IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

COFFEE HOUSE, Petitioner, vs. SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES, Respondent. _________________________________ BIHN THAI TRAN, DAN CAO and FRANK LUONG Real Parties in Interest. _________________________________	))))))))))))))))	2d Civ. No. _______________ Los Angeles Superior Court, Case No. GC044903 [Hon. C. Edward Simpson, Judge; Dept: NE R (626) 356-5356]

PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE RELIEF;
MEMORANDUM OF POINTS AND AUTHORITIES
[EXHIBITS FILED UNDER SEPARATE COVER]

____

EARLY, MASLACH & VAN DUECK
James G. Randall, SBN 126220
John C. Notti, SBN 109728
Paul A. Carron, SBN 123012
700 South Flower Street, Suite 2800
Los Angeles, California 90017
(213) 615-2500 // Fax (213) 615-2698

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson, SBN 109374
Alana H. Rotter, SBN 236666
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
(310) 859-7811 // Fax (310) 276-5261

Attorneys for Petitioner
COFFEE HOUSE

Court of Appeal
State of California
Second Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: ________________

Case Name: Coffee House v. Superior Court for the County of Los Angeles (Bihn Thai Tran, Dan Cao and Frank Luong)

Please check the applicable box:

[ ] There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208.

[X] Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
Luong Vu and his wife Thuy Doan	Owners of Coffee House
Farmers Insurance Exchange	Insurer of Coffee House
Zurich Financial Services Group	Ultimate parent of attorney-in-fact for Farmers Insurance Exchange

Please attach additional sheets with Entity or Person Information if necessary.

____
Signature of Attorney/Party Submitting Form

Printed Name: Alana H. Rotter
Greines, Martin, Stein & Richland LLP
Address: 5900 Wilshire Blvd., 12th Floor
Los Angeles, CA 90036
State Bar No: 236666
Party Represented: Petitioner COFFEE HOUSE

TABLE OF CONTENTS

	Page
INTRODUCTION	1
A. Issue Presented: Is A Business Liable For An Unanticipated Shooting By Unknown Masked Assailants?	1
1. Duty: Does a single verbal confrontation so presage a months-later, unannounced murderous assault by unidentified gunmen, as to impose a duty on the defendant business to protect against the assault? If so, what is the scope of such a duty?	1
2. Causation: Is it possible to know what proposed measures could have prevented the assault without knowing the attackers' identities and motive?	3
B. Why Writ Relief Is Necessary And Appropriate.	3
1. The inherently prejudicial denial of summary judgment is appropriately reviewed by writ petition.	4
2. Writ review is necessary to correct the trial court's clear error.	4
3. Writ review is necessary to address legal issues of broad import: whether businesses owe a duty to exclude the targets of a confrontation from their premises or to report all such incidents to law enforcement.	5

TABLE OF CONTENTS (Continued)

		Page
PETITION		7
A.	The Parties.	7
B.	Unidentified, Masked Men Approach Coffee House, Shoot Into The Premises, And Quickly Flee.	7
C.	Three People Injured In The Shooting Sue Coffee House For Premises Liability And Negligence, Alleging A Single Heated Verbal Confrontation A Few Months Earlier.	8
D.	Coffee House Moves For Summary Judgment Based On Lack Of Duty To Protect Against Future Third Party Crimes And Lack Of Causation.	9
E.	The Trial Court Denies Summary Judgment.	11
F.	The Trial Court's Denial Of Summary Judgment Was Clearly Wrong.	12
G.	Writ Relief Is Necessary And Appropriate To Prevent An Unnecessary Trial.	15
H.	This Petition Is Timely.	16
PRAYER		17
VERIFICATION		18

TABLE OF CONTENTS (Continued)

Page

MEMORANDUM OF POINTS AND AUTHORITIES 19

I. A Single Verbal Confrontation Between Patrons, Even One Where A Firearm Is Brandished, Does Not Impose Liability On A Business For An Unannounced Hail-Of-Gunfire Attack A Few Months Later. 19

A. The Existence Of A Business's Duty To Protect Against Third Party Criminal Attacks Is A Question Of Law Properly Resolved On Summary Judgment. 19

B. A Business's Duty To Protect Against Third Party Criminal Attacks Is Closely Circumscribed. 19

C. A Business Would Not *Reasonably* Foresee A Months-Later, Unannounced Assault By Unknown Hooded, Masked Gunmen Just Because There Is A Verbal Confrontation Involving A Patron. 21

D. Plaintiffs' Proposed Measures Have Substantial Social And Financial Consequences For Coffee House, Other Businesses, And The Public With Little Certainty Of Avoiding Harm. 24

1. Coffee House owed no duty to hire guards or have video cameras. 24

2. Coffee House and other businesses owe no duty to exclude the victims of prior harassment from their premises. 26

3. Coffee House and other businesses owe no duty to warn customers that a patron suffered a threatening verbal confrontation a few months earlier. 27

TABLE OF CONTENTS (Continued)

Page

4. Coffee House and other businesses owe no duty to report to law enforcement every potentially threatening confrontation between patrons. 29

5. Plaintiffs' proposed measures are amorphous because there is no defined trigger upon which a business owner can rely. 30

II. As A Matter Of Law, Plaintiffs Cannot Establish That Any Breach Of Duty By Coffee House Caused Their Injuries. 31

A. There Is No Nonspeculative Evidence That Reporting A Single Verbal Incident To Law Enforcement A Few Months Earlier Would Have Prevented Plaintiffs' Injuries. 32

B. Because The Identity And Motives Of The Assailants Are Unknown, Plaintiffs Cannot Establish That Excluding The Patron Targeted In The Earlier Confrontation Would Have Prevented The Shooting. 35

C. There's No Nonspeculative Link Between Any Absent Warning And Plaintiffs' Injuries. 36

CONCLUSION 38

CERTIFICATE OF WORD COUNT 39

TABLE OF AUTHORITIES

Cases	Page

Aguilar v. Atlantic Richfield Co.
(2001) 25 Cal.4th 826 — 13

Ann M. v. Pacific Plaza Shopping Center
(1993) 6 Cal.4th 666 — 13, 19, 20, 24, 30

Babb v. Superior Court
(1971) 3 Cal.3d 841 — 4, 15

Benson v. Superior Court
(2010) 185 Cal.App.4th 1179 — 4, 15

Brake v. Comfort Inn
(Ohio Ct.App. 2002, 2002-Ohio-7167) 2002 WL 31866170 — 22

Brandt v. Superior Court
(1985) 37 Cal.3d 813 — 5, 16

Bushling v. Fremont Medical Center
(2004) 117 Cal.App.4th 493 — 33

Castaneda v. Olsher
(2007) 41 Cal.4th 1205 — passim

Consumer Defense Group v. Rental Housing Industry Members
(2006) 137 Cal.App.4th 1185 — 28

Delgado v. Trax Bar & Grill
(2005) 36 Cal.4th 224 — 20

Dillon v. Legg
(1968) 68 Cal.2d 728 — 21

Fisherman's Wharf Bay Cruise Corp. v. Superior Court
(2003) 114 Cal.App.4th 309 — 12

TABLE OF AUTHORITIES (Continued)

Cases **Page**

Hall v. Superior Court
(2003) 108 Cal.App.4th 706 4, 15

Interinsurance Exchange of Automobile Club v. Superior Court
(2007) 148 Cal.App.4th 1218 5

Melton v. Boustred
(2010) 183 Cal.App.4th 521 13, 20, 23, 24

Miranda v. Bomel Const. Co., Inc.
(2010) 187 Cal.App.4th 1326 34

Orloff v. Los Angeles Turf Club
(1951) 36 Cal.2d 734 27

Padilla v. Rodas
(2008) 160 Cal.App.4th 742 32

People v. Brown
(2011) 192 Cal.App.4th 1222 30

Reid v. Google, Inc.
(2010) 50 Cal.4th 512 13

Saelzler v. Advanced Group 400
(2001) 25 Cal.4th 763 14, 15, 31, 32, 34-36

Sharon P. v. Arman, Ltd.
(1999) 21 Cal.4th 1181 13, 14, 19, 20, 25

Smith v. Superior Court
(1992) 10 Cal.App.4th 1033 15

Thompson v. Sacramento City Unified School Dist.
(2003) 107 Cal.App.4th 1352 33

Travelers Casualty & Surety Co. v. Superior Court
(1998) 63 Cal.App.4th 1440 4, 15

TABLE OF AUTHORITIES (Continued)

Cases | **Page**

Wiener v. Southcoast Childcare Centers
(2004) 32 Cal.4th 1138 ... 13, 19, 24, 35

Statutes

Civil Code section 51 ... 27

Code of Civil Procedure section 437c ... 4, 12, 15-16, 31, 37

Evidence Code section 1109 ... 30

Rules

California Rules of Court, rule 8.1115(c) ... 22

LIST OF EXHIBITS

Tab	Document	Page
1	First Amended Complaint For Personal Injuries, Filed 6/15/2010	1
2	Answer To First Amended Complaint, Filed 8/10/2010	8
3	Notice Of Motion And Motion For Summary Judgment And/Or Summary Adjudication; Memorandum Of Points And Authorities, Declaration, Filed 1/14/2011	13
4	Separate Statement Of Undisputed Facts In Support Of Defendant Coffee House MSJ/Summary Adjudication, Filed 1/14/2011	50
5	Plaintiffs' Opposition To Defendant's Motion For Summary Judgment, Etc.; Memorandum Of Points And Authorities; Declarations Of Franky Luong, Binh Tran, Dan Cao, Ban Nguyen, Kimberly Ponce, And Robert A. Brock, Filed 6/10/2011	62
6	Plaintiffs' Responsive Separate Statement In Opposition To Defendant's Motion For Summary Judgment Or For Summary Adjudication Of Issues, Filed 6/10/2011	146
7	Reply Memorandum Of Points And Authorities In Response To Plaintiff's Opposition To Defendant Coffee House MSJ/Summary Adjudication, Filed 6/17/2011	196
8	Objections To Evidence Submitted By Plaintiffs In Opposition To Defendant's Motion For Summary Judgment/Summary Adjudication, Filed 6/17/2011	209

LIST OF EXHIBITS (Continued)

Tab	Document	Page
9	Reply To Plaintiffs' "Additional Facts"/Separate Statement, Filed 6/17/2011	226
10	Reporter's Transcript Of June 24, 2011	244
11	Minute Order, Filed 6/27/2011	256
12	Ex Parte Application For Extension To File Writ Of Mandamus/Prohibition And Order, Filed 7/15/2011	259

INTRODUCTION

A. Issue Presented: Is A Business Liable For An Unanticipated Shooting By Unknown Masked Assailants?

Two hooded, masked gunmen stood in a doorway and sprayed a café with gunfire. Plaintiffs, injured in the fusillade, claim that the café should be held liable. Why? Because a few months earlier, someone came into the café, yelled at a patron for bad-mouthing him, and slammed down a gun. The same patron was killed in the later shooting. In the interim, both the yeller and the patron had been in the same café without incident. No one knows whether the deadly assault had anything to do with the earlier confrontation. And no one knows the identity or motive of the gunmen. Yet, plaintiffs assert that the café owed a duty to protect them and that its alleged breach of that duty caused their injuries. Both claims fail as a matter of law. The trial court, thus, erred in denying defendants' motion for summary judgment.

1. Duty: Does a single verbal confrontation so presage a months-later, unannounced murderous assault by unidentified gunmen, as to impose a duty on the defendant business to protect against the assault? If so, what is the scope of such a duty?

Plaintiffs' theory is that the café had a duty to protect them from a sudden shooting by unknown gunmen. But how is that duty triggered? It can't derive from prior similar incidents. A verbal confrontation, even one in which a firearm is brandished, is hardly comparable to a full-on assault with guns blazing. Plaintiffs claim that the earlier confrontation made the later sudden, armed attack foreseeable. In other words, in their view, every

time patrons have a heated or threatening argument, a business owner should anticipate that months later, disguised armed men may show up and open fire without warning. That can't be the rule. Random violence, unfortunately, can never be ruled out. But one confrontation does not create the heightened, extraordinary foreseeability that Supreme Court precedent requires before a business owner has a duty to protect against third party crime.

And even if there was a duty, what was its scope? The trial court implicitly acknowledged that the substantial burden of hiring guards or installing video surveillance cannot be justified on so thin a reed. Nor can the duty be to exclude the confronted patron indefinitely (which is the duty that the trial court found). No law suggests that those who are threatened – be they innocents, former lovers, or even gang members – are societal pariahs who must be banned from businesses. To the contrary, controlling Supreme Court authority suggests otherwise: It holds that a landlord has no duty to refuse to rent to, or to evict, suspected gang members, even when there has been prior gang violence by others. Indeed, plaintiffs' blame-the-victim approach goes much further than the duty that the Supreme Court rejected.

The same is true of plaintiffs' claim that the café should have warned customers about the prior incident so that the customers could have stayed away or shunned the victim. Such a rule would effectively mean that a business has to shut down once an unforeseen altercation has taken place. That is not and cannot be the law.

Nor should business owners be obligated, under threat of liability, to report to law enforcement every confrontation that occurs on their premises. Such an obligation would impose a large burden on both businesses and law enforcement across the State. Businesses would have to become the

guardians of public morals, regardless of the consequences – consequences that plaintiffs' own expert said here could include violent retaliation and substantial loss of business. At the same time there would be no assurance that a flood of such reports would help law enforcement to more effectively prevent future crimes by unknown persons, as was the case here.

2. Causation: Is it possible to know what proposed measures could have prevented the assault without knowing the attackers' identities and motive?

The other fatal flaw in plaintiffs' case is causation. What, other than perhaps heavily armed guards, would have stopped two unknown assailants from shooting up a café without warning? There's no evidence that the murderous assault was related to the prior confrontation. The assailants were never identified. Their motivation is unknown. Without that information, any claim that reporting the confrontation a few months earlier would have led law enforcement to prevent this particular crime is complete speculation.

* * *

This is precisely the sort of case – lacking both duty and causation as a matter of law – in which summary judgment should have been granted.

B. Why Writ Relief Is Necessary And Appropriate.

Writ relief from the trial court's summary judgment denial is necessary to avoid an unwarranted trial of claims barred as a matter of law and to answer questions of substantial, widespread importance.

1. The inherently prejudicial denial of summary judgment is appropriately reviewed by writ petition.

The Legislature has specifically authorized writ review of summary judgment denials. (Code Civ. Proc., § 437c, subd. (m)(1).) In doing so, it implicitly recognized the central role of the summary judgment procedure in weeding out unsustainable claims and the inherent prejudice of allowing such claims to proceed to trial, where they eat up limited judicial and courtroom resources. Not surprisingly, courts routinely intervene by writ at the summary judgment stage to preclude trial of legally meritless claims. (*Travelers Casualty & Surety Co. v. Superior Court* (1998) 63 Cal.App.4th 1440, 1450 ["Where the trial court's denial of a motion for summary judgment will result in trial on non-actionable claims, a writ of mandate will issue"]; *Benson v. Superior Court* (2010) 185 Cal.App.4th 1179, 1183 [issuing writ ordering trial court to enter summary judgment for defendants on the ground that as a matter of law, they did not have the duty alleged]; *Hall v. Superior Court* (2003) 108 Cal.App.4th 706, 709 [same].)

2. Writ review is necessary to correct the trial court's clear error.

Writ review is doubly necessary because of the trial court's clear error in denying summary judgment. Clear judicial error standing alone warrants writ relief. (*Babb v. Superior Court* (1971) 3 Cal.3d 841, 850-851.) Without this Court's intervention, petitioner will have to go through a time- and resource-consuming trial before the error is corrected. That result defeats the very purpose of the summary judgment procedure. The issues of duty and causation presented here are not going to change. The relevant facts are undisputed. Summary judgment, thus, should have been granted.

3. Writ review is necessary to address legal issues of broad import: whether businesses owe a duty to exclude the targets of a confrontation from their premises or to report all such incidents to law enforcement.

Writ review is also necessary to resolve a substantial issue of far-reaching importance to both business owners and patrons. (*Brandt v. Superior Court* (1985) 37 Cal.3d 813, 816 [writ relief appropriate to address issue of "widespread interest"]; *Interinsurance Exchange of Automobile Club v. Superior Court* (2007) 148 Cal.App.4th 1218, 1225 [writ relief appropriate "'where it is necessary to resolve an issue of first impression promptly and to set guidelines for bench and bar,'" citation omitted].)

The trial court concluded that a single confrontation at a café imposes a duty on the owners to take an array of protective measures, even where there is no indication that the confrontation is more than a one-time event. Those measures, according to the trial court, include excluding from the premises the *target* of threats and intimidation, and reporting such incidents to law enforcement. These are broad, wide-ranging duties to be imposed on businesses. If business owners are to be subjected to such duties, they need to know *in advance* what their obligations are.

There is, and should be, no such duty. But absent clarification from this Court, business owners throughout California will face uncertainty about the scope of their obligations, and will have to choose between taking onerous, unwarranted precautions or exposing themselves to potential litigation. The trial court's ruling also significantly impacts the general public, because it essentially imposes a duty to exclude anyone who might conceivably be the target of criminal attack. Individuals could find themselves barred from stores and restaurants on the basis of their

appearance, affiliations, or a multitude of other factors. This Court's guidance is necessary to prevent such speculative restrictions.

This Court should entertain this writ petition and should issue the requested relief.

PETITION

Petitioner Coffee House alleges:

A. The Parties.

1. Coffee House is the defendant in *Bihn Thai Tran, Dan Cao and Frank Luong v. Coffee House*, Los Angeles Superior Court case number GC044903. (Exh. 1.)[1/] Real parties in interest Bihn Thai Tran, Dan Cao and Frank Luong are plaintiffs in that action. (*Ibid.*) Respondent Los Angeles County Superior Court is the court exercising jurisdiction over that action. (*Ibid.*)

B. Unidentified, Masked Men Approach Coffee House, Shoot Into The Premises, And Quickly Flee.

2. The underlying suit stems from a shooting at the Coffee House storefront café in San Gabriel, California. The relevant facts are undisputed:

3. On the evening of February 5, 2009, two men in dark, hooded clothing with bandanas over their faces approached the door of Coffee House and immediately began shooting. (Exh. 29, 31-32, 147.) One Coffee House patron was killed and several others were injured. (Exh. 150.)

4. The incident was over quickly: Less than a minute passed between when the gunmen first appeared and when they left. (Exh. 32, 148.) The gunmen did not say anything during the incident. (Exh. 37-38, 150.)

1/ The exhibits are each true and correct copies of the pleadings and other documents filed in the superior court. Numbers refer to the consecutively-numbered pages in the separate volume of exhibits.

5. The gunmen's identities remain unknown. (Exh. 82, 85, 86, 150.)

C. Three People Injured In The Shooting Sue Coffee House For Premises Liability And Negligence, Alleging A Single Heated Verbal Confrontation A Few Months Earlier.

6. Three patrons injured in the shooting – real parties in interest here – sued Coffee House for premises liability and general negligence. (Exh. 1.)

7. The complaint alleged that Coffee House owed a duty of care to protect patrons from unreasonable risk of harm caused by the foreseeable criminal acts of third parties; that Coffee House breached that duty; and that the breach harmed the plaintiffs. (Exh. 3-5.)

8. Although pleaded as two theories, the complaint states a single cause of action: negligent premises management. (*Ibid.*)

9. The complaint claims that the shooting was foreseeable based on a prior incident. (*Ibid.*) On the prior occasion, a man named Viet came into Coffee House, yelled at a patron named Hung for "bad-mouth[ing]" him, slammed a gun on a glass table breaking it, and left. (Exh. 42-44, 46, 151-155.) Hung was the patron killed in the later shooting. (Exh. 161.)

10. Although the complaint alleged that Viet said he would return later (Exh. 2), plaintiffs subsequently admitted that he made no such claim (Exh. 47, 155). And although the complaint alleged that the confrontation occurred one week before the shooting (Exh. 2), plaintiffs subsequently admitted that it happened *a few months* before the shooting (Exh. 227; see also 42 [plaintiff's deposition testimony that confrontation occurred "(a) few months before the shooting"], 82 [same plaintiff's declaration that it occurred "(a) month or two before the shooting"]).

11. The complaint alleged that in light of the prior incident, Coffee House owed a duty (a) to hire a security guard, (b) to call 911 when the shooting began, (c) to post a lookout in case Viet returned, and (d) to warn patrons that a man had previously been looking for Hung. (Exh. 5.)

D. Coffee House Moves For Summary Judgment Based On Lack Of Duty To Protect Against Future Third Party Crimes And Lack Of Causation.

12. Coffee House moved for summary judgment or summary adjudication. (Exh.13-14.) It argued that it had no duty to hire security guards or take other precautions because the shooting was not foreseeable. (Exh. 17-22.) It also argued that the plaintiffs could not prove causation - that is, they could not prove that any breach by Coffee House was the legal cause of the injuries resulting from the unidentified gunmen's criminal acts. (Exh. 22-24.) The motion relied on the plaintiffs' deposition testimony. (Exh. 26-47.)

13. In opposing the motion, plaintiffs relied on their own declarations and on expert declarations from two members of the Los Angeles County Sheriff's Department. (Exh. 62-80, 88-95.)

a. On the duty issue, plaintiffs asserted that the shooting by the unidentified gunmen was "very foreseeable" because of the Viet-Hung incident a few months earlier, and because of general gang activity in the San Gabriel Valley. (Exh. 73-74.) They argued that these circumstances created a jury question as to whether Coffee House had a duty to hire an armed security guard, or to take other measures including (1) excluding Hung from the premises, (2) warning patrons that Viet had slammed a gun onto a table in front of Hung, and (3) reporting the prior incident to law enforcement. (Exh. 73-78.)

b. One of the plaintiffs asserted that he "understood" that Viet and Hung were both gang members. (Exh. 83, 228.) He could not say if they were from the same or rival gangs. (Exh. 83.) That plaintiff admitted, however, that since the initial incident both Hung and Viet had patronized Coffee House with no apparent friction. (*Ibid*.)

c. Another plaintiff said that he had heard that the motive behind the shooting was a gambling debt owed by Hung. (Exh. 38.)

d. Plaintiff's expert Kimberly Ponce declared that "[i]nforming local law enforcement of gang activity prior to a gang member committing a serious crime would, in all probability, bring retribution from the gang member(s). . . . Even the regular appearance of local law enforcement personnel can damage the reputation of the business in the community. This is not good for business and ultimately affects the business' revenue tremendously." (Exh. 88-90.)[2/]

e. On the causation issue, plaintiffs argued three things:

(1) Two plaintiffs did not know about the prior Viet-Hung incident; had Coffee House told them, they would not have patronized Coffee House; they also would have avoided Hung (Exh. 79);

(2) The one plaintiff who knew about the prior incident *assumed* that any friction between Viet and Hung had been worked out because he saw them both thereafter at Coffee House (Exh. 80);

(3) According to plaintiffs' expert Ban Nguyen, had the prior incident been reported to law enforcement "*[i]f* gang affiliations were suspected, the officer taking the report *could have* requested the assistance of officers specializing in gangs and gang activity to

---

2/ The trial court sustained Coffee House's objection to the final two paragraphs of Ponce's declaration, which are not summarized here. (See Exh. 210-213, 256.)

investigate." (Exh. 93., italics added.) Such officers "are adept of squelching potential problems . . . ." (*Ibid.*) Nguyen further generically opined that "[a] stronger law enforcement presence, in any form, would certainly have created a very visible and immediate warning to anyone considering a criminal attack in the premises. This, in turn, would have likely prevented any further criminal activity being perpetrated at or near the business." (*Ibid.*) Nguyen did not supply any facts as to why this particular attack occurred or who carried it out.

f. Plaintiffs argued that, on this evidence, "it is more probable than not that had Defendant just spoken with its regular customers or given them a simple warning about that incident, such a simple act would have prevented the Plaintiffs' injuries." (Exh. 80.) Likewise, plaintiffs argued that reporting the prior incident to law enforcement, in and of itself, would more likely than not have prevented the later shooting. (Exh. 252-253.)

14. In reply, Coffee House emphasized plaintiffs' undisputed testimony that the shooting occurred suddenly, without commotion or warning. (Exh. 197-198, 201.) They argued that plaintiffs had not established that security measures proposed by their expert would more probably than not have prevented such a sudden, unexplained shooting. (Exh. 198-200.)

E. The Trial Court Denies Summary Judgment.

15. The trial court denied summary judgment. (Exh. 256.) In doing so, it sustained in part, and overruled in part, Coffee House's evidentiary objections to plaintiffs' experts' declarations. (*Ibid.*) It overruled Coffee House's objections that Nguyen's expert declaration

regarding causation was speculative and lacked foundation. (Exh. 216-223, 256.)

16. The court found that Coffee House owed a duty to protect plaintiffs from criminal acts of third parties. (Exh. 256.) In particular, it held that Coffee House owed a duty (1) to exclude Hung from the premises and (2) to report the prior Viet-Hung incident to police. (*Ibid.*)

17. The court reasoned that those measures "are neither financially or socially burdensome" and that "[i]f these measures were taken, especially, preventing Hung from being present, it is reasonably probable that the incident would not have occurred." (*Ibid.*)

18. The trial court also found a triable issue of fact as to whether Coffee House's conduct was a substantial cause of plaintiffs' injuries because "Officer Nguyen's declaration states what law enforcement would have done if notified of the previous incident." (*Ibid.*)

F. The Trial Court's Denial Of Summary Judgment Was Clearly Wrong.

19. Defendants are entitled to summary judgment when plaintiffs' cause of action has no merit. (Code Civ. Proc., § 437c, subds. (a), (c).) Defendants may establish that a cause of action has no merit by showing that the plaintiff cannot prove one or more of its elements. (Code Civ. Proc., § 437c, subd. (p)(2).) The burden then shifts to the plaintiff to show a triable issue of material fact. (*Ibid.*) If the plaintiff cannot establish a triable issue of material fact, the court *must* grant summary judgment. (*Fisherman's Wharf Bay Cruise Corp. v. Superior Court* (2003) 114 Cal.App.4th 309, 320.)

20. Summary judgment is especially appropriate in cases like this involving a business's duty to prevent third party crime. (E.g., *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1185, disapproved on other grounds by *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853, fn. 19 and by *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527, fn. 5.)

21. The trial court's summary judgment denial was erroneous because plaintiffs cannot prove multiple aspects of their claim:

a. *Duty.*

(1) A business owner has no obligation to protect against third party crime absent a high degree of foreseeabilty. (*Wiener v. Southcoast Childcare Centers* (2004) 32 Cal.4th 1138, 1150; see also *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 532 ["extraordinarily high degree of foreseeability"].) Such foreseeability can rarely, if ever, be established without prior similar incidents. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 679, disapproved on other grounds by *Reid v. Google, Inc., supra*, 50 Cal.4th at p. 527, fn. 5.)

(2) A verbal confrontation where a gun is slammed down and *no* threat is made to return is not a prior similar incident to an unannounced shooting by masked gunmen. (*Sharon P., supra*, 21 Cal.4th at pp. 1191-1194,.) The confrontation does not make the shooting a few months later reasonably foreseeable. (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1221 [prior gang activity in area surrounding mobile home park insufficient to make particular gang confrontation in park foreseeable].)

(3) Even where future harm is somewhat foreseeable, a business has no obligation to take on unduly burdensome measures to prevent crime. (*Id.* at pp. 1213-1214.) The measures proposed here – hiring security guards, operating a video surveillance system,

excluding from the premises the *victim* of a prior confrontation, or advertising prior confrontations as a warning to customers to stay away – are high burdens not commensurate with the at best limited foreseeability here. (*Id.* at pp. 1216-1222 [no obligation to refuse to rent to or to evict suspected gang members]; *Sharon P., supra*, 21 Cal.4th at pp. 1189-1195 [no duty to provide guards or video monitoring].) Nor does a business owner have an obligation to notify law enforcement of one-time incidents that do not involve any threat of future action, a step that plaintiffs' own expert said could have negative consequences to the business (Exh. 89 ["Informing local law enforcement of gang activity prior to a gang member committing a serious crime would, in all probability, bring retribution from the gang member(s)"].)

b. *Causation*.

(1) The Nguyen declaration is premised on surmise and conjecture as to what measures, in fact, would have been taken if the Viet-Hung incident had been reported to law enforcement.

(2) Because the attackers, their motives, and their determination are unknown, the expert's claim that a heightened law enforcement presence would have deterred future crime establishes nothing as to whether *this* crime would have been prevented. (*Castaneda, supra*, 41 Cal.4th at p. 1223; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 775-777, 781.)

(3) For the same reason, the trial court abused its discretion in overruling Coffee House's objections that Nguyen's declaration was speculative and without foundation. (Exh. 216-223, 256.) Nguyen declared that "*[i]f* gang affiliations were suspected," certain law enforcement steps might be taken. (Exh. 93, italics added.) But there is no evidence that gang affiliation would have been suspected had the initial

encounter been reported. Even then, Nguyen only says that a law enforcement officer "could have" requested the involvement of specialized gang officers. (*Ibid.*) There is no testimony or foundation that such involvement would have been requested or resulted simply from the report of a single, angry confrontation about being "bad-mouth[ed]" and the display of a weapon. Absent a showing that such incidents are so uncommon in the San Gabriel Valley, and that enough law enforcement resources are available, to trigger heightened attention, a suggestion that one isolated incident would have triggered a material increase in law enforcement presence is complete conjecture. And, even assuming that whole speculative chain, there is no basis to believe that any measures taken would have prevented this particular crime by unknown assailants for unknown reasons. (*Saelzler, supra*, 25 Cal.4th at pp. 775-777, 781.)

G. Writ Relief Is Necessary And Appropriate To Prevent An Unnecessary Trial.

22. The denial of summary judgment is reviewable by writ petition. (Code Civ. Proc., § 437c, subd. (m)(1); see *Travelers Casualty & Surety Co. v. Superior Court, supra*, 63 Cal.App.4th at p. 1450; *Benson v. Superior Court, supra*, 185 Cal.App.4th at p. 1183; *Hall v. Superior Court, supra*, 108 Cal.App.4th at p. 709.) Such review is necessary here to prevent a wasted trial on claims that fail as a matter of law. (*Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1037.)

23. The trial court's ruling denying summary judgment is a clear error of law and writ relief is appropriate for that reason as well. (*Babb v. Superior Court, supra*, 3 Cal.3d at pp. 850-851.)

24. The issues of a business's duty to exclude from the premises the targets of prior intimidation or harassment, to warn customers to stay

away from the business premises because of prior incidents, or to report to law enforcement all incidents on their premises of threatened violence directed at patrons, pose substantial legal issues of widespread interest warranting writ review. (*Brandt v. Superior Court, supra*, 37 Cal.3d at p. 816.)

H. This Petition Is Timely.

25. The trial court entered its summary judgment order on June 27, 2011. (Exh. 256.) The clerk served the order by mail. (Exh. 257; Code Civ. Proc., § 437c, subd. (m)(1) [extending the normal twenty day filing period by five days when notice is served by mail].) The trial court extended the time to file this petition by ten days, as permitted by statute. (Exh. 261; Code Civ. Proc., § 437c, subd. (m)(1).) Petitioner is filing this petition within the requisite thirty-five day period. The petition therefore is timely.

PRAYER

Wherefore, petitioner Coffee House prays that this court:

1. Issue a peremptory writ in the first instance directing the trial court to vacate its June 27, 2011 order denying Coffee House's motion for summary judgment and instead enter a new order granting the motion; or

2. Issue an alternative writ, order to show cause, or other order directing the trial court either to vacate its June 27, 2011 order denying Coffee House's motion for summary judgment and instead enter a new order granting the motion or to show cause why it should not do so, and thereafter direct the trial court to vacate its June 27, 2011 order denying Coffee House's motion for summary judgment and instead enter a new order granting the motion;

3. Award Petitioner its costs in this proceeding; and

4. Grant such other and further relief as may be just and proper.

Dated: July 21, 2011

Respectfully submitted,

EARLY, MASLACH & VAN DUECK

GREINES, MARTIN, STEIN & RICHLAND LLP

By ______________________________
Alana H. Rotter

Attorneys for Petitioner COFFEE HOUSE

VERIFICATION

I, John Notti, declare:

I am an attorney duly licensed to practice law in California. I am associated with the law firm of Early, Maslach & Van Dueck, attorneys of record for petitioner Coffee House, in this proceeding. I have reviewed and am familiar with the records and files that are the basis of this petition. I make this declaration because I am more familiar with the particular facts, i.e., the state of the record, than is my client. This petition's allegations are true and correct.

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

Executed on July ___, 2011, at Los Angeles, California.

____

MEMORANDUM OF POINTS AND AUTHORITIES

I.

A Single Verbal Confrontation Between Patrons, Even One Where A Firearm Is Brandished, Does Not Impose Liability On A Business For An Unannounced Hail-Of-Gunfire Attack A Few Months Later.

A. The Existence Of A Business's Duty To Protect Against Third Party Criminal Attacks Is A Question Of Law Properly Resolved On Summary Judgment.

"[T]he existence and scope of a property owner's duty to protect against third party crime is a question of law for the court to resolve." (*Castaneda, supra*, 41 Cal.4th at p. 1213; see *Wiener, supra*, 32 Cal.4th at p. 1146 ["The existence of a duty and foreseeability, when analyzed to determine the scope of a duty, is a question of law that an appellate court will determine de novo"].) Because the duty issue is one of law, it is properly resolved on summary judgment. (*Sharon P., supra*, 21 Cal.4th 1181 [affirming summary judgment based on absence of duty determination]; *Ann M., supra*, 6 Cal.4th 666 [same].)

B. A Business's Duty To Protect Against Third Party Criminal Attacks Is Closely Circumscribed.

"[A] duty to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated." (*Ann M., supra*, 6 Cal.4th at p. 676.) The decision whether to impose such a duty requires balancing the foreseeability of the harm against the burden of the duty to be imposed. (*Id.* at pp. 678-679.) A court reviewing a claim that a business is liable for the consequences of a third party's criminal act, thus, engages in a multi-step analysis. First, the court

must identify the measures that plaintiff asserts should have been taken and analyze how financially and socially burdensome they would be to businesses. (*Castaneda, supra*, 41 Cal.4th at p. 1214.) Second, the court must identify the nature of the third party criminal conduct that allegedly could have been prevented, and assess how foreseeable it was. (*Ibid.*) Finally, the court must compare the burden and the foreseeability to determine the scope of the duty, if any. (*Ibid.*)

"[I]n the case of criminal conduct by a third party, an extraordinarily high degree of foreseeability is required to impose a duty on the landowner, in part because 'it is difficult if not impossible in today's society to predict when a criminal might strike.'" (*Melton, supra*, 183 Cal.App.4th at p. 532; see also *Castaneda, supra*, 41 Cal.4th at pp. 1218-1219, 1220-1221 [requiring "heightened foreseeability"]; *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 240 [same].) That heightened foreseeability "rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises." (*Ann M.*, *supra*, 6 Cal.4th at p. 679; see *Sharon P., supra*, 21 Cal.4th at pp. 1191-1194 [prior bank robberies in building not sufficiently similar prior incidents to trigger duty to protect]; *Castaneda, supra*, 41 Cal.4th at p. 1221 [two prior incidents of gang related gun violence at mobile home park insufficient to show particular suspected gang member residents likely to be violent].)

The less foreseeable the harm, the lower the burden a court will place on a business to prevent it; the more certain the likelihood of harm, the higher the burden a court will impose. (*Castaneda*, *supra*, 41 Cal.4th at p. 1214.) Likewise, the higher the burden of preventing future harm, the higher the degree of foreseeability that is required. (*Ann M., supra*, 6 Cal.4th at pp. 678-679.)

In assessing duty, however, is important to keep in mind that duty is not just a retrospective judgment about a particular defendant's conduct in a particular case. Rather, as the "expression of the sum total of . . . considerations of policy" (*Dillon v. Legg* (1968) 68 Cal.2d 728, 734), the duty calculus necessarily encompasses prescribing *future* conduct by businesses and the public at large. Thus, the relevant considerations include "the policy of preventing future harm, the extent of the burden to the defendant and *consequences to the community* of imposing a duty to exercise care with resulting liability for breach . . . ." (*Castaneda, supra*, 41 Cal.4th at p. 1213, italics added, citations and internal quotations omitted.) If the measures plaintiffs advocate would, across all business owners in the aggregate, constitute an undue burden on society in light of the foreseeability and moral blame attributable to the defendant, then no duty can exist. (See *id*. at pp. 1216-1217 [analyzing consequences for *all* landlords of rule requiring landlords not to rent to gang members or to affirmatively check on prospective tenant's gang status].)

Accordingly, we now discuss the foreseeability of a fusillade of gunfire from unknown individuals based on a verbal confrontation a few months earlier, and then the social and financial burden of each of the measures that plaintiffs propose.

C. A Business Would Not *Reasonably* Foresee A Months-Later, Unannounced Assault By Unknown Hooded, Masked Gunmen Just Because There Is A Verbal Confrontation Involving A Patron.

The relevant facts here are undisputed. There was an angry confrontation when a man entered Coffee House, accused a patron (Hung) of bad-mouthing him, and brandished a weapon. From that fact alone,

would one reasonably foresee that a few months later, two unidentified men would show up and without warning spray Coffee House with gunfire? To pose the question is to answer it. Of course not. An angry confrontation – even one where a firearm is brandished – is not likely to result in a fusillade of bullets a few months later. (See *Brake v. Comfort Inn* (Ohio Ct.App. 2002, 2002-Ohio-7167) 2002 WL 31866170 [nonpub. opn.] [violence by patrons in parking lot was not foreseeable from another patron's threat earlier in the evening to "come across the bar" when bartender stopped serving him liquor].)[3/] To the contrary, a future unprovoked armed assault would be highly unlikely.

Plaintiffs claim that because Hung was killed in the later gunfire, there must be a common link. There is no evidence to support that claim. As long as the shooters remain unidentified, there is no way to know whether Hung's death was a coincidence or a common factor. Likewise, plaintiffs claim that this was reasonably anticipated gang violence. Again, that is completely unknown. There is *no* cognizable evidence that Hung was a gang member. There is just one plaintiff's supposed "understanding" (Exh. 83, 228), which is not evidence of anything. Nor is there any evidence that the shooters were gang members or had a gang-related motive. The only "evidence" of motive is that one of the plaintiffs heard that Hung owed a gambling debt. (Exh. 38.) The reality is that the assailants' identities and motive are unknown.

But even accepting plaintiffs' speculation, their hypothesized scenario is that one gang member approached another, yelled at him, and slammed a weapon down. From those facts alone, is a reasonable person to foresee that unknown persons will show up a few months later and, for

---

3/ Pursuant to California Rule of Court, rule 8.1115(c), a copy of *Brake v. Comfort Inn* is attached to this petition.

unknown reasons, fire indiscriminately in an attempt to kill the victim of the first verbal assault? The chain of logic is too tenuous to suggest a likelihood, or even a reasonable probability, that the one event led to another.

There are lots of heated arguments. Sometimes those arguments are among acquaintances, sometimes they are among gang members, sometimes they are among people who used to be romantically involved. Do such arguments ever escalate into further violence? Sometimes, but not predictably. And it is certainly not predictable that unknown third parties will kill one of the disputants a few months later by firing indiscriminately and without warning into a crowded place.

Plaintiffs' own undisputed testimony also establishes another mitigating factor here: The two disputing patrons continued to come to the café for a few months after their confrontation with no further incident. (Exh. 83.) Thus, even if future violence was initially foreseeable, that foreseeability diminished with the passage of time and their repeated appearances without violence.

Just because one thing happens after another does not mean that the second event was foreseeable. Even someone being a gang member (which is merely speculative here) combined with the prevalence of gang violence in the area does not create enough foreseeability to require a landowner to remove that person from the premises. (*Castaneda*, *supra*, 4 Cal.4th 1205.)

Melton v. Boustred, supra, 183 Cal.App.4th 521, is on-point. There, the defendant homeowner broadcast on the Internet an open invitation to attend a free party with music and alcohol. Plaintiff was injured in a physical confrontation at the party. Rejecting a duty, *Melton* held it insufficient to argue that "'anyone with common sense'" would know that an open Internet invitation would attract people likely to commit violent

crime. (*Id*. at p. 538.) "Common sense is not the standard for determining duty. [Citation.] Nor is hindsight. [Citations.]" (*Ibid.*) The fact that random, violent crime is part of today's society "does not make a particular criminal act foreseeable for purposes of a duty analysis." (*Ibid.*) The shooting here was no more foreseeable – probably less so – than the violent, party in *Melton*.

D. Plaintiffs' Proposed Measures Have Substantial Social And Financial Consequences For Coffee House, Other Businesses, And The Public With Little Certainty Of Avoiding Harm.

Balanced against the limited foreseeability of the masked shooting here are the measures that plaintiffs claim Coffee House should have taken: (1) hiring guards, (2) excluding the victim, Hung, from its premises, (3) warning customers of the earlier confrontation, and (4) reporting the prior confrontation to law enforcement. As we now discuss, none of these measures can be justified.

1. Coffee House owed no duty to hire guards or have video cameras.

Requiring an establishment to hire guards is an extremely burdensome measure that can only be justified in the most compelling circumstances. (*Ann M., supra*, 6 Cal.4th at p. 679; *Wiener, supra*, 32 Cal.4th at p. 1147.) That would appear to be particularly true given the nature of the business here – a storefront café. There's no high value commodity to justify the cost. Meanwhile, the presence of guards alone is likely to discourage business.

It is also unlikely that guards would have prevented this incident. Two hooded, masked men showed upon and started shooting without warning. (Exh. 34, 37-38, 147, 149.) The whole incident was over in a minute. (Exh. 32, 148.) There was nothing an unarmed guard could have done. (See *Castaneda, supra*, 41 Cal.4th at pp. 1222-1223 [no evidence that security guard would have deterred one gang member from entertaining another in his home, "nor does common experience suggest any such effect was likely"].) Nor is there evidence that an armed guard - a requirement that would be even more burdensome because of the training and risk involved - would have deterred or stopped the lightning-quick assault here.

As an alternative, plaintiffs claim that Coffee House should have had, or at least purported to have, video monitoring. *Sharon P., supra*, 21 Cal.4th at pp. 1195-1196, addressed and rejected the very same argument. Video monitoring is not effective unless there is a person monitoring the camera, and even then, it does not deter all crime. (*Id.* at p. 1196.) Nor is there any reason to believe that video cameras would have deterred the specific shooting here. The gunmen were hooded and masked. (Exh. 31-32, 37, 147.) No one was going to be able to identify them on tape.

Not surprisingly, the trial court did *not* identify hiring guards or having video cameras as within the scope of Coffee House's duty. (See Exh. 256.)

2. Coffee House and other businesses owe no duty to exclude the victims of prior harassment from their premises.

The trial court relied primarily on the theory that Coffee House owed a duty to ban *the victim* of the earlier confrontation, Hung, from its premises. (Exh. 256.) Arguably, *if* Hung was the target of the assailants, then his absence would have prevented this particular shooting. But no case holds that a business owes a duty to exclude a *victim* from the premises. That would be an undue burden on businesses. Indeed, the Supreme Court has held that a property owner does not owe a duty to exclude even suspected gang members who later turn out to be assailants. (*Castaneda, supra*, 41 Cal.4th at p. 1210 [observing that such a duty would encourage discrimination "and would place landlords in the untenable situation of facing potential liability whichever choice they make"].) A business owner's obligation to exclude potential *victims* must be even less.

There is no evidence that Hung had ever engaged in violence. The only evidence is that *once*, a few *months* earlier, a person had threatened Hung with a gun for "bad-mouth[ing]" him. (Exh. 43-46, 82-83, 152-155.) Are business owners across this State now under a duty to exclude every person who has been threatened or every party to a verbal altercation? What about women who are threatened by former boyfriends or husbands? Must they excluded, too? Certainly ex-boyfriends or ex-husbands could come back with a gun someday.

The societal burden of such a rule is heavy. First, this blame-the-victim approach means that those who are harassed suffer doubly – from the harassment and threats and from being excluded from public premises. Second, the burden on business owners is huge. Hung is far from the only

person who has been in a verbal altercation or been threatened in a restaurant. Must businesses now exclude all of those persons?

Plaintiffs might argue that Hung is different because one of them "understood" that he was a gang member. Suspicion and proof of gang affiliation are different things. (See *Castaneda, supra*, 41 Cal.4th at pp. 1218-1219.) But even if Hung were a gang member, he is still entitled to equal protection of the law, and to be in a public place.

And, of course, just as in *Castaneda*, a business owner who excludes someone from the premises because of his victim status faces liability for violating the Unruh Civil Rights Act, Civil Code section 51. (See 41 Cal.4th at pp. 1216-1217; *Orloff v. Los Angeles Turf Club* (1951) 36 Cal.2d 734, 741 [reputation or suspicion of criminal tendencies or "mere suspicion based on past conduct and alleged reputed activities . . . or on conversations . . . with persons considered questionable" did not justify expulsion from a business establishment].)

Nor is the issue here one of excluding someone from the premises for a short time until tempers calm down. The attack here came a few months after the prior confrontation, and after both Hung and Viet had been back on the premises without incident. (Exh. 42, 83, 227.)

The societal burden of an exclude-the-victim rule would be exceedingly high.

3. Coffee House and other businesses owe no duty to warn customers that a patron suffered a threatening verbal confrontation a few months earlier.

Two plaintiffs hypothesize that instead of excluding Hung, Coffee House could have warned them about the prior incident or the dangers of

being at the same table as Hung.[4/] Again, however, the burden is substantial.

An obligation to warn individuals not to associate with Hung, again, would unfairly blame the victim. And a business owner who broadcasts such a "warning" faces the prospect of at least a lawsuit, if not liability, for defamation, infliction of emotional distress, or the like. If the obligation is instead to warn vaguely of some past altercation, the warnings will be either very burdensome or of little use: commercial suicide, if the idea is to keep customers away, or pointless, if the idea is merely to satisfy a disclosure obligation.

And how are business owners to effectively communicate such a warning? Do they have to post a notice to the effect that: "There have been 5 altercations in this establishment in the last 12 months, 2 involving the brandishing of weapons, 1 involving physical violence"? If that doesn't drive off customers, what will?

The flip side of the equation is that if every business warns about every altercation on the premises, the public is likely to become inured to such warnings ("warning fatigue") and they will have no practical effect, akin to the ubiquitous Proposition 65 warnings that appear everywhere from gas pumps to building entrances. (See generally *Consumer Defense Group v. Rental Housing Industry Members* (2006) 137 Cal.App.4th 1185, 1210-1217.)

Plaintiffs would say that if only this one business had warned these two plaintiffs about this one prior incident (the third already knew), that burden would have been low (other than driving away customers, that is). But that is not the test. The test is what are the "*consequences to the*

4/ The third plaintiff, Luong, observed the earlier incident, and continued to frequent Coffee House anyway. (Ex. 82-83.)

community of imposing a duty to exercise care" across the board in this type of situation. (*Castaneda*, *supra*, 41 Cal.4th at p. 1213, italics added, citations and internal quotation marks omitted.) Those consequences are broad and burdensome.

4. Coffee House and other businesses owe no duty to report to law enforcement every potentially threatening confrontation between patrons.

Finally, plaintiffs suggest that a business owner owes a duty to report every altercation to law enforcement. Again, the suggestion is misplaced.

Reporting an altercation to law enforcement is not risk-free. Plaintiffs' own expert testified that if Viet was a gang member, Coffee House would have been subject to retaliation from gang members for reporting the earlier incident. (Exh. 89.) According to the expert, reporting the incident would have been "not good for business and ultimately [would have] affect[ed] the business' revenue tremendously." (*Ibid*. ["Even the regular appearance of local law enforcement can damage the reputation of the business in the community"].) When law enforcement can't protect the public from retaliation, it is hardly fair to place the burden on businesses to accept those risks and to report every altercation.

Obviously, Hung, the victim, was free to report the incident to law enforcement. Whether he did or not is unknown. That means that the duty that plaintiffs suggest is that a business has to report an altercation regardless whether the victim wants it to do so.

If a business must report every altercation or argument, even if the parties have apparently resolved their issues, law enforcement will face a substantial burden responding and investigating every such incident. And, what will be the efficacy of law enforcement involvement? Could law

enforcement have stopped the murder here? Who knows. We don't even know who the assailants were. Would law enforcement have been patrolling more frequently at Coffee House on the night of the shooting, or on the scene at the moment of the shooting, based on one altercation a few months earlier? That's complete speculation, and highly unlikely.

The "report to law enforcement" duty plaintiffs propose is fraught with the same burdens as the others plaintiffs propose.

5. Plaintiffs' proposed measures are amorphous because there is no defined trigger upon which a business owner can rely.

There is another problem with plaintiffs' proposed combination of measures that a business should have to undertake. Determining duty requires a balancing foreseeability of the crime against "the 'burdensomeness, vagueness, and efficacy' of the proposed security measures. [Citation.]" (*Ann M., supra*, 6 Cal.4th at pp. 678-679.) The vagueness of the proposed security measures here includes when they are triggered. What confrontations between patrons trigger obligations to exclude patrons, to warn others, to report to law enforcement? Is it only altercations where, unlike here, someone threatens to return to do violence? Is it any time a weapon is brandished? What about domestic arguments, which are often the most dangerous in terms of the prospect for escalating into violence? (See *People v. Brown* (2011) 192 Cal.App.4th 1222, 1235-1236 [in criminal domestic violence prosecutions, Evidence Code section 1109 permits the introduction of prior acts of domestic violence based on legislative findings that domestic incidents tend to escalate over time].) And, for how long does a business have to exclude a patron-victim or warn of a prior confrontation? Days? Weeks? Months (as claimed here)?

The duty that plaintiffs assert, and that the trial court imposed, is standardless. Businesses have no means of knowing when the duty is triggered, unless it is triggered with every confrontation between patrons. In that event, the burden is tremendous.

* * *

Plaintiffs propose, and the trial court imposed, a duty on Coffee House to take measures that are standardless and that impose a substantial burden on the individual business here, in the aggregate, and on harassment *victims*. Those measures must be balanced against the exceedingly limited foreseeability of a months-later attack by unknown assailants with unknown motives. That balance does not begin to reach the heightened tipping point necessary to impose a duty on a business to protect its patrons from violent third party crime.

II.

As A Matter Of Law, Plaintiffs Cannot Establish That Any Breach Of Duty By Coffee House Caused Their Injuries.

In addition to duty, causation is also an essential element of plaintiffs' claim. (*Saelzler, supra,* 25 Cal.4th at p. 772.) Plaintiffs cannot show causation here. That inability, as a matter of law, to establish causation is an independent ground compelling summary judgment. (*Ibid*.; Code Civ. Proc., § 437c, subds. (a), (o)(1).)

A. There Is No Nonspeculative Evidence That Reporting A Single Verbal Incident To Law Enforcement A Few Months Earlier Would Have Prevented Plaintiffs' Injuries.

Two unknown masked assailants caused the injuries here for unknown reasons. Plaintiffs emphasize that Hung was killed. One could *speculate* that he was the target of the shooting, but even that's not clear. On this record, no one can know what the motive of the shooting was. It could well have been unrelated to the prior altercation. A few months had passed. The first incident concerned "bad-mouth[ing]" Viet. The reason for the second was either a gambling debt (Exh. 38), or unknown.

Saelzler, supra, 25 Cal.4th 763, is illustrative. There a package delivery person was assaulted at an apartment complex. She complained of lax security. But her assailants were unidentified. As a result, she could not show that the absence of increased security at each entrance or functioning locked gates was a substantial factor in causing her injuries. (*Ibid*.; *Padilla v. Rodas* (2008) 160 Cal.App.4th 742 [where unknown whether child entered pool through unlocked gate or from house, causation speculative].) As the Supreme Court summarized, "'[a] mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for defendant.' [Citation.]" (*Id.* at pp. 775-776.)

So, too, plaintiffs and the trial court here relied on an expert's claim that reporting the confrontation several months earlier might have prevented the murderous assault. But as in *Saelzler*, the assault could have occurred regardless of all but the most extreme security measures. Plaintiffs need

evidence that this particular crime – masked men intent on spraying the café with gunfire – would have been prevented.

Nor does the supposed expert testimony stand up to examination. "[A]n expert's speculative and conjectural conclusion that different measures might have prevented an injury cannot be relied upon to establish causation." (*Thompson v. Sacramento City Unified School Dist.* (2003) 107 Cal.App.4th 1352, 1373 [trial court did not err in excluding expert declarations that opined on causation without a factual basis].) That is exactly what plaintiffs attempted here.

Plaintiff's expert Nguyen said that "*[i]f* gang affiliations were suspected," specialized gang officers *might* become involved. (Exh. 93, italics added.) But the only evidence of gang affiliation was one plaintiff's after-the-fact testimony as to his own understanding. (Exh. 83, 228.) Even then, Nguyen says only that gang officers and other resources *could have been* requested or deployed. (Exh. 93.) He does not say that it is more probable than not that they *would have been* deployed based on the confrontation here. Nor does Nguyen say that gang officers more probably than not would have averted this attack. He cannot say that, because no one knows who the attackers were or the reason for their attack. An expert's testimony is only as good as the facts upon which it is based. (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510.) Here, the relevant facts are unknown.[5/]

Nguyen likewise claims that "[a] stronger law enforcement presence, in any form, would certainly have created a very visible and immediate

---

5/ There's another problem with Nguyen's opinion: He provides no foundation for knowledge of how the San Gabriel Police Department would have responded to a report filed and whether any response would have prevented the incident. (Exh. 217 [Coffee House's evidentiary objection].)

warning to anyone considering a criminal attack in the premises. This, in turn, would have likely prevented any further criminal activity being perpetrated at or near the business." (Exh. 93.) Would it have prevented this crime? He can't know that, without knowing who the attackers were and their motives.

Would investigating the prior incident likely have made a difference? Who knows. Just because the shootings took place after the confrontation does not mean that the two are related, especially given the lapse of several months between the two events. "'[T]he logical fallacy of "post hoc, ergo propter hoc" (after the fact, therefore because of the fact)' does not carry the day." (*Miranda v. Bomel Const. Co., Inc.* (2010) 187 Cal.App.4th 1326, 1339.) To show causation – to show that something that law enforcement might have done about the first incident would have prevented the later attack – Nguyen would have to have some *fact* that the two were related. There is none.

The Nguyen declaration relies entirely on impermissible speculation and, thus, cannot establish a fact dispute as to causation. (See *Saelzler, supra*, 25 Cal.4th at p. 776 [no triable causation issue established by expert's opinion that certain measures would have prevented an attack, because without knowing the assailants' identity, claim as to efficacy of proposed measures was speculative]; *Miranda v. Bomel Const. Co., Inc., supra*, 187 Cal.App.4th at p. 1339 [expert's declaration that plaintiff's "Valley Fever" could have been caused by fungus stirred up from dirt

disturbed on neighboring property properly excluded as speculative where no evidence of actual origin of fungus].)[6/]

The bottom line is that Nguyen's declaration is too tenuous to create a triable issue on whether additional measures would have prevented the murderous assault by masked, hooded gunmen who opened fire without warning and were gone in the space of a minute. (See *Wiener, supra*, 32 Cal.4th at pp. 1149-1150 ["if a criminal decides on a particular goal or victim, it is extremely difficult to remove his every means for achieving that goal"].) Plaintiffs have not met their burden of establishing "*by nonspeculative evidence*, some actual causal link" between their injury and Coffee House's alleged failure to provide adequate security measures. (*Saelzler, supra*, 25 Cal.4th at p. 774, italics added.)

B. Because The Identity And Motives Of The Assailants Are Unknown, Plaintiffs Cannot Establish That Excluding The Patron Targeted In The Earlier Confrontation Would Have Prevented The Shooting.

Plaintiffs' theory, adopted by the trial court (Exh. 256), was that if Coffee House had barred Hung from its premises, the crime would not have occurred there. Under plaintiffs' theory, Hung would have been shot elsewhere and some other bystanders would have been injured.

But there's a basic problem with plaintiffs' premise. There's no evidence – just speculation and conjecture – that Hung was the target of the attack. For all that is known, Coffee House, or even plaintiffs, were the target and Hung was an innocent bystander. It is *possible*, that Hung was

---

6/ For these same reasons, the trial court abused its discretion in overruling Coffee House's objections to Nguyen's testimony as speculative and lacking foundation. (Exh. 256.)

the target. But that is just one of many possibilities. "'A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for defendant.' [Citation.]" (*Saelzler, supra*, 25 Cal.4th at pp. 775-776.)

Because the identity and motives of the attackers are unknown, plaintiffs cannot prove that Hung was the target. And, if Hung was not the target, barring him from the premises would have made no difference.

C. There's No Nonspeculative Link Between Any Absent Warning And Plaintiffs' Injuries.

Plaintiffs' final theory, a theory *not* embraced by the trial court (see Exh. 256), is that Coffee House had a duty to warn plaintiffs about the prior confrontation. But even it there were a duty under that theory (as discussed in Section I.D.3., there is not), it founders on causation.

Plaintiff Luong *witnessed* the Viet-Hung confrontation. (Exh. 42-44, 46.) Coffee House could not have caused him injury by not warning him about something he already knew.[7/]

Plaintiff Cao's position is essentially no different. He claims that he would've stayed away if he had been warned. (Exh. 84-85.) But he admitted that he has patronized Coffee House *since the shooting*. (Exh. 85.) He says he feels safe now because there is a monitor behind the counter

---

7/ Luong claims causation on the theory that he *assumed* that Viet and Hung had resolved their differences because he saw them post-incident at Coffee House peaceably coexisting. (Exh. 83.) He blames Coffee House for not disabusing him of that assumption. (Exh. 79-80.) (There is no evidence that Viet and Hung did *not* resolve their differences.) The irony, of course, is that Luong blames Coffee House for making the same assumption that he made.

showing live views from various angles inside Coffee House. A monitor would not have prevented the shooting by masked men. And if he's willing to go back after *actually being shot*, it is not plausible that he would have stayed away just because of a warning about a confrontation. His claim that he would not have sat with Hung has the same problem as set out in the prior section. There is no *evidence* that Hung was the target of the attack.

That leaves plaintiff Tran. But even he has to establish *proximate* or *legal* cause. That requires showing that a warning about Hung had some logical connection to the attack. If a defendant negligently tells plaintiff that a meeting is on Monday rather than Tuesday and plaintiff is injured in a car accident on Monday traveling to what he expects to be the meeting, the defendant's negligence in some sense is a cause of plaintiff's injury. If it hadn't been for defendant's negligence, plaintiff would not have been at the particular place and time of the accident. But no one would say that the defendant is liable for plaintiff's injuries. The defendant's negligence has no logical connection to the act causing plaintiff's injuries. So it is here. Unless the attack was somehow related to the Viet-Hung confrontation, any failure to warn has no logical connection to the operative force causing Tran's injuries. Was the murderous shooting attack related to the Viet-Hung confrontation? No one knows. Thus, there is no proximate or legal cause as to any of the three plaintiffs, including Tran.

* * *

Plaintiffs cannot establish that any omission by Coffee House was a substantial cause of their injuries. This missing causal link was a distinct, independent ground compelling summary judgment. (Code Civ. Proc., § 437c, subds. (a), (o)(1).)

CONCLUSION

The trial court clearly erred in denying summary judgment in favor of Coffee House. Writ relief is necessary to prevent a needless trial and to resolve an important question of statewide interest. This Court should issue the requested writ relief, directing the trial court to vacate its order denying summary judgment and to enter a new order granting summary judgment.

Dated: July 21, 2011

Respectfully submitted,

EARLY, MASLACH & VAN DUECK
James G. Randall
John C. Notti
Paul A. Carron

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson
Alana H. Rotter

By ______________________________________
Alana H. Rotter

Attorneys for Petitioner COFFEE HOUSE

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204 (c)(1), I certify that this petition was produced using 13-point Times New Roman type style and contains **9,505** 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: July 21, 2011

____

Alana H. Rotter