

A LANDOWNER WHO BREACHES A CONTRACTUAL DUTY TO PROVIDE NON-NEGLIGENT SECURITY MAY BE HELD LIABLE FOR INJURIES TO THIRD PARTIES THAT OCCUR ON ADJACENT PUBLIC PROPERTY

Might a landowner’s contractual duty to provide security in a non-negligent manner extend to third parties injured on adjacent public property? In *Avila v. Jado Properties, Inc.*, the court said “yes” and held that a restaurant could be liable to teenagers shot at a party where the restaurant had promised to provide security to the parents of a girl who was having a party there. In *Avila*, plaintiffs appealed from an order granting summary judgment against them on the grounds that there was a triable issue of material fact regarding (1) the scope of the landowner’s contractual duty; (2) whether the landowner breached its contractual duty; and (3) whether there was a substantial link between the alleged breaches and the injuries plaintiffs suffered when they were shot on a public street in front of the landowner’s property.

In *Avila*, defendant was at a restaurant located in the City of Commerce. In addition to the main entrance, the restaurant had two doors which opened from the banquet room on to an adjacent public sidewalk. The owner of the restaurant was aware that customers would smoke on the sidewalk and even provided a patio at that location to be used by restaurant patrons.

Prior to the happening of the events underlying this lawsuit, two parents decided to host a party for their daughter at the restaurant. When planning the event, they were advised that appropriate security would be provided. The parents were not given, and did not ask for, details regarding the proposed security. However, they were advised the restaurant employed a security guard who routinely patrolled the outside of the restaurant in a golf cart.

Plaintiffs, who were teenage males, attended the party at the restaurant. Just before midnight, plaintiffs were congregated with other guests on the sidewalk outside the banquet room. At that time, a number of gang members pulled up in a car on the street in front of the

sidewalk. They allegedly yelled at some of the girls standing on the sidewalk, made a u-turn and stopped in front of the restaurant. The gang members then jumped out of the car and started an altercation with plaintiffs on the sidewalk. Plaintiffs were shot during the altercation.

At some point after the gang members arrived, but before the shootings occurred, the restaurant security guard was advised that people were fighting outside the restaurant. Allegedly, the security guard contacted an unidentified dispatcher and entered the restaurant to get assistance from an on-duty deputy sheriff. After learning of the fight, the sheriff proceeded to the sidewalk but was unable to call for back-up before the shootings happened.

Defendant argued that a landowner only owes a general duty to ensure that the property in his possession and control is maintained in a reasonably safe condition. Defendant cited the case of *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, where plaintiff sued a mall for not having security guards. *Ann M.* held that absent prior similar incidents there is no duty to hire guards.

Continued on page 2

IN THIS ISSUE

WESIERSKI & ZUREK IN TRIAL2

NEW AT WESIERSKI & ZUREK2

**BUSINESS OWNERS MAY BE HELD
LIABLE FOR THEIR EMPLOYEES’
FAILURE TO SUMMON HELP3**

Continued from page 1

Rejecting defendant's reliance on the *Ann M.* decision, the *Avila* court held that the "general duty of maintenance" discussion was inapplicable to this matter because the defendant owed a contractual duty to provide security. The court further reasoned that "accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing to be done, and a negligent failure to observe any of these conditions is a tort as well as a breach of contract." Therefore, whether the restaurant performed its duties with the required care was a triable issue of material fact to be considered by a jury.

Although the court disregarded defendant's "general duty of maintenance" argument with respect to the duty issue, it entertained the argument with regard to the issue of a landowner's duty to maintain property *outside* of his ownership, possession and control. On this note, defendant argued that, as a matter of law, business owners are not responsible for crimes occurring on public streets or sidewalks abutting their property. Further, defendant argued that it could not be considered to control the sidewalk outside the banquet room since the law of premises liability does not extend so far as to hold a landowner liable merely because his property exists next to an adjoining dangerous property and he took no action to influence or affect the condition of that adjoining property.

The court again rejected defendant's argument and reasoned that the duty of reasonable care applies to that portion of the premises to which the invitee, under the circumstances of the invitation, would be likely to go. Relying on the decisions in *Schwartz v. Helms Bakery Limited* (1967) 67 Cal.2d 232 and *Banks v. Hyatt Corp.* (5th Cir. 1984) 722 F.2d 214, the court found that the premises may be less or greater than the invitor's property. The premises may include such means of ingress and egress as a customer may reasonably be expected to use. Moreover, the area of invitation extends to the entrance of the property as well as to a safe exit after the purpose of the visit has concluded.

Applying the foregoing precedent, the court cited evidence that the restaurant's security guard patrolled the area as part of his general routine, the doors to the banquet room opened directly on to the sidewalk, and the restaurant owner and security guard acknowledged that patrons use the sidewalk in front of the banquet room to smoke and chat. Accordingly, the court held that the "control of the sidewalk" issue was a question of fact to be determined by a jury.

Finally, the court addressed the causation issue based on the assumption that defendant had breached a duty owed to plaintiffs. With respect to that issue, defendant argued that the declaration of plaintiffs' security consultant was insufficient to show a substantial nexus between the restaurant's purported omission and plaintiffs' injuries. Again, the court disagreed. The court concluded that the declaration, which stated that defendant had committed a fundamental breach in only providing personnel to protect automobiles, rather than restaurant patrons, was sufficient to raise a triable issue of material fact. Moreover, the court ruled that a jury could conclude that the restaurant's alleged failure to provide security for the party delayed the discovery of the gang members and failed to deter the ensuing criminal activity. In light of the foregoing, the court reversed the trial court's grant of summary adjudication on plaintiffs' causes of action for negligence and premises liability.

- Jill D. Brachman

WESIERSKI & ZUREK IN TRIAL

Ronald Zurek recently obtained a verdict for the defendant in a motor vehicle negligence case where the plaintiff alleged a back injury that required a surgery after years of unsuccessful conservative care. In this case the defendant driver was making a left turn when he was struck by a vehicle oncoming in the opposite direction. The defendant testified that he saw nobody coming as he started to turn. Despite this testimony, Mr. Zurek was able to use the physical evidence of a skid mark to convince the jury that the oncoming car must have been exceeding the speed limit when the defendant began his turn, thus explaining why the defendant's turn was not a careless act.

NEW AT WESIERSKI & ZUREK

Jennifer L. Koehler: Jenna obtained her Bachelor of Arts degree in Business and Economics in 1999 from Westmont College and her Juris Doctorate from Santa Clara University School of Law in 2002. She is licensed to practice law in California.

BUSINESS OWNERS MAY BE HELD LIABLE FOR THEIR EMPLOYEES' FAILURE TO SUMMON HELP

With the general spread of crime in modern society, the Courts of Appeal and State Supreme Court have been attempting to fashion reasonable parameters for the legal duty of a property or business owner to either provide safety measures, protection or warning to its customers and the public as a whole against foreseeable third party criminal acts on or near his property. Indeed, foreseeability is the key. Most crime, by its very nature, is an entirely random act which, if not reasonably foreseeable, cannot provide the property or business owner with the legal duty to take some sort of action to either protect or to warn the public. After all, if you know the criminal is coming and you know what the criminal intends to do before it happens, chances are the criminal is not going to commit the crime. It is the element of surprise which gives the criminal the upper hand. Nevertheless, where crime in general is foreseeable, such as where there have already been incidents on the premises, a general duty of preventative measures, such as hiring security guards, may attach.

That is the duty before a specific crime is committed - to put in place preventative measures if there has been prior similar crime on the premises. What about the duties that arise once an unforeseeable crime is commenced? What is the duty to intervene or to call police? Most recently, Division One of the Fourth Appellate District addressed the issue of a land or business owner's duty once a criminal act has started. In *Charles Morris IV v. Silvino De La Torre*, Charles Morris and four friends went to the defendant's 24-hour taco shop at 1:00 a.m. to purchase some food. Mr. Morris did not actually go into the shop; rather, he waited next to his friend's car in the parking lot. The parking lot was clearly visible from inside the shop.

Unbeknownst to Mr. Morris and his friends, this particular taco shop was frequented by the Nestor street gang in the late evening and early hours of the morning. In fact, the Nestor gang considered the taco shop to be their "turf." Of note is the fact that Mr. De La Torre claims that he was completely unaware of the gang's presence on a regular basis, and that the gang claimed the taco shop as their "turf." Thus, before the subject incident, the shop had no duty to hire guards.

While Morris' friends were inside ordering food, another car pulled into the parking lot carrying two members of the Nestor gang. One of the gang members confronted Mr. Morris indicating that this was their turf and that Morris and his friends could not eat there. Morris indicated that they would be leaving soon. The gang member was not placated and began a verbal altercation with Mr. Morris. Mr. Morris' friends then exited the taco shop and they attempted to calm down the two gang members. A fist fight then ensued. During the course of this fist fight, one of the gang members went into the taco shop and demanded a knife. Fearing for his own life, a taco shop employee opened the door that allowed the gang member to get into the kitchen area of the taco shop and gain access to a knife. He returned to the parking lot and stabbed Mr. Morris, as well as slashing the vehicle tires. The entire group then scattered.

The police were called. Mr. Morris attempted to run away from the scene, but kept falling due to his injuries. At one point, the gang member caught up with him again and stabbed him several more times. The police ultimately arrived and conducted an investigation resulting in the arrest of the two gang members. Mr. Morris then sued Mr. De La Torre for negligence. Counsel for Mr. De La Torre successfully moved for summary judgment. That ruling was appealed.

The taco shop employees submitted declarations stating that they never made any attempts to contact the police during the fight because the telephone in the taco shop was not working on the night of the fight. Plaintiff submitted admissible documentary evidence indicating that the telephone indeed was in service and that there were no requests by Mr. De La Torre for a repair call.

The trial court granted a summary judgment on the basis that the violent assault of the type sustained by Mr. Morris was not a foreseeable event to the defendant. While the Court of Appeals agreed with that notion, it held that the real issue was what the taco shop's duty was once the attack started. The reviewing court felt that plaintiff, as a frequent customer, had developed sufficient evidence of a "special relationship" between Morris and De La Torre which gave rise to a duty on the part of De La Torre's

Continued on page 4

Continued from page 3

employees to act affirmatively to protect Morris while he was on the premises. Plaintiff claimed there was a triable issue of fact as to whether or not the employees acted reasonably while Morris was being attacked in plain view. He cited two specific instances in support of this contention: First, the employees failed to call the police despite the fact they knew that there was an altercation occurring in the parking lot. Second, one of the employees opened the door which allowed the assailant access to the knife. Thus, while there was no duty to hire security guards or to add lighting, the court held that once an assault is actually occurring in plain view, there is no need for foreseeability to be addressed. Since a business owner is required to take reasonable action to protect his customers when criminal conduct is occurring at the business, the court held that there was a triable issue of fact as to whether the defendant's employees' failure to contact the police constituted negligence. The duty became even greater once the employees knew that the gang member had now taken a knife from the kitchen and was on his way to stab Mr. Morris. The court described contacting the police as a "minimal safety measure" that imposes no undue hardship on the business owner. While Morris was not a customer of the taco shop and was not inside the taco shop at the time he was assaulted, it was noted that he had been a frequent customer of the taco shop on prior occasions. It was also noted that the violence was directed both at Morris and at his other friends who had gone into the shop to order food. The assailant used the premises to effectuate the assault by entering the taco shop and retrieving the knife. Finally, it was noted that the defendant had to pay an extra assessment in his lease to cover his use of the parking area outside of the taco shop. All of these factors gave rise to a special relationship and justified the imposition of a duty to respond to the assault with reasonable measures, which at a minimum meant calling the police.

This opinion closes by addressing the issue of whether or not an employee has a duty to refrain from complying with a criminal's request in order to lessen the risk of injury to other employees or patrons. In reviewing prior opinions, the court held that a shopkeeper is not obligated to comply with an intruder's demands and, thus, there is no duty for a shopkeeper to refrain from complying with an intruder's demand. The uncontroverted evidence was that the taco shop employee feared for his own life when he opened the door in response to the gang member asking for a knife. A fight was underway, the perpetrator was a known gang member since he was shirtless and

prominently displaying his "Nestor" tattoo across his chest. He was in an agitated state when he came into the taco shop. The employees' fear was "eminently justifiable."

Thus, there seems to be a minimal duty, once an altercation has started, to call police. The court seemed reluctant to go further and to require actual intervention. The court even noted that handing the assailant a knife under the circumstances was not a breach of duty.

- Thomas E. Martin

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