
IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

CLARENCE WELLINGTON and)	Appeal from the Circuit
PEARL WELLINGTON,)	Court of Cook County,
)	Law Division
Plaintiffs-Appellants,)	
)	
v.)	No. 91 L 21186
)	
AMOCO OIL COMPANY,)	
)	Hon. Jacqueline Cox,
Defendant-Appellee.)	Judge, Presiding

BRIEF OF DEFENDANT-APPELLEE
AMOCO OIL COMPANY

September 11, 1997

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INTRODUCTION

This is a case in which the plaintiff -- shot while standing at a service station after refusing to give armed robbers his wallet -- is suing the oil company that leased the station to an independent dealer. The tenant-dealer's agreement with Amoco and the undisputed summary judgment evidence show that the tenant controlled the day-to-day operations of the station and was solely responsible for providing security at the station. There is also undisputed evidence that Amoco did not voluntarily undertake to protect the station's customers from criminal attacks. Nonetheless, plaintiffs have pursued their claims against Amoco.

At bottom, plaintiffs' case rests on the premise that liability may be imposed on a supplier of goods whenever an independent business sells the supplier's products and displays the supplier's signs. That is not a basis for liability in Illinois -- under literally dozens of cases -- nor should it be. The expansive theory of liability proposed by plaintiffs would overturn decades of settled Illinois law and expose companies doing business in this State to wholly unanticipated risks of liability, resulting entirely from the acts of independent third parties whose conduct they do not control and likely are not aware of. Plaintiffs' invitation to expand the potential liability for companies that lease property and supply products to commercial tenants is not supported by precedent or logic.

There are no questions on the pleadings.

ISSUES PRESENTED

1. Whether a landlord may be held liable for a criminal attack on one of the tenant's customers, based on the theory that the tenant is the landlord's actual agent, when the lease provides that (a) the tenant, not the landlord, controls the operation of its business, including deciding what products to sell and at what prices, (b) the tenant is responsible for payroll and taxes, (c) the tenant has complete discretion in

hiring and firing employees, including security guards, and (d) the landlord is not responsible for any injuries arising out of the operation of the tenant's business.

2. Whether a landlord may be held liable for a criminal attack on one of the tenant's customers, based on the theory that the tenant is the landlord's apparent agent, simply because the tenant displays signs indicating that it sells the landlord's products.

3. Whether Amoco voluntarily undertook to protect the station's customers from criminal attack when the station's security guards were hired and paid by the dealer, not Amoco, and Amoco never discussed with the dealer whether to have security guards and did not require the station to take any particular measures with respect to customer safety.

4. Whether the criminal attack at this station was objectively reasonable for Amoco to expect at the time and thus be subject to liability for the damages caused by the shooting.

5. Whether a duty should be imposed upon landlords to prevent crimes that occur on property they lease to independent businesses that sell the landlords' products.

JURISDICTION

The First Amended Complaint purports to allege claims against Amoco Corporation, one of its subsidiaries, Amoco Oil Company, and the operators of the service station at issue. C 165-186.^{1/} Amoco Corporation received summary judgment in its favor pursuant to Rule 304 in May 1994; plaintiffs have not appealed that order. C 1032. On September 24, 1996, the trial court granted summary judgment in favor of Amoco Oil Company ("Amoco") on all of plaintiffs' claims; the court found in its order that there was

^{1/} Record citations used in this brief are as follows: the original record on appeal is cited as "C" followed by the page number; the supplemental record is referred to as "Supp. R.," also followed by the page number; and record items contained in the appendix to this brief are cited as "App." Plaintiffs' opening brief on appeal is identified as "Pl. Br."

no just reason to delay enforcement or appeal of its summary judgment ruling. C 1329. Plaintiffs filed a motion for reconsideration on October 21, 1996, the trial court denied the motion on November 6, 1996, and plaintiffs filed a notice of appeal on December 6, 1996. C 1333, 1736, 1798-99. This Court's jurisdiction is invoked under S. Ct. Rule 304(a). The claims against the operators of the service station remain pending in the trial court.

STATEMENT OF FACTS

Recognizing that this case was decided on summary judgment, the facts that follow are based either on undisputed evidence or stated in the light most favorable to plaintiffs.

A. Background. In about 1977, an entity called the Chicago Born Losers Corporation (referred to alternatively as “the tenant,” “the Lessee,” or “the dealer”) began operating a service station located at 5727 West Madison in Chicago (“the station”). C 2170-71, 2216-17. Pursuant to a lease with ARCO, which owned the property, the station sold ARCO gasoline and other products until 1985, when Amoco bought that property and about 70 other stations from ARCO. C 575. After Amoco purchased the station, the only significant change it made was installing its own signs and gas pumps; it did not change the building located on the property, where there was a mini-mart with a cashier, selling food and other items. C 576-77, 580, 2220-22. The tenant sold Amoco gasoline until October 1991, when the tenant terminated its lease and sold its business to a new dealer. C 620-21, 2157.

B. The Agreements Between Amoco and the Tenant. After Amoco bought the property, the station began selling Amoco gasoline pursuant to two agreements between Amoco and Chicago Born Losers: a lease and a dealer supply agreement. App. A1-A8 (Def. Exs. 2, 4). These two documents to-

gether constituted the entire agreement between Amoco and the tenant. App. A4, ¶ 30; App. A8, ¶ 23. Amoco did not give the tenant any documents discussing Amoco's rules, regulations, and policies. C 2255.

The lease and the dealer supply agreement were each for a three-year term, and each was renewed in 1988 for another three years. App. A1, A5. Amoco leased to the tenant the property itself, the building located on the premises, and the equipment. C 622. The rent owed to Amoco under the lease was not calculated as a percentage of the tenant's sales; rather, the monthly payment was the same each month and was established annually. App. A1, ¶ 4.

Under the parties' agreements, the tenant had the exclusive right to possession and control of the premises. The lease specified that "the entire control and direction" of the station "shall be and remain with Lessee" and that Amoco did not have "the right to exercise any control or direction over the general business activities of Lessee conducted upon the Premises." App. A3, ¶ 21(a). The lease also provided that the tenant had "no authority to employ any person as agent or employee for or on behalf of [Amoco] for any purpose" and that no one performing any duties at the tenant's request would be deemed to be an Amoco agent or employee. Id.

Furthermore, while the tenant was given the right to sell Amoco products, the agreement explicitly recognized the tenant's right "to deal in other parties' trademarked products," as long as the other products were identified as non-Amoco products. App. A6-A7, ¶ 13(a), (d). See also App. A7, ¶ 15 ("Nothing herein shall preclude Dealer from selling competitive-brand products"). The lease even left open the possibility that it could remain in effect if the tenant decided to discontinue selling Amoco products altogether, although Amoco's signs and logo could no longer be displayed. App. A2, A4, ¶¶ 14(g), 25.

The tenant was prohibited from indicating in any manner that Amoco owned or operated the business, and it was required “at all times” to have a “clearly visible” sign on the premises identifying “Chicago Born Losers” as the proprietor. App. A3, ¶ 21(b), (c). The tenant placed this sign right next to the front entrance to the mini-mart located on the premises. See C 1784. The tenant was permitted to use Amoco’s trademark, but “only if the words ‘Products Dealer’ appear[ed] adjacent to the trademark so as to read ‘AMOCO Products Dealer’ or, if applicable, ‘STANDARD Products Dealer.’” App. A7, ¶ 13(f).

The lease required the tenant, not Amoco, to “keep the Premises * * * in clean, safe, and healthful condition” and to “perform necessary upkeep and maintenance.” App. A2, ¶ 9(d), (e). The parties’ agreements further provided that Amoco “shall not be liable for any loss, damage, injuries, or other casualty of whatsoever kind or by whomsoever caused, to the person or property of anyone * * * on or off the Premises, arising out of, resulting from, or in any way connected with Lessee’s use, possession or operation thereof.” App. A2, ¶ 12; App. A7, ¶ 20. In addition, the tenant was required to “pay all * * * operating expenses in connection with [its] use of the Premises,” including “any and all” fees, licenses, and taxes imposed in connection with operation of the business. App. A2, ¶ 10(a), (b); App. A6, ¶ 8.

The tenant was required to obtain Amoco’s written consent before making “permanent alterations in, or additions or attachments to the Premises.” App. A1, ¶ 9(a). Amoco had the contractual right to enter the property at any time to inspect the premises, test the gasoline being sold, maintain or repair underground storage tanks and other equipment belonging to Amoco, and enforce its rights under the lease. App. A3, ¶ 17. Amoco was also entitled to inspect the tenant’s books and records to determine whether the tenant was complying with the parties’ agreement in using Amoco’s trademark. App. A2, ¶ 14(c).

C. Operation of the Station. The tenant hired its own employees, supervised them, paid their wages, and instructed them on “all aspects of how they were to do their job[s].” C 2156-58, 2161-62, 2198. The tenant also kept all of its own books and records, and it hired its own accountant to prepare its tax returns. C 2236, 2285, 2304, 2324-25. Moreover, the tenant had full discretion to set the prices for the products it sold, including gas; it had full discretion to decide what products to sell; and it retained all of the profits (or incurred all of the losses) resulting from operating the station. C 2151, 2224, 2288; App. A6-A7, ¶¶ 13(a), 15. At this particular station, the only Amoco product sold was gasoline; other suppliers provided the non-gasoline products that the tenant elected to sell. C 2224.

The Amoco employee having the most frequent contact with individual service stations (except maybe gas delivery personnel) was an Amoco territory manager, who would make sales calls on a station, discuss how the station’s business was doing, and check for compliance with the items appearing on an Appearance and Cleanliness Evaluation form. Pl. Br. 11A; C 585-86, 660, 2223, 2227-28. Each territory manager had approximately 30 stations that he or she called on. C 573, 2348, 2488. During the relevant time period, the territory manager for the area including 5727 West Madison usually visited each station twice a month. C 660, 2222, 2362-63.

One of the things that the territory manager checked for when visiting the station was to see that the windows of the mini-mart were not blocked, so that customers could see inside the building and so that people inside could see outside. C 2227-31. At the time of the robbery at issue here, there was a “clear view” from the building to the gas pump where the plaintiff was filling up his car. C 2179-80. The territory manager also checked to see if the station’s lighting was adequate in the evening. Pl. Br.11A;

C 2232. Plaintiff himself admitted that at the time of the incident, the station was “well lit, well lighted.”

C 433.

D. Security at the Station. The evidence was undisputed that Amoco was unaware of any crimes that had occurred at this station, and the tenant never discussed with anyone at Amoco whether to have a security guard at the station.^{2/} C 595-96, 2234-35, 2369, 2492. Nick Charles, employed by the tenant as the manager of the station, was generally “in charge of security” at the station, and he sometimes wore what appeared to be a security guard’s uniform. C 450-55, 503, 531-32, 2156-57, 2169-70, 2502-03; Supp. R. 92-93. The tenant instructed its employees to “look out” for possible thieves, to “always * * * look out for suspicious activity,” and that if anyone “want[ed] to rob them, give them what they want.” C 2173, 2198, 2241-42. In addition, there were two video cameras inside the store pointing toward the cash register; no video cameras faced outside, toward the nine gas pumps on the property. C 2174-75, 2256. The cameras were installed by the tenant, before Amoco purchased the property. C 2175, 2317, 2319-20. The tenant did not have any type of alarm system. C 2180. Sometime in 1991, Amoco installed bullet-resistant glass in front of the cashier, as part of a program that covered all 24-hour stations in the Chicago area. C 661-62, 2182, 2199, 2224-26, 2390. The glass was paid for by the dealers, not Amoco. C 597, 634.

In the latter half of the 1980s, Amoco provided dealers with a brochure giving tips on surveillance cameras, lighting, and arranging merchandise so as not to block the windows, and it discussed these issues

^{2/} On summary judgment, plaintiffs offered photocopies of police reports concerning alleged crimes that supposedly occurred at the station and within a two-mile radius in 1989 and 1990. Supp. R. 164-91. Plaintiffs offered no evidence, however, that the purported crimes actually happened. And, as noted in the text, Amoco had no knowledge of any of these alleged crimes.

with some dealers in connection with security audits conducted of some stations by territory managers. C 2436-39, 2443-44. There was no evidence that Amoco was still disseminating these brochures or doing security audits at the time of the incident here (December 1990). In addition, Amoco never undertook to perform a security audit at this particular station. C 2369, 2371, 2373, 2505, 2522. Amoco made available to the tenant and other dealers videos that discussed putting excess cash in on-site safes, but there was no evidence that the tenant ever decided to take the videos. C 2371-73. In addition, for Amoco-operated stations, Amoco prepared a Loss Prevention Manual discussing issues relating to “cash and inventory shortages” caused by both “internal and external theft.” Supp. R. 202, 204-07; C 1714, 1720, 1759. This manual was not distributed to independent dealers like the tenant here. C 1714, 1759. With respect to customer safety, the manual stated: “[i]n order to enhance the security of the customers and employees, adequate lighting is a necessity.” Supp. R. 205-06.^{3/}

Amoco did not require that the tenant take any particular measures with respect to customer safety -- that was the tenant’s responsibility. C 663, 2315, 2449. If a serious crime occurred at a station, Amoco “requested that dealers notify [it],” after calling the police, so that Amoco “could properly respond to the media” (C 601-03) by “disseminat[ing] information to primarily protect Amoco’s image and show that the company was willing to cooperate with the authorities” (C 2427).

^{3/} Plaintiffs argued in the trial court that the Loss Prevention Manual was distributed to independently-operated stations; this contention was based on Amoco’s alleged failure to answer a request to admit. Supp. R. 14. Amoco pointed out in response that the parties had agreed to extend the time for Amoco to answer, and Amoco did, in fact, deny the request to admit. C 1714, 1720. Moreover, the request to admit concerned only whether Amoco used the manual to advise dealer-operated stations “in the year of 1989,” not 1990 when the incident here took place. C 1720.

E. The Incident Involving Plaintiff. On Saturday evening, December 8, 1990, at about 11:00 p.m., plaintiff Clarence Wellington (“Wellington”) pulled into the station at 5727 West Madison to refuel the BMW he was driving. C 407-08, 430. Wellington was familiar with the neighborhood; for years, he had owned four apartment buildings in the same neighborhood as the station, and he was coming directly from his son’s apartment, which was less than ½ mile from the station. C 413-17. Indeed, Wellington had gone to that station “many times” before -- two or three times a month since at least 1980, five years before Amoco bought the station. C 431, 452.

Wellington testified that the station that night “was well lit, well lighted.” C 433. When Wellington pulled up, there were “about five people” outside, either getting gas or on the telephone. C 437, 460, 462. After going inside the station to pre-pay for the gas, Wellington proceeded to the gas pumps. C 439. After he filled the tank, two men came up to him, forced him into the car, and announced, “This is a stickup.” Id. Wellington refused to give the men his wallet -- “I wouldn’t give it up to those crooks” -- there was a struggle inside the car, and Wellington was shot in the leg and the arm. C 440, 443, 472. Somehow Wellington was able to get out on the passenger side of the car, and the robbers fled after taking cash from Wellington’s pocket and ripping off the gold chains around his neck. C 440-41, 473-77. Wellington made it into the mini-mart, and the cashier called the police and the paramedics. C 441. One of Wellington’s assailants was eventually caught and found guilty; he received a 30-year sentence. C 499, 502-03.

Wellington testified that he bought gas at the station on a regular basis, and went to the station on the night in question, because he was “low” on gas and because he “like[d] the product”: “I always use Amoco gas. * * * it burn[s] well in my cars.” C 430-31. In fact, the only gasoline credit card that

Wellington carries is Amoco's; "Amoco is what I deal with all the time." C 425. In addition, Wellington said that he "felt secure" at the station: "I know there is a security guard and it is well lighted and it's Amoco, you know, a reputable people, so I just don't go to run of the mill stations." C 552-53. (Wellington did not testify, however, that "[s]afety was of the utmost importance given the currency [he] was carrying." Pl. Br. 4; see also *id.* at 14. Plaintiffs do not cite the record in support of this statement; there was no such testimony.) Wellington said that he has seen Amoco advertising but doesn't recall what the ads said, that the advertising "really doesn't have much bearing" on his decision to buy Amoco gas because "[t]his is something I use all the time," and that ads "wouldn't change [his] decision to shop at Amoco. * * * I buy Amoco because of the product." C 554-55. Wellington thought that Amoco owned the station, "[b]ecause of the signs. Everything said it's Amoco station. To the best of my knowledge, Amoco." C 450.

STANDARD OF REVIEW

This Court reviews summary judgment orders *de novo*. Summary judgment "should be granted when the pleadings, depositions and affidavits reveal that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Frye v. Medicare-Glaser Corp.*, 153 Ill. 2d 26, 31, 605 N.E.2d 557, 559 (1992). And "in order to survive a motion for summary judgment, the nonmoving party must come forward with evidence establishing a genuine issue of fact." *Lavazzi v. McDonald's Corp.*, 239 Ill. App. 3d 403, 408, 606 N.E.2d 845, 849 (2d Dist. 1992). In addition, whether the defendant owes a duty to the plaintiff is a question of law that is also reviewed *de novo* on appeal. *Petrauskas v. Wexenthaller Realty Mgmt., Inc.*, 186 Ill. App. 3d 820, 825, 542 N.E.2d 902, 905 (1st Dist. 1989).

ARGUMENT

There is typically “no duty [on] a landowner to protect others from criminal attacks by third persons on his property.” Pomp v. Cash Station, Inc., 244 Ill. App. 3d 87, 92, 613 N.E.2d 1150, 1152 (1st Dist. 1992) (quoting Rowe v. State Bank, 125 Ill. 2d 203, 215, 531 N.E.2d 1358, 1364 (1988)). Illinois has adopted a limited exception to this rule: “when there exists a special relationship between the parties, such as business invitor and invitee, the law may impose a duty to protect from reasonably foreseeable criminal activity.” Pomp, 244 Ill. App. 3d at 92, 613 N.E.2d at 1153.

Plaintiffs thus begin their argument by asserting that a “business invitor” -- a “possessor of land” -- owes a duty of care to members of the public who enter the invitor’s property. Pl. Br. 7. This has nothing to do with Amoco. The “business invitor” in this case was the tenant, which operated the gas station. Amoco was simply the landlord, leasing property it owned to an independent entity to conduct business on the premises. See Jackson v. Shell Oil Co., 272 Ill. App. 3d 542, 548, 650 N.E.2d 652, 656 (1st Dist. 1995) (the dealer operating the service station is the business invitor, not the oil company that leased the premises to the dealer).

Illinois courts have held uniformly that “[t]he landlord-tenant relationship is not the sort of ‘special relationship’ which renders the landlord responsible and liable for criminal acts of a third person.”^{4/} Morgan v. 253 East Delaware Condo. Ass’n, 231 Ill. App. 3d 208, 211, 595 N.E.2d 36, 38 (1st Dist. 1992); see also Rowe, 125 Ill. 2d at 216, 531 N.E.2d at 1364 (the landlord-tenant relationship “is not a ‘special’ one imposing a duty to protect against the criminal acts of others”). As a result, the general rule is that

^{4/} Landlord-tenant law applies when, as here, the operator of a service station leases the property from the defendant. E.g., Richardson v. Bulk Petrol. Co., 11 Ill. App. 3d 655, 657-58, 297 N.E.2d 405, 407 (1st Dist. 1973); Elbers v. Standard Oil Co., 331 Ill. App. 207, 222, 72 N.E.2d 874, 881 (1st Dist. 1947).

“a landlord does not have a duty to protect tenants from the criminal acts of third persons on the premises.” Petrauskas, 186 Ill. App. 3d at 825, 542 N.E.2d at 905. The reason for ““lessor immunity”” is that ““the lease is a conveyance of property which ends the lessor’s control over the premises, a prerequisite to the imposition of tort liability.”” Wright v. Mr. Quick, Inc., 109 Ill. 2d 236, 238, 486 N.E.2d 908, 909 (1985). Moreover, “the landlord is not an insurer and cannot be held liable * * * for harm done by every criminal intruder.” Morgan, 231 Ill. App. 3d at 211, 595 N.E.2d at 38. Thus, “the tenant who is in possession, not the landlord, is liable for injuries sustained by third parties on the premises.” Buente v. Van Voorst, 213 Ill. App. 3d 116, 118, 571 N.E.2d 513, 514 (3d Dist. 1991); accord, e.g., Almendarez v. Keller, 207 Ill. App. 3d 756, 759, 566 N.E.2d 441, 444 (1st Dist. 1990). Indeed, the Illinois Supreme Court has “repeatedly rejected” the idea “that this court should impose on a landlord a general duty to protect * * * those on the premises * * * from foreseeable criminal activity on the premises.” Rowe, 125 Ill. 2d at 216, 531 N.E.2d at 1364.

In short, when a landlord “wholly demise[s] the property” to a tenant, the tort duty falls “only upon [the] tenant in possession unless [the landlord] actually agree[s]” with the tenant that the landlord will be responsible for protecting customers against possible criminal attacks. Wright, 109 Ill. 2d at 239-40, 486 N.E.2d at 909 (emphasis added); see also Rowe, 125 Ill. 2d at 218, 531 N.E.2d at 1365. There was no such agreement here. As we will show, the tenant, not Amoco, took sole responsibility for providing security at the station and operating the station. As a result, plaintiffs’ theories for imposing a duty of care on Amoco -- that the tenant was Amoco’s agent and that Amoco voluntarily undertook to prevent criminal

attacks on station patrons -- are insufficient as a matter of law. The trial court properly entered summary judgment in Amoco's favor.

I. AMOCO PROPERLY RECEIVED SUMMARY JUDGMENT ON PLAINTIFFS' ACTUAL AND APPARENT AGENCY THEORIES.

Although it is not entirely clear, plaintiffs evidently are attempting to impose liability on Amoco based on two agency theories -- first, that the tenant was Amoco's actual agent and, second, that the tenant was Amoco's apparent agent. Neither theory is tenable. The contract documents and the summary judgment evidence make clear beyond a shadow of a doubt that the tenant was not Amoco's agent, but rather was a completely independent business. The tenant controlled the operation of the gas station, not Amoco. As for apparent agency, the cases hold uniformly that (1) the appearance that there is an agency relationship must be created by the principal's actions, and (2) apparent agency is not created simply because a business displays the defendant's signs or sells the defendant's products. Both principles require summary judgment on the apparent agency theory.

A. The Tenant Was Not Amoco's Actual Agent.

As explained in one of the cases cited in plaintiffs' brief, "[a] principal-agent relationship is a legal concept founded upon a consensual and fiduciary relationship between two parties." Knapp v. Hill, 276 Ill. App. 3d 376, 380, 657 N.E.2d 1068, 1071 (1st Dist. 1995) (emphasis added). The test used to determine agency is "whether the purported principal has the right to control the manner and method in which the work is carried out by the agent and whether the agent is capable of subjecting the principal to personal liability." Id. (emphasis added). These standards cannot be met here.

Plaintiffs assert that Amoco had "a number of rights to control various particulars of the station's operations." Pl. Br. 8-9. But even a cursory examination of the record demonstrates that plaintiffs'

argument is based on significant misstatements of the summary judgment evidence and the parties' contractual obligations.

Perhaps most egregiously, plaintiffs cite one page of Carol Grimm's deposition (C 575) as evidence supposedly supporting the statement that Amoco "controlled the operation, management and maintenance of the station since 1985." Pl. Br. 11. Grimm said no such thing. All that she said was that Amoco bought the station in 1985: "That station was one of the ARCO acquisitions that Amoco acquired at the end of 1985." C 575. Nor was there any evidence supporting the contention that the former ARCO dealers were "required" to attend, or somehow became Amoco agents by attending, an Amoco "training school." Pl. Br. 10. The undisputed evidence was only that this was "a brief training program" that was limited to the "method for paying for gasoline," "how to complete [Amoco] forms," information "about the brand," and information on acceptance of credit cards and "how to operate the credit card equipment." C 581. Amoco did not even give the tenant any documents discussing Amoco's rules and policies. C 2255.

Plaintiffs are no more accurate in describing the parties' written agreements. For example, plaintiffs cite ¶ 9(e) of the lease for the proposition that "Amoco dictated activity which could occur on the premises." Pl. Br. 9. What ¶ 9(e) actually says is that "Lessee shall keep the Premises, including adjoining areas, alleys, and sidewalks, in clean, safe, and healthful condition," App. A2 (emphasis added), thus making clear that it is the tenant, not Amoco, that has responsibility for safety. Similarly, ¶ 9(c) of the lease provides that "Lessee shall be fully responsible for and shall reimburse Lessor for all costs of repair or replacement relating to damage occurring * * * which is caused by the fault or negligence of Lessee, its

agents, employees or contractors.” App. A1 (emphasis added). How this supports the statement that “Amoco dictated maintenance guidelines” (Pl. Br. 9) is anybody’s guess.

Plaintiffs do accurately state that “‘CBL’ was required to operate only as [a] gas station” (*id.*), but the provision they cite in support, ¶ 12 of the lease, does not say that. Instead, ¶ 12 makes clear that it is not Amoco, but rather the tenant, that will bear the responsibility for any torts occurring on the property: “Lessor * * * shall not be liable for any loss, damage, injuries, or other casualty of whatsoever kind or by whomsoever caused, to the person or property of anyone * * * on or off the Premises, arising out of, resulting from, or in any way connected with Lessee’s use, possession or operation thereof * * *, and Lessee * * * agrees to indemnify and hold Lessor * * * harmless from and against all claims, demands, liabilities, suits or actions.” App. A2 (emphasis added). And it is misleading to state that “Amoco controlled [the] product sold.” Pl. Br. 9. The agreement specifically permits the tenant “to deal in other parties’ trademarked products” and “competitive-brand products” if they are identified as non-Amoco products. App. A6-A7, ¶¶ 13(a), (d), 15.

All of the contract provisions discussed above demonstrate that the tenant had full responsibility for operating its business; none of them supports the notion that the tenant was acting as Amoco’s agent or that Amoco had an “exhaustive list of controls” (Pl. Br. 10) over the tenant’s business. Indeed, ¶ 21 of the lease states explicitly that (a) Amoco has no right “to exercise any control or direction over the general business activities of Lessee”; (b) “the entire control and direction of such activities shall be and remain with Lessee”; (c) the tenant had “no authority to employ any person as agent or employee for or on behalf of [Amoco] for any purpose”; and (d) “neither Lessee nor any [of its employees] shall be deemed to be an

employee or agent of [Amoco].” App. A3. Plaintiffs’ brief does not bother to discuss these provisions -- all of which confirm that the tenant was responsible for the station’s day-to-day operations, not Amoco.

Plaintiffs also ignore other undisputed facts indicating that there is no agency relationship here:

- ! The tenant had the right to hire and fire the station’s employees, the tenant paid their wages, and the tenant told the employees how to perform their jobs. C 2156-58, 2161-62, 2198.
- ! The tenant had full discretion to decide what products to sell and what prices to charge, and the tenant stood to retain all of the station’s profits or incur all of the station’s losses. C 2151, 2224, 2288; App. A6-A7, ¶¶ 13(a), 15.
- ! The tenant had sole responsibility for keeping its books and records and paying all necessary taxes. C 2236, 2285, 2304, 2324-25; App. A2, ¶ 10(a), (b); App. A6, ¶ 8.
- ! Territory managers visited only about twice a month, principally to ask about the station’s business and to check the cleanliness of items appearing on the Appearance and Cleanliness form. C 660, 2222-23, 2227-28, 2362-63.

The remaining contract provisions upon which plaintiffs rely (Pl. Br. 9-10) are either common in commercial leases (annual rent adjustments; provision concerning business hours; control over the use of Amoco’s trademarks) or completely innocuous (the tenant’s obligation to keep the premises in good repair). This is especially true of the Acknowledgement of Mutual Understanding signed by the parties (Pl. Br. 9A). That document may fairly be summarized as “keep the station clean”; it has nothing to do with security. Amoco’s Appearance and Cleanliness form (Pl. Br. 10-11, 11A) likewise requires the tenant to keep the premises neat and clean. None of this is evidence of agency. If it were, then virtually every commercial tenant in the State of Illinois would be its landlord’s agent.

There is no support in Illinois law for the sweeping actual agency theory proposed by plaintiffs -- which explains why they have not cited a single case finding an agency relationship on facts remotely like those present here. Indeed, applying agency principles, “the courts have generally held that oil suppliers are not liable for the torts of gas station operators, even where the oil supplier is the owner-lessor of the station, exercises some supervision over the operation of the station, regularly inspects for possible violations of the governing contract and generally sets the pattern of the activity on the premises.” Coty v. U.S. Slicing Machine Co., 58 Ill. App. 3d 237, 242 n.1, 373 N.E.2d 1371, 1376 n.1 (2d Dist. 1978) (emphasis added).

The agency case most like this one is Richardson v. Bulk Petroleum Corp., 11 Ill. App. 3d 655, 297 N.E.2d 405 (1st Dist. 1973). In that case, this Court affirmed summary judgment for the oil company that leased a gas station to the station’s operator; the Court held that the operator was not the defendant’s agent: “where the lessor of a gasoline station had no control over or possession of the premises upon which an invitee was injured there was no liability on the part of the lessor.” Id. at 658, 297 N.E.2d at 407. The Court explained its agency holding as follows: (1) the visits by the defendant’s sales supervisor every 7-10 days, to offer counseling on “good business practices [and] management,” did not “raise a question of agency,” (2) the operator “had complete discretion in the hiring and firing of his employees,” (3) the operator was responsible for payroll and taxes, (4) the operator “was responsible for the cleanliness and maintenance of the station,” and (5) the lessor’s ability to enter the premises to exercise “rights of inspection” was “not unusual” and did not “justify a departure from the general rule” of no liability. Id. at 658-59, 297 N.E.2d at 408. All of these things are true in this case as well and require summary judgment in Amoco’s favor on plaintiffs’ actual agency theory. Accord, e.g., Elbers v. Standard Oil Co., 331 Ill.

App. 207, 217-22, 72 N.E.2d 874, 879-81 (1st Dist. 1947) (oil company not liable as a matter of law because it did not control the operations at the service station); Miller v. Sinclair Refining Co., 268 F.2d 114, 118 (5th Cir. 1959) (same) (cited with approval in O'Banner v. McDonald's Corp., 173 Ill. 2d 208, 213, 670 N.E.2d 632, 635 (1996)).

Other cases compel the same result. When the parties' written agreement provides that the operator of the business will be liable for any injuries that occur, this Court has not hesitated to hold that there is no actual agency as a matter of law. See Thomson v. McDonald's Inc., 180 Ill. App. 3d 984, 987, 536 N.E.2d 760, 763 (1st Dist. 1989) (no agency relationship as a matter of law where, "[a]ccording to the franchise agreement, only the [franchisees] were responsible for all losses and damages arising out of the operations of the business, including personal injury claims"); O'Banner v. McDonald's Corp., 273 Ill. App. 3d 588, 592-93, 653 N.E.2d 1267, 1270 (1st Dist. 1995) (the parties' agreements "clearly and undisputedly establish the lack of an actual agency relationship" where they "specifically and unequivocally state that the owners of the restaurant are not given authority to act as an agent for McDonald's Corporation and that the owners of the restaurant would alone be liable for any injuries occurring on the premises"), rev'd on other grounds, 173 Ill. 2d 208, 670 N.E.2d 632 (1996). Since the agreement here states explicitly that the tenant, not Amoco, is responsible for any injuries that occur on the premises (App. A2, ¶ 12), and that the tenant cannot act as Amoco's agent (App. A3, ¶ 21(a)), Thomson and O'Banner require judgment in Amoco's favor on plaintiffs' actual agency theory.

Even in the absence of such clauses, courts hold regularly that one business is not the actual agent of another. In Slates v. International House of Pancakes, 90 Ill. App. 3d 716, 413 N.E.2d 457 (4th Dist. 1980), for example, the court ruled that there was no agency relationship where the franchise agreement (1) placed "restrictions" on the franchisee's use of the franchisor's trademarks and trade secrets, (2)

required that the restaurant be named “International House of Pancakes,” (3) permitted only the sale of products approved by the franchisor, (4) required the purchase of certain ingredients from the franchisor or certain suppliers, and (5) gave the franchisor the power to adopt binding operating procedures covering virtually every area of restaurant operations. *Id.* at 727, 413 N.E.2d at 465-66. The court held nonetheless that “this control [by the franchisor] was not so all encompassing as to negate the express intention of the parties in the franchise agreement that no agency relationship was created.” *Id.* at 727, 413 N.E.2d at 466.

Similarly, in Salisbury v. Chapman Realty, 124 Ill. App. 3d 1057, 465 N.E.2d 127 (3d Dist. 1984), a case involving a franchised real estate broker, the court held as a matter of law that the franchisee was not the franchisor’s actual agent. Although the franchisee “conduct[ed] its business in accordance with [the franchisor’s] confidential operations manual,” attended the franchisor’s training sessions, maintained its office “according to standards set by [the franchisor],” and made its books available for inspection by the franchisor, the Salisbury court ruled that the franchisor “did not exercise such complete control over [the franchisee] so as to negate the intent of the franchise agreement not to create a principal-agent relationship.” *Id.* at 1061, 465 N.E.2d at 131. The court explained that the franchisor set “general standards,” but it did “not hire or fix the compensation of [the franchisee’s] employees nor does it control the firm’s day-to-day operation.” *Id.* See also Lavazzi v. McDonald’s Corp., 239 Ill. App. 3d 403, 413, 606 N.E.2d 845, 852 (2d Dist. 1992) (the franchisee, not the franchisor, is “liable for its worker’s safety” when “a franchisee which uses a franchisor’s logo * * * retains day-to-day control of operations such as hiring and firing employees, payroll, worker’s compensation insurance, and taxes”); Raglin v. HMO Illinois,

Inc., 230 Ill. App. 3d 642, 649-50, 595 N.E.2d 153, 158 (1st Dist. 1992) (purported principal’s “administrative role” is “not the type of control from which agency arises”).^{5/}

Amoco’s involvement with the tenant’s business was considerably less than the defendants in either Slates or Salisbury. Since there was no actual agency in those cases, it necessarily follows that the tenant was not Amoco’s actual agent here. By no stretch of the imagination can it be said that Amoco “has the right to control the manner and method in which the work is carried out by [the tenant].” Knapp, 276 Ill. App. 3d at 380, 657 N.E.2d at 1071. The trial court properly granted summary judgment on plaintiffs’ actual agency theory.

B. The Tenant Was Not Amoco’s Apparent Agent.

1. Apparent agency cannot be established by the conduct of the alleged agent.

The fundamental problem with plaintiffs’ apparent agency theory is that they misstate what is required to establish apparent agency. As plaintiffs would have it, apparent agency may be established when, inter alia, (1) “AMOCO, or ‘CBL,’ acted in a manner that would lead a reasonable individual to conclude” that CBL was Amoco’s employee or agent; and (2) plaintiff reasonably relied on “the conduct of AMOCO or ‘CBL.’” Pl. Br. 11-12 (emphasis added). This is not the law; apparent agency cannot be created by the acts of the would-be agent.

One of the cases cited elsewhere in plaintiffs’ brief makes this point clear: “The apparent authority of an agent must be based on words and acts of the principal, and not on anything the agent himself has

^{5/} In the analogous area of independent contractor cases, the rule is that the employer of an independent contractor may be held liable for the contractor’s negligence only if the employer “retains control over the operative details of the injury-causing work.” Yassin v. Certified Grocers of Illinois, Inc., 150 Ill. App. 3d 1052, 1068, 502 N.E.2d 315, 328 (1st Dist. 1986). The employer’s reservation of the right “to order that work be stopped, to inspect its progress, to receive reports or to make suggestions, does not subject the employer to such liability.” Id. (emphasis added).

said or done.” Wargel v. First Nat’l Bank, 121 Ill. App. 3d 730, 737, 460 N.E.2d 331, 335 (5th Dist. 1984) (emphasis added). This is because the apparent agency doctrine “is based on principles of estoppel. * * * [I]f a principal creates the appearance that someone is his agent, he should not then be permitted to deny the agency if an innocent third party reasonably relies on the apparent agency and is harmed as a result.” O’Banner v. McDonald’s Corp., 173 Ill. 2d 208, 213, 670 N.E.2d 632, 634 (1996) (emphasis added). See also, e.g., Yugoslav-American Cultural Center, Inc. v. Parkway Bank & Trust Co., 682 N.E.2d 401, 406 (Ill. App. Ct. 1st Dist. 1997) (it is “difficult” to prove apparent agency; “the principal is the source of power and * * * the agent’s authority can be proved only by tracing it to that source in some word or act of the alleged principal”); Spiegel v. Sharp Electronics Corp., 125 Ill. App. 3d 897, 901, 466 N.E.2d 1040, 1044 (1st Dist. 1984) (“some act or conduct by the alleged principal” is required to establish apparent agency).^{6/}

^{6/} Plaintiffs cite Gilbert v. Sycamore Mun. Hosp., 156 Ill. 2d 511, 622 N.E.2d 788 (1993), in support of their contention that the purported agent’s acts alone may establish apparent agency. Pl. Br. 11-12. Gilbert quotes a Wisconsin case that so states, at least for apparent agency cases against hospitals, but it does not adopt that rule for Illinois. To the contrary, Gilbert goes on to hold that apparent agency was proven there because the hospital -- the purported principal -- “holds itself out as a provider of emergency room care” and the patient “relies upon the hospital to provide complete emergency room care.” 156 Ill. 2d at 525, 622 N.E.2d at 795-96. The Gilbert Court reiterated that apparent authority “is the authority which the principal knowingly permits the agent to assume, or the authority which the principal holds the agent out as possessing.” Id. at 523, 622 N.E.2d at 795 (emphasis added).

Plaintiffs also cite Gilbert for the proposition that Illinois has adopted the rule set forth in two Restatement sections. Pl. Br. 11. That is not accurate either. After citing the sections cited by plaintiffs, the Gilbert Court stated: “We do not deem it necessary at this time to adopt a special rule in this area.” 156 Ill. 2d at 523, 622 N.E.2d at 795.

2. Amoco did not create the appearance that the tenant was its agent.

The alleged principal does not create the appearance of agency merely because the purported agent displays the alleged principal's signs or sells the alleged principal's products. Thus, Illinois courts have held that licensing someone to use a trade name, such as "McDonald's" or "International House of Pancakes," does "not create an agency relationship -- either actual or ostensible." Thomson, 180 Ill. App. 3d at 987, 536 N.E.2d at 763; Slates, 90 Ill. App. 3d at 725, 413 N.E.2d at 464. Nor is agency established by the use of the defendant's trademark signs. Washington v. Courtesy Motor Sales, Inc., 48 Ill. App. 2d 380, 383-84, 199 N.E.2d 263, 265 (1st Dist. 1964) ("Authorized Ford Dealer" sign does not show that the dealer is Ford's agent); Spiegel, 125 Ill. App. 3d at 901, 466 N.E.2d at 1043-44 (statement that dealer was a "factory authorized Sharp dealer" does not establish that dealer was Sharp's agent). Use of a trademark sign by an independent dealer -- a common occurrence -- "means nothing more than a dealer who sells products which have a trade name carrying substantial good will." Washington, 48 Ill. App. 2d at 383, 199 N.E.2d at 265.

Courts have applied these principles in the same factual context present here -- gas stations -- and concluded repeatedly that a station operator, as a matter of law, is not the apparent agent of the gasoline manufacturer-supplier. The rule is that "an oil company 'does not confer apparent authority, subjecting itself to vicarious liability for negligence, upon a retail service station by allowing the use of its trade name and selling its products to the station.'" Albright v. Parr, 126 Ill. App. 3d 464, 469-70, 467 N.E.2d 348, 352 (5th Dist. 1984). As one court concluded, "we do not believe that the prominent display of [a gasoline supplier's] brand name or symbol alone, would necessarily warrant the assumption that [the] service station was being operated as an agency of the owner of the brand name or symbol." Crittendon v. State Oil Co.,

78 Ill. App. 2d 112, 117, 222 N.E.2d 561, 564 (2d Dist. 1966) (reversing a judgment for plaintiff and ordering judgment entered for defendant because, as a matter of law, the station operator was not the defendant's apparent agent). Accord Elbers v. Standard Oil Co., 331 Ill. App. 207, 218-22, 72 N.E.2d 874, 879-81 (1st Dist. 1947) (oil company not liable as a matter of law even though its "widely publicized trade names" were "displayed in many places about the gas station," newspaper ads "invited the public to its stations," and one of its employees periodically repaired the equipment that injured plaintiff).^{2/}

Thus, under the case law, it does not matter that Amoco's "logos and insignias were everywhere" or that Wellington "believed" that Amoco owned the station because of the "big neon signs" that said "Amoco." Pl. Br. 12. Plaintiffs do not cite a single case holding that displaying the defendant's signs is enough to create apparent agency. As we have just shown, the cases hold precisely the opposite. An oil company's signs "indicate that this service station sold [the oil company's] products," but that does not justify the assumption that the station is operated by the oil company. Crittendon, 78 Ill. App. 2d at 117, 222 N.E.2d at 564. See also Trust Co. v. Sutherland Hotel Co., 389 Ill. 67, 72-73, 58 N.E.2d 860, 863 (1945) ("It is common knowledge that the names by which hotels are known to the public are often those of an individual who has no interest in the management of the business or the ownership of the building").

Adoption of the rule that plaintiffs suggest would result in an enormous increase in potential liability for companies doing business in Illinois. Corporate logos and signs are ubiquitous in today's economy.

^{2/} In addition, there is no apparent agency where the alleged agent is required to display a sign indicating its status as an independent business. See Salisbury, 124 Ill. App. 3d at 1062, 465 N.E.2d at 131. The tenant here was required to, and did, display just such a sign. App. A3, ¶ 21(c); C 1784.

If they may be the basis for liability, then suppliers and franchisors suddenly may find substantial liabilities being imposed on them solely because of the acts of independent businesses whose conduct is outside their control and occurs without their knowledge. Creating a rule that would have such profound consequences would be both ill-considered and unprecedented.

In sum, plaintiffs do not satisfy one of the requirements for apparent agency, because Amoco did nothing to create the appearance that the tenant was Amoco's agent. This requires judgment in Amoco's favor on the apparent agency theory.

3. Wellington did not justifiably rely on an appearance of agency created by Amoco.

There is an independent reason why plaintiffs' apparent agency claim is legally insufficient: plaintiffs have not demonstrated that "the injury would not have occurred but for the injured party's justifiable reliance on the apparent agency." O'Banner, 173 Ill. 2d at 213, 670 N.E.2d at 634. Failure to satisfy this essential element also mandates judgment in the defendant's favor. Id. at 213-14, 670 N.E.2d at 634-35.

To begin with, there is no justifiable reliance as a matter of law if the basis for the apparent agency is the defendant's signs. Crittendon, 78 Ill. App. 2d at 116-17, 119, 222 N.E.2d at 564, 566 (service station signs with the defendant's name on them did not "justify the assumption by plaintiff that Mendenhall was acting as State's agent"; the trial court's finding of reliance was "unwarranted from the manifest weight of the evidence"). That is essentially what we have here. See Pl. Br. 13 ("All of the Amoco neon signs and Amoco insignia on the pumps and throughout the station fostered plaintiff's understanding that Amoco was the proprietor").

Plaintiffs also state that Wellington relied on Amoco's "image and reputation." Id. But his general feeling about the company -- which sells gas through hundreds of dealer-operated stations in Illinois alone

-- does not explain why Wellington went to this station on the night in question, which is what is required to establish justifiable reliance. See O'Banner, 173 Ill. 2d at 213, 670 N.E.2d at 635 (plaintiff had to show that he relied on the apparent agency "in going to the restaurant where he was allegedly injured"). Wellington's other testimony provides that explanation: he went to the station at 5727 West Madison because he had been going to that station for years (including five years before it became an Amoco station) and he "always use[s] Amoco gas" -- he "like[s] the product." C 430-31, 452. Liking a particular product or station is not enough to establish the justifiable reliance element of an apparent agency claim, and plaintiffs do not argue otherwise.

Rather, plaintiffs stress Wellington's knowledge that this station had armed security guards. Pl. Br. 14. (As noted earlier (p. 7 n.2), plaintiffs offered no admissible evidence that the station was in a "high-crime area" (Pl. Br. 14), but that does not matter for purposes of our analysis.) The presence of security guards shows only that the operator of the station provided security; it has nothing to do with the question whether the operator was Amoco's apparent agent. Indeed, using the existence of the security guards to establish apparent agency would violate the well-settled rule that "[i]t is only the conduct or representation of the alleged principal -- not the supposed agent -- which can be set up as a basis for estoppel." Crittendon, 78 Ill. App. 2d at 117, 222 N.E.2d at 564; accord Bank of Waukegan v. Epilepsy Foundation, 163 Ill. App. 3d 901, 907, 516 N.E.2d 1337, 1340 (2d Dist. 1987) ("representations made by the agent, not the alleged principal," cannot prove apparent agency); see also pp. 20-21, supra. Nor is apparent agency established by evidence that Amoco's territory managers saw the tenant's security guards and knew that the tenant had a security camera inside the mini-mart. Pl. Br. 13. Quite the contrary -- that confirms what is already clear from the tenant's lease and the way the tenant operated the station: security was the

tenant's responsibility, not Amoco's. Apparent agency cannot be shown by evidence that the landlord knew that the tenant was performing duties that were solely the tenant's responsibility. The law of agency would be turned on its head if plaintiffs' theory were adopted.^{8/}

The undisputed evidence was that Wellington did not justifiably rely on any conduct of Amoco that created the appearance that the tenant was its agent. This is a separate reason for affirming summary judgment on plaintiffs' apparent agency theory.

II. AMOCO DID NOT VOLUNTARILY UNDERTAKE TO PROTECT THE STATION'S CUSTOMERS FROM CRIMINAL ATTACKS.

Plaintiffs' remaining cause of action is that Amoco "assumed the 'voluntary custodian protectee' role," by which plaintiffs evidently mean that Amoco undertook the duty of "providing or supervising security" at the station in order to protect the tenant's customers from criminal attacks. Pl. Br. 16. Plaintiffs' voluntary undertaking theory is not supported by the law or the facts.

The Illinois Supreme Court has instructed that the voluntary undertaking doctrine must be construed "narrow[ly]." Frye v. Medicare-Glaser Corp., 153 Ill. 2d 26, 33, 605 N.E.2d 557, 560 (1992). As a

^{8/} After the court granted Amoco's motion for summary judgment, Wellington submitted an affidavit, in support of a motion to reconsider, in which he stated that he would not have patronized the station had he known that Amoco did not own and operate the station. C 1776; Pl. Br. 16. This affidavit was not enough to defeat summary judgment. First, the affidavit was inconsistent with Wellington's deposition testimony; while he said in his deposition that he thought Amoco owned the station (C 450), he did not say that was why he went to the station -- he gave other reasons for going to the station. See pp. 9-10, supra. An affidavit cannot be used to contradict sworn deposition testimony. Pandya v. Hoerchler, 256 Ill. App. 3d 669, 673, 628 N.E.2d 1040, 1043 (1st Dist. 1993); Smith v. Ashley, 29 Ill. App. 3d 932, 935, 332 N.E.2d 32, 34 (4th Dist. 1975). Indeed, Wellington had patronized this station -- for years -- before it sold Amoco gasoline. C 431, 452. Second, the affidavit does not remedy the fatal flaws in plaintiffs' apparent agency theory. The affidavit does not establish that Wellington justifiably relied on anything that Amoco did that created an appearance of agency.

result, “the duty of care to be imposed upon a defendant is limited to the extent of its undertaking,” *id.* at 32, 605 N.E.2d at 560, and “[t]he extent of any liability is strictly limited by the scope of the undertaking,” Hill v. CHA, 233 Ill. App. 3d 923, 930, 599 N.E.2d 1118, 1123 (1st Dist. 1992) (emphasis added). Moreover, the scope of the undertaking is restricted to what the defendant actually agreed to do and no more. See *id.* at 935, 599 N.E.2d at 1126 (“The duty owed is limited by the extent of the undertaking and the agreement of the parties”); Homer v. Pabst Brewing Co., 806 F.2d 119, 121 (7th Cir. 1986) (a duty will be imposed “only to the extent actually assumed by the defendant”) (applying Illinois law).

Illinois courts take these admonitions seriously. In case after case, Illinois courts have held that a defendant who undertakes a duty to perform certain tasks does not thereby undertake a duty to perform other tasks, no matter how closely related. For example, a pharmacist who undertakes to warn of one side effect of a drug does not undertake to warn of other side effects, even though the pharmacist is aware of the other dangers, Frye, 153 Ill. 2d at 33-34, 605 N.E.2d at 560-61; a defendant who agrees only to remove snow from a parking lot does not thereby undertake to remove ice in the same parking lot, Eichler v. Plitt Theatres, Inc., 167 Ill. App. 3d 685, 692, 521 N.E.2d 1196, 1201 (2d Dist. 1988); a defendant that conducts a “general inspection” of some machinery and performs one repair does not undertake to warn of possible dangers concerning a portion of the machinery “that was not part of the repair contract,” Clark v. Hajack Equip. Co., 220 Ill. App. 3d 919, 923, 581 N.E.2d 351, 354 (1st Dist. 1991); and a store’s undertaking to remove tracked-in water by placing mats at the store entrance does not constitute an undertaking to remove water just beyond the mats, Roberson v. J.C. Penney Co., 251 Ill. App. 3d 523, 526-27, 623 N.E.2d 364, 366 (3d Dist. 1993).

Indeed, even if a defendant does voluntarily agree to perform a particular service, it is free to discontinue providing that service whenever it wishes, without liability. See Burke v. City of Chicago, 160 Ill. App. 3d 953, 957-58, 513 N.E.2d 984, 987 (1st Dist. 1987) (even though “the city had in the past voluntarily thrown salt or urea on the airport” when it snowed and “had been requested to do so the day of the occurrence,” it was not liable for failing to do so); Restatement (Second) of Torts § 323 comment c (1965) (“The fact that [an] actor gratuitously starts in to aid another does not * * * require him to continue his services. * * * His motives in discontinuing the services are immaterial”); see also id. § 324A comment a. “[T]he mere reliance by a party upon defendants’ gratuitous performance in the past, without more, is insufficient to impose any duty thereafter.” Burke, 160 Ill. App. 3d at 958, 513 N.E.2d at 987. Thus, a landlord’s alleged undertaking cannot be established “by proof of mere custom or usage”; a plaintiff’s reliance upon a landlord’s past performance is not enough to impose any continuing duty. Chisolm v. Stephens, 47 Ill. App. 3d 999, 1006-07, 365 N.E.2d 80, 86 (1st Dist. 1977) (holding that tenant was unjustified as a matter of law in relying on landlord’s practice -- for 15 years -- of removing snow and ice from the sidewalk).

As Chisolm indicates, the voluntary undertaking doctrine is construed just as narrowly in the landlord-tenant context as in other types of cases. This is particularly true with respect to a landlord’s alleged undertakings to provide security. Thus, an oil company’s construction of a security booth for a gas station attendant is not an undertaking to provide security outside the booth, Jackson v. Shell Oil Co., 272 Ill. App. 3d 542, 550, 650 N.E.2d 652, 657 (1st Dist. 1995); an agreement to secure specific floors in a building does not constitute “a general duty to police” the entire building, Phillips v. CHA, 89 Ill. 2d 122, 129, 431 N.E.2d 1038, 1041 (1982); an undertaking to patrol the grounds of a housing project is an

undertaking to protect the property, not to protect people, Hill, 233 Ill. App. 3d at 930-32, 599 N.E.2d at 1123-24; an agreement “to secure [a] building” by having a 24-hour doorman is “limited to screening of guests,” but is not an undertaking “to become absolute insurers for harm done to tenants by criminal attacks of third persons,” Morgan v. 253 East Delaware Condo. Ass’n, 231 Ill. App. 3d 208, 212, 595 N.E.2d 36, 39 (1st Dist. 1992); and a landlord’s agreement to hire a security firm to provide security guard services is only an undertaking “to use reasonable care in engaging [the firm] to provide the guard services,” not an undertaking to protect tenants and their guests, Pippin v. CHA, 78 Ill. 2d 204, 210, 399 N.E.2d 596, 599 (1979) (holding that the landlord, “at most,” could be liable for negligent hiring of the security firm). These cases -- ignored in plaintiffs’ brief -- make clear that the facts on which plaintiffs rely do not satisfy the stringent requirements that must be met in order to establish a voluntary undertaking under Illinois law.

The centerpiece of plaintiffs’ voluntary undertaking claim is the contention that territory managers performed security audits for (and discussed security issues with) some stations, and brochures and manuals were distributed to some stations, but none of this was done for the station at 5727 West Madison. Pl. Br. 17-18. This proves our point: Amoco never agreed to provide security for this station. The fact that Amoco may have provided security audits or brochures for some of its hundreds of other stations does not mean that it undertook to do so for all of its stations. An undertaking would hardly be “voluntary” if a defendant is required to perform the same undertaking for each retail outlet that sells the defendant’s products. In addition, the evidence concerning security audits, brochures and manuals was limited to the late 1980s -- there was no evidence that Amoco was providing those things for any stations in December 1990, when Wellington was shot -- and a party has no obligation to continue to perform services

undertaken voluntarily. E.g., Burke, 160 Ill. App. 3d at 958, 513 N.E.2d at 987; Chisolm, 47 Ill. App. 3d at 1006-07, 365 N.E.2d at 86.

Even if Amoco had agreed to provide a security “audit” for this station, “discuss” security issues with the tenant, or give the tenant brochures and manuals, none of that could be transformed into a duty to protect the tenant’s customers from criminal assaults, as plaintiffs suggest. This Court has held that providing a 24-hour doorman in a building, building a security booth for a cashier, and providing security for the property -- each of which is far more extensive than the items on which plaintiffs rely -- was not an undertaking to prevent criminal attacks on people using the premises. Jackson, 272 Ill. App. 3d at 550, 650 N.E.2d at 657; Morgan, 231 Ill. App. 3d at 212, 595 N.E.2d at 39; Hill, 233 Ill. App. 3d at 930-32, 599 N.E.2d at 1123-24. See also Lawson v. City of Chicago, 278 Ill. App. 3d 628, 643-44, 662 N.E.2d 1377, 1388-89 (1st Dist. 1996) (use of metal detectors on some days was not an undertaking to use them every day and “did not make the [defendant] an insurer against all crime”); Carrigan v. New World Enterprises, Ltd., 112 Ill. App. 3d 970, 973-78, 446 N.E.2d 265, 267-70 (3d Dist. 1983) (landlord’s installation of burglar alarms was not an undertaking to prevent criminal assaults on tenants). It necessarily follows that such a duty cannot be imposed by a much more limited undertaking of doing a security audit, discussing security issues, or providing brochures. As the Supreme Court has held, where “the [landlord] did not undertake to perform the guard services itself, it cannot be held to have had a duty to protect [the plaintiff].” Pippin, 78 Ill. 2d at 210, 399 N.E.2d at 599. See also Lavazzi v. McDonald’s Corp., 239 Ill. App. 3d 403, 409, 606 N.E.2d 845, 849 (2d Dist. 1992) (despite “references to safety in defendant’s audit reports,” defendant did not undertake duty of care for worker safety at manufacturing plant); Yassin v. Certified Grocers of Illinois, Inc., 150 Ill. App. 3d 1052, 1070, 502 N.E.2d 315, 329 (1st Dist. 1986)

(no voluntary undertaking to ensure customer safety where there was “no indication” that visits to a store by defendant’s inspectors two or three times per month were “intended as a substitute for protection that the grocery store would otherwise provide its customers”).

Indeed, the fact that the lease agreement states that Amoco will not be liable for any injuries and is not responsible for daily business operations, App. A2, ¶ 12; App. A3, ¶ 21(a), is a compelling indication that Amoco did not undertake to provide security at the station. See Rowe, 125 Ill. 2d at 210, 218, 531 N.E.2d at 1361, 1365 (no voluntary undertaking to protect against criminal acts where the lease provided that the landlord was not responsible for “all claims for injury or damage to person[s] * * * resulting directly or indirectly from any act or negligence of any tenant or occupant of the building or of any other person”); compare App. A2, ¶ 12; App. A7, ¶ 20 (Amoco “shall not be liable for any loss, damage, injuries, or other casualty of whatsoever kind or by whomsoever caused * * * arising out of, resulting from, or in any way connected with Lessee’s use, possession or operation [of the premises]”). See also Pippin, 78 Ill. 2d at 211, 399 N.E.2d at 600 (“By contracting with Interstate for guard services, the [landlord], as a matter of law, relied upon Interstate to perform its undertaking”). And the contractual language is reinforced by the actual practice at the station: the tenant, not Amoco, provided the security guards at the station; the tenant gave its employees instructions on dealing with robbers; the tenant installed security cameras even before Amoco bought the property; and Amoco never required the tenant to take any particular steps concerning customer safety. See pp. 7-8, supra; Lavazzi, 239 Ill. App. 3d at 410, 606 N.E.2d at 850 (defendant did

not undertake duty of care for worker safety at manufacturing plant; manufacturer “had its own safety personnel and procedures” and “did not rely on defendant for employee safety”).^{9/}

Furthermore, the specific security items mentioned by plaintiffs (Pl. Br. 17) would not have prevented the shooting that occurred here and would not result in a broad duty to protect customers from criminal assaults. With respect to having proper outdoor lighting and arranging merchandise to maximize the view outside (*id.*), both of those things had been done at the time of Wellington’s shooting. See C 433 (the station was “well lit”), C 2179-81 (there was a “clear view” from the mini-mart to the pumps). And these types of “commonplace” requirements “cannot reasonably be regarded as the assumption of a duty to protect against criminal acts.” Rowe, 125 Ill. 2d at 218, 531 N.E.2d at 1365 (explaining that “the furnishing of outside lighting” is done by “virtually every landlord”). The bullet-resistant glass inside the mini-mart (Pl. Br. 17) is similarly irrelevant. Wellington was not shot when he was inside the mini-mart, and it is well settled that providing security in one part of a gas station does not constitute an undertaking to provide security for the entire station. Jackson, 272 Ill. App. 3d at 550, 650 N.E.2d at 657 (“Shell Oil’s undertaking was limited to providing a secure booth for the service station attendant”; no liability since “Jackson was not attacked while in the booth”).

^{9/} In sharp contrast, the defendants in the cases cited by plaintiffs were directly and actively involved in providing security at the particular locations at issue. See Martin v. McDonald’s Corp., 213 Ill. App. 3d 487, 491, 572 N.E.2d 1073, 1077 (1st Dist. 1991) (“It was McDonald’s Corporation’s regional security manager, Jim Carlson, who acted directly as security supervisor for the newly acquired Oak Forest McDonald’s”); Decker v. Domino’s Pizza, Inc., 268 Ill. App. 3d 521, 528, 644 N.E.2d 515, 520 (5th Dist. 1994) (“here defendant undertook to establish a security program whose purpose and goal was to deter robberies and to protect employees from harm should a robbery occur”). Nothing even remotely like that occurred here -- Amoco and the tenant had a clear understanding, reflected by the actual practice at the station, that the tenant was responsible for providing security at the station.

It also does not matter that security equipment attached to the outside of the building required Amoco's approval. Pl. Br. 17. "Virtually every landlord retains the right * * * to prevent the tenant from constructing improvement to the leased premises," but that does not "change the rule that it is the leasee, as the party in possession and control of the premises, who owes a duty to a third person." Yacoub v. Chicago Park Dist., 248 Ill. App. 3d 958, 961, 618 N.E.2d 685, 687 (1st Dist. 1993). See also Rowe, 125 Ill. 2d at 221, 531 N.E.2d at 1366-67 (no duty imposed simply because lease prohibited the tenant "from altering the door locks or other security devices * * * without first obtaining [the owner's] permission"). Furthermore, liability cannot be imposed in any event based on the absence of outside security devices; an oil company has no obligation "to design [a] service station so that employees in the business office [have] an adequate view of areas of the station used by customers or to require [the oil company] to provide electronic surveillance devices to achieve that end." Gonzalez v. Kennedy Mobil Service, Inc., 274 Ill. App. 3d 1077, 1086, 654 N.E.2d 624, 629 (1st Dist. 1995).

There is no basis in law or in fact for plaintiffs' theory that Amoco voluntarily undertook to protect the station's customers from criminal attacks. The trial court properly entered summary judgment in Amoco's favor on the voluntary undertaking claim.

III. THE CRIMINAL ATTACK ON WELLINGTON WAS NOT REASONABLY FORESEEABLE.

For the reasons we have explained, the tenant was not Amoco's agent and Amoco did not voluntarily undertake to protect the tenant's customers from criminal assaults. But even if there was an agency or a voluntary undertaking, there is an independent reason why Amoco is still entitled to summary judgment here: the attack on Wellington was not reasonably foreseeable as a matter of law.

The existence of an agency relationship, or a voluntary undertaking by the defendant to provide security for the station's customers, is not enough to get a case to the jury. Because Illinois generally "does not impose a duty to protect others from criminal acts by third persons," Jackson, 272 Ill. App. 3d at 547, 650 N.E.2d at 655, there also must be evidence that the event that caused plaintiff's injuries was "objectively reasonable to expect, not merely what might conceivably occur." Hill v. Charlie Club, Inc., 279 Ill. App. 3d 754, 760, 665 N.E.2d 321, 326 (1st Dist. 1996); accord, e.g., Gonzalez, 274 Ill. App. 3d at 1084, 654 N.E.2d at 629; Anderson v. Woodlawn Shell, Inc., 132 Ill. App. 3d 580, 583, 478 N.E.2d 10, 13 (1st Dist. 1985). Whether an event was "objectively reasonable to expect" * * * must be judged by what was apparent to the defendant at the time of the attack on [plaintiff], 'and not by what may appear through hindsight.'" Hill, 279 Ill. App. 3d at 760, 665 N.E.2d at 326; accord Gonzalez, 274 Ill. App. 3d at 1084, 654 N.E.2d at 629. Thus, "there must have been more than a possibility that the act was foreseeable." Lutz v. Goodlife Entertainment, Inc., 208 Ill. App. 3d 565, 569, 567 N.E.2d 477, 480 (1st Dist. 1990). Rather, to impose liability, circumstances must be such "as to put a reasonably prudent person on notice of the probability of an attack." Shortall v. Hawkeye's Bar & Grill, 283 Ill. App. 3d 439, 443, 670 N.E.2d 768, 770 (1st Dist. 1996) (emphasis added). In short, if an occurrence was not "objectively reasonable to expect," the defendant is entitled to judgment as a matter of law, even if the defendant "in retrospect * * * should have foreseen that the unfortunate event * * * might conceivably occur." Winnett v. Winnett, 57 Ill. 2d 7, 13, 310 N.E.2d 1, 5 (1974).

It is, regrettably, a fact of life in urban America that "[e]veryone can foresee the commission of a crime virtually anywhere at any time." Hill, 279 Ill. App. 3d at 759, 665 N.E.2d at 325 (quoting Bence v. Crawford Sav. & Loan Ass'n, 80 Ill. App. 3d 491, 495, 400 N.E.2d 39, 42 (1st Dist. 1980)). But it

is not “at all palatable” that this type of foreseeability could “g[i]ve rise to a duty to provide police protection for others”; otherwise, “every store * * * would have to be patrolled by the private arms of the owner.” Bence, 80 Ill. App. 3d at 495, 400 N.E.2d at 42. Accordingly, this Court has held that “[g]eneralized allegations of crime will not suffice to establish that future criminal attacks are foreseeable.” Pomp v. Cash Station, Inc., 244 Ill. App. 3d 87, 93, 613 N.E.2d 1150, 1153 (1st Dist. 1992). Thus, a duty to anticipate a crime is not established by allegations that “violent crime was rampant” in a housing complex, Krautstrunk v. CHA, 95 Ill. App. 3d 529, 533, 420 N.E.2d 429, 433 (1st Dist. 1981), or that the defendant’s property “was in a ‘high crime’ area and that a person was fatally shot across the street,” Petrauskas, 186 Ill. App. 3d at 827, 542 N.E.2d at 906. Nor is such a duty imposed simply because it is foreseeable that crimes will occur at a particular type of business sometime. Pomp, 244 Ill. App. 3d at 93, 613 N.E.2d at 1153 (automated teller machines). A owner of land has “no broad duty to police it even where some form of notice of criminal activity may have been provided.” Lawson, 278 Ill. App. 3d at 641, 662 N.E.2d at 1386.

On the contrary, a duty may be imposed only when the defendant has “actual knowledge” of dangers existing at a specific location, Hill, 279 Ill. App. 3d at 760, 665 N.E.2d at 326, that put the defendant “on notice of the probability of an attack,” Shortall, 283 Ill. App. 3d at 443, 670 N.E.2d at 770. See also, e.g., Pomp, 244 Ill. App. 3d at 95, 613 N.E.2d at 1154 (no liability where defendants did not have “unique knowledge regarding possible future attacks at particular locations or times or involving particular assailants”); Petrauskas, 186 Ill. App. 3d at 825-29, 542 N.E.2d at 905-08 (rape inside an apartment not reasonably foreseeable even though landlord left fire escape doors and a window open); Lutz, 208 Ill. App. 3d at 570-71, 567 N.E.2d at 481 (prior incidents must put the owner on notice of the

danger in order to impose liability for failure to protect against criminal attacks); Krautstrunk, 95 Ill. App. 3d at 534, 420 N.E.2d at 433 (duty owed where the defendant was aware of the dangers on a particular floor of a building and knew of the “presence of loiterers and criminals” on the floor).^{10/}

It is undisputed that Amoco had no knowledge of any crimes that had occurred at this station. C 595-96, 2492. And there is no evidence at all to support the assertion that Amoco “either knew or should have known of the crime in the area, and should have foreseen crime at this station.” Pl. Br. 18. In any event, allegations that a business was in a “‘high crime’ area,” Petrauskas, 186 Ill. App. 3d at 827, 542 N.E.2d at 906, or that “violent crime was rampant” in the neighborhood, Krautstrunk, 95 Ill. App. 3d at 533, 420 N.E.2d at 433, are insufficient as a matter of law to establish that the criminal attack on Wellington was “‘objectively reasonable [for Amoco] to expect.’” Hill, 279 Ill. App. 3d at 760, 665 N.E.2d at 326. This is an independent ground for affirming the judgment in favor of Amoco.

IV. UNDER CIRCUMSTANCES LIKE THOSE PRESENT HERE, A DUTY SHOULD NOT BE IMPOSED UPON LANDOWNERS TO PREVENT CRIMINAL ATTACKS AT PREMISES LEASED TO INDEPENDENT BUSINESSES.

There is one final reason why the judgment should be affirmed: in circumstances like those that exist here, it would be too great a burden on society to impose upon landowners a duty to prevent criminal

^{10/} In Jackson, this Court held that even when an oil company has no notice of prior crimes at a particular station, “it is reasonably foreseeable that a service station will be robbed and that in the commission of such a robbery an attendant might be harmed.” 272 Ill. App. 3d at 547, 650 N.E.2d at 655. This part of the Jackson opinion does not cite, and is inconsistent with, the cases discussed in the text. We respectfully submit that this particular conclusion in Jackson is erroneous and that the cases cited in the text should be followed on this point.

attacks at premises leased to independent businesses that sell the landowners' products.

It is settled law in Illinois that “foreseeability alone does not result in the imposition of a duty.” Boyd v. Racine Currency Exchange, Inc., 56 Ill. 2d 95, 99, 306 N.E.2d 39, 41-42 (1973). Rather, in answering the legal question whether a duty will be imposed in certain circumstances, “[t]he likelihood of injury, the magnitude of the burden of guarding against it and the consequences of placing that burden upon the defendant, must also be taken into account.” Lance v. Senior, 36 Ill. 2d 516, 518, 224 N.E.2d 231, 233 (1967). Thus, the Court ““must balance the foreseeability of the harm against the burdens and consequences that would result from the recognition of a duty.”” Hill, 279 Ill. App. 3d at 759, 665 N.E.2d at 325 (quoting Hutchings v. Bauer, 149 Ill. 2d 568, 571, 599 N.E.2d 934, 935 (1992)).

These limitations on the imposition of a duty have particular force when a plaintiff asserts claims arising out of a criminal assault by an unknown felon. As this Court stated recently, “[t]he idea that duty should not be defined only by notions of reasonable foreseeability makes especially good sense when we inquire into the responsibility of a landowner for the criminal conduct of another.” Hill, 279 Ill. App. 3d at 759, 665 N.E.2d at 325. Indeed, imposing liability on landowners for crimes that occur on property they lease to others would have especially pernicious effects.

First, some landowners would undoubtedly respond by hiring armed security guards to patrol businesses that are operated by the independent companies that lease the landlords' property. While this would have a positive impact on the unemployment rate, the prospect of turning Illinois retail establishments into armed camps is not ““at all palatable.”” Bence, 80 Ill. App. 3d at 495, 400 N.E.2d at 42. Courts will not impose a duty where “[t]he burden sought to be imposed upon the defendants is a heavy one, which

would require intimate and constant surveillance.” Lance, 36 Ill. 2d at 519, 224 N.E.2d at 233. See also Hill, 279 Ill. App. 3d at 760, 665 N.E.2d at 326 (declining to impose a duty under which “[t]he hotel would be required to police all areas of its premises”).

Second, it is impossible for anyone to provide full protection against all crimes. “Even the assignment of an armed personal bodyguard with full police authority (which defendant did not have) could not guarantee such a result.” Stelloh v. Cottage 83, 52 Ill. App. 2d 168, 171, 201 N.E.2d 672, 673 (1st Dist. 1964). See also Boyd, 56 Ill. 2d at 99, 306 N.E.2d at 42 (“The presence of guards and protective devices do not prevent armed robberies”). Imposing on landowners a duty to protect against any crimes that might occur on the property ““would unjustly place upon defendant as a property owner a legal duty which is impossible of performance.”” Carrigan, 112 Ill. App. 3d at 974, 446 N.E.2d at 268. And because anyone can be a victim of a crime at any time, “liability would extend to the world at large.” Widlowski v. Durkee Foods, 138 Ill. 2d 369, 375-76, 562 N.E.2d 967, 969-70 (1990) (holding that “public policy does not support the imposition of a duty” in such a circumstance).

Third, businesses would incur considerable expense in providing security guards, defending against suits that will be filed as a result of the crimes that inevitably will occur, and paying judgments on some of those claims. Just as inevitably, those costs will be passed on to consumers in the form of higher prices for products manufactured and sold in Illinois.

Fourth, to the extent that a decision imposing a duty may be predicated upon the fact that Amoco provided advice to some stations on security issues, through audits and brochures, many businesses would likely respond by not providing any such advice in the future -- a result that would not benefit tenants or their customers. See Frye, 153 Ill. 2d at 33, 605 N.E.2d at 560 (“if we were to hold that by choosing to

place the ‘drowsy eye’ label on Frye’s prescription container defendants were assuming the duty to warn Frye of all of Fiorinal’s side effects, we believe that pharmacists would refrain from placing any warning labels on containers. Thus, consumers would be deprived of any warnings which might be beneficial”); Homer v. Pabst Brewing Co., 806 F.2d 119, 123 (7th Cir. 1986) (declining to impose a duty that “would only discourage employers from operating occupational health clinics, which benefit the employees”) (applying Illinois law).

All things considered, “[t]he ‘burdens and consequences’ that would result from imposition of a duty under these circumstances would be onerous.” Hill, 279 Ill. App. 3d at 760, 665 N.E.2d at 326. Illinois courts have been loath to impose responsibility for the ills of society on individual defendants, see Pomp, 244 Ill. App. 3d at 96, 613 N.E.2d at 1155 (declining to impose a duty to prevent crimes at automated teller machines; “[a] legislative body * * * is clearly a more appropriate forum to address these issues”); McColgan v. United Mine Workers, 124 Ill. App. 3d 825, 829, 464 N.E.2d 1166, 1169 (1st Dist. 1984) (“the consequences of placing the duty upon the unions are too far-reaching to justify the imposition of a duty to correct unsafe conditions throughout the mining industry”), but that is, in effect, what plaintiffs seek to achieve. A landlord, however, does not insure the safety of its tenant’s customers, Morgan, 231 Ill. App. 3d at 211, 595 N.E.2d at 38, and the creation ““of a general duty to anticipate and guard against the [crimes] of others would place an intolerable burden on society,”” Ziemba v. Mierzwa, 142 Ill. 2d 42, 52, 566 N.E.2d 1365, 1369 (1991). Consequently, a duty should not be imposed on Amoco and other landlords to guard against criminal assaults committed on their property in circumstances like those present here.

CONCLUSION

The judgment of the trial court should be affirmed.

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Respectfully submitted,

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