NO FORESEEABILITY, NO DUTY, NO-FRILLS!
THE NEBRASKA SUPREME COURT IMPOSES A
DUTY IN ERICHSEN v. NO-FRILLS
SUPERMARKETS OF OMAHA, INC.

INTRODUCTION

For almost fifty years, Nebraska law has required that a business owner use reasonable care to warn or protect business invitees from reasonably foreseeable criminal acts.¹ The Nebraska Supreme Court has often addressed the issue of whether a criminal act is reasonably foreseeable so as to impose a duty on a business owner.²

In the case of Erichsen v. No-Frills Supermarkets of Omaha, Inc.,³ the Nebraska Supreme Court again addressed the issue of a business owner's duty to a business invitee.⁴ In Erichsen, the court imposed a duty on business owners to use reasonable care to keep their premises safe for business invitees from the criminal acts of third parties.⁵

This Note will first discuss the decision of the Nebraska Supreme Court in Erichsen.⁶ This Note next examines the history of decisions from Nebraska and other jurisdictions involving the imposition of a duty upon a business owner in regard to third party criminal acts.⁷ This Note will then analyze the reasoning of the court in Erichsen in terms of the court's interpretation of foreseeability, known and obvi-
ous dangers, and policy factors. This Note concludes that, based upon past precedent, the Nebraska Supreme Court erred both in holding that No-Frills owed a duty to protect Erichsen from harm and in failing to define the duty owed to business invitees.

FACTS & HOLDING

On July 28, 1991, Janis L. Erichsen went shopping at No-Frills Supermarket. Upon returning to her car, Terry L. Bennett sprayed Erichsen in the face with chemical Mace. Bennett stole Erichsen's purse and retreated to his car where an accomplice waited. As Bennett attempted to start his car, Erichsen recovered from the Mace and ran toward Bennett's car, reaching in for her purse. In the ensuing struggle, Erichsen became entangled in the seat or seatbelt of Bennett's car. Bennett drove off, dragging Erichsen alongside the car. Bennett dragged Erichsen 1.6 miles, leaving a bloody trail strewn with Erichsen's pants, shoe, and sock. As a result of this assault, Erichsen suffered serious third-degree burns on her feet and legs, tore

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8. See infra notes 217-86 and accompanying text.
9. See infra notes 287-91 and accompanying text.
11. See Erichsen, 246 Neb. at 239, 518 N.W.2d at 118; Bennett, 2 Neb. Ct. App. at 189, 508 N.W.2d at 296; Cindy Gonzalez, Spray of Mace Stunned Me, Dragging Victim Says, Omaha World-Herald, July 31, 1991, at 1 (hereinafter Gonzalez).
14. Erichsen, 246 Neb. at 239, 518 N.W.2d at 118 (noting that Erichsen "became entangled in the safety belt or seat of the vehicle"). See Bennett, 2 Neb. Ct. App. at 189-90, 508 N.W.2d at 296 (stating that Erichsen became entangled in the seatbelt).
15. Erichsen, 246 Neb. at 239, 518 N.W.2d at 118; Bennett, 2 Neb. Ct. App. at 190, 508 N.W.2d at 296; Gonzalez, supra note 11, at 1. A witness who followed Bennett's vehicle said, "[Erichsen] was an older, heavyset lady and [was not] able to keep her legs up.... [Bennett was] going about fifty mph, all through the neighborhood, and [Erichsen] was just hanging out the car.... She was bouncing off cars and everything...." Cindy Gonzalez, Witnesses Doubted Eyes as Car Dragged Woman, Omaha World-Herald, July 30, 1991, at 1, 5.
16. Gonzalez, Witnesses Doubted Eyes as Car Dragged Woman, Omaha World-Herald, July 30, 1991, at 5. See Erichsen, 246 Neb. at 239, 518 N.W.2d at 118; Bennett, 2 Neb. Ct. App. at 190, 508 N.W.2d at 296 (stating the trail was approximately 1.6 miles long). Erichsen blacked out sometime during the dragging before the assailant dumped her off. Gonzalez, supra note 11, at 1, 11; Bennett, 2 Neb. Ct. App. at 190, 508 N.W.2d at 296.
her knee caps off, and underwent surgeries to remove rocks from her body and to reconstruct her knees.\textsuperscript{17}

Erichsen brought a personal injury action in the District Court of Douglas County, Nebraska against No-Frills Supermarkets of Omaha, Inc. ("No-Frills") and Harold Cooperman, owner of the shopping center where the No-Frills store was located.\textsuperscript{18} Erichsen alleged in her petition that at least ten crimes occurred in the No-Frills parking lot or surrounding area within sixteen months of her attack.\textsuperscript{19} These crimes included theft, robbery, and a purse-snatching.\textsuperscript{20} In addition, Erichsen alleged in her petition that No-Frills "knew or should have known" its patrons were the likely targets of crime, because No-Frills maintained few employees to help patrons to their cars.\textsuperscript{21} Erichsen asserted that No-Frills owed her a duty to foresee the kind of criminal activity of which she was a victim and should have protected her from the criminal activity or at least warned her of it.\textsuperscript{22}

No-Frills demurred, stating that Erichsen failed to plead sufficient facts to state a cause of action.\textsuperscript{23} The district court upheld No-Frills' demurrer, holding that the appellees, No-Frills Supermarkets and Harold Cooperman, did not owe Erichsen a duty of reasonable care.\textsuperscript{24} Erichsen appealed to the Nebraska Supreme Court.\textsuperscript{25}

\textsuperscript{17} Gonzalez, supra note 11, at 11; Bennett, 2 Neb. Ct. App. at 190-91, 508 N.W.2d at 296 (noting that Erichsen had 12-13 surgeries and was in the hospital for two months).

\textsuperscript{18} Erichsen, 246 Neb. at 238-39, 518 N.W.2d at 116-18.

\textsuperscript{19} Id. at 239, 518 N.W.2d at 118. See Brief for Appellant at 5, Erichsen v. No-Frills Supermarkets of Omaha, Inc., 246 Neb. 238, 518 N.W.2d 116 (1994) (No. A-92-1119).

\textsuperscript{20} Id.

\textsuperscript{21} Id. See Neb. Rev. Stat. § 25-806 (Reissue 1989). Nebraska Revised Statutes Section 25-806 provides in relevant part:

\textsuperscript{22} Id. See supra note 19.

\textsuperscript{23} Id. See Neb. Rev. Stat. § 25-806 (Reissue 1989). Nebraska Revised Statutes

\textsuperscript{24} Id.

\textsuperscript{25} Id.
On appeal, the Nebraska Supreme Court reversed and remanded the case, finding that Erichsen’s petition alleged sufficient facts to overcome the demurrer. The court explained that an actionable negligence claim must consist of the following elements: (1) a legal duty owed to protect the plaintiff; (2) a failure to perform such duty; and (3) damage which proximately resulted from such failure. The court defined duty as “an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.” In addition, the court stated that foreseeability is also a factor in determining the existence of a duty.

The court noted that, in regard to business invitees, Nebraska courts have adopted the Restatement (Second) of Torts Section 344 (“Restatement”). The Restatement provides:

[a] possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

In clarifying the landowner's duty under the Restatement, the court cited Comment f.

[Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general

26. Id. at 245, 518 N.W.2d at 121. In reviewing the order sustaining the demurrer, the Nebraska Supreme Court accepted the truth of all well-pled facts and the reasonable inferences that followed, but not the truth of the pleader’s conclusions. Id. at 239-40, 518 N.W.2d at 118 (citing Durand v. Western Sur. Co., 245 Neb. 649, 514 N.W.2d 840 (1994)).

27. Erichsen, 246 Neb. at 240, 518 N.W.2d at 118 (citing Schmidt v. Omaha Pub. Power Dist., 245 Neb. 776, 515 N.W.2d 756 (1994)). It is beyond the scope of this paper to discuss more than the duty owed to the plaintiff. See supra notes 60-291 and accompanying text.


29. Id. (citing Schmidt v. Omaha Pub. Power Dist., 245 Neb. 776, 515 N.W.2d 756 (1994)).

30. Id. at 240, 518 N.W.2d at 118-19 (citing C.S. v. Sophir, 220 Neb. 51, 368 N.W.2d 444 (1985); Harvey v. Van Aelstyn, 211 Neb. 607, 319 N.W.2d 725 (1982) (per curiam); Hughes v. Coniglio, 147 Neb. 829, 26 N.W.2d 405 (1946)).

31. Id. (quoting the RESTATEMENT (SECOND) OF TORTS § 344 (1965)).

32. Erichsen, 246 Neb. at 240-41, 518 N.W.2d at 119.
which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford reasonable protection.\textsuperscript{33}

The court stated that, if a sufficient history of criminal activity exists to make criminal acts reasonably foreseeable, a duty will be imposed.\textsuperscript{34} However, the court refused to impose a duty when the third party's actions were sudden and unexpected or based on a single incident of criminal activity.\textsuperscript{35} The court explained that, in proving foreseeability, a duty may exist when there are "many occasions of 'similar' criminal activity in one fairly contiguous area in a limited time span.\textsuperscript{36}

The court held that Erichsen alleged adequate facts in her petition that, if accepted as the truth, showed No-Frills owed her a duty to exercise reasonable care and that No-Frills breached that duty.\textsuperscript{37} However, the court refused to specify the safeguards that fulfilled the duty of reasonable care.\textsuperscript{38} The court explained that "[w]hether particular measures discharge a business owner's duty to exercise reasonable care is decided in hindsight with the benefit of knowledge."\textsuperscript{39} In addition, the court refused to engage in a cost-benefit analysis of specific safeguards.\textsuperscript{40} Instead, the court stated that it would "continue to

\textsuperscript{33} Id. (quoting \textsc{Restatement (Second) of Torts} \$ 344 cmt. f (1965)).

\textsuperscript{34} \textit{Erichsen}, 246 Neb. at 243, 518 N.W.2d at 120 (citing K.S.R. v. Novak and Sons, Inc., 225 Neb. 498, 406 N.W.2d 636 (1987)).

\textsuperscript{35} Id. at 241-43, 518 N.W.2d at 119-20 (citing \textit{Harvey v. Van Aelstyn}, 211 Neb. 607, 319 N.W.2d 725 (1982) (per curiam); \textit{Hughes v. Coniglio}, 147 Neb. 829, 25 N.W.2d 405 (1946)). The court stated that one incident was not sufficient notice to an owner that criminal activity will occur in the future. \textit{Id.} at 242-43, 518 N.W.2d at 119-20 (citing C.S. v. \textit{Sophir}, 220 Neb. 51, 365 N.W.2d 444 (1985); \textit{Harvey v. Van Aelstyn}, 211 Neb. 607, 319 N.W.2d 725 (1982) (per curiam); and \textit{Hughes v. Coniglio}, 147 Neb. 829, 25 N.W.2d 405 (1946)).

\textsuperscript{36} \textit{Erichsen}, 246 Neb. at 243, 518 N.W.2d at 120.

\textsuperscript{37} Id.

\textsuperscript{38} Id. at 244, 518 N.W.2d at 121.

\textsuperscript{39} Id. (citing \textit{Anderson v. Service Merchandise Co., Inc.}, 240 Neb. 873, 485 N.W.2d 170 (1992); \textit{Klewver v. Wall Constr. Co.}, 229 Neb. 867, 429 N.W.2d 373 (1988); and \textit{Havelicek v. Desai}, 225 Neb. 222, 403 N.W.2d 386 (1987)).

\textsuperscript{40} Id. (citing \textit{Anderson v. Service Merchandise Co., Inc.}, 240 Neb. 873, 485 N.W.2d 170 (1992); \textit{Havelicek v. Desai}, 225 Neb. 222, 403 N.W.2d 386 (1987); and \textit{Nownes v. Hillside Lounge, Inc.}, 179 Neb. 157, 137 N.W.2d 361 (1965)). For example, the court noted that it had not speculated in prior cases as to safely hanging light fixtures, properly lighting a stairwell, or fastening a stool to the floor. \textit{Id.} (citations omitted).
hold that a business possessor must exercise reasonable care to keep the premises safe for its business invitees."  

Judge Dale E. Fahrnbruch dissented. Judge Fahrnbruch stated that the court extended "premises liability" beyond any of its prior holdings. According to Judge Fahrnbruch, the Nebraska Supreme Court previously addressed pure premises liability questions in cases involving a defect or condition inherent in the property rather than in cases involving third party actions.

Judge Fahrnbruch stated that, while a purse-snatching in the parking lot was foreseeable, Erichsen's entanglement and subsequent car dragging were not foreseeable. According to Judge Fahrnbruch, No-Frills could not have foreseen such "bizarre events." Judge Fahrnbruch insisted that the court imposed a vague duty upon No-Frills by failing to define how the business could have fulfilled its duty. Judge Fahrnbruch stated, "If the majority is unwilling or unable to more clearly define the duty of a business owner to customers, the matter should be left to the Legislature and not to speculation of the business owner."

Judge Fahrnbruch stated that the court created a broad area of liability for business owners, offered no guidelines for business owners, and so placed an unreasonable hardship on owners who must now guess as to how to fulfill a duty to customers. Judge Fahrnbruch explained, "[T]he majority has set the classic 'trap for the unwary,' for only when the litigation trap is sprung will the business owner finally learn the extent of the duty owed."

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41. Erichsen, 246 Neb. at 244, 518 N.W.2d at 121 (citations omitted).
42. Id. at 245, 518 N.W.2d at 121 (Fahrnbruch, J., dissenting).
43. Id. (Fahrnbruch, J., dissenting).
44. Id. (Fahrnbruch, J., dissenting) (citing Ellis v. Far-Mar-Co., Inc., 215 Neb. 736, 340 N.W.2d 423 (1983)).
45. Id. at 246, 518 N.W.2d at 122 (Fahrnbruch, J., dissenting) (comparing Erichsen to Cook v. Safeway Stores, Inc., 354 A.2d 507 (D.C. 1976) (holding that a customer's rash actions in trying to restrain a thief were not foreseeable)).
46. Id. at 247, 518 N.W.2d at 122 (Fahrnbruch, J., dissenting).
47. Id. (Fahrnbruch, J., dissenting).
48. Id. (Fahrnbruch, J., dissenting). Judge Fahrnbruch stated that it may be improper for the court to determine how an owner may fulfill a duty in some situations. Id. (Fahrnbruch, J., dissenting). However, Judge Fahrnbruch also argued that the cases cited by the court, in stating that it could not speculate as to what fulfilled a duty, did not support the court's refusal to speculate as to what fulfilled a duty. Id. (Fahrnbruch, J., dissenting) (stating that, in the cases cited by the majority, duty was not even an issue). In addition, Judge Fahrnbruch noted that the Nebraska Supreme Court has in fact previously defined a defendant's duty. Id. (Fahrnbruch, J., dissenting) (citing Schmidt v. Omaha Pub. Power Dist., 245 Neb. 776, 515 N.W.2d 756 (1994)).
49. Erichsen, 246 Neb. at 246-48, 518 N.W.2d at 122 (Fahrnbruch, J., dissenting).
50. Id. at 248, 518 N.W.2d at 122 (Fahrnbruch, J., dissenting).
Judge Fahrnbruch stated that since crime is obvious to customers like Erichsen, No-Frills did not owe Erichsen a duty to protect or warn her.\textsuperscript{51} Judge Fahrnbruch reasoned that warnings in cases such as Erichsen's were futile anyway since the potential of crime is obvious to everyone.\textsuperscript{52} Therefore, Judge Fahrnbruch stated that the court's ruling left owners with the alternative of providing protection, which presumably meant hiring security guards.\textsuperscript{53} However, Judge Fahrnbruch pointed out that security guards cannot be everywhere and are ordinarily hired to protect primarily the business enterprise, not the customers.\textsuperscript{54}

Judge Fahrnbruch stated that "the provision of a full panoply of security personnel is inconsistent with the basic premise of 'no-frills' or discount retail operations; that is, the business saves money by providing less service but passes along this saving to the customer in the form of lower prices."\textsuperscript{55} In addition, Judge Fahrnbruch noted that such a risk was uninsurable, further burdening the business owner.\textsuperscript{56}

Judge Fahrnbruch emphasized that the court's holding made business owners insurers of safety.\textsuperscript{57} Judge Fahrnbruch stated that the economic impact of the court's opinion was disastrous, because business owners would be forced to warn and protect customers from potential crime.\textsuperscript{58}

Judge Fahrnbruch concluded that the events causing Erichsen's injury were unforeseeable and the duty the majority imposed on business owners was "unreasonable and economically disastrous."\textsuperscript{59}

\textsuperscript{51} Id. at 248-49, 518 N.W.2d at 123 (Fahrnbruch, J., dissenting).
\textsuperscript{52} Id. at 248, 518 N.W.2d at 123 (Fahrnbruch, J., dissenting).
\textsuperscript{53} Id. (Fahrnbruch, J., dissenting).
\textsuperscript{54} Id. (Fahrnbruch, J., dissenting).
\textsuperscript{55} Id. at 249, 518 N.W.2d at 123 (Fahrnbruch, J., dissenting).
\textsuperscript{56} Id. (Fahrnbruch, J., dissenting).
\textsuperscript{57} Id. (Fahrnbruch, J., dissenting).
\textsuperscript{58} Id. (Fahrnbruch, J., dissenting). Judge Fahrnbruch posed the question: "Must the business owner erect a billboard in the owner's parking lot to advise potential customers of the perils of possible victimhood to which they may fall prey should they decide to exit their vehicles?" Id. (Fahrnbruch, J., dissenting). According to Judge Fahrnbruch, if the answer is yes, it becomes questionable whether potential customers will become actual customers. Id. (Fahrnbruch, J., dissenting). Judge Fahrnbruch next questioned whether a business can then survive. Id. (Fahrnbruch, J., dissenting). Judge Fahrnbruch stated that "[i]t seems unlikely that any business could survive such a 'warning.'" Id. (Fahrnbruch, J., dissenting). According to Judge Fahrnbruch, "[t]he rule is unrealistic in today's world." Id. (Fahrnbruch, J., dissenting). Judge Fahrnbruch further added that making discount businesses hire additional employees leads to such businesses' economic demise. Id. (Fahrnbruch, J., dissenting).
\textsuperscript{59} Erichsen, 246 Neb. at 249, 518 N.W.2d at 123 (Fahrnbruch, J., dissenting).
BACKGROUND

NEBRASKA CASE LAW

Foreseeability

In determining whether a duty is owed, the Nebraska Supreme Court examines the specific factual circumstances of a case to determine if the criminal act was foreseeable.\(^{60}\) For example, the Nebraska Supreme Court evaluated the element of duty in *Hughes v. Coniglio*.\(^ {61}\) In *Hughes*, a restaurant patron, Anthony Hughes, was injured when two other customers suddenly began fighting.\(^ {62}\) The restaurant had no history of patrons fighting.\(^ {63}\) Hughes' father filed suit on Hughes' behalf in the District Court of Douglas County, Nebraska, alleging negligence on the part of the restaurant.\(^ {64}\) After Hughes presented his evidence, the restaurant moved for dismissal.\(^ {65}\) The trial court sustained the motion because of insufficiency of evidence.\(^ {66}\)

Hughes appealed to the Nebraska Supreme Court, claiming the trial court erred in dismissing the action based on a finding of insufficiency of the evidence.\(^ {67}\) On appeal, the court found for the restaurant, stating:

> [T]he proprietor of a place of business who holds it out to the public for entry for his business purposes, is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentionally harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm.\(^ {68}\)

The court stated that the restaurant could not have discovered or prevented the fight, because the restaurant had no knowledge or warning that these particular customers were prone to violence.\(^ {69}\)


\(^{61}\) 147 Neb. 829, 832-33, 25 N.W.2d 405, 408 (1946).


\(^{63}\) *Hughes*, 147 Neb. at 832, 25 N.W.2d at 407-08.

\(^{64}\) Id. at 829-30, 25 N.W.2d at 405-07.

\(^{65}\) Id. at 830, 25 N.W.2d at 406.

\(^{66}\) Id. at 830, 25 N.W.2d at 407.

\(^{67}\) Id. at 829-30, 25 N.W.2d at 405-07.

\(^{68}\) Id. at 833-34, 25 N.W.2d at 408.

\(^{69}\) Id. at 832, 25 N.W.2d at 408.
In Welsh v. Zuck, the court examined the standard of care to impose on a business owner. In Welsh, a tavern owner, Leonard Zuck, had a firing range in the basement of his bar. A patron, Chester Rima, brought his gun in for adjustments and left the unloaded gun with the bartender after having it adjusted. Rima retrieved the gun later in the evening. Rima then left the tavern with the gun, re-loaded the gun, and returned to the tavern forty five minutes later with the gun concealed under his coat. Later, in the tavern, Rima became upset when he thought he heard a comment about his wife. Rima took out his gun and pointed it in the air. Another patron grabbed Rima from behind and a struggle ensued in which Rima accidentally shot the plaintiff, customer William Welsh.

Welsh filed suit in the District Court of Red Willow County, Nebraska, against Zuck, Rima, and the bartender, alleging negligence. At trial, the jury found for Welsh against Rima and Zuck but not against the bartender. Zuck appealed to the Nebraska Supreme Court, alleging that there was insufficient evidence to find him liable and that his motion for a directed verdict or motion for judgment notwithstanding the verdict should have been upheld by the district court.

On appeal, the Nebraska Supreme Court, relying on Section 348 of the Restatement of Law, Torts, held that Zuck was not negligent. The court stated that even though Zuck knew a gun was on the prem-

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70. 192 Neb. 1, 218 N.W.2d 236 (1974).
72. Welsh, 192 Neb. at 2-4, 218 N.W.2d at 238.
73. Id. at 4, 218 N.W.2d at 238.
74. Id. at 4, 218 N.W.2d at 238-39.
75. Id. at 4, 218 N.W.2d at 239.
76. Id. at 5, 218 N.W.2d at 239.
77. Id.
78. Id.
79. Id. at 2, 6, 218 N.W.2d at 236, 238-39.
80. Id. at 2, 218 N.W.2d at 238.
81. Id. at 2-3, 218 N.W.2d at 238. Zuck died and the administrator of his estate, Herbert Zuck, appealed. Id.
82. Id. at 5-6, 218 N.W.2d at 239 (citing Hughes v. Coniglio, 147 Neb. 829, 25 N.W.2d 405; RESTATEMENT OF THE LAW, TORTS § 348 (1946)). RESTATEMENT OF THE LAW, TORTS § 348 (1946) is the predecessor of RESTATEMENT (SECOND) OF TORTS § 344 (1965). Harvey v. Van Aelstyn, 211 Neb. 607, 611, 319 N.W.2d 725, 727 (1982) (per curiam). See RESTATEMENT (SECOND) OF TORTS § 344 (1965) which provides in relevant part:

[a] possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Id.
ises, he could not possibly have foreseen the shooting or prevented it. 83

In *Harvey v. Van Aelstyn*, 84 the Nebraska Supreme Court examined the foreseeability of an assault in a bar in determining whether or not the bar owner owed a duty to protect the victim. 85 In *Harvey*, a jealous boyfriend, Robert Van Aelstyn, stormed into a bar and struck Thomas Harvey, who was dancing with Van Aelstyn's girlfriend. 86 On two prior occasions, Van Aelstyn had struck people, once in the bar and once outside. 87 In addition, approximately ten disturbances, including a stabbing, an assault with a beer bottle, and a fist fight, had occurred in and near the bar within four and one-half years prior to this incident. 88 Harvey sued Carlena Warren, the bar owner, in the District Court for Cheyenne County, Nebraska, alleging negligence. 89 Warren moved for a directed verdict which the trial court granted because of insufficient evidence. 90 Harvey appealed the directed verdict to the Nebraska Supreme Court, alleging there was sufficient evidence to raise a factual question as to Warren's negligence. 91

On appeal, the Nebraska Supreme Court held that the assault was not reasonably foreseeable, and thus no duty was owed because the tavern owner must only protect against anticipated independent acts. 92 In *Harvey*, the court relied on Comment d of the Restatement which provides:

A . . . possessor of land who holds it open to the public for entry for his business purposes is not an insurer of the safety of such visitors against the acts of third persons . . . . He is, however, under a duty to exercise reasonable care to give them protection. In many cases a warning is sufficient care if the possessor reasonably believes that it will be enough to enable the visitor to avoid the harm, or protect himself against

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83. *Welsh*, 192 Neb. at 4-9, 218 N.W.2d at 238-41.
85. *See Harvey v. Van Aelstyn*, 211 Neb. 607, 611-18, 319 N.W.2d 725, 727-30 (1982) (per curiam) (discussing Nebraska's application of the *RESTATEMENT (SECOND) OF TORTS* § 344 (1965) and applying the Restatement to determine that the owner could not foresee the actions of a third person and thus did not owe a duty).
86. *Harvey*, 211 Neb. at 609-11, 319 N.W.2d at 728-27 (per curiam).
87. *Id.* at 615-16, 319 N.W.2d at 729 (per curiam) (discussing one person being struck in the bar and the other being struck across the street after leaving the bar).
88. *Id.* at 616, 319 N.W.2d at 729-30 (per curiam).
89. *Id.* at 608, 319 N.W.2d at 726 (per curiam). Harvey also sued Van Aelstyn for assault and battery. *Id.* (per curiam). The trial court found Van Aelstyn liable as a matter of law. *Id.* (per curiam).
90. *See Harvey*, 211 Neb. at 608-09, 319 N.W.2d at 726 (per curiam).
91. *See id.* at 607-09, 319 N.W.2d at 725-26 (per curiam).
92. *Id.* at 617-18, 319 N.W.2d at 730 (per curiam) (citing Moore v. Yearwood, 164 N.E.2d 215 (Ill. App. 1960); Evanish v. V.F.W. Post No. 2717, 130 N.W.2d 331 (Minn. 1963); and Pierce v. Lopez, 490 P.2d 1182 (Ariz. App. 1971)).
it. There are, however, many situations in which the possessor cannot reasonably assume that a warning will be sufficient. He is then required to exercise reasonable care to use such means of protection as are available, or to provide such means in advance because of the likelihood that third persons . . . may conduct themselves in a manner which will endanger the safety of the visitor.93

The court stated that Warren could have done nothing to protect Harvey — she could not have warned Harvey or restrained Van Aelstyn.94 The court also refused to speculate whether a security officer could have prevented the assault.95

In Childers v. LCW Apartments,96 the Nebraska Supreme Court examined what prior incidents must be shown to establish foreseeability so as to impose a duty on a landowner.97 In Childers, two men assaulted a tenant, Barbel Childers, and stole her purse and car in the parking lot of her apartment building.98 Burglaries, theft, and vandalism had occurred on the premises prior to the assault on Childers.99 Childers sued the apartment complex owners, LCW Apartments, in the District Court for Douglas County, Nebraska, alleging negligence.100 At trial, the jury rendered a verdict for LCW Apartments, finding no duty was owed to Childers.101

Childers appealed to the Nebraska Supreme Court, alleging error in the trial court's refusal to allow testimony regarding previous criminal acts.102 The Nebraska Supreme Court noted that “[i]mplicit in the appeal is the assumption that the law of Nebraska imposes a duty upon a landlord to protect a tenant from the criminal activities of third persons. We have discovered no authority to that effect in Nebraska[.]”103 Finding that the landlord was not negligent, the court determined that evidence of prior incidents shown to establish foreseeability must be substantially similar to the incident the court is evaluating.104 The court specified that burglary, theft, and vandalism were not substantially similar to an assault so as to make the assault fore-

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93. Id. at 614-15, 319 N.W.2d at 729 (per curiam) (quoting Restatement (Second) of Torts § 344 cmt. d (1965)).
94. See Harvey, 211 Neb. at 615, 319 N.W.2d at 729 (per curiam).
95. Id. at 617-18, 319 N.W.2d at 730 (per curiam).
98. Children, 214 Neb. at 291-92, 333 N.W.2d at 678.
99. See id. at 293, 333 N.W.2d at 679.
100. Id. at 291, 333 N.W.2d at 678.
101. See id. at 291-93, 333 N.W.2d at 678-79.
102. Id. at 291-92, 333 N.W.2d at 677-79.
103. Id. at 292, 333 N.W.2d at 679.
104. Id. at 291-94, 333 N.W.2d at 678-80 (citing Evers v. Evers, 146 Neb. 104, 18 N.W.2d 673 (1945); 32 C.J.S. Evidence §§ 578, 583-84 (1964)).
seeable, and thus, the trial court did not abuse its discretion by excluding the evidence.\textsuperscript{105}

In \textit{C.S. v. Sophir},\textsuperscript{106} the Nebraska Supreme Court considered whether to impose a duty on a landowner based on a single prior similar incident.\textsuperscript{107} In \textit{C.S.}, a tenant, C.S., was sexually assaulted in the parking lot of her apartment building.\textsuperscript{108} C.S. sued the landlord in the District Court of Douglas County, Nebraska, alleging that the apartment manager knew a sexual assault occurred in the apartment's parking lot within two months of the assault on C.S. and that the landlord was negligent because he failed to warn her.\textsuperscript{109} The landlord demurred.\textsuperscript{110} In sustaining the demurrer, the trial court found that C.S. failed to state a cause of action.\textsuperscript{111} C.S. appealed to the Nebraska Supreme Court.\textsuperscript{112}

On appeal, the Nebraska Supreme Court examined whether C.S. stated a cause of action.\textsuperscript{113} The court refused to impose a duty on the landlord based on one prior assault.\textsuperscript{114} The court stated that a landowner is not an insurer of safety at all times.\textsuperscript{115} The court also noted that one does not have to warn against known or obvious dangers; the ordinary person should know that parking lots are common places for crime such that no warning is necessary.\textsuperscript{116} The court stated that, even if the owner had a duty to warn, there was no guarantee the crime would have been prevented.\textsuperscript{117}

In \textit{K.S.R. v. Novak and Sons, Inc.},\textsuperscript{118} the Nebraska Supreme Court ruled that a landlord had a duty to protect his tenant.\textsuperscript{119} In \textit{K.S.R.}, James Quarrels sexually assaulted tenant K.S.R. at knife

\begin{itemize}
\item \textsuperscript{105} \textit{Id.} at 292-93, 333 N.W.2d at 678-79.
\item \textsuperscript{106} 220 Neb. 51, 368 N.W.2d 444 (1985).
\item \textsuperscript{107} \textit{C.S. v. Sophir}, 220 Neb. 51, 52-3, 368 N.W.2d 444, 446 (1985).
\item \textsuperscript{108} \textit{C.S.}, 220 Neb. at 52, 368 N.W.2d at 446.
\item \textsuperscript{109} \textit{Id.} at 51-2, 368 N.W.2d at 444-46.
\item \textsuperscript{110} \textit{Id.} at 55, 368 N.W.2d at 447.
\item \textsuperscript{111} \textit{Id.} at 52, 55, 368 N.W.2d at 446, 447.
\item \textsuperscript{112} \textit{Id.}
\item \textsuperscript{113} \textit{Id.} at 52, 368 N.W.2d at 446.
\item \textsuperscript{114} \textit{Id.} at 53-54, 368 N.W.2d at 446-47.
\item \textsuperscript{115} \textit{Id.} at 53, 368 N.W.2d at 446 (citing \textit{Foster v. Winston-Salem Joint Venture}, 274 S.E.2d 265 (N.C. App. 1981); \textit{Kline v. 1500 Massachusetts Avenue Apartment Corp.}, 439 F.2d 477 (D.C. Cir. 1970); \textit{Carrigan v. New World Enterprises, Ltd.}, 446 N.E.2d 265 (Ill. App. 1983)).
\item \textsuperscript{116} See \textit{id.} at 53, 368 N.W.2d at 446 (citing \textit{Waegli v. Caterpillar Tractor Co.}, 197 Neb. 824, 251 N.W.2d 370 (1977) (finding that the court could not impose a duty on the landlord because one does not have a duty to warn of a known danger and a parking lot presents a known danger)).
\item \textsuperscript{117} \textit{Id.} at 53, 368 N.W.2d at 446 (stating that "[t]o impose liability over the mere possibility of a crime occurring is folly").
\item \textsuperscript{118} 225 Neb. 498, 406 N.W.2d 636 (1987).
\end{itemize}
point in her apartment. Quarrels had been caught masturbating in the laundry room across from K.S.R.’s apartment two days before the attack and several other times in the building. In addition, Quarrels had previously broken into another tenant’s apartment to stand naked by her bed. Because of Quarrel’s behavior, eight to ten tenants had moved out. K.S.R.’s own door had been kicked in one week before the assault and had not been fixed despite her repeated requests for maintenance.

K.S.R. filed suit in the District Court of Douglas County, Nebraska, against the apartment complex owner, Novak and Sons, Inc. (“Novak”), alleging Novak had failed to fulfill its duty to provide adequate security and repair K.S.R.’s door. Novak moved for summary judgment and the district court granted the motion. K.S.R. appealed to the Nebraska Supreme Court, alleging in part that the district court erred in finding that Novak did not owe her a duty of protection from criminal acts.

The Nebraska Supreme Court in K.S.R. held that a question of fact existed as to whether the sexual assault was foreseeable. The court stated that K.S.R.’s case, unlike the case in C.S. v. Sophir, involved an extensive history of criminal acts. The court noted evidence of activities that are not similar to the incident at hand may be excluded.

Policy Factors

The Nebraska Supreme Court has enunciated the factors to consider in determining whether to impose a duty on a landowner. These factors are as follows: (1) relationship of the parties; (2) nature

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120. K.S.R., 225 Neb. at 499, 406 N.W.2d at 637.
121. Id. at 499, 406 N.W.2d at 637-38.
122. Id. at 499, 406 N.W.2d at 638.
123. Id.
124. Id. at 499, 406 N.W.2d at 637.
125. Id. at 498-99, 406 N.W.2d at 637.
126. Id. at 498, 406 N.W.2d at 637.
127. Id. at 498-99, 406 N.W.2d at 636-38.
128. Id. at 500-01, 406 N.W.2d at 638-39.
130. K.S.R., 225 Neb. at 500, 406 N.W.2d at 638 (stating that “[t]he case at hand is readily distinguishable from Sophir. In the instant case repeated intrusions with related objectionable sexual conduct by the assailant were known to the landlord. Here, unlike Sophir, there was a history of criminal activity at the leased premises.”).
131. Id. (citing Childers v. LCW Apartments, 214 Neb. 291, 333 N.W.2d 677).
of the inherent risk; (3) burden of guarding against the injury; (4) public interest in the solution; and (5) fairness of imposing a duty.\[133\]

In Schmidt v. Omaha Public Power District,\[134\] the Nebraska Supreme Court described the factors it considers in establishing duty.\[135\] In Schmidt, an employee, William J. Schmidt, was injured when he hit a private electric powerline while digging post holes at a job site.\[136\] To obtain the location of buried utility lines, the employer, Bonn Fence Company, had called Hotline, a service which provides information for safe excavation.\[137\] Hotline failed to inform the employer that the service only warned against city powerlines, not private powerlines.\[138\]

Schmidt sued Omaha Public Power District and Hotline in the District Court of Douglas County, Nebraska, alleging negligence.\[139\] Both Omaha Public Power District and Hotline moved for summary judgment.\[140\] The trial court granted both motions for summary judgment, finding no basis for the testimony of Schmidt's expert witness.\[141\]

Schmidt appealed to the Nebraska Supreme Court, alleging the district court erred by granting the motions for summary judgment because Schmidt had offered evidence supporting issues of law, including failure to warn.\[142\] Schmidt also alleged that the district court erred in excluding the testimony of Schmidt's expert witness.\[143\]

On appeal, the Nebraska Supreme Court examined Schmidt's argument that Hotline had a duty to warn callers that it could not disclose all powerline locations.\[144\] The court stated that, not only is foreseeability considered, but policy factors as well as fairness may be

\[134\] 245 Neb. 776, 515 N.W.2d 756 (1994).
\[135\] Schmidt v. Omaha Pub. Power Dist., 245 Neb. 776, 786-90, 515 N.W.2d 756, 763-65 (1994) (listing the policy factors as follows: (1) the relationship of the parties; (2) the ability and opportunity to exercise care; (3) the nature of the risk; and (4) the public interest in the solution) (citations omitted).
\[136\] Schmidt, 245 Neb. at 777, 515 N.W.2d at 758.
\[137\] Id. at 778, 515 N.W.2d at 769. Hotline was furnished by the Omaha Public Power District and other utilities. Id.
\[138\] See Schmidt, 245 Neb. at 780, 515 N.W.2d at 760 (stating that the plaintiff alleged that Hotline was negligent because of the failure to inform the plaintiff that it did not locate private powerlines).
\[139\] Id. at 777-81, 515 N.W.2d at 758-60.
\[140\] Id. at 781, 515 N.W.2d at 760-61.
\[141\] Id.
\[142\] Id. at 781-82, 515 N.W.2d at 761.
\[143\] Id.
\[144\] Id. at 785, 515 N.W.2d at 763.
considered. The court examined a number of factors including: (1) the relationship of the parties; (2) the ability and opportunity to exercise care; (3) the nature of the risk; and (4) the public interest in the solution.

The court applied the policy factors balancing test to the facts of Schmidt and found that the defendant had a duty to warn the public. In Schmidt, the court examined the relationship between Hotline and the callers, noting that Hotline widely advertised its services, relied on customers for continued existence, and did not charge the caller a fee. The nature of the risk, stated the court, was serious — possible injury or death. The court stated that Hotline had the opportunity to exercise care through a simple verbal warning that other powerlines might be present. The court noted that the cost of this practice would be minimal. Finally, the court stated that the public interest could be protected by imposing a duty to warn, especially considering that Hotline’s business revolved around public safety.

Post-Erichsen Case

In S.I. v. Cutler, the Nebraska Supreme Court again addressed the issue of foreseeability giving rise to the duty of a landowner. In S.I., H. Michael Cutler and Betty F. Cutler owned a building in which the Visiting Nurses of the Midlands ("Visiting Nurses") was a tenant. The plaintiff, S.I., an employee of Visiting Nurses, was assaulted in the building elevator one morning. The assailant had loitered in the building for one half hour prior to the assault. On other occasions, the same assailant and others had assaulted or threatened building invitees. Additionally, the landowners had received complaints about the prior assaults. During the three to four months prior to the assault, the security guard observed the as-

145. Id. at 786-90, 515 N.W.2d at 763-65 (describing and analyzing foreseeability and policy factors under the facts of the case presented).
146. Id. at 788-90, 515 N.W.2d at 764-65 (applying each of the factors to the facts of the case).
147. Id. at 788-91, 515 N.W.2d at 764-65.
148. Id. at 789-90, 515 N.W.2d at 765.
149. Id. at 786-90, 515 N.W.2d at 763-65.
150. Id. at 790, 515 N.W.2d at 765.
151. Id.
152. Id.
153. 246 Neb. 739, 523 N.W.2d 242 (1994) (per curiam).
154. S.I. v. Cutler, 246 Neb. 739, 741-42, 523 N.W.2d 242, 244 (per curiam).
155. S.I., 246 Neb. at 740, 523 N.W.2d at 243 (per curiam).
156. Id. (per curiam).
157. Id. (per curiam).
158. Id. at 740, 744, 523 N.W.2d at 243, 245 (per curiam).
159. Id. (per curiam).
sailant hanging around the building and, on one occasion, ejected the assailant.\textsuperscript{160} In addition, a burglary occurred in the building six months prior to the assault on S.I.\textsuperscript{161}

S.I. brought a negligence action against the Cutlers in the District Court of Douglas County, Nebraska.\textsuperscript{162} The Cutlers demurred and the district court sustained the demurrer to S.I.'s petition, dismissing the action.\textsuperscript{163} S.I. appealed to the Nebraska Supreme Court, claiming that she did state a cause of action.\textsuperscript{164}

On appeal, the Nebraska Supreme Court decided a duty must be imposed after considering the relationship of the parties, the nature of the risk, the ability of the landlord to exercise care, and the public's best interest.\textsuperscript{165} Furthermore, the court stated that, because a sufficient amount of prior criminal activity had been alleged, the assault was reasonably foreseeable and the Cutlers had a duty to protect S.I.\textsuperscript{166} The court stated that the facts in S.I. fell somewhere between the facts of K.S.R. and the facts of C.S.\textsuperscript{167} The court added, "[T]his incident was not the result of a random criminal act by a third party and the actions of the assailant were reasonably foreseeable."\textsuperscript{168}

Judge Fahrnbruch concurred with the majority.\textsuperscript{169} Judge Fahrnbruch agreed with the court's decision because S.I. involved a foreseeable assault by a known repeat assailant, rather than an unforeseeable random criminal attack by a completely unknown assailant in which the victim incurred injuries after pursuing the assailant.\textsuperscript{170}

\section*{Other Jurisdictions}

\subsection*{Foreseeability}

Other jurisdictions have also examined foreseeability in determining whether to impose a duty on a business owner.\textsuperscript{171} Several state courts have found that some incidents involving crime are not

\begin{thebibliography}{9}
\bibitem{160} Id. at 744, 523 N.W.2d at 245 (per curiam).
\bibitem{161} Id. (per curiam).
\bibitem{162} Id. at 739, 523 N.W.2d at 242-43 (per curiam).
\bibitem{163} Id. at 739, 523 N.W.2d at 243 (per curiam).
\bibitem{164} See id. at 739-41, 523 N.W.2d at 242-44 (per curiam).
\bibitem{165} Id. at 744, 523 N.W.2d at 245 (per curiam).
\bibitem{166} Id. at 744-45, 523 N.W.2d at 245 (per curiam).
\bibitem{167} Id. at 744, 523 N.W.2d at 245 (per curiam).
\bibitem{168} Id. at 745, 523 N.W.2d at 246 (per curiam).
\bibitem{169} Id. (per curiam) (Fahrnbruch, J., concurring).
\bibitem{170} Id. at 745-46, 523 N.W.2d at 246 (per curiam) (Fahrnbruch, J., concurring).
\end{thebibliography}
foreseeable. For example, in Nigido v. First Nat'l Bank of Baltimore, a bank customer, Salvatore Nigido, was shot when robbers held up the bank. Nigido sued the bank in the Circuit Court of Baltimore County, Maryland, alleging that, because robberies were foreseeable, the bank was negligent in failing to provide guards. The bank demurred, and the court entered judgment in favor of the bank. Nigido appealed to the Maryland Court of Appeals.

On appeal, the Maryland Court of Appeals stated that, even if the robbery was foreseeable, the subsequent shooting of a customer was not necessarily also foreseeable. According to the court, a mere allegation of a history of robberies failed to establish that the shooting was foreseeable. The court affirmed judgment for the bank, holding that the bank did not owe a duty to protect Nigido.

Similarly, the District of Columbia in Cook v. Safeway Stores, Inc. also found that some incidents involving crime are not foreseeable. In Cook, a stranger snatched a wallet from a grocery store customer's shopping cart. The customer grabbed the thief's arm, causing him to drop the wallet and head quickly for the exit. The customer noticed twenty dollars missing from her wallet, so she chased the thief and grabbed his arm again. The thief then punched her in the face and fled.

The customer filed suit in the Superior Court of the District of Columbia against Safeway Stores, Inc. ("Safeway"), alleging Safeway failed to protect her. The trial court entered an order directing the verdict for Safeway because the customer failed to state a cause of

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172. Nigido, 288 A.2d at 128 (finding that the shooting of the customer was not foreseeable). See Wright, 362 S.E.2d at 921 (stating that assaultive criminal behavior cannot be foreseen) (citation omitted); Jones, 478 P.2d at 784 (stating the criminal act was so improbable that it could not be expected); Kelly, 417 So. 2d at 562 (stating the business owner could not foresee the criminal activity of youths in the parking lot).
175. Nigido, 288 A.2d at 127.
176. Id.
177. Id.
178. Id. at 128.
179. See id. at 128-29.
180. Id. at 128, 131.
183. Cook, 354 A.2d at 507.
184. Id. at 507-08.
185. Id. at 508.
186. Id.
187. Id. at 507-09.
The customer appealed to the District of Columbia Court of Appeals, alleging that she did state a cause of action. The District of Columbia Court of Appeals affirmed the trial court's decision, stating that Safeway could not have reasonably foreseen the customer's rash actions in trying to restrain the thief. The court stated that Cook fell within the scope of an earlier case holding that a grocer had no duty to prevent an unforeseeable incident involving a child being pushed against a window and injured. The court stated that grocers are not insurers of customers' safety and have no duty to foresee and protect customers from unexpected incidents such as the one in Cook. In addition, the court stated that, even though crime is a constant hazard, business owners are not required to hire armed guards.

Policy Factors

Some state courts have stated that, because crime is everywhere, crime is always foreseeable, and policy factors prohibit the imposition of a duty. For example, in Goldberg v. Housing Authority of City of Newark, two men in an elevator attacked a person delivering milk to a housing project tenant. The delivery person sued the Housing Authority of the City of Newark ("Housing Authority"), alleging negligence. At trial, the jury found for the delivery person because the Housing Authority failed to protect the delivery person.

The Housing Authority appealed the decision to the New Jersey Superior Court, Appellate Division. The superior court affirmed

188. Id. at 507-08.
189. See id. at 507.
190. Id. at 508-10.
191. Id. at 508-09 (citing Graham v. Safeway Stores, Inc., 316 A.2d 852, 853 (D.C. App. 1974)). The court also distinguished Cook from another case in which a grocer was found to have a duty to foresee the possible danger of allowing troublesome boys to loiter at the store. Id. at 508 (citing Viands v. Safeway Stores, 107 A.2d 118, 121 (D.C. Mun. App. 1954)).
193. Id. at 509.
197. Goldberg, 186 A.2d at 291 n.1.
198. Id. at 291.
199. See id.
the trial court, stating that the Housing Authority had a duty to furnish police protection.\textsuperscript{200} The Housing Authority appealed to the New Jersey Supreme Court.\textsuperscript{201}

On appeal, the New Jersey Supreme Court reversed the lower courts' decisions and found for the Housing Authority.\textsuperscript{202} The court stated that because all crime is foreseeable, imposition of a duty is a question of fairness, not foreseeability.\textsuperscript{203} The court determined that imposition of a duty on the landowner would be unfair when the owner could not determine in advance of litigation what actions would discharge its duty.\textsuperscript{204} The court stated that, in determining the imposition of a duty, the court would also weigh the relationship between the parties, the type of risk, and the public interest.\textsuperscript{205} The court explained that the costs of implementing safeguards to fulfill this duty would ultimately fall on the tenants who could not afford such a burden.\textsuperscript{206}

Similarly, in \textit{Meadows v. Friedman R.R. Salvage Warehouse, Div. of Friedman Bros. Furniture Co., Inc.},\textsuperscript{207} the Missouri Court of Appeals of the Eastern District examined the foreseeability of crime as well as factors to weigh in determining duty.\textsuperscript{208} In \textit{Meadows}, an assailant assaulted and shot Mary Sue Meadows, a customer, while she was shopping at Friedman Railroad Salvage Warehouse ("Friedman").\textsuperscript{209} Meadows sued Friedman in the Circuit Court of St. Louis, Missouri, alleging negligence in failing to warn and protect her.\textsuperscript{210} The circuit court dismissed Meadows' petition.\textsuperscript{211} Meadows appealed to the Missouri Court of Appeals of the Eastern District.\textsuperscript{212}

On appeal, the Missouri Court of Appeals found for Friedman, stating that Friedman did not have a duty to protect or warn Meadows.\textsuperscript{213} The court stated that, in modern society, crime is foreseeable at any place and at any time.\textsuperscript{214} Thus, the court stated that the imposition of a duty is not determined solely by evaluating foreseeability,

\textsuperscript{200} \textit{Id.} at 291-92.
\textsuperscript{201} \textit{See id.} at 291.
\textsuperscript{202} \textit{Id.} at 299.
\textsuperscript{203} \textit{Id.} at 293.
\textsuperscript{204} \textit{Id.} at 297.
\textsuperscript{205} \textit{Id.} at 293.
\textsuperscript{206} \textit{Id.} at 297-98.
\textsuperscript{207} 655 S.W.2d 718 (Mo. App. E.D. 1983).
\textsuperscript{208} \textit{Meadows v. Friedman R.R. Salvage Warehouse, Div. of Friedman Bros. Furniture Co., Inc.}, 655 S.W.2d 718, 721 (Mo. App. E.D. 1983).
\textsuperscript{209} \textit{Meadows}, 655 S.W.2d at 720.
\textsuperscript{210} \textit{Id.} at 718-20.
\textsuperscript{211} \textit{Id.}
\textsuperscript{212} \textit{Id.}
\textsuperscript{213} \textit{Id.} at 720, 722.
\textsuperscript{214} \textit{Id.} at 721.
but rather by evaluating fairness, the relationship of the parties, the public interest, and the nature of the inherent risk.\textsuperscript{215} The court emphasized that in the analysis of duty, policy is the determining factor.\textsuperscript{216}

ANALYSIS

In \textit{Erichsen v. No-Frills Supermarkets of Omaha, Inc.},\textsuperscript{217} the Nebraska Supreme Court imposed a harsh duty on business owners.\textsuperscript{218} The court found that No-Frills had a duty to exercise reasonable care to protect Erichsen.\textsuperscript{219} In failing to define the specific measures business owners must take in order to fulfill their duty to invitees, the court did not provide guidance as to how business owners can avoid liability for the criminal acts of third parties.\textsuperscript{220}

The court’s decision may be criticized for several reasons.\textsuperscript{221} First, the court, in finding that a duty was owed, departed from past decisions regarding foreseeability.\textsuperscript{222} Second, the court did not discuss the impact of known and obvious dangers.\textsuperscript{223} Third, the court failed to consider and weigh the policy factors set forth in prior case law.\textsuperscript{224} Finally, the court failed to clarify the duty owed to invitees.\textsuperscript{225}

\begin{itemize}
\item \textsuperscript{215} \textit{Id.} (citing Goldberg v. Housing Authority of City of Newark, 186 A.2d 291 (N.J. 1962)).
\item \textsuperscript{216} \textit{Id.}
\item \textsuperscript{217} 246 Neb. 238, 518 N.W.2d 116 (1994).
\item \textsuperscript{218} \textit{See Erichsen v. No-Frills Supermarkets of Omaha, Inc., 246 Neb. 238, 249, 518 N.W.2d 116, 123 (1994) (Fahrnbruch, J., dissenting) (stating that the duty was “unreasonable and economically disastrous”).}
\item \textsuperscript{219} \textit{Erichsen, 246 Neb. at 243-44, 518 N.W.2d at 120-21.}
\item \textsuperscript{220} \textit{Id. at 244, 518 N.W.2d at 121; id. at 247, 518 N.W.2d at 122 (Fahrnbruch, J., dissenting).}
\item \textsuperscript{221} \textit{See infra notes 222-25 and accompanying text.}
\item \textsuperscript{222} \textit{See infra notes 226-65 and accompanying text.}
\item \textsuperscript{223} \textit{See \textit{Erichsen}, 246 Neb. at 238-45, 518 N.W.2d at 116-21 (discussing the Restatement, prior case law, and foreseeability but not known and obvious dangers).}
\item \textsuperscript{224} \textit{See id. (discussing the Restatement, prior case law and foreseeability but not the relationship of the parties, nature of the risk, or opportunity to exercise care or public interest); see S.I. v. Cutler, 246 Neb. 739, 744, 523 N.W.2d 242, 245 (1994) (per curiam) (examining the nature of the risk, the ability to exercise care, the public interest, and the relationship of the parties); Schmidt v. Omaha Pub. Power Dist., 245 Neb. 776, 788-90, 515 N.W.2d 756, 764-65 (1994) (examining fairness, the nature of the risk, the ability to exercise care, the public interest, and the relationship of the parties); C.S. v. Sophir, 220 Neb. 51, 53, 386 N.W.2d 444, 446 (1985) (stating the factors to consider are the nature of the risk, the public interest, the relationship of the parties, the likelihood of injury, the magnitude of the burden of guarding, and the consequences of placing that burden) (citations omitted).}
\item \textsuperscript{225} \textit{Erichsen, 246 Neb. at 247, 518 N.W.2d at 122 (Fahrnbruch, J., dissenting) (describing the duty as “amorphous”).}
\end{itemize}
FORESEEABILITY

In *Erichsen*, the alleged history of crime at No-Frills consisted of 10 incidents, none involving assaults, over a sixteen month time span.\(^{226}\) Despite prior precedent concerning the foreseeability of criminal acts, the Nebraska Supreme Court found that this history was sufficient to make the assault on Erichsen foreseeable.\(^{227}\) However, in *Welsh v. Zuck*,\(^{228}\) the Nebraska Supreme Court held that the shooting of a tavern customer by an enraged patron was not foreseeable and did not impose a duty on the tavern owner despite the tavern owner's knowledge that a gun was on the premises.\(^{229}\) Likewise, in *Harvey v. Van Aelstyn*,\(^{230}\) the court had refused to consider a bar fight foreseeable despite two former incidents of violence involving the same patron and a history of ten disturbances in a four year period.\(^{231}\) In *C.S. v. Sophir*,\(^{232}\) the Nebraska Supreme Court found that a sexual assault occurring in the same area two months prior to another sexual assault did not make the second assault foreseeable.\(^{233}\) As well, in *Childers v. LCW Apartments*,\(^{234}\) the court found that an assault was not foreseeable because the nature of the act was not similar to the previous criminal acts occurring on the premises, including burglaries, theft, and vandalism.\(^{235}\)

However, the Nebraska Supreme Court in *K.S.R. v. Novak and Sons, Inc.*\(^{236}\) found the criminal acts of a third person were foreseeable.\(^{237}\) A week after someone kicked in the tenant's door which remained in disrepair, the tenant was sexually assaulted in her apartment by an assailant who had been caught masturbating near the victim's apartment several other times.\(^{238}\) Because the court con-

\(^{226}\) Id. at 239, 518 N.W.2d at 118.
\(^{227}\) Id. at 243-44, 518 N.W.2d at 120.
\(^{228}\) 192 Neb. 1, 218 N.W.2d 236 (1974).
\(^{229}\) Welsh v. Zuck, 192 Neb. 1, 4-9, 218 N.W.2d 236, 238-41 (1974) (stating the owner knew a gun was present, the shooting was not foreseeable, and the owner could not have prevented the shooting) (citations omitted).
\(^{230}\) 211 Neb. 607, 319 N.W.2d 725 (1982) (per curiam).
\(^{231}\) Harvey v. Van Aelstyn, 211 Neb. 607, 610-17, 319 N.W.2d 725, 727-30 (1985) (per curiam) (finding there was no duty owed to protect the bar customer who was assaulted).
\(^{232}\) 220 Neb. 51, 368 N.W.2d 444 (1985).
\(^{237}\) See *K.S.R. v. Novak and Sons, Inc.*, 225 Neb. 498, 500, 406 N.W.2d 636, 638 (1987); *Erichsen*, 246 Neb. at 242, 518 N.W.2d at 120 (stating that the *K.S.R.* court found the sexual assault was foreseeable).
\(^{238}\) *K.S.R.*, 225 Neb. at 499, 406 N.W.2d at 637-38.
cluded that this assault was foreseeable, the landlord owed a duty to the tenant. \(^{239}\)

The amount of evidence showing a history of criminal activity sufficient to impose a duty falls on a spectrum with \textit{Welsh, Harvey, C.S.}, and \textit{Childers} on one end and the extensive history of \textit{K.S.R.} on the other end. \(^{240}\) The situation in \textit{Erichsen} differs from the situation in \textit{K.S.R.} \(^{241}\) In \textit{Erichsen}, ten criminal incidents occurred in the parking lot and surrounding areas over sixteen months. \(^{242}\) These incidents included thefts and robberies, but did not involve assaults resulting in physical injuries. \(^{243}\) \textit{Erichsen} was assaulted with mace, robbed and dragged by a car — actions that caused her substantial physical injury. \(^{244}\) In contrast, in \textit{K.S.R.}, the prior criminal acts were similar in that the prior acts were all of a sexual nature. \(^{245}\) In addition, in \textit{K.S.R.}, the same assailant committed the prior acts. \(^{246}\)

The criminal history in \textit{Erichsen} is closer to the \textit{Harvey, C.S.}, \textit{Welsh}, and \textit{Childers} end of the spectrum. \(^{247}\) In \textit{Harvey}, the assailant had been violent twice before and ten criminal incidents occurred within four years. \(^{248}\) In \textit{C.S.}, a sexual assault occurred within two months of the sexual assault at issue. \(^{249}\) In \textit{Welsh}, the altercation involved a gun, and the tavern owner knew guns were on the prem-

\(^{239}\) \textit{Id.} at 500, 406 N.W.2d at 638.

\(^{240}\) See \textit{S.I. v. Cutler}, 246 Neb. 739, 744; 523 N.W.2d 242, 245 (1994) (per curiam) (comparing the prior criminal activity in \textit{K.S.R.} which made an assault foreseeable with the prior criminal activity in \textit{C.S.} which did not make an assault foreseeable and determining that the facts of \textit{S.I.} fell in the middle) (citing \textit{K.S.R. v. Novak and Sons, Inc.}, 225 Neb. 498, 406 N.W.2d 666 (1987); \textit{C.S. v. Sophir}, 220 Neb. 51, 368 N.W.2d 444 (1985)). \textit{Compare} \textit{C.S.}, 220 Neb. at 51-55, 368 N.W.2d at 444-47 (finding that one prior assault did not make a second assault foreseeable) and \textit{Harvey}, 211 Neb. at 807-18, 319 N.W.2d at 725-30 (per curiam) (finding that two violent incidents by the defendant in addition to ten other incidents in the past four years did not make a shooting foreseeable) and \textit{Welsh}, 192 Neb. at 1-11, 218 N.W.2d at 236-42 (finding that guns on the premises did not make a shooting foreseeable) and \textit{Childers}, 214 Neb. 291-94, 333 N.W.2d 677-80 (finding that burglaries, theft, and vandalism were not sufficiently similar to an assault to make such assault foreseeable) with \textit{K.S.R.}, 225 Neb. 496-501, 406 N.W.2d 636-39 (finding that many incidents of sexual misconduct by the assailant on the premises made a sexual assault foreseeable).

\(^{241}\) See \textit{infra} notes 242-46 and accompanying text.

\(^{242}\) \textit{Erichsen}, 246 Neb. at 239, 518 N.W.2d at 118.

\(^{243}\) \textit{Id.}

\(^{244}\) \textit{Id.}

\(^{245}\) \textit{K.S.R.}, 225 Neb. at 498-99, 406 N.W.2d at 637-38 (stating the prior incidents include masturbation in public and breaking into an apartment to stand naked near a woman's bed).

\(^{246}\) \textit{Id.} at 499, 406 N.W.2d at 637-38.

\(^{247}\) See \textit{infra} notes 248-52 and accompanying text.

\(^{248}\) \textit{Harvey}, 211 Neb. at 615-16, 319 N.W.2d at 729-30 (per curiam).

In each case, the court found that no duty was imposed upon the business owner because the incidents were not foreseeable. Yet, in Erichsen, the court determined that Erichsen's assault was foreseeable based upon ten incidents not involving assault, occurring within a sixteen month time span, and perpetrated by random assailants.

The Nebraska Supreme Court itself stated in Childers v. LCW Apartments that for evidence of prior incidents to show foreseeability, those incidents must be substantially similar to the incidents at issue. The court specified in Childers that burglary, theft, and vandalism were not substantially similar to an assault. The Nebraska Supreme Court even stated in Erichsen that what may result in the imposition of a duty on a landowner is "the allegation of many occasions of 'similar' criminal activity in one fairly contiguous area in a limited timespan." Justice Fahrnbruch's dissent in Erichsen termed the incident at No-Frills "utterly unforeseeable." Based on the court's past precedent, an assault with Mace, purse-snatching, pursuit of the robber, and car dragging are not substantially similar to the thefts and robberies occurring prior to the incident at issue so as to impose a duty on No-Frills.

In S.I. v. Cutler, Judge Dale E. Fahrnbruch stated in his concurring opinion that the cases of S.I. and Erichsen were factually different. Judge Fahrnbruch reiterated this view by distinguishing for several reasons his position imposing a duty in S.I. from his dissenting position in Erichsen. First, in S.I., the same assailant and others had assaulted building patrons before. Second, the same as-

250. Welsh, 192 Neb. at 4-7, 218 N.W.2d at 238-40.
251. Harvey, 211 Neb. at 617-18, 319 N.W.2d at 730 (per curiam); C.S., 220 Neb. at 53-54, 368 N.W.2d at 446-47; Welsh, 192 Neb. at 6-9, 218 N.W.2d at 239-41.
252. Erichsen, 246 Neb. at 243-44, 518 N.W.2d at 120.
255. Childers, 214 Neb. at 293, 333 N.W.2d at 679 (emphasis added).
256. Erichsen, 246 Neb. at 243, 518 N.W.2d at 120.
257. Id. at 246, 518 N.W.2d at 122 (Fahrnbruch, J., dissenting).
258. See id. at 239, 518 N.W.2d at 118 (stating that in her petition Erichsen alleged that the prior criminal activity created a duty on the part of No-Frills to foresee and protect her from the assault with mace, the purse-snatching, and the car dragging); id. at 245, 518 N.W.2d at 120 (Fahrnbruch, J., dissenting) (stating that the majority found that Erichsen's allegations raised a question of fact); see supra notes 247-51 and accompanying text.
259. 246 Neb. 739, 523 N.W.2d 242 (1994) (per curiam).
260. S.I. v. Cutler, 246 Neb. 739, 745, 523 N.W.2d 242, 246 (per curiam) (Fahrnbruch, J., concurring).
261. S.I., 246 Neb. at 745, 523 N.W.2d at 246 (per curiam) (Fahrnbruch, J., concurring).
262. Id. at 740, 523 N.W.2d at 243 (per curiam).
sailant had loitered at the building often and had been ejected.\textsuperscript{263} Third, the owners had received complaints about the assaults.\textsuperscript{264} Judge Fahrnbruch stated that, unlike the attack in \textit{S.I.}, the attack in \textit{Erichsen} was so random, bizarre, and unforeseeable to an owner of a business that the business owner could not possibly have prevented it.\textsuperscript{265}

\textbf{KNOWN AND OBVIOUS DANGERS: THE VICTIM'S FORESEEABILITY}

The Nebraska Supreme Court took the position in \textit{C.S.} that crime is foreseeable in parking lots, thus making such crime a known and obvious danger.\textsuperscript{266} According to the court, a landowner does not have a duty to warn or protect with regard to known and obvious dangers.\textsuperscript{267} In \textit{C.S.}, the court noted that the ordinary person should know parking lots are optimum places for crime; yet, in \textit{Erichsen}, the court failed to mention this factor.\textsuperscript{268} Instead, in \textit{Erichsen}, the court imposed a duty upon the business owner, a "no-frills" self-service store, to protect customers from what the court previously viewed as a known and obvious danger — crime in parking lots.\textsuperscript{269} Had the court applied its rationale in \textit{C.S.} to \textit{Erichsen}, the court would have found that Erichsen should have known of the potential danger of the No-Frills parking lot, and so the court should have refused to impose a duty on No-Frills given these facts.\textsuperscript{270}

In \textit{Goldberg v. Housing Authority of City of Newark},\textsuperscript{271} the New Jersey Supreme Court agreed that all crime is foreseeable.\textsuperscript{272} The court in \textit{Goldberg} stated:

\begin{quote}
Everyone can foresee the commission of crime virtually anywhere and at any time. If foreseeability itself gave rise to a duty to provide 'police' protection for others, every residential
\end{quote}

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\textsuperscript{263} \textit{Id.} (per curiam). \\
\textsuperscript{264} \textit{Id.} (per curiam). \\
\textsuperscript{265} \textit{Id.} at 745-46, 523 N.W.2d at 246 (per curiam) (Fahrnbruch, J., concurring). \\
\textsuperscript{267} \textit{C.S.}, 220 Neb. at 53, 368 N.W.2d at 446. \\
\textsuperscript{268} \textit{Id. \textit{See Erichsen}, 246 Neb. at 238-45, 518 N.W.2d at 116-21 (discussing criminal activity but failing to discuss what an ordinary person should know).} \\
\textsuperscript{269} \textit{Erichsen}, 246 Neb. at 243, 518 N.W.2d at 120; \textit{id.} at 249, 518 N.W.2d at 123 (Fahrnbruch, J., dissenting). No-Frills provides fewer services and passes the savings on to the customer. \textit{Id.} (Fahrnbruch, J., dissenting). \\
\textsuperscript{270} \textit{Compare C.S.}, 220 Neb. at 53, 368 N.W.2d at 446 (stating that an ordinary person knows or should know that crime occurs in parking lots); with \textit{Erichsen}, 246 Neb. at 239, 518 N.W.2d at 118 (stating that the assault on Erichsen occurred in the parking lot). \\
\textsuperscript{271} 186 A.2d 291 (N.J. 1962). \\
\textsuperscript{272} \textit{Goldberg v. Housing Authority of City of Newark}, 186 A.2d 291, 293 (N.J. 1962). \\
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curtilage, every shop, every store, every manufacturing plant
would have to be patrolled by the private arms of the owner.
And since hijacking and attack upon occupants of motor vehi-
cles are also foreseeable, it would be the duty of every motor-
ist to provide armed protection for his passengers and the
property of others. Of course, none of this is at all palatable.
The question is not simply whether a criminal event is fore-
seeable, but whether a duty exists to take measure to guard
against it. Whether a duty exists is ultimately a question of
fairness. The inquiry involves a weighing of the relationship
of the parties, the nature of the risk, and the proposed
solution.273

POLICY FACTORS

Foreseeability is not the only factor the court may consider in de-
termining duty; the court may also consider policy factors.274 The
court in Erichsen did not mention the policy factors previously set
forth in C.S. and Schmidt v. Omaha Public Power District.275

In both C.S. and Schmidt, the Nebraska Supreme Court stated
that, in determining the duty to be imposed, the court would consider
the relationship of the parties, the nature of the risk, the opportunity
and burden to exercise care, the public interest in the proposed solu-
tion, and an overall sense of fairness.276 The court in Erichsen failed
to apply these policy factors in its opinion, even though it did evaluate
these policy factors in S.I., just four short months later.277 Considera-
tion of policy factors is within the Nebraska Supreme Court’s province
as shown in Schmidt and more recently in S.I.278

273. Goldberg, 186 A.2d at 293.
274. Id. See S.I., 246 Neb. at 744, 523 N.W.2d at 245 (per curiam) (considering the relationship of the parties, nature of the risk, opportunity to exercise care and public interest); Schmidt v. Omaha Pub. Power Dist., 245 Neb. 776, 787-90, 515 N.W.2d 756, 764-65 (1994) (considering the relationship of the parties, the nature of the risk, the opportunity to exercise care, and the public interest) (citations omitted); C.S., 220 Neb. at 53, 368 N.W.2d at 446 (considering the relationship of the parties, the nature of the risk, the magnitude of the burden, the likelihood of injury, and the public interest) (citations omitted).
276. Schmidt, 245 Neb. at 787-90, 515 N.W.2d at 764-65; C.S., 220 Neb. at 53, 368 N.W.2d at 446.
277. Compare Erichsen, 246 Neb. at 238-45, 518 N.W.2d at 116-21 (examining foreseeability but not policy factors) with S.I., 246 Neb. at 744, 523 N.W.2d at 245 (per curiam) (considering policy factors).
278. See Schmidt, 245 Neb. at 787-90, 515 N.W.2d at 764-65 (examining policy factors); S.I., 246 Neb. at 744, 523 N.W.2d at 245 (per curiam) (examining policy factors).
Applying these policy considerations to the facts of Erichsen indicates again that a duty should not have been imposed on No-Frills.\(^{279}\) First, the relationship of the parties was one of a business owner and a business invitee.\(^{280}\) Second, the nature and likelihood of the risk, given the prior criminal acts perpetrated in the parking lot, was the possibility of things being stolen, not an assault and a car dragging.\(^{281}\) Third, although No-Frills may have the ability to forewarn its customers of potential criminal activity, to do so would likely scare away potential customers.\(^{282}\) According to Judge Fahrnbruch, a problem arises because the business owner cannot obtain insurance to cover criminal activity, and thus "[t]he entire burden of this uninsurable risk . . . falls upon the business owner."\(^{283}\) Fourth, the public has an interest in keeping "no-frills" discount stores in business to save money; if the entire burden of protection is put on such businesses, the economic impact on the public would be harsh because the cost of protection would be passed on to the customers.\(^{284}\)

Finally, Judge Fahrnbruch stated that, by offering no guidelines on how to fulfill a duty to business invitees, the court unfairly placed a burden on business owners who are now left to speculate regarding what duty is owed.\(^{285}\) The court, according to Judge Fahrnbruch, cre-

\(^{279}\) See infra notes 280-86 and accompanying text.

\(^{280}\) See Erichsen, 246 Neb. at 238-39, 518 N.W.2d at 118 (stating Erichsen was a customer who had been shopping at No-Frills).

\(^{281}\) Id. at 239, 518 N.W.2d at 118. Erichsen alleged that ten crimes involving theft and robbery occurred over a sixteen month span at No-Frills prior to the assault; none of the incidents alleged were assaults with injuries. Id. Courts have imposed liability when a history of prior crimes gave notice that the crime would occur again in the future. See C.S., 220 Neb. at 53-54, 368 N.W.2d at 447 (citations omitted).

\(^{282}\) S.I., 246 Neb. at 744, 523 N.W.2d at 245 (per curiam) (considering ability); Schmidt, 245 Neb. at 788-90, 515 N.W.2d at 764-65 (examining ability); see Erichsen, 246 Neb. at 249, 518 N.W.2d at 123 (Fahrnbruch, J., dissenting) (describing what a business owner could do to provide a warning and questioning whether customers would choose the business and questioning whether the business would survive).

\(^{283}\) Id. at 247-48, 518 N.W.2d at 122 (Fahrnbruch, J., dissenting). The New Jersey Supreme Court stated that fairness requires that an owner be able to determine ahead of time what duty is owed and how it is satisfied. Goldberg, 186 A.2d at 297. The Goldberg court explained:

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? . . . We doubt that any police force in the friendliest community has achieved that end. How then can the owner know what is enough to protect the tenants in their persons and property. . . . We assume that advocates of liability do not intend an absolute obligation to prevent all crime, but rather have in mind some unarticulated level of effectiveness short of that goal. Whatever may be that degree of safety, is there any standard of performance to which the owner may look for guidance?

\(^{284}\) Id.
ated the “classic ‘trap for the unwary’” because, in the aftermath of Erichsen, only after litigation will business owners know how to fulfill the duty imposed upon them by the Nebraska Supreme Court.\(^{286}\)

**CONCLUSION**

The decision of the Nebraska Supreme Court in *Erichsen v. No-Frills Supermarkets of Omaha, Inc.*\(^{287}\) ultimately adds to the clutter of confusion surrounding the issue of foreseeability in determining the duty of business owners to invitees.

The court’s decision in *Erichsen* may be criticized in three ways: (1) foreseeability of the criminal act; (2) known and obvious danger, or the victim’s foreseeability; and (3) policy factors consideration. First, if a business owner only owes a duty to protect from foreseeable criminal acts,\(^{288}\) an assault with mace, a purse-snatching, and a car-dragging are not foreseeable in light of prior case law. The prior criminal activity alleged in *Erichsen* falls on the end of the spectrum of previous Nebraska cases in which the court did not impose a duty.

Second, if crime is foreseeable everywhere, then business owners do not owe a duty to their invitees because crime in this regard is a known and obvious danger.\(^{289}\) However, even if crime is foreseeable everywhere, some incidents relating to crime, such as a victim’s reaction to an assault, may not be foreseeable; thus no duty was owed.\(^{290}\)

Third, this decision does not reflect good public policy. If the public prefers to frequent “no-frills” discount stores, then the risk of lower security must be outweighed by the lower prices. In addition, it is poor public policy to impose a duty on business owners without defining what action would fulfill that duty.\(^{291}\)

\(^{286}\) *Erichsen*, 246 Neb. at 248, 518 N.W.2d at 122 (Fahrnbruch, J., dissenting).

\(^{287}\) 246 Neb. 238, 518 N.W.2d 116 (1994).

\(^{288}\) See *Harvey v. Van Aelstyn*, 211 Neb. 607, 617, 319 N.W.2d 725, 730 (1982) (per curiam) (stating that “[u]nder the general rule . . . it is clear that the possessor of the premises is not bound to anticipate the unforeseeable independent acts of third persons, and it is only when such acts can reasonably be anticipated that the possessor has the duty to take some precautionary measures to protect against such independent acts.”).

\(^{289}\) Goldberg *v. Housing Authority of City of Newark*, 186 A.2d 291, 293 (N.J. 1962); see *C.S. v. Sophir*, 220 Neb. 51, 53, 368 N.W.2d 444, 446 (1985) (stating that the ordinary person knows parking lots are conducive to crime, and regarding such known and obvious dangers, there is not a duty to warn).

\(^{290}\) See *Cook v. Safeway Stores*, Inc., 354 A.2d 507, 508-09 (D.C. App. 1976) (stating that a customer’s rash attempt to restrain a purse-snatcher was not foreseeable); *Nigido v. First Natl Bank of Baltimore*, 286 A.2d 127, 128 (Md. 1972) (stating that even if robbery was foreseeable, a subsequent shooting of a customer was not).

\(^{291}\) See *Erichsen v. No-Frills Supermarkets of Omaha, Inc.*, 246 Neb. 238, 249, 518 N.W.2d 116, 123 (1994) (Fahrnbruch, J., dissenting) (stating, “I find the potential amorphous duties on business owners inherent in the majority’s opinion to be both unreasonable and economically disastrous”).
Regardless of which approach is chosen by a court, the result in Erichsen should still have been different: no foreseeability, no duty, No-Frills.

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