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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CHARLES E. MORRIS, IV, Plaintiff and Appellant, v. SILVINO DE LA TORRE, Defendant and Respondent.	D040278 (Super. Ct. No. GIS004607)

APPEAL from a judgment of the Superior Court of San Diego County, Luis R. Vargas, Judge. Reversed.

Estey & Bomberger and Stephen J. Estey, for Plaintiff and Appellant.

Clements & Knock and Thomas V. Clements, Debra A. Stevens, and Michael M. Linley for Defendant and Respondent.

Charles Morris filed a negligence action against Silvino De La Torre, the owner of a taco shop, arising from the criminal conduct of a gang member who seized a knife from the shop's kitchen and used it to stab Morris while Morris was in the parking lot in front of the shop. The trial court granted summary judgment in De La Torre's favor, finding the incident was not sufficiently foreseeable to impose a duty of care. Although we agree with the court's foreseeability analysis, we reverse the judgment because the court failed to distinguish between a business owner's duty to take protective measures to deter *future* criminal conduct, and the duty to respond to *contemporaneous* criminal acts occurring on property used by the business.

For reasons we shall explain, we hold De La Torre had no duty to take preventive measures such as hiring security guards, issuing warnings, or screening employees. However, because we conclude a special relationship existed between De La Torre and Morris, De La Torre's employees had a duty to take reasonable steps in response to the ongoing criminal conduct. A triable issue of fact exists as to whether De La Torre's employees breached the duty by failing to summon help for Morris. In defining the scope of this duty, we reject Morris's contention that the employees, who were in fear for their own safety, were required to refrain from complying with the gang member's demands for access to a knife.

FACTUAL AND PROCEDURAL SUMMARY

Morris filed his complaint against De La Torre and Richard and Ruth Karlson. De La Torre owned Victoria's Taco Shop, a 24-hour taco shop located in a strip mall owned

by the Karlsons.[1] On July 31, 2000, Richard Cuevas, a member of the Nestor street gang, punched Morris and started a fistfight in the parking lot in front of the taco shop. Cuevas then entered the taco shop, grabbed a knife from the taco shop's kitchen, and used the knife to stab Morris while they were in the parking lot. Cuevas also pursued and again stabbed Morris across the street from the taco shop after Morris attempted to flee.

Morris alleged De La Torre was negligent because (1) he was aware of repeated instances of violent conduct at the business and failed to take appropriate security precautions which could have prevented the attack; and (2) his employees, who were aware of the assault while it was occurring, responded to the violence by providing the assailant with a knife and failing to call the police. Morris also claimed De La Torre had a duty not to hire employees who did not have legal work status.

De La Torre moved for summary judgment, arguing that he had no duty to protect Morris against the criminal conduct of a third party, there was no breach of duty, and any breach was not the proximate cause of Morris's injuries. Alternatively, De La Torre moved for summary adjudication of issues, requesting a ruling that his employees had no duty to call 911 and that their legal status could not be considered as a factor in defining duty.

The parties' factual presentation revealed the following. At about 1:00 a.m. on July 31, 2000, Morris and four friends drove to the taco shop for food and parked in the parking lot in front of the business. The front of the taco shop is made out of glass and

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1 The Karlsons are not parties on appeal.

there is a clear view from the shop to the parking lot. A couple of Morris's friends went into the taco shop to get food, while Morris and his other two friends stayed outside. Morris, who was a regular customer, did not enter, nor did he intend to enter, the taco shop that evening. Because of a stomachache, he did want any food.

At about the same time, Cuevas and Sal De La Vega, whom Morris and his friends did not know, also pulled into the parking lot. Cuevas was shirtless and had the word "Nestor" tattooed across his stomach. Morris was sitting on the hood of the car when Cuevas confronted him, stating that the taco shop belonged to the Nestor gang and Morris and his friends could not eat there. Morris, who was not in a gang, responded that he lived in the area and was from Imperial Beach.

Morris's friends came out of the taco shop and tried to calm Cuevas and De La Vega. A loud argument erupted; then Cuevas hit Morris. A fistfight ensued in the parking lot between Morris and his friends and Cuevas and De La Vega. One of De La Torre's employees stated that the employees did not know the disturbance in the parking lot was a fight because people outside were often loud. However, contrary evidence indicated the employees had told the police they were aware of the fistfight as it was occurring.

Cuevas went into the taco shop and yelled "filero," a slang word in Spanish meaning "knife." Cuevas gained access to a large knife by passing through a three- or four-foot high door which separated the customer area from the kitchen area. The door may have had a lock on it, but it was not clear whether the lock was attached or

functioning.[2] According to the police, one of the taco shop employees stated he opened the door for Cuevas.[3] The employee indicated he became afraid when Cuevas entered the shop yelling for a knife. Another employee stated he did not say anything to Cuevas because Cuevas looked angry and had the knife in his hands. All of the employees were afraid because they did not want to be victims of a stabbing or beating.

Cuevas exited the taco shop, walked towards Morris, stabbed him two times, and then slashed car tires. The stabbing occurred in the parking lot, about 15 to 20 feet away from the front of the taco shop. After Morris was stabbed, everyone scattered. Two of Morris's friends ran to a pay phone at a nearby Jack-in-the Box and called 911. Morris ran from the taco shop but kept falling; he was able to run across the street to an elementary school, where he could not run anymore. Cuevas was behind him with the knife and stabbed him three or four more times.

A taco shop employee saw Cuevas bend over a person on the ground in the parking lot and make stabbing motions; he also saw Cuevas chasing after two people. Another employee saw Cuevas running about 20 feet behind a bleeding Morris.

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2 One employee told the police the door did not have a lock, and the employee tried to close the swinging door and told Cuevas he could not go into the kitchen area. Another employee stated the door did have a lock but it was usually left unlocked because customers used it to access the bathroom. Owner De La Torre stated the door was always locked and the bathroom was for employee use only; however, at some point he did notice the latch on the door was broken.

3 This fact is disputed. In his deposition testimony, the employee denied that he opened the door, stating that Cuevas pulled on the door to open it.

The entire incident, from the time the fight broke out until the police arrived, lasted about seven or eight minutes. After Morris's friends called 911, the police arrived in about two to four minutes.

The employees told the police they did not call the police because the telephone in the taco shop was not working. One employee stated he did not want to get involved because he was working in the United States illegally. De La Torre stated the telephone was not working on July 31, and he had Pacific Bell fix it the next day. In response to a subpoena issued by Morris to Pacific Bell for repair records, Pacific Bell produced no records indicating a repair was made. Instead, it provided documents which apparently indicate it had no record of any repair work having been done on the telephone during the period in question.

Morris had been to the taco shop two to three times a week for over four years, but prior to July 31 he had never gone there past midnight. He had never had any problems there, and was unaware that the shop was in a gang area. He submitted a declaration stating that if he had been warned of the presence of the Nestor gang in the late evening and early morning hours or of the high crime rate at the premises, he would not have gone there at that time.

De La Torre claimed he had never heard of any fights or other crime outside or inside the taco shop prior to July 31, and he had never had a problem with gang graffiti. None of the businesses in the shopping center had security guards.

Morris presented evidence that the taco shop was in an area frequented by the Nestor gang, that previous fights had occurred there, and that the police had observed the

Nestor gang congregate at the taco shop location. A security consultant observed graffiti all over the rear of the taco shop and the shopping center. An individual who lived three houses away from the taco shop stated he regularly went to the taco shop; the Nestor gang members congregated in front of the taco shop and harassed people as they tried to enter it; and he himself had been harassed by them at the taco shop. Another individual declared that on March 4, 2000, at about 1:00 a.m., she witnessed some individuals fighting in the restaurant for an extended period of time, and one of the individuals was badly bleeding. She also had witnessed other fights at the taco shop. The employees did not intervene or call the police during any of the fights.

A third individual declared that in the summer of 1999, he was at the taco shop with a group of friends and he observed a group of gang members who were drinking and appeared intoxicated. When he approached the counter to order food, a couple of the gang members challenged him about territory and demanded money, and the other gang members started getting up as if to attack him. He ran to the car and as he and his friends sped away, the gang members hit and kicked the vehicle. It appeared that the taco shop employees knew the gang members and were undisturbed by their conduct.

Police records showed that between January 1, 1998, and the July 31, 2000 attack on Morris, police activity (which apparently resulted in charges) at the strip mall included a carjacking and an automobile theft in May 2000, an automobile theft in December 1999, and a burglary in May 1998. Police records also showed telephone calls made to the police between January 1, 1999, and July 31, 2000, included three calls reporting fights or other such altercations on March 22, 2000, at 3:32 p.m., on November 24, 1999,

at 12:22 p.m., and on July 10, 1999, at 9:33 a.m. During this same time period there were eleven 911 calls, a robbery call, four burglary calls, an automobile theft call, and a vandalism call.

De La Torre's lease agreement with the shopping center owners provides that the tenant pay additional rent for the expenses of the common areas (including the parking areas), based on the tenant's proportionate share of the entire center. De La Torre's share is 20 percent of the expenses, based on the 1394 square feet his business occupies in the 7003 square foot center. The landlord is required to keep the common areas "in a clean and orderly condition, lighted and landscaped" and to repair any damage to the facilities. The tenant has nonexclusive use of the common areas, including the parking areas.

Trial Court's Rulings

The trial court granted De La Torre's summary judgment motion, ruling that the incident was not sufficiently foreseeable to impose a duty of care. The court sustained several of De La Torre's objections to the evidence submitted by Morris, but also addressed the import of the evidence on its merits notwithstanding the admissibility problems. We shall do likewise.[4] The court concluded the evidence of prior incidents offered by Morris did not show incidents similar to the assault on Morris. The court noted that the statistical evidence presented by Morris did not show any attempted murders or aggravated assaults. Further, the court concluded that the evidence that the

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4 We need not evaluate the trial court's evidentiary rulings because none of them ultimately impact our holdings on appeal.

taco shop was a gathering place for gang members and that fistfights had occurred on the premises did not make the type of violent assault that occurred foreseeable.

In ruling on Morris's motion for reconsideration, the court found there was a factual issue whether the door leading to the kitchen area was held open by the employee for Cuevas. However, the trial court concluded summary judgment was proper because the nature of the door was such that it would not have prevented Cuevas from entering the kitchen even without the employee's assistance and thus there was no causation. Further, De La Torre did not owe Morris a duty of care arising from their economic relationship because the undisputed facts showed that Morris was not a customer in that he remained outside and had no intention of entering the taco shop.

DISCUSSION

Summary judgment is proper where there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) To prevail on a summary judgment motion, the moving defendant has the initial burden to show a cause of action has no merit because an element of the claim cannot be established or there is a complete defense to the cause of action. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; Code Civ. Proc., § 437c, subd. (o).) To satisfy this burden, the defendant must present evidence which either conclusively negates an element of the plaintiff's cause of action, or which shows the plaintiff does not possess, and cannot reasonably obtain, needed evidence. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 855.) If the defendant makes this showing, then the burden

shifts to the plaintiff to set forth specific facts showing that a triable issue of material fact exists. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477.)

On appeal, we review the trial court's decision de novo, considering all the evidence presented by the parties (except evidence properly excluded by the trial court) and the uncontradicted inferences reasonably supported by the evidence. (*Merrill v. Navegar, Inc., supra*, 26 Cal.4th at p. 476.) We view the evidence in the light most favorable to the plaintiff, liberally construing the plaintiff's submissions while strictly scrutinizing the defendant's showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor. (*Saelzler v. Advanced Group 400, supra*, 25 Cal.4th at p. 768.)

Morris contends a special relationship existed between himself and De La Torre and that this imposed a duty on De La Torre to act affirmatively to protect him while he was on the premises. Morris argues there are triable issues of fact whether the employees acted reasonably when he was being attacked in plain view. He points specifically to the employees' conduct of (1) failing to call the police; and (2) opening the door to allow the assailant access to the knife. Morris also argues the stabbing incident was foreseeable, creating a duty on the business owner to take protective measures against future third party crime such as hiring a security guard, warning customers that the Nestor gang congregated at the taco shop in the late night and early morning hours, and screening employees for legal work status.

Morris's arguments present two analytically different issues concerning De La Torre's potential liability arising from the criminal acts of third parties. One argument — pertaining to the duty to hire security personnel, issue warnings, and screen employees —

concerns a business owner's duty to prevent violence *before* it has occurred. The other argument — pertaining to the failure to summon aid and the opening of the door — concerns a business owner's duty to respond to *ongoing* violence occurring at the business.

As we shall explain, we hold that the presented facts do not show a sufficient degree of foreseeability of a violent attack to warrant imposing a duty of care on De La Torre to take protective measures against future third party crime. However, because the facts show the special relationship doctrine applied to Morris, De La Torre's employees had a duty to take reasonable steps to respond to the ongoing violence being perpetrated in plain view in the parking lot used by the taco shop. Whether the employees' failure to summon aid breached that duty is a question for the jury to decide. We also hold that, under circumstances where the employees were afraid for their personal safety, the duty to respond did not include the duty to refrain from complying with the gang member's demands for access to a knife.

I. *General Principles*

To establish negligence, a plaintiff must show that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the breach was a proximate or legal cause of the plaintiff's injuries. (*Sharon P. v. Arman, Ltd*. (1999) 21 Cal.4th 1181, 1188 (*Sharon P.*), disapproved on other grounds in *Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 853, fn. 19.) The existence of duty is a question of law for the court. (*Sharon P., supra,* 21 Cal.4th at p. 1188.) To determine the existence and scope of a duty in a particular case, the courts consider such factors as the "'foreseeability of harm

to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, 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, and the availability, cost, and prevalence of insurance for the risk involved.'" (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 675, fn. 5 (*Ann M.*).) The question of foreseeability is a question of law for the court when it is being analyzed to determine the existence or scope of duty. (*Id.* at pp. 674, 678.)

As a general rule there is no duty to control or warn about the conduct of another; however, such a duty may exist where a special relationship exists, including the relationship between a landholder and invitees. (*Peterson v. San Francisco Community College Dist*. (1984) 36 Cal.3d 799, 806.) A possessor of land may be liable for injury caused by the harmful acts of third persons if the landholder fails to exercise care to discover that harmful acts are being done or likely to be done, or fails to give an adequate warning to enable visitors to avoid or protect themselves against the harm. (*Kentucky Fried Chicken of Cal., Inc. v. Superior Court* (1997) 14 Cal.4th 814, 823.) Although a landholder must act as a reasonable person to avoid harm from the attacks of third persons, the landholder is not an insurer of the visitor's safety, and thus he is under no duty to exercise care until he knows or has reason to know the acts of the third person are occurring or about to occur. (*Ibid*.) The landholder is "'required to take action when he has reason to believe, from what he has observed or from past experience, that the

conduct of the other will be dangerous to the invitee, but not if there is no reason to anticipate a problem.'" (*Id*. at p. 824.)

In recent years, the California Supreme Court has on several occasions evaluated the scope of a landholder's duty to protect persons from random, criminal conduct. The court has emphasized the necessity of balancing the foreseeability of the harm against the burden of the duty to be imposed. Thus, where the burden of prevention is great, a high degree of foreseeability is required; whereas where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree of foreseeability may be required. (*Ann M., supra*, 6 Cal.4th at p. 678-679.) That is, duty is determined by balancing the foreseeability of the criminal acts against the '"burdensomeness, vagueness, and efficacy'" of the proposed security measures. (*Id*. at p. 679.) Applying this analysis in the context of a landholder's duty to protect patrons from violent crime, the court has observed that because "random, violent crime is endemic in today's society[,] [i]t is difficult, if not impossible, to envision any locale open to the public where the occurrence of violent crime seems improbable." (*Id.* at p. 678.)

Emphasizing that landholders are not insurers of public safety, the court has held that the owner of a strip mall has no duty to hire security guards (a highly burdensome measure) absent a showing of a high degree of foreseeability of the harm, which in most cases would require evidence of prior similar incidents of violent crime on the premises.

(*Ann M., supra*, 6 Cal.4th at p. 679.)[5] In *Sharon P., supra,* 21 Cal.4th at pages 1196 and 1199, the court extended the prior similar incidents requirement to less burdensome security measures, including lighting, security cameras, and periodic inspections at an underground parking structure. (Accord, *Nicole M. v. Sears, Roebuck & Co*. (1999) 76 Cal.App.4th 1238, 1247.)

In the context of evaluating causation, the California Supreme Court held that an apartment owner (who had provided nighttime security guards in a large complex with a history of serious violent crime) could not be liable for its failure to provide daytime security guards and failure to maintain functioning locked gates without an actual causal link showing that the additional security measures would have prevented the assault on the plaintiff. (*Saelzler v. Advanced Group 400, supra*, 25 Cal.4th at pp. 770, 775-777.) The court found that the plaintiff's argument that increased security might have prevented the harm was speculative, observing that crime can occur despite the highest level of security. (*Id*. at p. 777.) The court reiterated the importance of considering the landlord's practical ability to prevent the harm when evaluating causation: "'When an injury can be prevented by a lock or a fence or a chain across a driveway or some other physical device, a landowner's failure to erect an appropriate barrier can be the legal cause of an injury inflicted by the negligent or criminal act of a third person. [Citations.] But where . . . we are presented with an open area which could be fully protected, if at all,

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5 The court in *Ann M., supra*, 6 Cal.4th at pages 677-678 reexamined and changed its pronouncement in *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, that prior similar incidents were not required to show foreseeability of third party crime.

only by a Berlin Wall, we do not believe a landowner is the cause of a physical assault it could not reasonably have prevented.'" (*Id*. at p. 779.) The court recognized that its decision required the balancing of two important and competing concerns: "society's interest in compensating persons injured by another's negligent acts, and its reluctance to impose unrealistic financial burdens on property owners conducting legitimate business enterprises on their premises." (*Id*. at p. 766.)

The Supreme Court and appellate courts have recognized, however, that liability may properly be imposed when the facts show the landholder had *actual notice of immediate danger*, and failed to reasonably respond. "When criminal conduct is ongoing, . . . the landowner or occupier [must] take such appropriate action as is reasonable under the circumstances to protect patrons." (*Kentucky Fried Chicken of Cal., Inc. v. Superior Court, supra,* 14 Cal.4th at p. 823.) Thus, liability may be imposed where the "defendant failed to act despite actual notice that [a] particular dangerous assailant was on the premises." (*Saelzler v. Advanced Group 400, supra*, 25 Cal.4th at p. 779, citing *Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225, 1238.) For example, in *Mata v. Mata* (2003) 105 Cal.App.4th 1121, 1129, the court held there were triable issues of fact whether a breach of duty occurred in a case where a tavern owner's security guard failed to call 911, failed to check for weapons, and failed to fully eject from the business premises, including the parking lot, a customer who had a history of violence and who was engaging in threatening behavior.

The courts have also considered the nature and scope of this duty to respond once violent conduct has commenced at the business. In *Kentucky Fried Chicken of Cal., Inc.*

v. Superior Court, supra, 14 Cal.4th at pages 828-829, the court held a shopkeeper has no duty to comply with an armed robber's demands for surrender of property merely because such compliance might lessen the danger of injury to others on the premises. In *Alvarez v. Jacmar Pacific Pizza Corp*. (2002) 100 Cal.App.4th 1190, 1196, 1213, the court held no liability could be imposed on a restaurant owner for an employee's failure to inform police (who were responding to a 911 call) that a person involved in an altercation had stated he would return to the premises, under circumstances where the person did return and fatally shot the victim after the police left the premises. The court in *Alvarez* reasoned that to the extent the restaurant had any duty, it satisfied that duty when an employee called 911, and that the restaurant had no responsibility to insure all relevant information was conveyed to the police.

II. *Duty to Take Protective Measures Against Future Third Party Criminal Conduct*

We consider first Morris's contention that De La Torre had a duty to take protective measures *before* the instant violence occurred, i.e., by hiring security personnel, issuing warnings, or screening employees.

A business owner does not have a duty to *insure* the public's safety from random, violent crime. (See *Ann M., supra*, 6 Cal.4th at p. 679.) In cases involving random crime where the requested security measures included security guards, lighting, security cameras, or periodic inspections, the California Supreme Court has held no such duties should be imposed unless there was a high degree of foreseeability shown by prior similar incidents of violent crime on the premises. (*Sharon P.*, *supra*, 21 Cal.4th at p. 1199; *Ann M., supra*, 6 Cal.4th at p. 679.) The courts have long recognized that a

landholder who has notice of a *specific assailant* targeting the premises has a duty to warn. (See, e.g., *Peterson v. San Francisco Community College Dist., supra,* 36 Cal.3d at pp. 805, 813-814 [rapist assaulting women on stairway at college parking lot].) However, unlike the situation where a specific assailant is committing crimes at a certain location, the problem of gang violence is more pervasive and not readily preventable or responsive to measures taken even by law enforcement, let alone business owners.

A recent case, *Claxton v. Atlantic Richfield Co*. (2003) 108 Cal.App.4th 327, involved the issue of foreseeability of a violent attack by a gang member. The court in *Claxton* concluded that the violent, racially-motivated attack by the gang member at a 24-hour gas station was foreseeable based on evidence of numerous prior incidents of violent attacks (including a robbery of the station manager at knifepoint *by the same gang member*; a robbery of a customer; assaults of customers by gang members forcing them to surrender change; theft of merchandise by gang members with threats of reprisals if police were notified; a race-based altercation between two gangs during daytime; gang graffiti threatening racial violence; and five homicides at an adjacent park), as well as repeated requests by the station manager for security personnel. (*Id.* at pp. 332-334, 339.)

The prior incidents of criminal activity in this case pale in comparison to those in *Claxton*. Morris, who was a regular customer, did not realize there was a gang problem at the taco shop. Despite evidence of prior fights and gang harassment at the premises, there was no indication that there had been any serious assaultive conduct. Although the prior fighting and gang presence created some degree of foreseeability that injury could

occur, it did not make it highly foreseeable that a violent attack would occur. Further, the fact that the business is open 24 hours a day does not on its own make the attack highly foreseeable (see *Sharon P.*, *supra,* 21 Cal.4th at p. 1194).[6] In fact, the calls to the police reporting fights at the strip mall were made during the daytime. Absent evidence of blatant gang activity as in *Claxton*, to impose a duty on a business to monitor if and when gangs are congregating at the business premises for purposes of hiring security or issuing warnings, would require the landholder to undertake a highly burdensome task.

To support his foreseeability argument, Morris cites *Cohen v. Southland Corp*. (1984) 157 Cal.App.3d 130 and *Gomez v. Ticor* (1983) 145 Cal.App.3d 622. In *Cohen* and *Gomez* the courts concluded that a history of crimes such as robbery or theft may make an injury-producing robbery foreseeable for purposes of requiring "minimal" security measures other than hiring security guards, even though there had been no previous assaults or injury-producing crimes. (See discussion of *Cohen* and *Gomez* in *Sharon P., supra*, 21 Cal.4th at pp. 1197-1198.) However, the analyses in *Cohen* and *Gomez* were premised on foreseeability being a factual issue for the jury (*Cohen v. Southland Corp., supra,* 157 Cal.App.3d at p. 141; *Gomez v. Ticor, supra,* 145 Cal.App.3d at p. 629), an approach now expressly rejected by the California Supreme Court (see *Sharon P., supra*, 21 Cal.4th at p. 1193). Instead, the courts must make a legal

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6 *Sharon P*. rejects the notion that an underground parking structure is so inherently dangerous so as to dispense with the prior similar incidents requirement (*Sharon P.*, *supra*, 21 Cal.4th at pp. 1191-1197), a conclusion that applies equally to a 24-hour business (see *id*. at p. 1194.)

determination on the issue of foreseeability for purposes of the existence and scope of duty. In doing so, we are mindful of the Supreme Court's admonition that we now live in a society "'which appears unable to effectively stem the tide of violent crime.'" (*Ann M., supra*, 6 Cal.4th at p. 678.) Because of the general increase in crime, prior criminal incidents are increasingly common, and the courts are faced with the continuing and difficult task of balancing the competing concerns of society's interest in compensating injured persons, against its reluctance to impose additional burdens on businesses that operate at the site of the crimes. (See *Saelzler v. Advanced Group 400, supra*, 25 Cal.4th at p. 766.)

Based on the California Supreme Court's recent pronouncements requiring evaluation of a landholder's duties in the context of current societal conditions, and considering the burden of requiring a business owner to monitor gang activity, we conclude that, on balance, the prior incidents of criminal activity in this case did not make the foreseeability of an aggravated assault sufficiently high for purposes of imposing a duty to take protective measures against future third party crime such as hiring a security guard, issuing warnings, or screening employees.[7]

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7 Morris contends that because under federal law De La Torre is prohibited from hiring persons without legal work status, the illegal status of the employee who stated he did not want to get involved is a relevant consideration when evaluating De La Torre's liability. Given our conclusion that in this case De La Torre had no tort duty to screen employees, the employee's illegal status is not relevant to this case, and we need not further consider this issue.

III. *Duty to Respond to Ongoing Third Party Criminal Conduct*

The duty portion of De La Torre's summary judgment motion was founded on the premise that it was not foreseeable a fight would commence in the parking lot and one of the participants would run into the shop, steal a knife, and then go outside and stab someone with it. Although we agree the acts were not foreseeable under the circumstances of this case and thus De La Torre had no duty to take protective measures against future third party crime, this conclusion does not end our inquiry. Whether such conduct was foreseeable is of no moment in evaluating the duty of employees to respond once they are aware of contemporaneous criminal conduct occurring at the business. Foreseeability of third party crime concerns the duty to take protective measures *before* the harm has occurred. When assaultive conduct is occurring in plain view, there is nothing to foresee. Instead, a determination of a business owner's duty to respond to *ongoing* third party violence turns on other factors, most notably whether a special relationship existed between the business and the plaintiff and whether the business owner had control over the area where the assault occurred.

A. *Failure to Summon Aid*

A business owner is required to take reasonable action to protect customers when criminal conduct is occurring at the business. (*Kentucky Fried Chicken of Cal., Inc. v. Superior Court, supra*, 14 Cal.4th at pp. 823-824.) Here, facts were presented indicating that a fight was occurring in the parking lot directly in front of the taco shop and visible to the employees through a large glass window. The employees saw Cuevas seize a knife

from the taco shop, go back to the parking lot, and assault Morris. These facts alerted the employees that dangerous conduct was occurring at the business.

Requiring the employees to take reasonable steps to summon aid in response to such dangerous conduct occurring at the business premises is a minimal safety measure that imposes no undue hardship on a business owner. (See *Mata v. Mata, supra*, 105 Cal.App.4th at pp. 1129-1130; *Alvarez v. Jacmar Pacific Pizza Corp., supra*, 100 Cal.App.4th at p. 1213.) Indeed, it is well established that a business owner has the duty to summon aid when a customer needs medical attention. (See, e.g., *Breaux v. Gino's, Inc*. (1984) 153 Cal.App.3d 379, 382.)

De La Torre does not argue that summoning help in the face of violence against customers is not encompassed within a business owner's duty of care. Rather, De La Torre argues that no special relationship and no duty to respond exists in this case because Morris was not a customer and the attack took place in an area over which De La Torre had no control. He relies on the uncontested facts that Morris did not enter the taco shop and was not planning on eating any food, and that the attack took place in the parking lot.

De La Torre's arguments sweep too broadly without regard to the particular facts of this case showing a close connection between Morris, the location of the assault, and the business enterprise. Relevant case authority teaches that the determination of the persons and locations encompassed within a business owner's duty of care turns on an evaluation of all the factors involved in the case.

As to the persons encompassed within the special relationship, the court in *Ann M., supra*, 6 Cal.4th 666, explained that "duties are no longer imposed on an occupier of land solely on the basis of rigid classifications of trespasser, licensee, and invitee." Instead, the purpose of the plaintiff's presence on the land is but one factor to consider along with the other factors traditionally associated with duty analysis. (*Id*. at pp. 674-675, and fn. 5; see also *Beauchamp v. Los Gatos Golf Course* (1969) 273 Cal.App.2d 20, 25.) Moreover, courts in other jurisdictions have recognized that in appropriate circumstances a person may be an "invitee" even if the person is not at the moment a paying customer. (See, e.g., *Smith v. Montgomery Ward & Co.* (Fla. 1970) 232 So.2d 195, 199 [duty owed even though person browsing at store had not made purchase]; *Hastings v. Smith* (Tenn. 1969) 443 S.W.2d 436, 439.) Thus, when determining the existence of a special relationship and the concomitant duty of a business owner to respond to the actions of a third party, the purpose of the plaintiff's presence on the land at the time of the incident in question must be considered along with all the other circumstances of the case.

As to the physical limits of the duty, the law generally provides that a business's duty does not extend to premises that it does not own, possess, or control. (*Southland Corp. v. Superior Court* (1988) 203 Cal.App.3d 656, 664; *Hassoon v. Shamieh* (2001) 89 Cal.App.4th 1191, 1196-1197.) However, the mere fact that an assault occurs on property that is outside the actual building where the business is conducted does not automatically determine the issue of the business's control. Rather, in evaluating liability for conduct occurring in outside areas, the courts have reached varying results depending

on such factors as the connection between the area where the crime occurred and the business, and the nature of the duty sought to be imposed. (Compare *Donnell v. California Western School of Law* (1988) 200 Cal.App.3d 715, 720 [no duty to install lights or take other preventive measures to prevent assault which occurred on city-owned sidewalk adjoining defendant's business], *Steinmetz v. Stockton City Chamber of Commerce* (1985) 169 Cal.App.3d 1142, 1144, 1147-1148 [no duty to provide better lighting or escort plaintiff from defendant's premises, where plaintiff was injured in parking lot in same industrial park as, but about one block away from, defendant's business], and *Hassoon v. Shamieh, supra,* 89 Cal.App.4th at p. 1197 [no duty owed to plaintiff who was inside store when shot by assailants in a car outside store; plaintiff alleged breach of duty arising from employee's conduct of triggering shooting by bringing an assault victim inside store]; with *Southland Corp. v. Superior Court, supra*, 203 Cal.App.3d at pp. 666-667 [triable issue of fact whether store owner controlled vacant lot adjacent to store for purposes of duty to control loitering where store's lease authorized nonexclusive use of lot for parking, customers regularly parked on lot, and employees had previously taken action to remove juvenile loiterers from lot] and *Mata v. Mata*, *supra*, 105 Cal.App.4th at pages 1130-1131 [tavern business's duty to remove drunken, threatening patron from premises extended to parking lot which was maintained by employees, used by customers for parking and mingling, and used by taco wagon that obtained electricity from tavern business].)

The circumstances here fully support the existence of a special relationship between Morris and the business, as well as the extension of De La Torre's duty to

reasonably respond to ongoing criminal conduct on property he used for business purposes. Morris had frequently been a customer at the taco shop on other occasions; on the night of the assault he was with friends who entered the taco shop to purchase food; the gang violence was directed at Morris as well as his friends (who were customers that very night) when the latter joined the melee in the parking lot after ordering their food; and the assailant used the taco shop's premises to effectuate the assault by entering the taco shop and retrieving the knife. Further, the taco shop's lease included the use of the parking lot to service the parking needs of its customers, and the parking lot was visible through the glass front of the taco shop. These facts create a sufficient nexus between the business and the victim and the location of the assault to create a special relationship and to justify imposition of a duty to respond to the assault with reasonable measures; i.e., by summoning aid. Thus, the court erred in concluding no duty existed and granting summary judgment on the basis that Morris was not a customer.

Because a triable issue of fact exists as to whether De La Torre breached the duty to respond when his employees failed to summon aid, this is a question for the jury to decide. If the jury determines there was a breach, it must then decide whether the breach was the cause of Morris's injuries — that is, whether it was more probable than not that if the employees had summoned help when they observed a dangerous situation on the premises, injury to Morris could have been prevented or lessened. (See *Saelzler v. Advanced Group 400, supra*, 25 Cal.4th at p. 776; *Rosh v. Cave Imaging Systems, Inc., supra,* 26 Cal.App.4th at pp. 1235-1236.) Among the factors relevant to decide this causation issue, the jury can evaluate such circumstances as the loud altercation in the

parking lot before the seizure of the knife, the two stabbing incidents occurring over a seven- to eight- minute time period, and the police response time of about two to four minutes.

B. *Opening the Door*

The issue of the employee opening the door for the assailant, although facially more egregious than the failure to summon aid, is subject to a different analysis because the uncontradicted evidence indicates the employee who purportedly opened the door did so out of fear for his own safety. In *Kentucky Fried Chicken of Cal., Inc. v. Superior Court, supra*, 14 Cal.4th at pages 828-829, the court held the employees did not owe a duty to comply with a robber's demands for property to lessen the risk of injury to patrons. The facts here present a situation converse to the situation in *Kentucky Fried Chicken*, but a similar conclusion applies. Just as there is no duty for a shopkeeper to *comply* with an intruder's demands, likewise there is no duty for a shopkeeper to *refrain from complying* with an intruder's demands when the shopkeeper is acting out of actual fear for his own safety. Duty involves the balancing of competing concerns — in this instance, the shopkeeper's interest in protecting his own safety as opposed to the shopkeeper's duty to protect customers. (See *id.* at pp. 825-826.) A shopkeeper has the right to choose to protect his own safety by compliance with an intruder's demands, and does not have a duty to protect his customers at the expense of his own safety. In this same vein, the courts have recognized that employees responding to the exigencies of criminal conduct cannot be expected to react calmly and with a rational calculation of the probability of harm. (See *Hassoon v. Shamieh, supra*, 89 Cal.App.4th at pp. 1198-2000.)

Drawing all inferences in favor of the plaintiff here, the evidence indicates that in response to Cuevas's angry demand for a knife, an employee opened a three- or four-foot, possibly locked, door which facilitated Cuevas's retrieval of a knife from the kitchen. It is undisputed that while these events were unfolding, the employees feared for their own safety, concerned they might become the victim of a beating or stabbing. Although there are no facts indicating Cuevas or De La Vega had any type of weapon before the incident, nor that any direct threat was made to the employees, the facts unmistakably establish Cuevas's gang membership was conspicuously emblazoned on his bare abdomen and all knew he was a gang member. There is no evidence employees working on the night of the assault in any way supported or encouraged the gang activity Cuevas perpetrated.

When viewed in the context of a fight occurring just outside the taco shop and an obviously angry gang member yelling for a knife, the employee's fear was eminently justifiable. Moreover, because the size of the door did not make it a substantial barrier to Cuevas's entry, the nature of the employee's purported facilitative conduct was relatively minor. Where, as here, a business employee legitimately fears for his own safety, the employee has no duty to refuse to comply with the demands of an angry, volatile gang member to protect a customer.

Because we conclude there was no duty, we need not otherwise evaluate the trial court's conclusion that as a matter of law there was no causal connection between the opening of the door and the retrieval of the knife.

DISPOSITION

The judgment is reversed. Costs to Morris on appeal.

CERTIFIED FOR PUBLICATION

HALLER, J.

WE CONCUR:

NARES, Acting P. J.

McDONALD, J.