criminal attack and duty imposed on employer to take precautions against possible attack); Wallace v. Der-Ohanian, 199 Cal. App. 2d 141, 18 Cal. Rptr. 892 (1962) (intervening forces will not break the causal connection if the intervention of the forces was itself probable or foreseeable). Despite the general "no duty" rule, landlords at common law were liable for third party criminal acts against their tenants if the landlords' direct act of negligence precipitated the injury. Haines, *supra* note 13, at 311. Landlords were responsible for misfeasance, or active misconduct causing injury to their tenants, but not for nonfeasance, or failure to take steps to protect the tenants from harm. Haines, *supra* note 15, at 311. The court in *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970), stated that the reason earlier courts failed to impose a duty of protection on landlords was based upon several principles: (1) judicial reluctance to alter the traditional common law concept of the landlord-tenant relationship by broadening the responsibilities of the landlord; (2) the notion that the act of a third person in committing an intentional tort that harms another person is a superseding cause of the harm; (3) the difficulty of determining foreseeability of criminal acts; (4) the undefined standard which the landlord must meet; (5) the economic consequences of the imposition of the duty; and (6) the conflict between imposing a duty upon landlords to protect tenants and the public policy that allocates the duty of protecting citizens from criminal acts to the government rather than the private sector. *Kline*, 439 F.2d at 481.

21. 439 F.2d 477 (D.C. Cir. 1970).

22. *Id.* at 478. The court in *Kline* found support from *Levine v. Katz*, 407 F.2d 303

relationship exists between a landlord and a tenant giving rise to a duty.[23] The court stressed that the modern landlord-tenant relationship is more closely analogous to that of the innkeeper-guest relationship than to the agrarian antecedent where no duty was imposed, because modern tenants have little control over the common areas and can rarely provide for their own protection.[24] The tenant, therefore, has the right to expect the landlord to provide reasonable protection from foreseeable harm.[25]

The *Kline* decision has not precipitated the imposition upon landlords of a general duty to protect tenants from criminal activities. A limited duty arises only where the foreseeability of harm to tenants is present.[26] California courts have followed *Kline* in recognizing the landlord's liability in certain situations. For example, in *O'Hara v. Western Seven Trees Corp.*,[27] the landlords had been notified that a man had raped several tenants in their apartment complex.[28] The landlords were also aware of conditions indicating a likelihood that the rapist would repeat his attacks.[29] The plaintiff had been assured before leasing the premises that they were safe and were patrolled at all times by professional guards. The plaintiff, relying on these statements, rented the apartment and later found that the landlords did not employ any guards.[30] The tenant was raped in her apartment four months later.[31] The *O'Hara* court, relying upon *Kline*, stated that although the rape occurred in the tenant's apartment, the failure of the landlord to take reasonable precautions to safeguard the common areas could have contributed to the tenant's injuries and the case was remanded for trial.[32] *O'Hara* established the precedent that since only landlords are in a position to secure common areas, they have a duty to protect against types of crimes of which they

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(1968), which recognized that a landlord, who is the only party with the power to make repairs in a multiple dwelling complex, has a duty to tenants to use ordinary care and diligence to maintain the common areas in a safe condition. *Kline*, 439 F.2d at 480; Levine v. Katz, 407 F.2d 303, 304 (1968).

23. *Kline*, 439 F.2d at 482-83.

24. *Id.*

25. *Id.* The court in *Kline* stated that the value of the modern apartment lease includes not only the right to interior space, but also adequate heat, light, ventilation, serviceable plumbing, secure windows and doors, and proper maintenance. *Id.* at 481.

26. *Id. See* R. SCHOSHINSKI, *supra* note 11, at 217-23.

27. 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977).

28. *Id.* at 802, 142 Cal. Rptr. at 489.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 803, 142 Cal. Rptr. at 490.

have notice and which are likely to recur if the common areas are not secure.[33]

The rule of *O'Hara* was refined in *7735 Hollywood Boulevard Venture v. Superior Court.*[34] The plaintiff in *Hollywood* was raped by an individual who, because of his frequent attacks, had been dubbed the "Westside Rapist" by the media.[35] The plaintiff claimed that the landlord was negligent for failing to replace a burned out light bulb in the common area.[36] She alleged that because there were incidents of rape in the neighborhood, the landlord should have been on notice of the threat to her safety.[37] In dismissing the action, the court emphasized that there were no prior acts of violence *on the premises* and that the landlord could not therefore have had notice of the danger.[38] In addition to the court's finding that the landlord could not foresee the injury, the court found that requiring a landlord to install and maintain lighting for security purposes was problematic.[39] The court stated that imposing a duty raises the difficult problem of determining the areas in which lighting is required, and the wattage of lighting which the landlord has a duty to install.[40]

A short time after the *Hollywood* decision, the California Court of Appeal held in *Kwaitkowski v. Superior Trading Co.*[41] that a landlord owed a duty to guard the safety of his tenants.[42] The tenant in *Kwaitkowski* was raped and robbed in a dimly lit lobby of an apartment building. The front door to the complex had a defective lock and some lights were missing.[43] The factual situation in *Kwaitkowski* was similar to that in *Kline* and in *O'Hara* because the

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33. *Id.* at 803, 142 Cal. Rptr. at 490.
34. 116 Cal. App. 3d 901, 172 Cal. Rptr. 528 (1981).
35. *Id.* at 903, 172 Cal. Rptr. at 530.
36. *Id.*
37. *Id.*
38. *Id.* In defining the duty a landlord owes a tenant, the *Hollywood* court noted that even though a proprietor is not the insurer of the safety of persons on the premises, when foreseeable risks are present, the landlord is under a duty to control the acts of third persons and to protect the tenants against the risk of harm. Where the landlord has no reason to anticipate potential criminal attacks, however, the landlord is not required to take precautions against such unforeseeable injury. *Id.* at 905, 172 Cal. Rptr. at 530.
39. *Id.* at 906, 172 Cal. Rptr. at 530.
40. *Id.* at 905, 172 Cal. Rptr. 530. The *Hollywood* court stated that, where no prior crimes had occured on the premises, the question of duty owed is undefinable since "it is an easy matter to know whether a stairway is defective and what repairs will put it in order . . . but how can one know what measures will protect against the thug, the narcotic addict, the degenerate, the psychopath, and the psychotic?" *Id.* (quoting Goldberg v. Housing Auth., 38 N.J. 578, 186 A.2d 291 (1962)).
41. 123 Cal. App. 3d 324, 176 Cal. Rptr. 494 (1981).
42. *Id.*
43. *Id.* at 326, 176 Cal. Rptr. at 495.

landlords had actual notice of the danger to the tenants based on the high crime rate in the neighborhood, and prior attacks and robberies on the premises.[44] The court stressed that the difference between *Hollywood* and *Kwaitkowski* was that the assaults on other tenants were both predictable and probable in *Kwaitkowski*, whereas in *Hollywood* no prior attacks had occurred on the premises.[45] The *Kwaitkowski* court based the landlord's duty to the plaintiff on the special relationship between the landlord and the tenant[46] and the foreseeability of the criminal attack.[47] Thus, where the landlord has actual knowledge of prior attacks, a duty arises to protect the tenant from foreseeable harm by third persons.[48]

In 1984, the California Supreme Court extended landlord tort liability for the criminal acts of a third party to a community college in *Peterson v. San Francisco Community College District*.[49] The plaintiff in *Peterson* was assaulted on a stairway in a campus parking lot when a man jumped from behind thick foliage adjoining the stairway.[50] The court found that a special relationship existed which imposed a duty on the college to protect and warn the plaintiff against the dangers.[51] Since prior assaults of a similar nature had occurred on the same stairway and the defendant knew of the incidents, but failed to warn the tenant or trim the adjacent foliage, the defendant was liable.[52]

Landlord liability has also been extended to encompass homeowner's associations. In *White v. Cox*,[53] the Court of Appeals for the

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44. *Id.* at 333, 176 Cal. Rptr at 500.

45. *Id.*

46. *Id.* at 326, 176 Cal. Rptr. at 496. The landlord-tenant relationship is similar to that between an innkeeper and guest and is a "special relationship." *Id.*

47. *Id.*

48. *Id.*

49. 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842 (1984).

50. *Id.* at 805, 685 P.2d at 1195, 205 Cal. Rptr. at 844.

51. *Id.* at 806, 685 P.2d at 1195, 205 Cal. Rptr. at 844. As a general rule a person has no duty to control the conduct of another and no duty to warn others who may be endangered by such conduct. Commonly recognized special relations, however, impose a duty between innkeepers and guests and possessors of land and members of the public who enter in response to the landowner's invitation. *Id.*

52. *Id.* at 815, 685 P.2d at 1202, 205 Cal. Rptr. at 851. The failure of the defendant to notify students of prior assaults or to trim foliage connected the defendant's conduct with the plaintiff's injury. *Id.* The *Peterson* court defined the question of duty as:

> a shorthand statement of a conclusion, rather than an aid to analysis in itself .... But it should be recognized that "duty" is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection.

Id. at 805-06, 685 P.2d at 1196, 205 Cal. Rptr. at 845 (quoting Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968)).

53. 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (1971).

Second District held that condominium owners could maintain an action against their condominium association for negligently maintaining a sprinkler in the common areas of the complex.[54] A member of the unincorporated association of condominium owners sued for personal injuries suffered when the plaintiff tripped and fell over a water sprinkler alleged to have been negligently maintained by the association in the common area of the project.[55] The court in *White* stated that condominiums draw elements both from tenancy in common and from separate ownership.[56] Condominium owners are therefore tenants in common of the common areas and the personal property held by the management association, and they are owners in fee of separate units.[57] The *White* court found that condominiums possess sufficient aspects of an unincorporated association to make them liable in tort to their members.[58] Therefore, the liability of a condominium association as a landlord had merely been extended to include the negligent maintenance of the common areas.[59]

B. Director Liability

The primary reason for the creation of a corporation is the limited liability afforded the shareholders for corporate obligations.[60] Tort liability of directors is rooted in the law of agency.[61] Directors are

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54. *Id.*
55. *Id.*
56. *Id.* at 829, 95 Cal. Rptr. at 262.
57. *Id.*
58. *Id.* at 830, 95 Cal. Rptr. at 263.
59. *Id.*
60. H. HENN & J. ALEXANDER, LAW OF CORPORATIONS 147 (3d ed. 1983) [hereinafter HENN & ALEXANDER]. Other corporate attributes include: (1) the power to take hold of and convey property in the corporate name; (2) the power to sue and to be sued in the coporate name; (3) centralization of management in the board of directors; (4) perpetual succession; and (5) ready transferability of interests. *Id.*
61. RESTATEMENT (SECOND) OF AGENCY §§ 352, 354 (1958). Section 352 provides:

> An agent is not liable for harm to a person other than his principal because of his failure adequately to perform his duties to his principal, physical harm results from reliance upon performance of the duties by the agent, or unless the agent has taken control of land or other tangible things.

Section 354 adds:

> An agent who, by promise or otherwise, undertakes to act for his principal under such circumstances that some action is necessary for the protection of the person or tangible things of another, is subject to liability to the other for physical harm to him or to his things caused by the reliance of the principal or of the other upon his undertaking and his subsequent unexcused failure to act, if such failure creates an unreasonable risk of harm to him and the agent should so realize.

In regards to nonfeasance, Restatement (Second) of Agency section 354, comment b provides that "[t]he agent causes the damage by undertaking to afford protection and subsequently failing to give it." RESTATEMENT (SECOND) OF AGENCY § 354, Comment b (1958).

considered agents of their corporate principal for the purposes of tort liability.[62] Under both the early common law and the current law, directors are not liable for the torts of the corporation merely by virtue of their office.[63] Nevertheless, directors were liable for injuries suffered by third persons because of their own torts, irrespective of whether they acted on behalf of the corporation or on their own account.[64] Participation in the tort by the director may be found by direct action of the director[65] or by knowing approval or ratification of unlawful acts.[66] When directors personally direct or approve their agent's tortious conduct, they become jointly liable with the corporation and can be named personally as defendants.[67] The rationale for this rule, as stated in *O'Connell v. Union Drilling Co.*,[68] is that a contrary rule would allow a director of a corporation to escape liability by hiding behind the shield of his corporate position.[69]

In a later case, *United States Liability Insurance Co. v. Haidinger-Hayes, Inc.*,[70] the California Supreme Court reviewed an action brought by an insurance company against a corporation and the corporation's president for damages for negligence in computing the premium rate for an insured.[71] The court stated that directors or

62. HENN & ALEXANDER, *supra* note 60, at 583.

63. *See* O'Connell v. Union Drilling Co., 121 Cal. App. 302, 308-09, 8 P.2d 867, 870 (1932) (money paid by plaintiffs to corporation for securities which were void at inception held recoverable from directors who actively participated).

64. Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 517 F.2d 1141 (1975) (corporate director who voted for commission of tort is personally liable even though tortious act committed in name of corporation); Preston-Thomas Constr., Inc. v. Central Leasing Corp., 518 P.2d 1125 (Okla. App. 1974) (a corporate officer or director becomes personally liable for wrongfully using trust funds if the officer or director receives funds, participates in the wrongful distribution of funds or is ignorant of the wrongdoing and negligently fails to learn of the conversion).

65. *See* Price v. Hibbs, 225 Cal. App. 2d 209, 222, 37 Cal. Rptr. 270, 278, (1964) (corporate officials who act tortiously are liable to injured persons even though corporation may also be liable and have a cause of action against officials); James v. Marinship Corp., 25 Cal. 2d 721, 742-43, 155 P.2d 329, 341 (1944) (agent of corporation liable for his tortious act of discrimination in violation of contract).

66. *See, e.g.*, United States Liab. Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal. 3d 586, 463 P.2d 770, 83 Cal. Rptr. 418 (1970) (liability insurance company brought action against corporation and corporation's president for negligence in computing premium rates for an insured).

67. *See* Dwyer v. Lanan & Snow Lumber Co., 141 Cal. App. 2d 838, 841, 297 P. 2d 490, 493 (1956) (plaintiff injured by cable owned by corporation brought suit against corporation, director and officer who had notice of the danger but failed to remedy the danger).

68. 121 Cal. App. 302, 8 P.2d 867 (1932).

69. *Id.* at 309, 8 P.2d at 870. *See also* 18B AM. JUR. 2d *Corporations* § 1877 (1964).

70. 1 Cal. 3d 586, 463 P.2d 770, 83 Cal. Rptr. 418 (1970).

71. *Id.*

officers of a corporation only incur liability if they participate in the wrong or direct that the tort be done.[72] In examining the type of liability imposed upon agents for active participation in tortious acts, the court noted that liability of officers and directors has mostly been restricted to cases involving physical injury, not pecuniary harm, to third persons.[73] The court held the corporation liable, but not the corporation's president, because no fiduciary relationship existed between the president and the plaintiff.[74]

Directors have also been found liable in situations similar to that in *Dwyer v. Lanan & Snow Lumber Co.*[75] when the director knows that a condition or instrumentality under his or her control poses an unreasonable risk of injury to third parties, but fails to take action to remove the risk of harm.[76] In *Dwyer*, the manager of a sawmill informed the defendant, who was both the president and a director of the mill, that a cable had been secured improperly and was in danger of falling.[77] The cable had fallen once before. The corporate officials failed to secure the cable and were held liable to the person injured when the cable fell.[78] The court held that the director was liable for torts in which he had participated.[79]

In a later case, *Wyatt v. Union Mortgage Co.*,[80] the California Supreme Court applied the same rule of nonfeasance to misrepresentation by a lender of mortgage terms.[81] In *Wyatt*, the plaintiff was induced to enter into a loan agreement which had been advertized

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72. *Id.* at 595, 463 P.2d at 775, 83 Cal. Rptr. at 423 (1970). The court reasoned that directors are not responsible to third persons for negligence amounting to nonfeasance, nor are directors liable to third persons for a breach of duty owed to the corporation alone. *Id.* In order for directors to be liable there must be a breach of duty owed to the third person and the directors owed no duty to the plaintiff. *Id.*

73. *Haidinger-Hayes*, 1 Cal. 3d at 595, 463 P.2d at 775, 83 Cal. Rptr. at 423.

74. *Id.* at 594, 463 P.2d at 774, 83 Cal. Rptr. at 422.

75. 141 Cal. App. 2d 838, 297 P.2d 490 (1956).

76. *Id. See* Adams v. Fidelity and Casualty Co., 107 So. 2d 496 (La. App. 1958). In a wrongful death action when an iron reel fell on the deceased, the corporate directors were held liable because they should have foreseen the danger. *Id.* at 502. The court in *Adams* noted that imposing liability in cases of nonfeasance depends on whether the director owes a duty directly to a third person. No liability exists if the act consists only of a breach of duty which the director owes to the corporation. *Id. See also* Curlee v. Donaldson, 233 S.W.2d 746 (Mo. App. 1950) (officer who instructed corporation to trespass and cut timber is liable when act is done in the scope of employment); Schaefer v. D & J Produce Inc., 403 N.E.2d 1015 (Ohio App. 1978) (no liability of corporate officers when truck owned by corporation and driven by corporate agent struck and killed another motorist).

77. *Dwyer*, 141 Cal. App. 2d 838, 839, 297 P.2d 490, 491 (1956).

78. *Id.* at 841, 297 P.2d at 493.

79. *Id.*

80. 24 Cal. 3d 773, 598 P.2d 45, 157 Cal. Rptr. 392 (1979).

81. *Id.*

by the defendant as having a small balloon payment at the end of the loan term.[82] At the end of the term, the balloon payment was more than the original amount of the loan and the plaintiffs agreed to refinance the amount with the defendant.[83] The defendant then assessed late charges and eventually threatened to foreclose on the plaintiffs' home. The plaintiffs sued for misrepresentation of the loan terms in the mortgage agreement.[84] The court found that the defendant had misrepresented the terms of the loan and held that the directors were liable because they authorized and participated in a conspiracy to injure third parties through the corporate entity.[85]

The Ninth Circuit has also faced the issue of director liability for nonfeasance in *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.*[86] In *Murphy*, the plaintiff sued the defendants under the Sherman Act[87] for effectively excluding their tugboats from servicing the large vessel segment of the ship assist market.[88] In dealing with the corporate executive's participation in attempting to monopolize the industry, the court stated that personal liability must be founded upon specific participation by the executive in the tort.[89] The participation necessary for liability to ensue may be in the form of direct action, or knowing approval or ratification of unlawful acts.[90] In addition, the court stressed that the acts or conduct must be inherently unlawful before liability will attach.[91] The court held

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82. *Id.* at 779-80, 598 P.2d at 48, 157 Cal. Rptr. at 395 (a balloon payment is amount owed to amortize principal and interest unpaid at maturity of loan when monthly payments are insufficient to cover full cost of loan).

83. *Id.*

84. *Id.* at 781, 598 P.2d at 49, 157 Cal. Rptr. at 396.

85. *Id.* at 785, 598 P.2d at 52, 157 Cal. Rptr. at 399.

86. 467 F. Supp. 841 (9th Cir. 1979).

87. The Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C. §§ 1, 2 (1987).

88. *Murphy*, 467 F. Supp. at 847.

89. *Id.* at 852.

90. *Id.* The court cited several cases to support this proposition. *See e.g.* Donesco, Inc. v. Casper Corp., 587 F.2d 602 (3rd Cir. 1978) (corporate officer arranged for the use and copying of material constituting unfair competition); Tillman v. Wheaton-Haven Recreation Ass'n, 517 F.2d 1141 (1975) (directors of the association promulgated and enforced white only membership policy).

91. *Murphy*, 467 F. Supp. 841, 852 (9th Cir. 1979). The court relied upon *Lobato v. Pay Less Drug Stores, Inc.*, 261 F.2d 406 (10th Cir. 1958), which stressed that the act must be "positively wrongful" to generate individual liability to the participating directors or officers. *Lobato*, 261 F.2d at 409. The *Murphy* court further noted that this principle is codified in Section 2343 of the California Civil Code. *Murphy*, 467 F. Supp. at 852. California Civil Code section 2343 provides:

> AGENT'S RESPONSIBILITY TO THIRD PERSONS. One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course

that the director's action, which was limited to approving or ratifying the policy of refusing to work with competitors, was not inherently wrongful and no liability could be imposed.[92]

California courts have consistently held directors liable for wrongful acts in which they participated or when they had knowledge of a dangerous condition but failed to take precautions.[93] As an agent of the corporation, directors are not liable for torts incurred by the acts of the corporation as a whole unless the director was an actor in the commission of the tort.[94]

II. THE CASE

The question presented in *Frances T. v. Village Green Owners Association*[95] was whether a condominium owners association and the individual members of the board of directors could be held liable for injuries to a resident caused by the criminal conduct of a third party.[96]

A. The Facts

The plaintiff owned and lived in a condominium unit located in a project consisting of ninety buildings with several large grassy areas called courts.[97] The owners association was responsible for the man-

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of his agency, in any of the following cases, and in no others:
1. When, with his consent, credit is given to him personally in a transaction; 2. When he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so; or, 3. When his acts are wrongful in their nature.

CAL. CIV. CODE § 2343 (West 1985). However, the court stated that the often uncertain line between proper and improper conduct, and the social interest in not deterring socially useful conduct by the imposition of excessive risks makes appropriate a limitation on personal liability in cases of participation by directors in inherently wrongful conduct. *Murphy*, 467 F. Supp. at 853.

92. *Id.* at 853.

93. *See* Price v. Hibbs, 225 Cal. App. 2d 209, 222, 37 Cal. Rptr. 270, 278 (1964) (corporate officials who act tortiously are liable to injured persons even though corporation may also be liable); James v. Marinship Corp., 25 Cal. 2d 721, 742-43, 155 P.2d 329, 341 (1944) (agent of corporation liable for his tortious act of discrimination in violation of contract).

94. *See, e.g.*, Murphy Tugboat v. Shipowners & Merchants Towboat, 467 F. Supp. 841 (9th Cir. 1979); United States Liab. Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal. 3d 586, 463 P.2d 770, 83 Cal. Rptr. 418 (1970); James v. Marinship Corp., 25 Cal. 2d 721, 742-43, 155 P.2d 329, 341 (1944); Price v. Hibbs, 225 Cal. App. 2d 209, 222, 37 Cal. Rptr. 270, 278 (1964); Dwyer v. Lanan & Snow Lumber Co., 141 Cal. App. 2d 838, 297 P.2d 490 (1956). *See also* 1B BALLANTINE & STERLING, CALIFORNIA CORPORATION LAWS (4th ed. 1985) § 101.

95. 42 Cal. 3d 490, 723 P.2d 573, 229 Cal. Rptr. 456 (1986).

96. *Id.* at 495, 723 P.2d at 574, 229 Cal. Rptr. at 457.

97. *Id.* at 496, 723 P.2d at 575, 229 Cal. Rptr. at 458.

agement of the project and the maintenance of common areas.[98] The plaintiff's unit faced the largest court.[99] The project had been subject to a crime wave that included purse snatchings, burglaries, and robberies.[100] All of the residents, as well as the members of the board of directors, were aware of the criminal activity.[101] After the plaintiff's home was burglarized, she sought additional lighting because the court upon which her unit faced was dimly lit.[102] The plaintiff formally requested that the condominium board of directors install more lighting.[103] Some months later, when she had not heard from the board, she made a second request.[104] The board of directors failed to respond to the requests and the plaintiff subsequently installed additional exterior lighting herself.[105] The board of directors ordered her to remove the fixtures because the lighting violated the project's covenants, conditions and restrictions.[106] She refused to comply.[107] Subsequently, she appeared before the board and requested that her lights be allowed to remain until the lighting condition was improved.[108] The board ordered her to remove the lights and prohibited her from using them in the interim.[109] The plaintiff complied with the order and did not turn on her lights.[110] Since the lighting she had installed was connected with the original circuitry, and since she had removed the original lighting, the exterior of her unit was in total darkness.[111] The evening she turned off the offending light fixtures an intruder entered her unit and raped and robbed her.[112]

The plaintiff sued the condominium association and the directors for negligence, breach of contract, and breach of fiduciary duty.[113]

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98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 498, 723 P.2d at 576, 229 Cal. Rptr. at 459. Section 11.2(b) of the Conditions, Covenants, and Restrictions provides: "Nothing shall be altered or constructed in or removed from the *Common Area* or the *Association Property*, except upon the written consent of the *Board*." *Id.* at 510 n.18, 723 P.2d at 584 n.18, 229 Cal. Rptr. at 467 n.18. (emphasis in original).
107. *Id.* at 498, 723 P.2d at 576, 229 Cal. Rptr. at 459.
108. *Id.*
109. *Id.* In response to complaints by residents, the board of directors, through the project's Architectural Guidelines Committee, began to investigate possible lighting improvements in early 1980. *Id.* at 497, 723 P.2d at 575, 229 Cal. Rptr. at 458.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 495, 723 P.2d at 574, 229 Cal. Rptr. at 457.

The trial court sustained defendant's demurrers to plaintiff's three causes of action without leave to amend and dismissed the case.[114] The Court of Appeal for the Second District affirmed the dismissal of the contract and breach of fiduciary duty claims, but held that the complaint stated a cause of action for negligence of the association and the directors.[115]

B. The Opinion

The California Supreme Court affirmed the appellate court decision allowing the plaintiff a cause of action for the negligence of the homeowners association and the directors.[116] The court relied on previous California decisions in concluding that the standard of care owed by the association to potential victims of third party criminal conduct is the same as that owed by a landlord.[117]

The *Frances T.* court cited *O'Hara v. Western Seven Trees Corp.*[118] which held a landlord has a duty to take reasonable steps to protect a tenant from the criminal acts of third parties.[119] The *Frances T.* court reasoned that since only landlords are in a position to secure the common areas, they have a duty to protect tenants against types of crimes of which the landlords have notice and which are likely to recur if the common areas are not secure.[120] The *Frances T.* court concluded that even though the association was not a landlord in the strict sense, the fact that the common areas were solely within the control of the association places the responsibilities of a landlord upon the association.[121] The court relied upon *White v. Cox*[122] to

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114. *Id.*

115. Frances Troy v. Village Green Condominium Project, 149 Cal. App. 3d 135, 196 Cal. Rptr. 680 (1983) (appellate decision).

116. 42 Cal. 3d 490, 723 P.2d 573, 229 Cal. Rptr. 456 (1986).

117. Frances T. v. Village Green, 42 Cal. 3d at 499, 723 P.2d at 576, 229 Cal. Rptr. at 459 (1986).

118. 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977).

119. *Frances T.*, 42 Cal. 3d at 501, 723 P.2d at 578, 229 Cal. Rptr. at 461. *See supra* notes 27-33 and accompanying text for discussion of *O'Hara*. The court in *Frances T.* also relied on *Kwaitkowski v. Superior Trading Co.*, 123 Cal. App. 3d 324, 328, 176 Cal. Rptr. 494 (1981). *See supra* notes 41-48 for discussion of *Kwaitkowski*.

120. *Frances T.*, 42 Cal. 3d at 501, 723 P.2d at 578, 229 Cal. Rptr. at 461. The court in *Frances T.* noted that foreseeability is the most important factor to consider when analyzing the liability of the landlord. Foreseeability is determined in light of all the circumstances and not by a rigid mechanical rule. *Id.* at 502, 723 P.2d at 579, 229 Cal. Rptr. at 462. The *Frances T.* court also cited *Isaacs v. Huntington Memorial Hospital*, 38 Cal. 3d 112, 695 P.2d 653, 24 Cal. Rptr. 356 (1985) (evidence of prior similar incidents is not an indispensible requisite or condition for a finding of foreseeability).

121. 42 Cal. 3d at 500, 723 P.2d at 578, 229 Cal. Rptr. at 461.

122. 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (1971).

hold the association liable for negligence since *White* held a condominium association to the same standard of care owed by landlords.[123]

The court emphasized that the association bears the duty to protect tenants from foreseeable crime.[124] The key to liability, according to the court, is whether the association had knowledge that prior crimes had been committed on the premises.[125] Even though the crimes which occurred before the plaintiff's injury did not include rape, the court stated that the precise injury to the plaintiff need not have been foreseen so long as the possibility of this type of harm was foreseeable.[126]

The *Frances T.* court then discussed the liability of the individual directors.[127] The court held that director liability for personal injuries to a third party depends on a finding that the director specifically authorized, directed, or participated in the allegedly tortious conduct, or that the director knew of the hazardous condition and negligently failed to take appropriate action to avoid the harm.[128] Under the circumstances of the case, the court found the plaintiff had alleged particularized facts that stated a cause of action for negligence against the individual directors.[129] The decision indicated that the directors may have acted reasonably and that the plaintiff must prove that an ordinary prudent person would not have acted similarly under the

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123. *Frances T.*, 42 Cal. 3d at 500, 723 P.2d at 577, 229 Cal. Rptr. at 459. The court also relied on *O'Connor v. Village Green Owners Association*, 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1983). In *O'Connor*, the issue was whether a condominium association that discriminated against children was a business establishment within the meaning of the Unruh Civil Rights Act (CAL. CIV. CODE § 51). *O'Connor*, 33 Cal. 3d at 796, 662 P.2d at 431, 191 Cal. Rptr. at 324. The court in that case noted that the condominium association performs all the customary business functions which rest on the landlord in the traditional landlord-tenant relationship. *Id.*

124. *Id.*

125. *Id.* at 503, 723 P.2d at 579, 229 Cal. Rptr. at 462.

126. *Id.*

127. *Id.*

128. *Id.* at 508, 723 P.2d at 584-85, 229 Cal. Rptr. at 466-67. The *Frances T.* court cited several cases to support this proposition. *See* Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 517 F.2d 1141 (4th Cir. 1975); Teledyne Indus., Inc. v. Eon Corp., 401 F. Supp. 729 (S.D.N.Y. 1975); Middlesex Ins. Co. v. Mann, 124 Cal. App. 3d 558, 177 Cal. Rptr. 495 (1981); Wyatt v. Union Mortgage Co., 24 Cal. 3d 773, 598 P.2d 45, 157 Cal. Rptr. 392 (1979); United States Liab. Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal. 3d 586, 463 P.2d 770, 83 Cal. Rptr. 418 (1970); Price v. Hibbs, 225 Cal. App. 2d 209, 37 Cal. Rptr. 270 (1964); Dwyer v. Lanan & Snow Lumber Co., 141 Cal. App. 2d 838, 841, 297 P.2d 490 (1956); Thomsen v. Culver City Motor Co., 4 Cal. App. 2d 639, 41 P.2d 597 (1935); O'Connell v. Union Drilling & Petroleum Co., 121 Cal. App. 302, 8 P.2d 867 (1932). The plaintiff must also prove that an ordinary prudent person would not have acted similarly under the circumstances. *Frances T.*, 42 Cal. 3d at 508, 723 P.2d at 584-85, 229 Cal. Rptr. at 466-67.

129. *Frances T.*, 42 Cal. 3d at 508, 723 P.2d at 584-85, 229 Cal. Rptr. at 466-67.

circumstances.[130] The court also noted that the causal link between the lighting and the plaintiff's injuries could have been too attenuated.[131] These questions, the court held, were for the trier of fact and were not appropriate grounds for sustaining a general demurrer to the plaintiff's claim.[132]

C. The Dissent

According to the dissent, neither the association nor the directors should have been liable for negligence.[133] One contention of the dissent is that the failure of the association to investigate the lighting was characterized wrongly by the majority as misfeasance.[134] Misfeasance, according to the dissent, denotes conduct which is blameworthy in itself and the failure of the association to act promptly was not blameworthy.[135] The dissenters also rejected the majority's finding that the association is under the same duty of care as a landlord to protect tenants from the criminal acts of third persons.[136] They objected to the majority's reliance on *O'Connor v. Village Green Owners Association*,[137] in which a homeowners association was construed to fill the role of a landlord under a statute which prevented discrimination in all business establishments.[138] The dissent proposed that the classification was irrelevant when deciding whether an association is similar to a landlord for the purposes of the general common law of torts.[139]

The dissent further contended that California Corporations Code Section 7231 was misconstrued by the majority and argued that the

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130. *Id.* at 511-12, 723 P.2d at 586, 229 Cal. Rptr. at 469.
131. *Id.*
132. *Id.*
133. *Id.* at 519, 723 P.2d at 591, 229 Cal. Rptr. at 474 (Mosk, J., dissenting).
134. *Id.*
135. *Id.* Chief Justice Bird, in her concurring opinion, found error in the dissent's reasoning. She contended the distinguishing factor between misfeasance and nonfeasance is dependant upon the participation of the defendant in the creation of the risk, not upon the blameworthiness of the defendant's conduct. *Id.* at 515, 723 P.2d at 588, 229 Cal. Rptr. at 695 (Bird, C.J. concurring). According to Chief Justice Bird, in order for an act to consitute misfeasance, the defendant's conduct need only increase the risk to the plaintiff and does not need to be blameworthy in itself. *Id.* at 515, 723 P.2d at 588, 229 Cal. Rptr. at 695. The formula for misfeasance and nonfeasance is capable of manipulation and any set of facts can be compressed within the concept of nonfeasance or expanded to fit the mold of misfeasance. Harper & Kime, *The Duty to Control the Conduct of Another,* 43 YALE L.J. 886 (1934).
136. *Frances T.*, 42 Cal. 3d at 520, 723 P.2d at 592, 229 Cal. Rptr. at 475 (Mosk, J., dissenting).
137. 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1981).
138. *Frances T.*, 42 Cal. 3d at 500, 723 P.2d at 577, 229 Cal. Rptr. at 460.
139. *Id.* at 520, 723 P.2d at 591, 229 Cal. Rptr. at 475 (Mosk, J., dissenting).

Code altered the common law.[140] The dissent argued that the California Legislature, in enacting Section 7231, changed the common law standard of care for directors by imposing one standard for all situations.[141] The proper standard, according to the dissent's interpretation of Section 7231, should be one of subjective reasonableness.[142] Therefore, the dissent would not apply the common law which holds a director liable for injuries to a third party when the corporation owes a duty of care to a third person.[143]

III. Legal Ramifications

The effect of the decision in *Frances T.* may be to deter qualified persons from becoming directors by subjecting them to increased liability in tort.[144] In the case of condominium associations, individuals are disinclined to serve as directors because of the increased exposure of their personal assets.[145] The added potential liability, as expanded by *Frances T.*, may further deter qualified individuals from serving since the risk is much greater than the rewards of being a director.[146]

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140. *Id.*

141. *Id.* at 526, 723 P.2d at 598, 229 Cal. Rptr. at 481.

142. *Id.* The California Corporations Code section 7231(a) outlines the duty of care a director owes to a corporation:

> A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

California Corporations Code section 7231(c) adds:

> A person who performs the duties of a director in accordance with subdivision (a) . . . shall have no liability based upon an alleged failure to discharge the person's obligations as a director, including, without limiting, the generality of the foregoing, any actions or omissions which exceed or defeat a public or charitable purpose to which assets held by a corporation are dedicated.

The California standard relies upon the ABA Committee's comments where the committee stated that the revised standard of care "reflects the good-faith concept embodied in the so-called 'business judgment rule,' which has been viewed by the courts as a fundamental precept for many decades . . . [and] incorporates the familiar concept that . . . a director should not be liable for an honest mistake of business judgment." ABA, *Report of Committee on Corporate Laws: Changes in the Model Business Corporation Act,* 30 Bus. Law. 501, 505 (1975). *See also* 1B Ballantine & Sterling, California Corporation Laws (4th ed. 1985) § 406.01.

143. *Frances T.*, 42 Cal. 3d at 529, 723 P.2d at 598, 229 Cal. Rptr. at 481 (Mosk, J., dissenting).

144. J. Hanna, California Condominium Handbook 115 (1975).

145. 1B Ballantine & Sterling, *supra* note 142, at § 406.08.

146. *Frances T.*, 42 Cal. 3d at 529, 723 P.2d at 598, 229 Cal. Rptr. at 481 (Mosk, J., dissenting). *See also*, 1B Ballantine & Sterling, *supra* note 145, at § 406.08. Any person

The *Frances T.* decision may also cause increased insurance premiums that are necessary to cover the added exposure of directors. To assure directors that they may avoid the expense of liability in situations similar to that in *Frances T.*, corporations can indemnify or insure them for expenses and damages that may arise from being sued as a director.[147] With the parameters of liability increased by *Frances T.*, the costs of insurance for directors will proportionately rise to meet the additional tort exposure.[148] Many insurance companies have withdrawn from the directors and officers insurance market or have altered their policies to decrease the availability and scope of coverage, or have increased their premiums.[149] Since the condominium association finances its operations by levying assessments on the members, and because the cost of insurance is allowable as an operating expense,[150] the higher premiums will be passed on to the individual owners.[151] Even though members of nonprofit corporations

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considering serving as a director of a corporation is undoubtly concerned with potential personal liability. *Id.* Controlling law provides some reassurance that a director may avoid liability if the director performs the duties of a director and acts within the standards of conduct set forth in the Nonprofit Public Benefit Corporation Law or the Nonprofit Mutual Benefit Corporation Law. Both of these provisions require the director to perform his duties in good faith and to act as an ordinary prudent person would in a like position under similar circumstances. CAL. CORP. CODE §§ 5231(c), 7231(c) (West 1987). If a director acts according to this standard, then no liability should attach for any alleged failure to perform obligations as a director. 1B BALLANTINE & STERLING, *supra* note 142, at § 406.08. It is apparent the *Frances T.* decision invalidates the assurance of nonliability since the court found that the failure of the directors to act amounted to participation in the tortious activity, thus subjecting them to liability even though the directors were merely enforcing the Conditions, Covenants, and Restrictions of the association. *Frances T.*, 42 Cal. 3d at 511, 723 P.2d at 586, 229 Cal. Rptr. at 469.

147. 1B BALLANTINE & STERLING, *supra* note 142, at § 406.08. *See* CAL. CORP. CODE § 317 (West 1977) (corporations can indemnify agents against judgments, fines, settlements, and other amounts incurred in connection with a proceeding if the agent acted in good faith and in the best interests of the corporation). *See also id.* §§ 5238(a), 7237(a) (West 1987) (directors are agents entitled to indemnification if allowed by a majority vote of a quorum of directors or upon approval of the members).

148. Veasey, Finkelstein & Bigler, *Delaware Supports Directors With A Three Legged Stool of Limited Liability, Indemnification, and Insurance,* 42 BUS. LAW. 399, 400 (1987).

149. *Id.* Directors have reacted by refusing to serve because of increased potential liability. The creation of an unreasonable risk of exposure of director's personal assets is undermining the policy of having independent directors serve as decision makers. *Id.* at 401.

150. CAL. CIV. CODE § 1366(b)(1) (West 1987). The Department of Real Estate regulations provides that regular assessments to defray expenses attributable to operation of homeowners associations must ordinarily be levied against each owner according to the number of subdivision interests owned by the individual assessed to the total number of interests subject to easements. CAL. ADMIN. CODE tit. 10, § 2792.16(a) (1987). *See* D. HAGMAN & R. MAXWELL, *supra* note 2, at § 385.70.

151. D. HAGMAN & R. MAXWELL, *supra* note 2, at § 385.70. Owners cannot escape the increase in expense because each unit owner is required to become a member of the homeowners association and to pay monthly assessments. *Id.* at § 386.04.

are not personally liable for the liabilities of the corporation,[152] if insurance is unavailable and if the association agrees to indemnify the director, the resulting expenses from lawsuits will be apportioned among the association members.[153]

Frances T. will also have an impact upon homeowners associations and their ability to enforce architectural controls.[154] Directors of homeowners associations are under a duty to exercise good faith in approving or restricting new construction or improvements, and stand in a fiduciary relationship with the association.[155] The court in *Frances T.* recognized that a fiduciary duty exists between the directors and the corporation,[156] and that homeowners may sue as shareholders for damages resulting to the corporation.[157] The architectural controls, which are included in the covenants and restrictions, are equitable servitudes and bind all owners of separate interests in the project.[158] These servitudes may be enforced by any owner of a separate interest as well as by the association.[159] Therefore, the homeowners may state a cause of action based upon a breach of the architectural controls against the association for approving construction which violates the covenants, conditions, and restrictions and an injunction may issue.[160] Damages may also be recovered for a violation of a covenant.[161] In

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152. *Id.* at § 385.03.

153. *Id.* at § 385.70. Even though the board of directors is limited to regular assessment increases of no more than 10% of the regular assessment from the preceding year, and special assessments are limited to 5% of the budgeted gross receipts of the association for that year, the assessment limitation does not apply to the increases in the payments of insurance premiums. CAL. CIV. CODE § 1366(b) (West 1987).

154. *Frances T.*, 42 Cal. 3d at 529, 723 P.2d at 598, 299 Cal. Rptr. at 481.

155. D. HAGMAN & R. MAXWELL, *supra* note 2, at § 385.74. *See* Cohen v. Kite Hill Community Ass'n, 142 Cal. App. 3d 642, 191 Cal. Rptr. 209 (1983) (homeowner stated a cause of action against association for approving the construction of a neighbor's fence in violation of the declaration of restrictions).

156. *Frances T.*, 42 Cal. 3d at 512, 723 P.2d at 587, 229 Cal. Rptr. at 470 (but no fiduciary duty exists between directors and shareholders).

157. *Id.* The *Frances T.* court found no fiduciary duty existed between the directors and the unit owner. *Id.*

158. CAL. CIV. CODE § 1354 (West 1987).

159. D. HAGMAN & R. MAXWELL, *supra* note 2, at § 385.74 (unless stated in the Covenants, Conditions, and Restrictions).

160. *Id. See* Seaton v. Clifford, 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (1972) (injunction allowed for enforcement of a deed restriction limiting use to residential purposes in tract of single family homes); Arrowhead Mut. Serv. Co. v. Faust, 260 Cal. App. 2d 567, 67 Cal. Rptr. 325 (1968) (defendant's use of his lot for business purposes in violation of restrictions was enjoined by suit based on equitable servitudes brought by other lot owners); Bramwell v. Kuhle, 183 Cal. App. 2d 767, 6 Cal. Rptr. 839 (1960) (suit by owners of property to enjoin construction in violation of subdivision restrictions).

161. D. HAGMAN & R. MAXWELL, *supra* note 2, at § 385.74. *See* Knox v. Streatfield, 79 Cal. App. 3d 565, 145 Cal. Rptr. 39 (1978) (action brought by condominium owner against

light of these factors, the *Frances T.* decision places the directors in a Catch-22 situation. In the case, the directors complied with the association's covenants, conditions, and restrictions by mandating removal of the lighting since their presence was in direct violation of those regulations. The decision in *Frances T.*, however, places the directors in conflict with the association's guidelines since, by allowing the plaintiff's lights to remain, the directors would breach the fiduciary duty they owe to the corporation and could be subject to damages if a shareholder brought suit.[162]

IV. CONCLUSION

The California Supreme Court, in *Frances T. v. Village Green Owners Association*, has extended landlord liability in tort for the criminal acts of third parties to condominium homeowners associations. Not only did the court sustain a cause of action against the association, but the court also held that the directors of the association could be personally liable as well. The directors could be found to have participated in a tortious act by their failure to respond within a reasonable time to the plaintiff's request for adequate lighting. The *Frances T.* decision may give rise to increased exposure of directors for actions which actually amount to fulfillment of their duties to the corporation through the enforcement of the covenants, conditions, and restrictions of the homeowners association. The liability of an association and the directors appears to turn on whether the directors have knowledge of prior criminal acts on the premises and of faulty conditions which exist in the security of the premises. When such conditions exist, the directors are in a Catch-22 situation. If the directors remedy the condition, they may be breaching their fiduciary duties to the association by failing to enforce the association's building restrictions. On the other hand, adhering to their duty

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another owner for damages and injunctive relief for violations of subdivision building restrictions); Atlas Terminals, Inc. v. Sokol, 203 Cal. App. 2d 191, 21 Cal. Rptr. 293 (1962) (violation of restrictive covenant to keep property clean and sightly gives rise to damages).

162. D. HAGMAN & R. MAXWELL, *supra* note 2, at § 385.74. *See* Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co., 114 Cal. App. 3d 783, 171 Cal. Rptr. 334 (1981) (homeowners acted as shareholders in suit for breach of fiduciary duty against developers who were directors of association and caused damage to the corporation); Knox v. Streatfield, 79 Cal. App. 3d 565, 145 Cal. Rptr. 39 (1978) (plaintiffs action for damages was based upon a reduction of property value for violations of the declaration of restrictions which amounted to the addition of a storage shed, painting portions of the common areas, construction of a deck and building a fence without approval of the architectural committee).

to follow the association building resitrictions could result in injuries to unit owners, which also results in liability.

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