

BAR OWNER HELD POTENTIALLY LIABLE FOR ONE PATRON SHOOTING ANOTHER OFF PREMISES, DESPITE TWICE ESCORTING THE ATTACKER OUTSIDE

Ten years ago the California Supreme Court in *Ann M. v. Pacific Plaza Shopping Center*, ruled that in order to impose upon a landlord a duty to hire security guards for protection against third party criminal acts, there must be a "high degree of foreseeability" of such criminal acts. Rarely, if ever, can a plaintiff show this degree of foreseeability without proof of prior similar incidences or violent crime on the premises.

In *Mata v. Mata*, 105 Cal.App.4th 1121, a patron of a bar was banned from the bar because he looked and acted as if he had been drinking and because of comments he had made about beating up another patron. Shortly after a security guard "escorted" the patron out of the bar for the second time the same evening, he fired shots into the bar from outside the front door. One patron was killed and another was seriously wounded. An action was filed naming as defendants the owner of the bar and the owner of the property. Defendants' motion for summary judgment was granted. The trial court found the totality of the circumstances supported a finding that the shooting was an unforeseeable event which defendants had no duty to guard against. Plaintiffs appealed.

The Court of Appeal overruled and remanded finding that there were genuine issues of material fact as to the owner of the bar, and that the trial court used the wrong criteria in granting the motion. A "tavern keeper" has a duty to protect its patrons from injury when he/she: "(1) permitted someone on the premises with a "known propensity" for fighting; (2) permitted a person to remain on the premises whose conduct had become so obstreperous and aggressive that the tavern keeper knew or ought to have known that he or she endangered others; (3) had been warned of danger from an obstreperous patron and did not take suitable steps to protect others; (4) failed to halt a fight as soon as possible after it started; (5) did not provide adequate staff to police the premises; and (6) tolerated disorderly conditions."

Ann M. v. Pacific Plaza Shopping Center was inapposite because in this instance the defendant employed a security guard and that guard was on duty the night of the shooting. The duty to protect had already been assumed and foreseeability was irrelevant. A security guard has a special relationship with the customers of the business that hired the guard. This relationship imposes an obligation to act affirmatively to protect customers on the premises. The security guard is liable to an injured customer when he/she fails to act reasonably which failure causes injury. The business that hired the guard may be liable: (1) for failing to hire a competent security guard; and (2) if the guard acts unreasonably.

The proprietor will be **directly** liable when he/she negligently hires or retains an incompetent guard or negligently trains or supervises that guard. An injured patron does not need to prove notice of prior similar acts if the proprietor negligently hired, trained or supervised the guard.

In that case, the defendant assumed a duty to protect patrons by hiring a security guard. Therefore, the issue on

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At trial, the records showed that plaintiff's decedent had a history of falling prior to being admitted to the defendant's long term care facility. While in their care, plaintiff's decedent exhibited a penchant for wanting to climb out of her bed and climb out of her wheelchair if she were left alone. She was assigned a score that was high for a risk of falls. There were at least three documented falls, two of which produced injury. The record at trial showed that the facility not only failed to notify the patient's family of these problems until late in the sequence of events, but also failed to have their on-staff doctor make a recommendation for either implementation of additional safety measures or initiating a request to obtain restraints.

Plaintiff's decedent was ultimately transferred out of this facility to a second facility where she passed away. The Department of Health Services investigated the defendant's care of the patient and found that the defendant had violated various California regulations. At trial, plaintiff requested a special jury instruction on negligence per se to the effect that if the jury found that the defendant had indeed violated those regulations, then it must be found negligent in absence of proof by the defendant to the contrary. The trial court refused this instruction on the basis that the jury could become confused between the standard of proof in elder abuse cases and the standard of proof in a case involving negligence per se. The standard elder abuse jury instructions were selected and the case went to deliberations. The jury returned a 9 to 3 verdict in favor of the defendant and the plaintiff appealed.

The Fourth District, Division One reversed in the case of *Norman v. Life Care Centers of America*. Since the negligence per se instruction was a correct statement of law, it should have been used by the trial court. It was clear that the plaintiff's decedent was a member of a class of persons designed to be protected by those regulations, and it was clear that the regulations had in fact been violated. The court held that like statutes, applicable regulations are a factor to be considered by the jury in determining the reasonableness of the defendant's conduct. The court found that the Department of Health Services' regulations

**WESIERSKI & ZUREK
IN TRIAL**

Mark J. Giannamore of our L.A. office recently tried a case entitled *Ovasapyan v. Galfayan*. Four plaintiffs alleged that defendant Galfayan rear-ended their vehicle while they were stopped at a traffic light. Ms. Galfayan was not cooperative with counsel, and never appeared for trial.

The defense utilized Neal Person of Larry Garfinkle & Associates, who provided testimony that the incident could not have occurred as the plaintiffs alleged. In deposition, all four plaintiffs had indicated that this was an in-line, flush impact. The defense argued that this was an off-set impact. The defense also utilized Michael Vesley, D.C. On cross-examination of plaintiffs' treating physician, Mr. Giannamore was able to draw into question the authenticity of plaintiffs' alleged injuries.

The jury determined that Ms. Galfayan was at fault for the incident; however, they determined that these four plaintiffs were not injured as alleged, and rendered a defense verdict. Plaintiffs filed a motion for new trial and a judgment notwithstanding the verdict, both of which were denied.

Mr. Giannamore tried another case in Glendale entitled *Hubbard v. Zeroyan*. Plaintiff alleged that the defendants had advertised free rocks by way of a sign posted in their front yard. Plaintiff Hubbard had backed her vehicle up into the defendants' driveway to collect these rocks. While loading the rocks into her van, plaintiff allegedly tripped over a sprinkler and fell over a small wall, breaking her right lower leg and left foot. The right leg required fixation with a rod.

The defendants alleged that the free rock sign had been taken down long before the incident, and that plaintiff was trespassing. Furthermore, they alleged that the sprinkler was not a dangerous condition, since it was open and obvious, and that plaintiff had walked past same approximately 15 to 20 times without incident. Defense theorized that plaintiff misstepped while negotiating this wall, while carrying rocks.

The jury deliberated less than four hours and returned a defense verdict as to all defendants. Plaintiff's motion for a new trial, and a judgment notwithstanding the verdict, were both denied. No appeal was taken from this judgment.

imposed duties of care on the defendant, and that those duties had been breached. Accordingly, a negligence per se instruction was appropriate. The Court of Appeals felt that there would not be any danger of confusion on the jury's part and therefore, a new trial was ordered.

- Thomas E. Martin

NO DISCOVERY MISDEED GOES UNPUNISHED BY THE COURTS: THE RESURRECTION OF C.C.P. § 128.5 AS AN ALL-PURPOSE SANCTION

Until the mid-1990's, any "bad faith" or "frivolous" litigation conduct could trigger a motion by the adversary for sanctions. Then, a new sanction, 128.7, came along which punished only frivolous papers. It was assumed that Section 128.7 replaced Section 128.5. Now it has been held that Section 128.5 is still "live" and can be used to redress a broad range of frivolous or bad faith conduct, not just frivolous motions and papers. There is a split of authority as to whether Section 128.5 still applies, but one recent case takes the position that it does.

In *Olmstead v. Gallagher*, the Court of Appeal held that C.C.P. Sections 128.5 and 128.7 apply concurrently to different kinds of misconduct. It further held that a directly false response to discovery qualifies as a "misuse of the discovery process" subject to sanctions under Section 2023 of the *Code of Civil Procedure*.

C.C.P. Sections 128.5 and 128.7

The beauty of Section 128.5, enacted in 1981, was that under subdivision (a) it authorized the trial court to award attorneys' fees incurred as a result of a very wide range of misconduct, namely any "bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." Subdivision (b)(1) states that these tactics "include, but are not limited to, the making or opposing of motions or the filing and service of a complaint or cross-complaint only if the actions or tactics arise from a complaint filed, or a proceeding initiated, on or before December 31, 1994." The court in *Olmstead* held that such language does not indicate that other kinds of abusive tactics are excluded after that time.

In 1994, the legislature enacted Section 128.7 which was intentionally drafted to resemble Rule 11 of the *Federal Rules of Civil Procedure*. It made sanctions, including an award of attorney fees contingent on violation of the implied certification that pleadings and other documents filed with the court had factual and legal merit and were not being filed for an improper purpose. However, the legislature indicated that Section 128.7 would be repealed as of January 1, 1999. Subsequently, in 1998, the repeal date was extended to January 1, 2003 and then again to January 1, 2006.

These two sections have been interpreted as establishing mutually exclusive sanctions regimes. While Section 128.5 was thought to apply to proceedings initiated before January 1, 1995, Section 128.7 was meant to control after that date. The court in *Olmstead* rejected this approach and held that Section 128.7 sanctions misconduct associated with pleadings and other filings, while Section 128.5 was left in effect for other types of litigation misconduct, and that both sections are currently operative.

C.C.P. Section 2023

Subdivision (a) of this section states that "[m]isuses of the discovery process include, but are not limited to" nine abuses, including making an "evasive response to discovery." In *Olmstead*, the court held that this subdivision is very clear on the fact that the list of abuses provided is not exhaustive. Moreover, since the discovery statutes must be liberally interpreted to further the goal of educating "the parties concerning the claims and defenses so as to encourage settlements and to expedite and facilitate trial," the type of misconduct involved in *Olmstead*, namely a false interrogatory answer, although not specifically listed under the statute, is still included as a misuse of the discovery process.

In *Cedars-Sinai Medical Center v. Superior Court*, the Supreme Court held that destroying evidence in response to a discovery request after litigation has started qualifies as a "misuse of discovery" within the meaning of Section 2023. The court in *Olmstead* held that if the Supreme Court held that such misconduct amounts to misuse of discovery, then responding falsely to an interrogatory qualifies as well. Section 2030(f)(1) embodies the requirement that interrogatory responses be "as complete and straightforward as the information reasonably available to the responding party permits." Moreover, even if the plaintiffs in *Olmstead* claimed that their responses were only a mistake, the court was not persuaded by such argument. In *Ghanooni v. Super Shuttle*, the court held that a discovery abuse is sanctionable even if it is not wilful.

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The lesson to be learned from *Olmstead* is that “misuse of the discovery process” could encompass many types of misconduct, even types that are not specifically mentioned by the legislature. As such, lawyers who are faced with such misconduct from their opposing counsels can use *Olmstead* to argue for sanctions, including attorneys’ fees, for a very broad range of misconduct.

- Dana-Monica Paun

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the motion was not foreseeability of harm, but whether: (1) the guard acted reasonably under the circumstances; (2) the employer was negligent in the hiring, retaining, supervising or training of the guard and (3) the actions or inactions of the guard and/or employer contributed to plaintiff’s injuries.

Defendant also claimed immunity because the shooting occurred off the premises. Although a landowner or possessor generally does not have a duty to take measures to prevent foreseeable violence occurring off the premises, there were facts to support an inference that defendant exercised sufficient control over the parking lot to permit imposition of a duty.

In *Southland v. Superior Court*, a summary judgment motion was denied based on facts which showed that: (1) the store provided inadequate parking; (2) defendant was aware customers regularly used the adjacent lot; (3) the lease authorized the nonexclusive use of the lot, (4) it was reasonable to infer defendant realized a significant commercial benefit from customers’ use of the lot; (5) the store and the lot were a hangout for local juveniles who sometimes fought; and (6) store employees on a number of occasions requested police assistance.

Defendant’s final contention was that under *Alvarez v. Jacmar Pacific Pizza Corp.*, it had no duty beyond calling the police. The court summarily discussed this contention. In *Alvarez*, the defendant did not hire security personnel and therefore was inapposite.

Finally, the court upheld summary judgment as to the owner of the property. To impose liability upon an owner, the plaintiff must show the landlord had **actual** knowledge of the dangerous condition as well as the right and ability to cure that condition. Plaintiffs failed to meet this burden.

-Laura J. Barns

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