

# **HEATING UP!** **NEGLIGENT** **SECURITY** **SEMINAR:**

People+Premises+Data

7th ANNUAL LEIGHTON LAW SEMINAR SERIES ▼ MARCH 31, 2015



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TRIAL LAWYERS

# **HEATING UP!** **NEGLIGENT SECURITY SEMINAR:** People+Premises+Data

For its 7th Annual Leighton Law Seminar Series, and in conjunction with the *Daily Business Review*, the 2015 program was aptly titled **Heating Up: Negligent Security: People+Premises+Data**. That's because this year's event was venues at the home of the Miami Heat and included tickets to the *Heat* vs. *San Antonio Spurs* NBA basketball game following the seminar.

The two past NBA champions fought it out on the court following presentations at the seminar by **John Elliott Leighton**, **Carl D. Fedde, CPA** and **Brandon Bowers**. Each of these highly respected men are experts in their respective fields. They each brought a unique perspective to the seminar, which was approved by the Florida Bar for 6.5 hours of continuing legal education credit. The program was moderated by Marit Hudson, Esq., who is a business coach in Miami with Shirlaws.

Following the extensive program and question-and-answer session, attendees were provided a private reception on the terrace outside the American Airlines Arena and the opportunity to see the Miami's 2013 NBA championship trophy.



**Inadequate security litigation has been a hot topic in the law – and lay media – for many years. It is only in the past few years that Data Security has been seen as a major area in the law as well. Given Florida's stature as a bellwether state, both legally and technologically, it is only reasonable that this year's Leighton Lecture Series should address both of these important topics.**

Editor's Note: John Elliott Leighton is the managing partner of Leighton Law, P.A., a trial law firm with offices in Miami and Orlando. A board certified trial lawyer, his practice is focused on the representation of severely injured victims, primarily due to the failure to maintain reasonable or adequate security at commercial premises, resort injuries, medical malpractice, vehicle collision, and consumer product liability. He is the author of the book, *Litigating Premises Security Cases* (West 2006)

The program was moderated by Marit Hudson, Esq., who is a business coach in Miami with Shirlaws.





The seminar provided a number of important highlights for those in attendance:

**SCREENING THE NEGLIGENT SECURITY CASE**

Screening a security the case is the most important step in the entire process. Because these cases are intensive in time, money and legal effort, they require a high degree of scrutiny. They can be complex and require substantial resources. While there are many potential inadequate security cases, few meet the damage threshold that will justify litigation against a premises owner or business.

It is important to consider insurance coverage at the outset since many insurers have inserted exclusions and sub limits in their commercial general liability policies. As a result a business or property owner may be uninsured and unable to satisfy a substantial judgment.

**TYPES OF SECURITY CASES**

There are many types of negligent security cases, which include:

- Security guards and guard services. These can be based on acts or omissions.
- Lighting.
- Security mechanisms and equipment.
- Security policies or procedures.
- Property design. Fences, landscaping, entrances and exits all play a part.
- Key control cases involving hotels, apartments, dormitories, etc.
- Supervision cases involving employees at nursing homes, schools and day care centers, etc.
- Hiring/retention cases: An employer who does not have proper screening procedures in place

Most premises security cases involve a crime of opportunity committed against a victim who was previously unknown to the assailant. In evaluating the security case it is important to review what the relationship was between the victim and perpetrator before the crime.

**WHO HAS THE DUTY?**

Although there are many complexities in inadequate security litigation, these cases are based on premises liability law. As in all tort cases, a duty must first be established as a threshold for liability.

A property owner has a duty to maintain the premises in a reasonably safe condition and give warning of concealed perils that are or should be known to people who come on to the property. Businesses are obliged to protect its guests from reasonably foreseeable criminal conduct and a there is a non-delegable duty to provide reasonable protection against third-party criminal attacks.



## THE ISSUE OF FORESEEABILITY

Proving foreseeability is one of the threshold issues in negligent premises security cases. The Plaintiff must demonstrate that the owner, landlord or business should have foreseen the possibility of a violent crime or other incident. At that point there is a duty to take reasonable precautions to protect invitees.

Past incidents and crimes on and near the property in conjunction with experts. Knowledge of prior crimes is relevant on the issue of foreseeability. Police crime records provide a good starting point to prove foreseeability. Beyond that, the defendant's internal records may include incidents that were not reported to the police or other facts that would place them on notice of a condition on the property

## EXPERT WITNESSES

One of the most important aspects of security cases is the need to utilize expert witnesses. This is necessary to prove both foreseeability and negligence. Most people are unfamiliar with concepts of deterrence, displacement and criminology. Unfortunately the field of security litigation has seen a wide range of expert witnesses, from seasoned criminologists to academics to former law enforcement. Each of these types of experts can be qualified and effective; by the same token, they can also be unqualified or out of their area of expertise. With Florida's adoption of the Daubert standard in 2013, choosing a qualified expert has become even more important. Daubert puts the trial judge in the position of a gatekeeper with regard to expert testimony. That means both the plaintiff and the defense need to be sure their experts can meet the new criteria.

## SECURITY ISSUES

There are a number of issues to consider when preparing security cases for discovery and trial:

- Has security been increased or decreased, either in the number of guards, pattern of deployment or budget size?
- Can you find a property and compare the two security policies and practices? For instance, there might be less security in a lower-rent apartment complex for budgetary reasons.
- Has there been a change in the size of the property? A shopping center might add a second floor or a new wing without a proportional increase in its security force.
- Has there been a change in the nature of the business? If a bar or an adult book store opens at a local shopping center, security may need to increase because the property may attract "rough" customers.
- Has there been a rise in the crime rate in the area or on the property?
- Have there been prior requests for additional security on the property or complaints from patrons?
- If security cameras are used on the premises, what are the monitoring policies and procedures?
- Have employees been given security procedures to use when parking their cars or leaving the establishment at night?

By selecting knowledgeable experts, gathering facts and testimony in depositions, and thoroughly preparing the case, there should be a solid foundation in place for trying a negligent premises security case. The claims and defenses have become more complex over the years, but careful evaluation, selection, screening and discovery will pay dividends in the end for the experienced practitioner.

## OBTAINING DATA AND ELECTRONIC DISCOVERY

**Carl Fedde, CPA** specializes in finding and analyzing data. As a forensic litigation accountant, he focuses on obtaining critical accounting and financial data. Part of his professional expertise involves determining what data is complete and what is missing. At Heating Up, Carl discussed methods for identifying and obtaining electronic data. Fedde provided suggestions for complying with federal and Florida electronic discovery rules and dealing with "undue burden" and cost claims. With the proliferation of electronically stored information (ESI), the role of the forensic accountant becomes even more critical.

## DATA SECURITY, PRIVACY AND COMPLIANCE

**Brandon Bowers** makes data security his priority. That's because as Chief Technology Officer for ZenTek Data Systems, he is charged with making data security and providing clients with the tools necessary to protect their data and privacy. Compliance with laws of standards for electronic data has become a full time task for many law firms and businesses. ZenTek provides full service support for clients with these needs.

Mr. Bowers discussed some of the relevant standards for compliance with data security including the American Bar Association's recently amended Model Rules of Professional Conduct. In particular, the ABA Model Rule (and now some states) requires technological competence on the part of lawyers (Rules 1.1 and 1.6). Although Florida has not yet adopted the rules, as states continue to do so Florida is likely to follow.

Laws such as HIPAA (Health Insurance Portability and Accountability Act) and HITECH (Health Information Technology for Economic and Clinical Health) are front and center with regard to data privacy and security in contemporary law practices. Because of the proliferation of electronic patient health information (EPHI), regulations require releases be executed in order to properly access or share this data.





Brandon provided attendees some guidelines for protecting their data by creating policies related to Information Technology, which include:

1. Email Use
2. Password Policy
3. Internet Usage
4. Backup Policy and Procedures
5. Data Policy and Safeguards
6. Network Security
7. Encryption

Finally Mr. Bowers emphasized that data breaches are almost certain to occur. The key is to minimize and remediate the breaches and develop reasonable protocols within the law firm.

## CONCLUSION

One thing became clear in Heating Up: Security is a major issue in society and in particular law practices today. From premises security and safety, to data privacy and security, to electronically stored health information, today's lawyers are inundated with rapidly developing law related to security.

Attendees at Heating Up were provided with the latest developments and strategies for addressing these critical topics. And at the end, they enjoyed a great basketball game among NBA heavyweights. All in all, a day worthy of champions at the home of three-time champion Miami Heat.





# Meet the Faculty:



## John Elliott Leighton

Board certified trial lawyer  
Leighton Law, P.A.

**JOHN ELLIOTT LEIGHTON** is the managing partner of Leighton Law, P.A., a Miami and Orlando trial law firm. He represents victims of negligence and the families of those whose lives have been taken due to the fault of others. He is a Board Certified Civil Trial Specialist by the Florida Bar Board of Legal Specialization. He focuses his practice on catastrophic injury, resort injuries, inadequate premises security/violent crime, motor vehicle/motorcycle/trucking crashes, brain injury, medical malpractice, product liability, cruise ship and legal malpractice litigation. John is an accomplished author, having published numerous articles, books and book chapters on a variety of personal injury and trial skills topics. His writings have been featured articles in Trial magazine seven times. He is a frequent national lecturer at legal programs and conventions and has spoken and taught at seminars, colleges and conventions in over a dozen states.

Mr. Leighton regularly chairs national trial skills colleges and seminars. He is past Chairman of the Association of Trial Lawyers of America's Motor Vehicle, Highway and Premises Liability Section and current Chairman of its Inadequate Security Litigation Group, which he has chaired since 1996. He also currently serves as the Chairman of the Academy of Trial Advocacy, a national invitation-only organization of the country's leading catastrophic injury trial lawyers. John is also a charter member of the Cooperative Association of Medical Malpractice Attorneys, a national consortium of top medical malpractice trial lawyers and is on the national Board of Advisors of the National Crime Victim Bar Association, having received its 2007 "Advocate of Justice" award.

Mr. Leighton is the author of the two-volume text, *Litigating Premises Security Cases* (West Publishing, 2006). It is the most comprehensive treatise on investigating, preparing, litigating and trying inadequate premises security cases, and he updates it annually.

He has been sought out to consult and litigate catastrophic injury cases throughout the United States, including Indiana, Wisconsin, Texas, New York, North Carolina, Illinois, Kentucky and Georgia. He is often called upon to handle catastrophic and complex matters in other states, and his victories on behalf of families who have lost loved ones to negligence have resulted in record setting verdicts and settlements.

Mr. Leighton was lead counsel in the nationally recognized parasailing death case involving 15 year-old Amber May White. Amber and her sister Crystal were parasailing in Pompano Beach, Florida in August 2007 when an improperly maintained parasail combined with negligence on the part of the operator caused the parasail to break loose, hurtling the two girls into a hotel. Amber was killed and Crystal suffered head injuries. Mr. Leighton has fought for passage of a law regulating the parasailing industry, known as "the Amber May Act," which was finally passed and enacted this past year. He often appears on news shows such as CNN and NBC's Today Show as a legal consultant.

Mr. Leighton has been selected for inclusion in The Best Lawyers in America for the past 9 years, voted as one of the "Top Lawyers" in the South Florida Legal Guide for the last 13 years, has been named a Florida SuperLawyer™ (and voted as one of the top 100 of all Florida SuperLawyers) for the last 10 years, and has been elected to the Florida Trend magazine "Legal Elite" Top Lawyers in Florida by peer selection. He is rated as "10.0/10 - Superb" by AVVO.com and holds an AV preeminent rating by Martindale-Hubbell.

Leighton received his undergraduate and law degrees with honors from the University of Florida, where he was an editor of the Florida Law Review, competed on the Trial Team, and taught first-year jurisprudence.





## Carl D. Fedde, CPA

Forensic Accountant  
Mallah Furman

**CARL FEDDE** is the Director of Litigation and Forensic Accounting Services at Mallah Furman. Mr. Fedde's area of concentration includes litigation and forensic accounting services. He is a seasoned expert in issues involving forensic and financial investigation. Carl is a veteran in embezzlement and fraud investigation engagements, with extensive experience in civil matters involving fiduciary obligations, contract dispute, family law matters, asset reconstruction and shareholder disputes.

Carl's experience includes fraud investigation, loss profit analysis and testimony, damage analysis, embezzlement cases, contract disputes, loss of earnings valuations, trust and estate issues and financial reconstruction. He is well versed in the issues involving discovery and evaluation of financial and electronically stored data, having worked extensively on e-discovery issues in his practice.

Mr. Fedde received his Bachelors of Science in Accounting with a minor in Computer Science and a Bachelors of Arts in Economics at the University of Kentucky. He practices with Mallah Furman in Miami and is Certified in Financial Forensics (CFF)



## Brandon Bowers

Chief Technology Officer  
Zentek Data Systems

**BRANDON BOWERS** is an IT Professional with over 12 years of experience working with small to large sized organizations which span worldwide. Implementing cutting edge technologies such as Voice over IP, Virtualization, Secure Remote Access, Cloud Based Systems, and more. He is the Chief Technology Officer for ZenTek Data Systems which is a member of The ASCII Group ("The oldest and most prestigious groups of independent information technology solution providers, integrators, managed service providers, and value added resellers.")

Mr. Bowers has extensive technological experience in computer science and received his Bachelors in Management Information Systems from Florida Atlantic University.



## NEGLIGENT PREMISES SECURITY LITIGATION

# Q&A

### QUESTIONS FROM ATTENDEES

#### Q. Can video surveillance deter crimes?

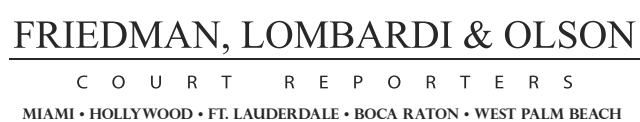
**Sometimes.** The worst situation is "dummy" cameras (fake cameras which do not video or record). By having dummy cameras the business is creating a false sense of security while acknowledging a need for security. The best situation for deterrence is when someone is watching the video and has a loudspeaker to talk to someone on property and it is interactive.







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**Leighton Law** focuses on representing plaintiffs in complex and catastrophic personal injury and wrongful death cases, with special emphasis on resort torts, violent crime/negligent premises security, cruise ship and maritime, medical malpractice, legal malpractice, trucking, aviation, and product liability cases.

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