IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION FIVE

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. B234545 Los Angeles Superior Court, Case No. GC044903 [Hon. C. Edward Simpson, Judge; Dept: NE R (626) 356-5356]

REPLY TO REAL PARTIES' RETURN TO PETITION FOR WRIT OF MANDATE OR OTHER APPROPRIATE RELIEF

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INTRODUCTION

The Return does not differ much from the preliminary opposition. For the most part, it just rehashes the same arguments. Like the preliminary opposition, it ignores the large body of case law—including most of the cases cited in the Alternative Writ—requiring heightened foreseeability before a business will be held liable for failing to prevent a third party's criminal act. And like the preliminary opposition, it relies on *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, which is inapposite because it involved a business's actual awareness of an imminent crime. About the only new thing in the Return is the vague, unsupported assertion that suspects have been arrested in the shooting that led to this suit. But it is a great leap from that assertion to the evidence that would be necessary to defeat summary judgment—evidence that the shooting was sufficiently foreseeable to justify imposing the burdensome duties that plaintiffs propose, and that any breach of duty caused plaintiffs' injuries.

The bottom line remains the same: A verbal confrontation between café patrons, even one where a weapon is brandished, does not make it reasonably foreseeable that months later, masked gunmen will suddenly appear and spray the café with gunfire. Nor is plaintiffs' speculative expert declaration substantial evidence of causation. The defendant café therefore was entitled to summary judgment. A peremptory writ to that effect should issue.

TRAVERSE TO PLAINTIFFS' RETURN

Plaintiffs' Return admits virtually all of the facts underlying the summary judgment motion at issue here. Plaintiffs also allege a handful of additional facts, and argue about the application of case law to the facts. Petitioner Coffee House addresses the legal argument in the attached memorandum of points and authorities. It responds to the additional factual allegations as follows:

1. As to paragraph 5: Plaintiffs concede that the attackers' identities were unknown at the time of the summary judgment hearing. (Return p. 9, ¶ 21(b)(2).) But now they claim—for the first time—that the police have identified suspects. (*Ibid.*) There is no record support for the claim. It is made "on information and belief," based on an unspecified "confidential source" who counsel says he believes. (*Ibid.*; Return p. 11.) Plaintiffs provide no details at all: not when the suspects were identified, not who they are, not what their motive was. Plaintiffs admit that they have none of this information. (Return p. 9, ¶21(b)(2).) They do not even describe the nature of their claimed confidential source. There is nothing by which to gauge the claim's reliability, making the unsubstantiated allegation no better than rumor. This Court should disregard it. Even if it does not, the allegation would shed no light on whether the shooting was reasonably foreseeable *before* it happened, the relevant question here.

2. As to paragraph 21(a)(2): As a matter of law, the February 2009 shooting was not reasonably foreseeable from a heated verbal

confrontation two months earlier. (See Exh. 20-21, 201-202, 247-249; Petition for Writ of Mandate ("Pet.") 13-14, 21-24.)

3. As to paragraph 21(b)(1): The Nguyen declaration should have been stricken because, among other things, it lacks foundation and its vague assertion that various measures would have deterred or prevented this incident is pure speculation. (See Exh. 214-223 [evidentiary objections]; Pet. 14-15 [arguing that trial court abused its discretion in overruling objections].)

4. As to paragraph 21(b)(2): Again, this Court should disregard plaintiffs' belated, unsubstantiated claim that suspects have been identified. (See ¶ 1, *ante*.)

5. As to paragraph 21(b)(3): Nguyen's declaration provides no foundation for knowledge of how the San Gabriel Police Department would have responded if Coffee House had reported a prior verbal confrontation, or whether any response would have prevented this incident. (See Exh. 214-223 [evidentiary objections]; Pet. 14-15 [arguing that trial court abused its discretion in overruling objections].) Moreover, Nguyen did not even purport to know that Viet and Hung had gang affiliations (Exh. 93), and there is no cognizable evidence of that in the record.

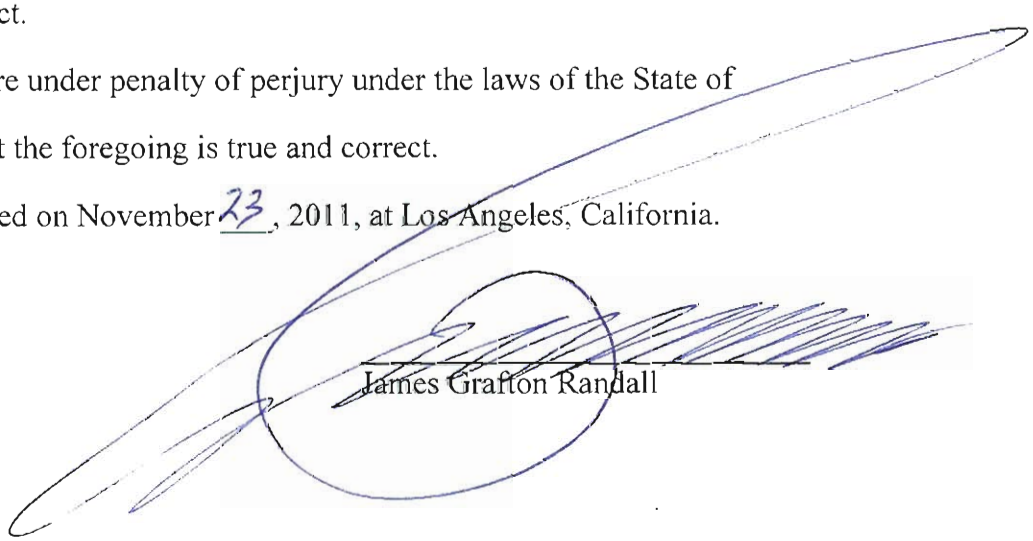
VERIFICATION

I, James Grafton Randall, 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 reply. 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 reply's factual 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 November 23, 2011, at Los Angeles, California.



James Grafton Randall

MEMORANDUM OF POINTS AND AUTHORITIES

I. The Cases Cited In The Alternative Writ—Largely Ignored In The Return—Reinforce That Coffee House Is Entitled To Summary Judgment.

Coffee House's petition demonstrated that it is entitled to summary judgment on two independent grounds:

- Plaintiffs cannot establish that a single heated, verbal confrontation between two patrons imposed a duty on Coffee House to undertake the burdensome, open-ended security measures that they propose. (Pet. 19-31.)
- Even if Coffee House had a duty to undertake the vague proposed measures, plaintiffs cannot establish a reasonable probability that those measures would have prevented the shooting rampage by masked gunmen. (Pet. 31-37.)

This Court's Alternative Writ cites six cases supporting these grounds. All six reject attempts to hold a landlord liable for a third party's criminal act. They are directly on point, highlighting fundamental gaps in plaintiffs' case as to both foreseeability and causation.

Plaintiff's response?

No comment.

The Return says nothing about the closely analogous *Thai v. Strang* (1989) 214 Cal.App.3d 1264, which held that a drive-by shooting at a roller

rink was not foreseeable even though a person had been threatened with a rifle in the rink's parking lot three days earlier. (*Id.* at pp. 1269, 1273.) It says nothing about *Davis v. Gomez* (1989) 207 Cal.App.3d 1401, which held that a tenant's possession of a firearm did not foretell that "she was actually disposed to use it indiscriminately against another tenant." (*Id.* at pp. 1404-1405.) It says nothing about *Wiener v. Southcoast Child-Care Centers, Inc.* (2004) 32 Cal.4th 1138, which emphasized that heightened foreseeability is required in part because "if a criminal decides on a particular goal or victim, it is extremely difficult to remove his every means for achieving that goal." (*Id.* at p. 1150.) It says nothing about *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, which held that proof of causation "cannot be based on mere speculation, conjecture and inferences drawn from other inferences to reach a conclusion unsupported by any real evidence, or on an expert's opinion based on inferences, speculation and conjecture." (*Id.* at p. 488.) And it says nothing about *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, which rejected a security expert's causation testimony on the ground that without knowing the assailants' identities, he could not establish causation. (*Id.* at p. 781.)

The Return also ignores a significant aspect of the one cited case that it does acknowledge. *Castaneda v. Olsher* (2007) 41 Cal.4th 1205 is relevant not just for its foreseeability analysis, which plaintiffs try to distinguish, but also for its holding that a property owner does not owe a duty to exclude even suspected gang members who turn out to be

assailants—a point which plaintiffs do not mention. (*Id.* at p. 1210; see also Pet. 13-14, 26-27 [emphasizing this point].)

The rest of the Return is no more persuasive, primarily rehashing arguments that plaintiffs asserted in the preliminary opposition. Those arguments are no better the second time around.

II. The Return Does Not Establish A Triable Fact Dispute As To Duty.

A. *Delgado v. Trax Bar & Grill* Does Not Support The Burdensome Duties That Plaintiffs Seek To Impose Here.

The Return argues that even if a confrontation between two patrons did not make a shooting spree two months later foreseeable enough to require hiring a security guard, *Delgado v. Trax Bar & Grill* justifies imposing other measures that they propose. (Return 2, 7-8, 12-21, 22-24.) *Delgado* does no such thing.

Delgado is inapposite because it involved a bar that *knew* of an *unfolding* attack and failed to respond. (36 Cal.4th at pp. 245-247.) Here, by contrast, the issue is a cafe's duty to prevent *possible future* conduct. That is a very different inquiry. (*Margaret W. v. Kelley R.* (2006) 139 Cal.App.4th 141, 160 [distinguishing *Delgado* on this ground].)

In any event, *Delgado* confirmed that there is no duty to take any burdensome measure to prevent future criminal acts, absent a showing of heightened foreseeability. (36 Cal.4th at p. 243, fn. 24.) All of the

measures that plaintiffs propose here are burdensome. The Supreme Court has expressly categorized video monitoring and excluding suspected gang members as highly burdensome. (*Ibid*; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1195-1196; *Castaneda*, *supra*, 41 Cal.4th at p. 1210.)[1/] Plaintiffs' own expert attested that reporting the prior confrontation to police would have exposed Coffee House to gang retribution. (Exh. 89.) And the proposed duty to warn patrons indefinitely about the prior incident would be commercial suicide. (Pet. 27-29; Preliminary Reply 5-6.)

Plaintiffs' proposed measures are far afield from the minimally burdensome duties imposed in *Delgado*. There, the bar's security guard concluded that a fight was likely to break out unless he separated two groups of people. (36 Cal.4th at p. 245.) He told one group to leave the bar. (*Ibid.*) The other group followed, and a fight broke out in the parking lot. (*Id.* at p. 231.) The Court held that the guard should have attempted to dissuade the second group from following the first, or confirmed that the outside guard was at his post to keep the groups separate. (*Id.* at pp. 246-247.) That's it. There is no suggestion that the bar had to take measures that could lead to violent retribution, decreased business, and ongoing expense. Because that is what plaintiffs urge here, *Delgado*, and the form jury instruction based on it (see Return 18-20), are unavailing.

1/ *Sharon P.* was 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.

B. Plaintiffs' Vague, Unsubstantiated Claim That Shooting Suspects Have Been Identified Does Not Impact The Foreseeability Analysis.

In a brand new claim, the Return asserts vaguely—with no details or evidentiary support—that suspects in the shooting have been identified and arrested. (Return 3, 5, 9; see also Return 11 [plaintiffs' counsel claiming to have obtained information from an unspecified confidential source].) This new, last-ditch claim should be disregarded, both because it is unsubstantiated and because it was not before the trial court at the time of the summary judgment motion. (*Physicians Committee for Responsible Medicine v. McDonald's Corp.* (2010) 187 Cal.App.4th 554, 568 ["In reassessing the merits of the (summary judgment) motion, we consider only the facts properly before the trial court at the time it ruled on the motion," internal quotation marks omitted].)

But even if considered, the claim does not change the foreseeability analysis. The identity of the masked gunmen would only lead to after-the-fact second guessing. It has no bearing on what Coffee House reasonably should have foreseen before the attack. The question remains whether, when one patron slammed a gun down and accused another patron of bad-mouthing him, Coffee House should have predicted that two months later—after the two patrons had been back without incident—masked gunmen would go on a shooting spree in the café. (*Castaneda*, *supra*, 41 Cal.4th at p. 1221 [question is whether property owner "could have

predicted the third party crime would likely occur"]; *Margaret W.*, *supra*, 139 Cal.App.4th at p. 156 ["foreseeability must be measured by what the defendant actually knew"].) The answer remains no.

C. Coffee House Did Not Waive Its Foreseeability Argument.

Contrary to plaintiffs' assertion, Coffee House's separate statement of undisputed facts encompassed its argument that the shooting was not reasonably foreseeable. Plaintiffs seize on the fact that there was no separate heading for foreseeability. (See Return 21.) No matter. Foreseeability is simply one factor in determining the scope of Coffee House's duty of care. (*Castaneda*, *supra*, 41 Cal.4th at p. 1213.) The separate statement had a section entitled "Defendant Owed Plaintiffs No Duty Of Care," which included the facts relating to both the shooting and the verbal confrontation months earlier. (See Exh. 51-54.) That section encompassed the issue of duty, including the subsidiary question of foreseeability.

III. The Return Does Not Identify A Triable Fact Dispute As To Causation.

In claiming a triable fact dispute as to causation, the Return parrots, virtually verbatim, plaintiffs' preliminary opposition. (Compare Preliminary Opposition 6-7 and Return 24-26.) Coffee House has already addressed the argument in its preliminary reply, and so does not rehash it

here. (Preliminary Reply 7-8.) The causation cases cited in the Alternative Writ, which plaintiffs ignore, reinforce the point: The thin, speculative evidence that plaintiffs rely on does not establish that their proposed security measures, more probably than not, would have prevented the shooting rampage by masked men. Causation remains an independent ground compelling summary judgment for Coffee House.

CONCLUSION

The trial court clearly erred in denying summary judgment for Coffee House. 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: November 28, 2011

Respectfully submitted,

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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 **REPLY TO REAL PARTIES' RETURN TO PETITION FOR WRIT OF MANDATE OR OTHER APPROPRIATE RELIEF** was produced using 13-point Times New Roman type style and contains **2,252** 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: November 28, 2011

Alana H. Rotter

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On November 28, 2011, I served the foregoing document described as: **REPLY TO REAL PARTIES' RETURN TO PETITION FOR WRIT OF MANDATE OR OTHER APPROPRIATE RELIEF** on the parties in this action by placing a true copy thereof enclosed in sealed envelope(s) addressed as follows:

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(626) 356-5336
[LASC Case No. GC044903]

(X) BY MAIL: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on November 28, 2011, at Los Angeles, California.

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

Anita F. Cole