

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION FIVE

COFFEE HOUSE,)	2d Civ. No. B234545
)	
Petitioner,)	Los Angeles Superior Court,
)	Case No. GC044903
vs.)	
)	[Hon. C. Edward Simpson, Judge;
SUPERIOR COURT FOR THE COUNTY)	Dept: NE R (626) 356-5356]
OF LOS ANGELES,)	
)	
Respondent.)	
)	
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BIHN THAI TRAN, DAN CAO and)	
FRANK LUONG)	
)	
Real Parties in Interest.)	
)	
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**PRELIMINARY REPLY IN SUPPORT OF PETITION FOR WRIT
OF MANDATE, PROHIBITION OR
OTHER APPROPRIATE RELIEF**

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INTRODUCTION

Plaintiffs' Preliminary Opposition only confirms the trial court's plain error in denying Coffee House's motion for summary judgment. The Opposition largely ignores the governing legal standards discussed in the Petition, and misstates the law on the one legal issue that it does address. In short, it identifies no material fact issue precluding summary judgment on the claim that Coffee House negligently failed to protect plaintiffs from an unanticipated shooting rampage by still-unidentified masked gunmen. As a matter of law, plaintiffs cannot establish either that Coffee House had the duty they claim or that any breach of duty caused their injuries.

But absent this Court's intervention, the claims will be tried anyway. And in the meantime, the trial court's erroneous ruling will leave business owners throughout California in doubt as to whether they are duty-bound to undertake an array of burdensome measures that have little, if any, likelihood of protecting patrons. This is a situation that calls out for writ relief.

ARGUMENT

I. For Purposes Of Determining The Scope Of A Duty, Foreseeability Is A Question Of Law Properly Resolved On Summary Judgment.

The scope of a business's duty to protect patrons from a third party criminal act is a question of law. (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213.) One factor in the duty analysis is the foreseeability of the act. (*Ibid.*) Foreseeability in this context is a question of law appropriately resolved on summary judgment. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 678, disapproved on other grounds by *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527, fn. 5.)

Plaintiffs' contrary argument ignores directly on-point Supreme Court authority: The Court has squarely stated that *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, on which plaintiffs rely (Preliminary Opposition ("Prelim. Opp.") 3-4), does *not* establish that foreseeability, for purposes of the duty analysis, is a fact question: "Any such reading of *Isaacs* is in error." (*Ann M., supra*, 6 Cal.4th at p. 678.) Rather, "[f]oreseeability, when analyzed to determine the existence or scope of a duty, *is a question of law to be decided by the court.*" (*Ibid.*, italics added; see also *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1188, disapproved on other grounds by *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853, fn. 19 and by *Reid v. Google, Inc., supra*, 50 Cal.4th at

p. 527, fn. 5 [same]; *Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1146 [same].)

The Opposition fails to acknowledge this well-settled rule, but the case law does not. Courts routinely determine foreseeability as a matter of law, and grant summary judgment based on that determination. (E.g., *Wiener, supra*, 32 Cal.4th at pp. 1150-1151 [affirming summary judgment for defendant business owner where, as a matter of law, plaintiffs did not show that murderous act was foreseeable]; *Ann M., supra*, 6 Cal.4th at pp. 679-680 [affirming summary judgment where, as a matter of law, violent criminal assault was not sufficiently foreseeable to impose a duty to provide security guards]; *Sharon P., supra*, 21 Cal.4th at pp. 1197-1199 [defendant business owner entitled to summary judgment where, as a matter of law, violent criminal assault was not reasonably foreseeable].)

This case is no different. Whether a shooting rampage by unidentified gunmen was reasonably foreseeable based on a confrontation months earlier is a question of law, appropriate for resolution on summary judgment. The question could only have been resolved one way: The rampage was not sufficiently foreseeable to justify the onerous measures that plaintiffs seek to impose on Coffee House and indeed on all businesses. Coffee House thus was entitled to summary judgment.

II. The Opposition Ignores Fatal Flaws In Plaintiffs’ Case As To Both Duty And Causation.

A. The Opposition Relies On Unsupported Claims That The Prior Confrontation Was Gang-Related, Which In Any Event Would Make No Difference.

Relying on speculation, plaintiffs contend that the prior verbal confrontation was gang-related and that a gang connection made the armed assault by masked gunmen two months later foreseeable. (Prelim. Opp. 2, 7.) The Opposition, however, does not cite the record. No wonder. There is no cognizable evidence that the individuals involved in the prior confrontation, Hung and Viet, were gang members: The only evidence cited is one plaintiff’s supposed “understanding,” which is not evidence of anything. (Petition (“Pet.”) 22.) And there is no evidence *at all*, cognizable or otherwise, for plaintiffs’ new summary assertion that Hung and Viet wore tattoos indicating gang affiliations. (Prelim. Opp. 2.) Moreover, even if there was evidence that Hung and Viet were in gangs, it would not affect the foreseeability of the later shooting rampage. No one knows who the shooters were or what their motive was, much less whether *they* were in a gang. The unsupported claim that Hung and Viet were gang members thus does not create a triable fact issue as to whether the shooting by masked gunmen several months later was foreseeable.

B. The Opposition Fails To Rebut Coffee House’s Showing That The Measures Plaintiffs Seek To Require Would Be Highly Burdensome.

The Petition showed that the measures that plaintiffs argue Coffee House was duty-bound to undertake would be highly burdensome, both on Coffee House in particular and on society in the aggregate, with little likelihood of having any positive effect. (Pet. 24-30.) The Opposition largely ignores that showing.

- The Opposition says nothing about the duty that the trial court actually found—a vague obligation for business owners to indefinitely exclude the victim of any prior confrontation. That obligation would heavily burden both business owners and those excluded. (Pet. 26-27.)

- In asserting that a duty to warn would-be patrons about prior confrontations would be minimally burdensome, the Opposition ignores reality. It asserts that the requirement would not be a warning that patrons should stay away from the business (which it does not dispute would be economic suicide), just a warning that there was a prior confrontation involving a gun, based on which patrons could *decide* to stay away. (Prelim. Opp. 7.) What would be the point of the proposed warning, if not to keep patrons away? Indeed, plaintiffs' theory is that *they would not have come to Coffee House* if they had been warned of the prior confrontation. (*Ibid.*) In other words, they would have treated the warning as an instruction to stay away. An open-ended duty for every business owner to give such a warning for months after any verbal confrontation on the premises, even if the patrons appear to have resolved their differences, would be highly burdensome.

- The Opposition’s suggestion that a business need only warn that someone has been the victim of a threat and then allow the public to decide whether to associate with that person, ignores that such a warning either would be an invitation to shun the threatened individual or would have no effect at all. (See Pet. 27-28.)

- The Opposition’s assertion that requiring video monitoring would be minimally burdensome ignores the Supreme Court’s observation that video monitoring is not effective without a person monitoring the camera (*Sharon P.*, *supra*, 21 Cal.4th at pp. 1195-1196), and the fact that video cameras would have been unlikely to deter this shooting by masked gunmen who could not have been identified on tape (see Pet. 25). And while the Opposition emphasizes that Coffee House had a video monitoring system that broke a day or two before the shooting (Prelim. Opp. 6-7), that makes no difference. Without knowing who the assailants were, it’s impossible to know whether they believed the monitoring system was working at the time or that they would have been deterred had the monitoring system worked.

- In asserting that Coffee House should have hired a doorman, the Opposition does not explain how a doorman could have stopped two armed gunmen who appeared, sprayed the premises with gunfire, and were gone within a minute. (See Pet. 24-25.)

C. The Opposition Ignores The Undisputed Fact That The Shooters’ Identities And Motives Are Unknown, Precluding The Plaintiffs From Establishing Causation.

The Petition explained that even if Coffee House had a duty to undertake the measures that plaintiffs urge, plaintiffs' case would fail because they cannot show that any breach of duty caused their injuries. (Pet. 31-37.) In particular, because no one knows who the shooters were or why they went on a rampage, any claim that action by Coffee House would have prevented the harm is too speculative to succeed. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 775-776 [where assailants were unidentified, plaintiff could not prove that absence of particular security measures was a substantial factor causing her injuries].)

The Opposition's response? Silence. It does not acknowledge that the shooters remain unidentified. Nor does it explain how plaintiffs' expert's opinion regarding what would reduce the likelihood of the shooting is anything but impermissible speculation. Instead, the Opposition asserts that certainty is not required, and that the plaintiffs need only show that certain measures more likely than not would have prevented the shooting. (Prelim. Opp. 6.) But plaintiffs have not begun to make even that showing. There is no specific basis in the record, including in the expert's declaration, for concluding that the proposed security measures—reporting the verbal confrontation several months earlier to police, hiring a doorman, or installing video surveillance—would have prevented the armed assault by masked gunmen.

The lack of information about the gunmen is also fatal to plaintiffs' theory that Coffee House had a duty to warn patrons about the prior verbal confrontation. As the Petition explained, the plaintiffs have to show that a

warning about the confrontation had some logical connection to the attack. (Pet. 37.) Unless the attack was related to the prior confrontation, any failure to warn about that confrontation has no logical connection to the force causing plaintiffs' injuries. But no one knows if the two are related, because no one knows who the gunmen were or why they sprayed Coffee House with gunfire. The Opposition does not argue otherwise. Plaintiffs therefore cannot prove causation, and Coffee House is entitled to summary judgment.

III. This Case Warrants Writ Relief.

The Opposition's disdain of writ relief in this instance is, in fact, an attack on writ relief in any case, and certainly from any denial of summary judgment. But the Legislature has specifically authorized writ review of an order denying summary judgment. (Code Civ. Proc., § 437c, subd. (m)(1).) The Opposition ignores that provision, instead summarily asserting that review after a full trial will be "more appropriate." (Prelim. Opp. 1, 10.) Why? Not only is writ relief statutorily authorized in this context, but it is often granted. (See, e.g., *Wiener*, *supra*, 32 Cal.4th at pp. 1150-1151; *Sharon P.*, *supra*, 21 Cal.4th at pp. 1197-1199; *Ann M.*, *supra*, 6 Cal.4th at pp. 679-680.)

Moreover, although the Opposition contends that the issues would be better addressed on a more complete record, it does not identify any *specific* facts requiring further development. Nor could it. The most significant fact is undisputed: The gunmen's identities and motives are unknown. (AA 82,

85, 86, 150.) Plaintiffs therefore cannot prove that the shooting was reasonably foreseeable from a verbal confrontation several months earlier or that any breach of duty by Coffee House caused their injuries. Nothing about that conclusion is going to change at trial.

What *will* happen if this case goes to trial is that Coffee House and the judicial system will expend unnecessary resources trying meritless claims. Meanwhile, business owners throughout California will remain in limbo as to the scope of their duties. That limbo is a real concern, notwithstanding the fact that the trial court's ruling is not precedential. (Prelim. Opp. 1, 10.) Precedential or not, the ruling signals to other business owners that they could be exposed to liability for third party criminal acts unless they undertake the burdensome measures that plaintiffs advocate here. This Court's intervention is necessary to clarify whether that is the case.

CONCLUSION

Coffee House sought writ relief because the trial court clearly erred in ruling (1) that a business owner has a duty to exclude the victim of a verbal confrontation indefinitely and (2) that it was not speculative that additional measures would have prevented a violent attack by unknown assailants with unknown motives.

Nothing in the Preliminary Opposition buttresses those erroneous rulings. Writ relief is necessary to avoid an unnecessary trial and to resolve important questions affecting business owners and patrons throughout

California. Plaintiffs have had a full opportunity to seek to justify the trial court's erroneous ruling but have not done so. The requested writ relief should be granted.

Dated: August 3, 2011

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204 (c)(1), I certify that this **PRELIMINARY REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE RELIEF** was produced using 13-point Times New Roman type style and contains **2,097** words, not including the tables of contents and authorities, the caption page, signature blocks, Certificate of Interested Entities Or Persons, or this Certification page.

Dated: August __, 2011

Alana H. Rotter

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On August 3, 2011, I served the foregoing document described as:
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Executed on August 3, 2011, at Los Angeles, California.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Anita F. Cole