

**A LANDLORD IS NOT IMMUNE FROM LIABILITY
FOR RAPE OF TENANT IF SIMPLE MEANS ARE
AVAILABLE TO THE LANDLORD TO PREVENT CRIME**

In *Ambriz v. Kelegian* (2007), D.J.D.A.R. 1143, the California Court of Appeal, 4th District, concluded that a tenant of a large apartment building could maintain a premises liability action against her landlord when a criminal intruder raped her.

The tenant had been assaulted and raped by an intruder in the common area of the 330 unit apartment complex where the tenant lived. The tenant alleged that the complex had been advertised as a “secured community” when she moved in. The landlord had also represented that it maintained a locked entry gate and all doors were secured. The complex had also received a zoning variance from the City of Escondido, allowing it to exceed typical density limits, in exchange for its promise to comply with a city ordinance which required the landlord to provide special security measures for access to the building.

At the time of the subject incident, three of the four entrances to the building did not close and lock properly. Residents, including the plaintiff, had repeatedly complained to management, and the doors were not repaired.

The rapist was identified as a transient who had been seen in the complex on a number of occasions over a period of eight months before the rape. Within one month of the incident, plaintiff had complained to management that this particular transient scared her. The tenant requested that the doors be fixed. Management told plaintiff they would take care of it.

Police testimony confirmed that the rapist entered the building through an open door and not by forced entry.

The Appellate Court examined the history of liability imposed on a landlord for the criminal conduct of a third-party. The Court examined the two important elements of a landlord’s liability: duty and causation.

With respect to duty, the Court separated previous cases into two distinct categories, based on the landlord’s burden of preventing future harm caused by the third-party criminal conduct.

In the first category, the Court placed those cases in which the landlord’s burden of preventing future harm caused by third-party criminal conduct is great or onerous. In order for a plaintiff to prove duty in this situation plaintiff must produce evidence of heightened foreseeability, shown by proof of prior similar criminal incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location. In the second category, the Court placed those cases where the burden of preventing the harm could be accomplished through simple means by imposing minimal burdens. In that situation, plaintiff could meet her burden of establishing a duty on the part of the landlord based on regular reasonable foreseeability.

In *Ambriz*, the Court found that the landlord’s burden to prevent the harm to plaintiff would have been minimal and could have been accomplished by simple means. Specifically, the Court held that requiring a landlord to keep existing locks on doors in good working order was a

Continued on page 4

IN THIS ISSUE

NEW AT WESIERSKI & ZUREK..... 2

SEMINARS..... 2

**FIRST AMENDMENT RIGHTS ON
PRIVATE PROPERTY..... 3**

NEW AT WESIERSKI & ZUREK

David M. Phillips: Mr. Phillips was born in Logansport, Indiana, on April 17, 1962. After graduating from Occidental College with a Bachelor of Arts degree in 1984, he attended Loyola University of Los Angeles Law School, receiving his Juris Doctor degree in 1990.

Mr. Phillips is admitted to the California Bar and the United States District Court for the Central District of California. He is a member of the Pasadena, Los Angeles and American Bar Associations, the Association of Southern California Defense Counsel, and the Defense Research Institute.

Mr. Phillips has significant trial experience as both a defense and plaintiff attorney having tried over 35 jury trials involving security guard liability, assault, employment, real estate transactions, premises liability, product liability, breach of contract, legal malpractice, fire damage and motor vehicle cases. His general liability experience includes landlord-tenant and habitability claims. He has extensive experience with uninsured motorist and other first party claims.

Mr. Phillips represents employers in the defense of wrongful termination, discrimination, wage and hour and FEHA claims. In addition, Mr. Phillips has had over 400 arbitrations and mediations.

Mr. Phillips has handled high exposure cases involving brain injuries, spinal injuries, amputation, fraud, construction site injuries and public entity liability. He has been trial counsel for such entities as Westfield, Universal Studios, Century 21, American Golf, YMCA and Best Western Hotels.

Mr. Phillips was employed by a large commercial liability insurance company as a senior trial attorney and participated as an advisor to the company's trial seminar program.

Mr. Phillips has written articles for insurance journals and has participated in numerous seminars on legal and insurance issues. Mr. Phillips serves as Judge Pro Tempore and mediator for the Los Angeles Superior Court.

Marian E. Ballog: Marian Ballog attended California State University, Fullerton, where she graduated with a Bachelor's Degree in 1975. She received her Juris Doctorate Degree from Pepperdine University School of Law after early graduation in 1979. She was admitted to the California State Bar that same year.

Ms. Ballog has extensive trial and courtroom experience from ten years as a Deputy District Attorney with the Orange County District Attorney's Office. She has practiced in a civil litigation firm before joining Wesierski & Zurek. She has served in various community volunteer roles, including the Board of Directors of a women's homeless shelter in Los Angeles.

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Arpineh Babakhanian: Ms. Babakhanian graduated summa cum laude in 2003 from California State University, Northridge with a Bachelor of Arts degree in Psychology. She earned her Juris Doctorate from Southwestern University, School of Law, in Los Angeles, California in 2006. She was admitted to the California Bar in December 2006.

Ms. Babakhanian was the recipient of the Paul D. Wildman Scholarship for Academic Excellence while at Southwestern. She was also the recipient of the CALI Award for Excellence for Computer Assisted Litigation as well as International and Comparative Intellectual Property. Ms. Babakhanian had the opportunity to co-chair the Armenian Law Students' Association from 2004-2005 at Southwestern.

Her experience includes an externship with the Honorable Meredith C. Taylor of the San Fernando Superior Court as well as clerkships for three civil litigation firms. Ms. Babakhanian is a member of the American Bar Association, San Fernando Valley Bar Association, Los Angeles County Bar Association and Armenian Bar Association. She is licensed to practice before all the courts of the state of California as well as the United States District Court, Central District of California.

FIRST AMENDMENT RIGHTS ON PRIVATE PROPERTY

In the mid 1970's a group of high school students set up a card table in the central court of the Pruneyard Shopping center in Campbell, CA to solicit signatures for a petition to be sent to the White House to oppose a United Nations resolution against "Zionism." They were asked to leave the shopping center and were told their conduct violated Pruneyard regulations. It was suggested that they continue their activities on the public sidewalk. The students left and later brought suit contending that the California Constitution guaranteed the right to seek signatures at shopping centers. The trial court agreed with Pruneyard that it could control activities on its private property. The decision was appealed.

In 1979 the court held in *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, that certain private retail establishments could be used for expressive activity. It ruled that the modern shopping center had taken on many attributes of a town square, where people were encouraged to come and congregate. Following the *Pruneyard* decision, it was interpreted that any shopping center (not just a large one like the 21 acre Pruneyard) as well as any commercial establishment could be used for free speech activities as long as they were open to the public.

In the early 1990's pro-life proponents relied on *Pruneyard* to support their position that they have the right to be on private property including abortion clinics. The court held that these buildings and parking lots were not open to the public and that the owners had a superior expectation of privacy. It was not until the late 1990's that a string of cases set out that a large retail establishment could exclude individuals who claimed to have a First Amendment right to be on their property.

In *Trader Joe's Co. v. Progressive Campaigns, Inc.* (1999) 73 Cal. App. 4th 425, the defendants attempted to obtain signatures for initiative petitions outside the Trader Joe's Market in Santa Rosa. The Appellate Court held that defendants' right to engage in expressive activity on private property under Cal. Const. Art. I, §§ 2 and 3, while affording greater protection than U.S. Const. Amend. I, did not protect the challenged activities on the Trader Joe's premises. Applying a balancing test, the Appellate Court held that Trader Joe's constitutionally protected property interests outweighed the public's interest in using the grocery store as a forum for free speech and petitioning activity. A distinction was made between Trader Joe's and a large shopping center whose relationships to other establishments transformed it into a public forum. The court determined that the test was whether the store had become a public forum as follows:

"The *Pruneyard* court's conclusion that the societal interest in using shopping centers as forums for expressive activity outweighed the property interests of the shopping center owner was supported by tangible

evidence that shopping centers were supplanting central business districts as the preferred public forum, i.e., the place where people chose to come and meet and talk and spend time. In contrast, in the present case there is absolutely no evidence in any of appellants' declarations that the Santa Rosa Trader Joe's has assumed a comparable role. Thus, in contrast to the shopping center discussed in *Pruneyard*, the Santa Rosa Trader Joe's is not a public forum uniquely suitable as a place to exercise free speech and petitioning rights." (*Id.* at 434.)

Subsequently, in *Young v. Raley's, Inc.*, (2001) 89 Cal. App. 4th 476, plaintiffs contended the private sidewalk in front of a Raley's Supermarket was a public forum where they had a right to engage in speech and political petitioning. The court noted that:

"A freestanding store, with abutting parking spaces for customers, does not assume significant public attributes merely because the public is invited to shop there for goods sold by the property owner. Property does not lose its private character merely because the public is generally invited to use it for designated purposes. Thus, in contrast to *Pruneyard* and other multipurpose shopping centers, the Raley's supermarket in question does not have a public character, it is not a public meeting place, and society has no interest in using it as such."

The Court next addressed whether "big box" retail establishments fell under the umbrella of *Pruneyard*. In *Costco Cos. v. Gallant*, (2002) 96 Cal. App. 4th 740, Costco brought an action for declaratory and injunctive relief against three individuals who were engaged in the business of gathering voter signatures for initiatives and referenda and in registering voters for upcoming elections. The trial court determined that the ban on expressive activities at stand-alone stores was valid. It was noted that the public was invited to Costco's stand-alone stores solely for the purpose of purchasing goods and services.

Specifically, the Court stated as follows:

"Here as in *Trader Joe's*, the public is invited to Costco's stores solely for the purpose of purchasing goods and services. Unlike the patrons of a large regional shopping center, Costco customers do not come to its stores with the expectation they will meet friends, be entertained, dine or congregate. While outlets such as Costco are popular, because of the narrow activity they offer--the purchase of goods and services offered by Costco--they are in no sense 'miniature downtowns.' (See *Robins*, supra, 23 Cal. 3d at p. 910) Thus, unlike the shopping center considered in *Robins*, Costco's stand-alone stores

Continued from page 1

minimal burden. Further, the landlord had undertaken this duty through previous representations to tenants and promises to the City in exchange for a beneficial zoning variance.

With respect to causation, the Court held that plaintiff must establish that the defendant's act or omission was a substantial factor in bringing about the injury. Specifically, the plaintiff must show that the inferences favorable to the plaintiff are more reasonable or probable than those against her. Mere speculation that the act or omission of the landlord would have prevented the crime is inadequate. Here, plaintiff offered evidence that the rapist entered the complex without forced entry and there had been numerous entries by this particular intruder and others in the past with knowledge on the part of the landlord.

In order to avoid liability in these situations, an apartment complex should follow these guidelines:

- (1) If possible, do not advertise, either orally or in writing, that the building is a "security building" or otherwise provides a secured premises for tenants;
- (2) If the building has existing locks or other security features to prevent access, those devices should be kept in proper working order;
- (3) Management should maintain proper documentation in the form of inspection and repair logs for security devices. Specifically, a log should be filled out confirming that management has inspected the locks and describe their condition on a regular basis;
- (4) Management should maintain documentation with respect to complaints from tenants and others about the condition of the building as well as corresponding and appropriate documentation as to a response to each complaint;
- (5) Ensure that the apartment complex is not subject to any specific local ordinances requiring that the building be secured;
- (6) Lease agreements should include a specific provision that the tenant is aware and understands that the landlord does not warrant the complex as "secured" or as a "security building."

- David M. Phillips

Continued from page 3

are not essential or invaluable forums for the general exercise of free speech." (*Id.* at 755.)

Most recently, in *Albertson's, Inc. v. Young*, (2003) 107 Cal. App. 4th 106, the Court held that retailers within larger commercial developments did not come under the *Pruneyard* decision.

"The test that courts must apply is whether, considering the nature and circumstances of the private property, it has become the functional equivalent of a traditional public forum. Here, the nature and circumstances of the Albertson's store do not impress it with the character of a traditional public forum, nor do the setting and circumstances of the shopping center where it is located." (*Id.* at 110.)

Thus, the test remains whether the store has become a public forum:

"A location will be considered a quasi-public forum only when it is the functional equivalent of a traditional public forum as a place where people choose to come and meet and talk and spend time. (*Pruneyard*, supra, 23 Cal.3d at pp. 907, 910, fn. 5; *Trader Joe's*, supra, 73 Cal.App.4th at p. 434.) The evidence does not establish that the Albertson's store is such a place." (*Id.* at 121.)

"To establish a right to solicit signatures at the entrance to a specific store, it must be shown that the particular location is impressed with the character of a traditional public forum for purposes of free speech. For reasons stated above, the walkway at the entrance to Albertson's grocery store in Fowler Center is not such a public forum." (*Id.* at 122.)

The line of cases since *Pruneyard* have viewed retail establishments on an individual basis, and ask whether the establishment has become a quasi public forum. The test is why people come to the store. Most people come to a grocery store to shop for food and food-related items, they do not come to congregate. As long as the public is invited onto the premises only to shop, the store cannot be considered a quasi public forum, and management has the right to ask any solicitor to leave, even one who claims a violation of his First Amendment rights.

- Juhli Anton

Editor

Paul J. Lipman