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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

TERRELLE FORD,

Plaintiff and Appellant,

v.

PALMDEN RESTAURANTS, LLC et al.,

Defendants and Respondents.

E053195

(Super.Ct.No. INC052449)

OPINION

APPEAL from the Superior Court of Riverside County. Harold W. Hopp, Judge.

Reversed.

Donald R. Holben & Associates, Daniel M. DiRe, William N. Pabarcus, and Donald R. Holben for Plaintiff and Appellant.

Ives, Kirwan & Dibble and Steven B. Kotulak for Defendant and Respondent Palmden Restaurants, LLC.

Kinkle, Rodiger & Spriggs and A.J. Pyka for Defendants and Respondents DFO, Inc.; DFO Holding Company; Denny's Corporation; Denny's Holdings, Inc.; Denny's, Inc.; and Denny's Realty, Inc.

For two years, every Saturday night around 2:00 a.m., members of a gang called the Gateway Posse Crips (Gateway) would “take over” a Denny’s restaurant in Palm Springs. When they arrived, ordinary diners fled. The gang members used profanity, table-hopped, ordered hardly anything, and left without paying. They used alcohol and marijuana in the parking lot.

In March 2003, Gateway members started a “brawl” at the restaurant. In April 2004, in another fight at the restaurant, Gateway members beat and kicked plaintiff Terrelle Ford, leaving him with long-term cognitive impairment.

In this action, Ford sued, among others, (1) Palmden Restaurants, LLC (Palmden), which operated the restaurant as a Denny’s franchisee, and (2) DFO, LLC (DFO), Denny’s Corporation (DC), Denny’s Holdings, Inc. (DHI), Denny’s Inc. (DI), and Denny’s Realty, Inc. (DRI) (collectively the Denny’s entities), which were the Denny’s franchisor and related corporations.

The trial court granted summary judgment in favor of Palmden and the Denny’s entities, on the ground that Ford could not show that their alleged negligence caused his injuries.

We must reverse. We acknowledge that Palmden was not an insurer of its patrons’ safety. However, particularly in light of the prior similar brawl, Palmden had a duty to do *something* to protect them. Even if it is speculative that measures such as surveillance cameras, security guards, or a protective order would have prevented an attack by violent gang members, Palmden clearly could have prevented the attack simply by closing the restaurant down for a few hours every Saturday night. Finally, Ford also

raised a triable issue of fact with respect to whether the Denny’s entities were jointly liable on the theory that Palmden was their ostensible agent.

I

EVIDENTIARY ISSUES

A. *Ford’s Reliance on Excluded Evidence.*

Palmden contends that Ford’s opening brief sets forth facts based on “inadmissible” evidence (meaning evidence to which the trial court sustained objections).

In his reply brief, Ford contends that the trial court erred by sustaining Palmden’s objections. He further contends that the procedure that the trial court used in ruling on the objections “deprived him of a reasonable opportunity to respond.”

1. *Additional factual and procedural background.*

Palmden filed written objections to some of Ford’s evidence.

At the hearing on the motion, the trial court stated: “. . . I am overruling . . . all of the written objections[] because they were not submitted in the format required by the California Rules of Court. That does not mean that you can’t make objections. We have a court reporter.¹ If you wish to make objections, you may do so today.”

Counsel for Palmden proceeded to raise oral objections to some of Ford’s evidence. The trial court sustained some of the objections and overruled others. At one

¹ See Cal. Rules of Court, rule 3.1352 [“A party desiring to make objections to evidence in the papers on a motion for summary judgment must either: [¶] (1) Submit objections in writing . . . ; or [¶] (2) Make arrangements for a court reporter to be present at the hearing.”].)

point, counsel for Ford remarked, “I did not think evidentiary issues were going to be at fault [*sic*] today.” Otherwise, however, he did not object to this procedure.

2. *Analysis.*

In ruling on a motion for summary judgment, the trial court may “consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court” (Code Civ. Proc., § 437c, subd. (c).) “Similarly, ‘[o]n appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained.’ [Citation.]” (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534.) We can consider excluded evidence if — and only if — we first determine that the exclusion was erroneous.

Ford, however, forfeited any such contention by failing to raise it in his opening brief. “““Obvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it or require the effort and delay of an additional brief by permission. Hence the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before. . . . [Citations.]”” [Citation.]” (*Doe v. California Dept. of Justice* (2009) 173 Cal.App.4th 1095, 1115.)

Accordingly, we will not consider any evidence that the trial court excluded.

B. *Palmden's Reliance on Disputed Facts.*

In its brief, Palmden sets forth a long list of facts that it characterizes as “undisputed.” (Underscoring omitted.)

In his reply brief, Ford contends that Palmden has “ignored the contrary material facts” Ford is correct. Palmden has included “facts” that Ford s

pecifically labeled as “disputed.” Moreover, in most if not all of those instances, Ford introduced evidence *contradicting* the supposedly “undisputed” fact.

This court expects greater candor. (See Rules Prof. Conduct, rule 5-200(A), (B).) If Palmden believed that the claimed dispute was not genuine, it behooved Palmden to say so and to explain why. Instead, Palmden simply sweeps the dispute under the rug, evidently thinking this court will not notice.

Accordingly, we do not rely on Palmden’s statement of facts. Instead, we accept all facts in Palmden’s separate statement that Ford labeled as undisputed, if there is evidence that supports them. We even accept all facts in Palmden’s separate statement that Ford labeled as *disputed*, if (1) there is evidence that supports them, and (2) there is no contrary evidence (Code Civ. Proc., § 437c, subd. (b)(3)). Finally, we accept all facts in Ford’s separate statement, if there is evidence that supports them. (*Ibid.*)

II

STATEMENT OF FACTS

The following facts are relevant to Palmden’s liability. We will discuss additional facts that are relevant to the liability of the Denny’s entities in part VI, *post*.

A. *Factual Background.*

Palmden subleases and operates a Denny's restaurant in Palm Springs (the Denny's). Karen McBride is the principal in Palmden.

Gateway is a predominantly African-American gang. The Denny's is located in Gateway turf.

Over a period of about two years, "pretty much every Saturday night," around 2:00 a.m., Gateway members and associates would "take over" the Denny's. They hung out at a club nearby named Zelda's. Thus, when Zelda's closed for the night, they flocked to the Denny's. They identified themselves as the "Gateway Posse." They flashed gang signs.

Members of the Gateway group refused to wait in line; they would just seat themselves. They were loud; they would use "foul language." They would "table-hop." Only a few of them would order food, and the ones who did would leave without paying. Other customers responded by canceling their orders or asking for their food to go and then leaving. Some Gateway members would stay outside in the parking lot, drinking and smoking marijuana. They had had "many fights," both outside and inside the restaurant.²

² Ford asserts that "[t]he Palm Springs Police Department repeatedly responded to reports of violent crimes committed at the subject Denny's." (Capitalization omitted.) The cited portion of the record, however, merely shows that one particular officer, during his five years on patrol, responded to over 20 calls — not necessarily involving violence — at the Denny's.

[footnote continued on next page]

McBride testified that she was wholly unaware of this situation. Even if so, servers and other Palmden employees were certainly aware of it.

B. *The “Brawl” on March 1-2, 2003.*

On March 1-2, 2003, the Gateway group caused a “brawl” at the Denny’s.³ Around 2:00 a.m., a Gateway member named Tyrone Thomas “walked into [the] Denny’s, screamed out ‘Gateway,’ and punched a Hispanic male in the face” Soon “the whole restaurant became involved.” “Tables were being tipped over, items were being thrown, innocent women sitting at the booths were being punched.” A window of the Denny’s was broken.

One police officer was out in the parking lot, but he was unable to get control of the situation until backup officers arrived. By the time they restored order, they were unable to locate any victims. They did arrest several people, including Lavareck Ware, a member of Gateway. Ware was eventually convicted for fighting in public and for helping Tyrone Thomas to escape.

[footnote continued from previous page]

Similarly, Ford asserts that “[p]olice reports reflect constant violence at the restaurant.” The cited portion of the record, however, reflects only a single incident in which gang members verbally threatened a manager.

³ The parties have spilled a great deal of ink over whether this incident was a “riot.” No eyewitness actually characterized it as a riot. However, one testified that it was “one punch away from a riot.” Another described it as “If not a riot, [the] closest thing to a riot,” but only because “there was no focus as far as one subject punching on another subject.”

A third called it “a fight . . . that turned into a brawl.” We choose to use this less tendentious term.

The following weekend — and that weekend only — Palmden kept the Denny’s closed. McBride met with various police officers to talk about how to improve the safety of the Denny’s. They informed her that members of Gateway “could have been” involved in the brawl. They recommended that she add more lighting in the parking lot and install “No Loitering” signs. They also recommended video surveillance. In addition, they recommended contracting with the police department to use off-duty police officers as security guards.⁴ According to McBride, however, they told her that “under no circumstances should [she] close [her] restaurant” Officers from the gang task force began dropping by the Denny’s, although not on a “routine or regular basis.”

In January 2004, when Lavareck Ware returned, a manager asked him to leave. A person with Ware told the manager, “If you go outside to get the police I’m going to stab you. If I don’t get you tonight I’ll get you another time.” Ware and his associate then left.

C. *The Beating of Ford on April 10-11, 2004.*

On the night of April 10-11, 2004, police officers visited the restaurant, but they “left . . . because nobody had shown up.” The Gateway group arrived as usual. It included some of the same people who had been involved in the March 2003 brawl.

Ford, a loan officer, lived in Moreno Valley. A little after 2:00 a.m., he went to the Denny’s with a group of friends, including his cousin, Tyree Long.

⁴ According to McBride, she did talk to a police officer about hiring off-duty police officers, but he told her, “[T]here’s no need for you to hire security. We are going to protect you.”

Suddenly, just outside the front door, some 10 to 30 men started “pummeling” one man. Ford’s friends went outside to try to break up the fight. At first, Ford stayed inside.

Long asked, “[W]hy are you guys jumping this one guy[?]” Someone responded, “[Y]ou can . . . get done the same way.” A Gateway member named Roddrick Lee then “blind[-]sided” Long. The two groups started to fight.

Someone had locked the front door. Ford went out through an emergency exit. His intention was to help his friends and family members. A group of men, including Gateway members Ware and Lee, started hitting and kicking Ford.

Ford’s friends found him unconscious, lying in a pool of blood. He suffered a broken nose, a broken upper jaw, and severe head trauma. He had to relearn how to walk and how to feed himself. He was left with impaired short-term memory. He had only fragmentary memories of the incident.

The Denny’s had no security guards and no surveillance cameras. At one point, McBride told police “that corporate Denny’s wouldn’t allow them to put in security cameras.” Palmden’s only policy with regard to incidents of violence was to call 911.

Fred Del Marva, a private investigator, testified for Ford as an expert on restaurant and bar security.⁵ According to Del Marva, Palmden should have:

1. Obtained a protective order requiring Gateway members to stay away;

⁵ The trial court excluded Del Marva’s opinions with respect to duty and foreseeability but admitted his opinions with respect to causation.

2. Hired security guards (either one off-duty police officer or two private security guards) to work between 11:00 p.m. and 5:00 a.m. on Friday and Saturday nights;
3. Installed video surveillance cameras; and
4. Installed a “panic button” linked directly to the police department.

If the preceding measures failed to prevent assaults on customers, Palmden should have closed the restaurant during the early morning hours on Friday and Saturday nights. In Del Marva’s opinion, each of these measures would have prevented Ford’s beating.⁶

Sometime in 2004 or 2005, Palmden started shutting down the Denny’s after bar-closing time on Saturday nights. This forced gang members to go elsewhere.

III

PROCEDURAL BACKGROUND

Ford filed this action in 2005. In the operative complaint, he asserted causes of action for negligence, premises liability, wanton and willful misconduct, false imprisonment, and to set aside fraudulent conveyances.

Between February and March 2010, Palmden and each of the Denny’s entities filed separate motions for summary judgment. They argued that (1) they had no duty to protect Ford, and (2) they did not cause Ford’s injuries. In addition, the Denny’s entities argued that they were not liable for Palmden’s acts or omissions because Palmden was

⁶ Del Marva also testified that Palmden should have refused entry to anyone who had participated in the March 2003 incident. However, he did not specifically testify that this would have prevented Ford’s beating.

not their agent. The Denny’s entities (except for DFO) also argued that they were not liable on an alter ego theory.

After hearing argument, the trial court granted the motions, ruling that there was no triable issue of material fact with respect to causation. Accordingly, it entered judgments in favor of Palmden and the Denny’s entities.⁷

IV

STANDARD OF REVIEW

“A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.]” (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

⁷ In addition to the five entities defined in this opinion as the Denny’s entities, the judgment was also in favor of a sixth entity — DFO Holdings, Inc. (DFOHI).

DFOHI was not named in the caption of the operative complaint. That complaint devoted five paragraphs to naming and specifying the capacity of the five Denny’s entities; there was no such paragraph for DFOHI.

DFOHI was mentioned only once in the complaint; there was an allegation that “the [d]efendants hereinafter named,” who were listed as DFO, DHI, DI, DRI *and* DFOHI, were all subsidiaries of DC. Given the lack of any other reference to DFOHI, however, this appears to be a typographical error. Thus, the register of actions does not list DFOHI as a defendant on Ford’s complaint.

We also note that DFOHI did not file a motion for summary judgment. Admittedly, the attorneys for the Denny’s entities did file a notice of motion purportedly on behalf of all six entities. However, DC, DFO, DHI, DI, DRI each filed a separate memorandum of points and authorities and a separate statement; DFOHI did not.

Accordingly, we conclude that DFOHI was never a defendant. Even if it was, however, it certainly was not entitled to the entry of judgment in its favor when it had not filed a motion for summary judgment.

“[I]n moving for summary judgment, a ‘defendant . . . has met’ his ‘burden . . . if’ he ‘has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. . . .’ [Citation.]” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) “We review the trial court’s decision de novo [Citations.]” (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65-66.)

IV

CAUSATION

The trial court granted summary judgment based on lack of causation. Ford contends that he raised a triable issue of fact with respect to causation.

“A tort is a legal cause of injury only when it is a substantial factor in producing the injury. [Citation.]” (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.)

“[T]he ‘substantial factor’ test subsumes the ‘but for’ test. ‘If the conduct which is claimed to have caused the injury had nothing at all to do with the injuries, it could not be said that the conduct was a factor, let alone a substantial factor, in the production of the injuries.’ [Citation.]” (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1052.)

“Though normally a question of fact, causation may be decided as a question of law if the undisputed facts permit only one reasonable conclusion. [Citation.]” (*Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518, 1528.)

The leading California Supreme Court case on causation in the context of third party criminal acts is *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763. There, the plaintiff was the victim of a beating and attempted rape by unknown assailants at an apartment complex owned by the defendants. (*Id.* at p. 769.) The defendants were aware of criminal activity at the complex; indeed, much as in this case, a gang had its headquarters there. (*Id.* at p. 770.) The defendants had taken some steps to improve security. They had attempted to repair broken gates and locks, though with only mixed success. They had also hired security guards to patrol at night but not during the day. (*Id.* at pp. 770-771.) The trial court granted summary judgment for the defendants, ruling that there was no triable issue of fact with respect to causation. (*Id.* at p. 771.)

The Supreme Court agreed. It cited with approval *Nola M. v. University of Southern California* (1993) 16 Cal.App.4th 421, explaining: “*Nola M.* concluded that the plaintiff must do more than simply criticize, through the speculative testimony of supposed security ‘experts,’ the extent and worth of the defendant’s security measures, and instead must show the injury was actually caused by the failure to provide greater measures. [Citation.] . . . [A] different rule would ‘make the landowner the insurer of the absolute safety of everyone who enters the premises.’ [Citation.]” (*Saelzler v. Advanced Group 400, supra*, 25 Cal.4th at p. 774.)

Similarly, it cited favorably *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, summarizing it thus: “[E]xpert opinion resting solely on speculation and surmise is inadequate to survive summary judgment because it fails to establish a “‘reasonably probable causal connection’” between the defendant’s negligence and the plaintiff’s

injury. [Citation.] . . . ‘[A] tenant’s negligence action against her landlord for injuries resulting from the criminal assault of a third person must be supported by evidence establishing that it was *more probable than not* that, but for the landlord’s negligence, the assault would not have occurred. Where . . . there is evidence that the assault could have occurred even in the absence of the landlord’s negligence, 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. . . .’ [Citation.]” (*Saelzler v. Advanced Group 400, supra*, 25 Cal.4th at p. 775.)

The court cautioned against inferring causation from a lack of security: “[W]e hesitate to adopt a rule . . . that seemingly would prevent summary judgment on the causation issue *in every case* in which the defendant failed to adopt increased security measures of some kind. . . . ‘[I]t would be grossly unfair to permit a lay jury, after the fact, to determine in any case that security measures were “inadequate,” particularly in light of the fact that the decision would always be rendered in a case where the security had, in fact, proved inadequate’ [Citation.] . . . [I]f we simply relied on hindsight, the mere fact that a crime has occurred could always support the conclusion that the premises were inherently dangerous.” (*Saelzler v. Advanced Group 400, supra*, 25 Cal.4th at p. 778.)

In the case before it, the court observed: “Plaintiff admits she cannot prove the identity or background of her assailants. They might have been unauthorized trespassers, but they also could have been tenants of defendants’ apartment complex, who were

authorized and empowered to enter the locked security gates and remain on the premises. . . . That being so, and despite the speculative opinion of plaintiff's expert, she cannot show that defendants' failure to provide increased daytime security at each entrance gate or functioning locked gates was a substantial factor in causing her injuries. [Citations.]" (*Saelzler v. Advanced Group 400, supra*, 25 Cal.4th at p. 776.)

The court added: "Plaintiff, citing her expert's declaration, opines that her injuries could have been avoided if defendants had hired roving security guards to patrol the entire premises during the day as well as at night. Aside from the inordinate expense . . . , the argument is entirely speculative, as assaults and other crimes can occur despite the maintenance of the highest level of security. [Citations.] . . . [¶] . . . '[W]here do we draw the line? How many guards are enough? Ten? Twenty? Two hundred? . . . To characterize a landowner's failure to deter the wanton, mindless acts of violence of a third person as the "cause" of the victim's injuries is (on these facts) to make the landowner the insurer of the absolute safety of everyone who enters the premises.' [Citations.]" (*Saelzler v. Advanced Group 400, supra*, 25 Cal.4th at pp. 777-778.)

In *Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519, however, the court distinguished *Saelzler*. There, the plaintiff was raped in a storage room at her apartment complex. (*Ambriz*, at p. 1523.) The entry gate to the complex was often chained open; the locks on three of the four entry doors were broken. The management was aware that male intruders were gaining entry to the complex. The actual rapist was a transient who had been seen inside the complex, sleeping and panhandling. According to the

investigating officer, the lack of evidence of forced entry indicated that it was more likely than not that the rapist had entered the complex through an open door. (*Id.* at p. 1524.)

The appellate court held that there was a triable issue of fact regarding causation. (*Ambriz v. Kelegian, supra*, 146 Cal.App.4th at pp. 1535-1538.) It explained, in part: “In this case, [the plaintiff] and . . . management *did* know the identity of [the] attacker, and [the plaintiff] had seen this same individual inside her building . . . on more than 10 occasions prior to the attack. The assailant was a transient who did not live at [the complex]. We can infer that his entry was thus unauthorized. Based on the evidence [the plaintiff] offered, we can also infer that the malfunctioning doors had allowed a number of people to gain unauthorized entry into the complex.” (*Id.* at pp. 1537-1538.)

Here, Del Marva recommended a variety of security measures. In terms of their likelihood of preventing Ford’s injuries, they fell across a continuum. At one end of the continuum, it seems highly speculative that such milk-and-water measures as “No Loitering” signs or brighter lighting would have had any effect on violent gang members. It is also speculative that a panic button would have been any more effective than calling 911.

It is only slightly less speculative that security video cameras would have been effective. It was not only Del Marva who recommended surveillance cameras; the police did so, too. However, as one police officer noted, while cameras may make gang members “behave,” they may only make them hide or disguise themselves. McBride claimed the police told her that cameras would not prevent violence; they would merely make it possible to identify the perpetrators afterwards.

It is not as speculative, however, that security guards would have been effective. Arguably, as one officer observed, a private security guard “would just be one other person we’d have to send to the hospital eventually if [Gateway] continued hanging out there.” However, the police recommended that, rather than using private security guards, Palmden should contract to hire off-duty police officers. Such officers would have been in uniform and armed. The same officer who scoffed at private security guards believed that, if *he* had been present, *he* would have been able to prevent the April 2004 incident. Nevertheless, mindful of the Supreme Court’s concern that even an expert may have no way of knowing how many security guards it will take to deter a violent criminal, we will assume, without deciding, that this aspect of Del Marva’s opinion was on the speculative side of the line.

Del Marva also recommended that Palmden should have called the police any time a gang member: (1) was disruptive or abusive, (2) refused to comply with seating policies, (3) left without paying, (4) used drugs or alcohol in the parking lot, or (5) loitered in the parking lot. It stands to reason that these steps, if taken consistently, would have made the Denny’s an uncongenial place for Gateway members to hang out. Even so, it could be argued that this was still somewhat speculative; for example, it is also possible that they would have resorted to violent retaliation.

Next, Del Marva recommended a protective order. Palmden has never explained why a protective order would not have worked.⁸ Once again, it stands to reason that, if Palmden had excluded Gateway members from its premises, the violence that culminated in Ford's injuries would not have occurred. It could be argued, however, that Palmden would have had difficulty identifying individuals as members of Gateway.⁹ It could also be argued that violent gang members would think nothing of violating an injunction. We therefore assume, without deciding, that the effectiveness of a protective order was speculative.

There is one aspect of Del Marva's opinion, however, that was not even arguably speculative. He also recommended that, if lesser measures were tried and proved unsuccessful, Palmden should have simply closed the Denny's during the early morning hours on Friday and Saturday nights. If the Denny's had been closed, Gateway members would not have been there to attack Ford, and Ford would not have been there to be attacked. This is tautological — the opposite of speculative.

It could be argued that the Gateway members would have just gone elsewhere and, eventually, assaulted someone else. Nevertheless, a landlord may have a duty to evict a

⁸ The general counsel for the Denny's entities testified that several Denny's restaurants had used "stay-away" orders to deal with gang problems — inferably with success. However, this was in evidence only in connection with the summary judgment motions by the Denny's entities; it was not in evidence in connection with the summary judgment motion by Palmden.

⁹ In hindsight, it is a shame that the district attorney did not make an effort to protect Palmden — to say nothing of Palm Springs's citizens and visitors — by seeking an injunction against Gateway's activities as a public nuisance. (See generally *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090.)

tenant who is a gang member (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1219-1221), even though it could be argued that the gang member would just move somewhere else and commit violent acts there. Likewise, a landlord's failure to evict a tenant who owns a vicious dog may be the legal cause of the injuries of a person attacked by the dog (*Donchin v. Guerrero* (1995) 34 Cal.App.4th 1832, 1846-1847), even though the alternative would seem to be that the dog would have just attacked someone elsewhere.

We emphasize that we are *not* saying that a business that is plagued by gang members necessarily *has* to shut down (even for a few hours). It would be perfectly reasonable for it to experiment first with lesser measures, such as surveillance cameras, security guards, or a protective order. According to Palmden, however, it is speculative that these would have been successful. What we *can* say with certainty is that *either* these measures would have worked, *or else* closing down the restaurant would have worked.

This is sufficient to dispose of Palmden's argument, based on *Saelzler*, that there was no causation. However, Palmden also argues that Ford cannot show causation because he "voluntarily le[ft] the safety of a locked restaurant to join in an ongoing fight" Essentially, this is an argument that Ford was the superseding cause of his own injuries.

California recognizes comparative negligence, rather than contributory negligence. In other words, the fact that the plaintiff's own negligence contributed to his or her injuries is not a complete defense; it simply reduces the defendant's liability, under

principles of comparative fault. (See generally *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 828-829.)

The plaintiff's negligence is a complete defense only if it is a *superseding* cause of the plaintiff's injuries. (See *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1016-1017.) "[T]he defense of 'superseding cause[]' . . . absolves a tortfeasor, even though his conduct *was* a substantial contributing factor, when an independent event intervenes in the chain of causation, producing harm of a kind and degree so far beyond the risk the original tortfeasor should have foreseen that the law deems it unfair to hold him responsible. [Citations.]" (*Soule v. General Motors Corp.*, *supra*, 8 Cal.4th at p. 573, fn. 9.)

"[H]owever, . . . an intervening act does not amount to a 'superseding cause' relieving the negligent defendant of liability [citation] if it was reasonably foreseeable: '[A]n actor may be liable if his negligence is a substantial factor in causing an injury, and he is not relieved of liability because of the intervening act of a third person if such act was reasonably foreseeable at the time of his negligent conduct.' [Citation.]" (*Landeros v. Flood* (1976) 17 Cal.3d 399, 411.)

Here, once gang members were allowed to hang out at the restaurant, it was foreseeable that they would commit acts of violence against customers. (See part V, *post*.) But it was also foreseeable that other customers would come to the defense of their friends and family. "Generally, where an actor puts himself or others in danger, it is foreseeable a person will attempt to rescue those placed in danger. As Justice Cardozo said, 'Danger invites rescue.' [Citation.] Accordingly, although the rescuer may be said

to have willingly exposed himself to the danger, such act does not eliminate or excuse the culpability created by the actor's negligence." (*Sears v. Morrison* (1999) 76 Cal.App.4th 577, 580.) There was substantial evidence that Ford went outside, despite the locked door, to come to the aid of his friends and family members.

We therefore conclude that there was a triable issue of fact with regard to causation.

V

DUTY

The trial court erroneously ruled that Ford could not show causation. Accordingly, it never ruled on Palmden's claim that Ford could not show that it had a duty to protect him. If Palmden was entitled to summary judgment based on lack of duty, rather than lack of causation, we could still affirm the judgment. Ford contends, however, that Palmden also was not entitled to summary judgment on the issue of duty.

"It is established that business proprietors such as . . . restaurants . . . owe a duty to their patrons to maintain their premises in a reasonably safe condition, and that this duty includes an obligation to undertake 'reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures.' [Citations.]" (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 229.)

"[T]he court's task in determining duty 'is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue

is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed’ [Citations.]” (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 772.)

“ . . . ‘First, the court must determine the specific measures the plaintiff asserts the [business proprietor] should have taken to prevent the harm. This frames the issue for the court’s determination by defining the scope of the duty under consideration. Second, the court must analyze how financially and socially burdensome these proposed measures would be to a [proprietor] Third, the court must identify the nature of the third party conduct that the plaintiff claims could have been prevented had the [proprietor] taken the proposed measures, and assess how foreseeable (on a continuum from a mere possibility to a reasonable probability) it was that this conduct would occur. Once the burden and foreseeability have been independently assessed, they can be compared in determining the scope of the duty the court imposes on a given defendant. The more certain the likelihood of harm, the higher the burden a court will impose on a [proprietor] to prevent it; the less foreseeable the harm, the lower the burden a court will place on a [proprietor].’ [Citation.]” (*Castaneda v. Olsher, supra*, 41 Cal.4th at p. 1214.)

“The existence of a legal duty is a question of law for the court. [Citation.]” (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1188-1189.)

Here, when we view the evidence in the light most favorable to Ford, it was clearly foreseeable that a Denny’s customer would become the victim of violent third party criminal conduct. Gang members took over the Denny’s every Saturday night. It should have been apparent that they were gang members, as they identified themselves as

the “Gateway Posse,” and they flashed gang signs. Even if not, however, it was apparent that they were violent, as they had previously been involved in fights both inside and outside the restaurant.

McBride maintained that she was unaware of any of this. This is irrelevant. At least four members of her staff were well aware of it. Their knowledge must be imputed to Palmden. (Civ. Code, § 2332.)

Palmden asserts, “It is well established that a corporation is not chargeable with the knowledge of an officer or agent who has no authority to bind the corporation” Actually, the test is whether the agent is acting within the scope of his or her authority (*Sanders v. Magill* (1937) 9 Cal.2d 145, 153; cf. *Primm v. Joyce* (1948) 87 Cal.App.2d 288, 291-292); this may or may not involve entering into contracts on behalf of (i.e., “binding”) the principal. In any event, a server has some authority to bind a restaurant. It would be absurd to suppose that a person who has ordered a meal from a waiter or waitress has not entered into a contract with the restaurant. Palmden’s employees who observed the conduct of Gateway members were acting within the scope of their employment; hence, their knowledge must be imputed to Palmden. (See *Hellar v. Bianco* (1952) 111 Cal.App.2d 424, 427 [bartender’s knowledge of slanderous writing on restroom wall was imputable to tavern].)

As a general rule, Ford was not required to show prior similar incidents. (See generally *Delgado v. Trax Bar & Grill, supra*, 36 Cal.4th at pp. 240-244.)¹⁰ Nevertheless, he did, in fact, show a prior similar incident — namely, the brawl on March 1-2, 2003. McBride was concededly aware of the brawl. Moreover, the police informed her that Gateway was involved.

Palmden claims it was unaware that anyone was *injured* in the brawl. However, Christopher Bluhm — who was not only the manager of the Denny’s, but also McBride’s son — admitted that a customer “came up to me and asked for napkins because he had been cut.” In any event, eyewitnesses, including Denny’s staff, saw people being punched. A restaurant window was broken. Certainly Palmden knew that a violent event had taken place on its premises. McBride consulted the police for advice about how to prevent something similar from happening again. Thus, it appears that a violent crime was not only foreseeable, but actually foreseen. This relatively high likelihood of harm militates in favor of imposing a relatively heavy burden on Palmden to prevent it.

As we discussed in part IV, *ante*, Palmden had the option of experimenting with a number of security measures. There was no evidence that any of these were particularly burdensome. The cost of calling the police every time a gang member became disruptive or committed a crime on the premises would seem to be negligible. Del Marva testified that the cost of surveillance cameras depends on the layout of the restaurant but that

¹⁰ Ford *was* required to show prior similar incidents in order to establish a duty to hire security guards, which requires “heightened foreseeability.” (*Delgado v. Trax Bar & Grill, supra*, 36 Cal.4th at pp. 236-240.)

“more Denny’s restaurants have such video surveillance systems than do not and the costs of such systems is considered a normal cost of doing business.” He also testified that the cost of hiring off-duty police officers would be about \$444 per weekend — hardly a prohibitive amount.

If these were ineffective, and if Palmden therefore went ahead and closed the restaurant down for a few hours on Saturday nights, presumably it would lose some revenue. However, it must be remembered that generally, Gateway members did not order food, and when they did, they left without paying; meanwhile, they scared other customers away. We know that, after the March 2003 brawl, and again after the April 2004 incident, Palmden did, in fact, close the restaurant. This was relevant evidence that closing the restaurant was feasible. (See *People v. Lockheed Shipbuilding & Constr. Co.* (1975) 50 Cal.App.3d Supp. 15, 36.)

We therefore conclude that there was a triable issue of fact with regard to whether Palmden had a duty to protect Ford.

VI

THE LIABILITY OF THE DENNY’S ENTITIES

Ford also contends that there was also a triable issue of fact with respect to whether the Denny’s entities were liable based on (1) their own negligence, (2) actual agency, or (3) ostensible agency. We discuss only ostensible agency, because we conclude that it is dispositive.

A. *Additional Factual and Procedural Background.*

The following additional facts were shown in connection with the Denny's entities' motions for summary judgment.

1. *The relationship between the Denny's entities.*

DC is a holding company; it owns all the stock in DHI. DHI, in turn, is a holding company that owns all the stock in DI. DI is an operating company, but it also owns all the stock in DFO. Finally, DFO is an operating company, but it also owns all the stock in DRI.

2. *The relationship between Palmden and DFO.*

DFO owns the trademark "Denny's" and acts as the Denny's franchisor. It was DFO that had a franchise agreement with Palmden.

The franchise agreement specified that Palmden was an independent contractor. However, it did give DFO some control over Palmden's business practices, including vendors, uniforms, menus, signs, and advertising.¹¹

The franchise agreement required Palmden to keep the restaurant open 24 hours a day, seven days a week. DFO allowed individual franchisees to deviate from this requirement if a "risk assessment" — which had to be requested by the franchisee — showed above-normal criminal activity during late-night hours. Some 15 restaurants

¹¹ Ford claims that the Denny's entities had refused to let Palmden install security video cameras. This evidence was admitted as against Palmden. The trial court, however, sustained the Denny's entities' objection to it. We therefore do not consider it in connection with the Denny's entities' liability. (See part I.A, *ante*.)

nationwide (including eight in California alone) had been allowed to close during the late-night “bar rush” period.

A franchisee was permitted, but not required, to have signs indicating that its particular restaurant was independently owned and operated.

3. *The relationship between Palmden and DI.*

DI owns and operates the approximately 250 Denny’s restaurants that are corporate-owned, rather than franchised. DI also subleased the Palm Springs restaurant property to Palmden.

Palmden was required to comply with the Denny’s Brand Standards Manual, provided by DI. This gave DI some control over Palmden’s business practices.¹²

4. *The relationship between Palmden and the other Denny’s entities.*

DC, DHI, and DRI had no direct contractual relationship with Palmden. They did not have any property interest in the Palm Springs restaurant. However, there was some evidence that arguably might justify treating all of the Denny’s entities as alter egos.

B. *Ostensible Agency.*

“An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him.” (Civ. Code, § 2300.)

¹² A copy of the Brand Standards Manual was filed in the trial court under seal. It has not been included in the appellate record. Hence, we are not able to determine precisely how much control it gave DI.

““It is elementary that there are three requirements necessary before recovery may be had against a principal for the act of an ostensible agent. The person dealing with the agent must do so with belief in the agent’s authority and this belief must be a reasonable one; such belief must be generated by some act or neglect of the principal sought to be charged; and the third person in relying on the agent’s apparent authority must not be guilty of negligence. [Citation.]” [Citation.]” (*Kaplan v. Coldwell Banker Residential Affiliates, Inc.* (1997) 59 Cal.App.4th 741, 747.)

In *Beck v. Arthur Murray, Inc.* (1966) 245 Cal.App.2d 976, the court found sufficient evidence that a franchisee was the ostensible agent of a franchisor. It noted that the franchisee repeatedly used the “Arthur Murray” name in its advertising, mailings, phone calls, and contract with the plaintiff. (*Id.* at p. 979.) The court agreed “that the mere licensing of trade names does not create agency relationships either ostensible or actual.” (*Id.* at p. 981.) However, it noted that there was evidence that the plaintiff had, in fact, relied on the belief that she was dealing with the nationwide Arthur Murray. (*Id.* at p. 979.)

Similarly, in *Kuchta v. Allied Builders Corp.* (1971) 21 Cal.App.3d 541 [Fourth Dist., Div. Two], this court held that there was sufficient evidence that a franchisee was the ostensible agent of a franchisor. We noted that both entities used the name “Allied Builders System”; both used common advertising; the franchisor referred to the franchisee as its “branch office”; and phone calls to the franchisor produced a response from the franchisee. (*Id.* at pp. 547-548.)

Finally, in *Kaplan v. Coldwell Banker Residential Affiliates, Inc.*, *supra*, 59 Cal.App.4th 741, the court found a triable issue of fact with respect to whether the franchisee was the ostensible agent of the franchisor. They both used the same “Coldwell Banker” name, logo, and advertising. The franchisee was required to hold himself out as a “member” of Coldwell Banker. (*Id.* at p. 747; see also *id.* at p. 744.) The plaintiff testified that he relied on appearances and believed that he was dealing with Coldwell Banker. (*Id.* at pp. 747-748; see also *id.* at p. 744.)

Here, much as in these cases, Palmden did business as “Denny’s,” using the Denny’s name, logo, and other trademarks. While some Denny’s restaurants are franchisee-operated, others are corporate-operated; hence, we cannot say it is common knowledge that all Denny’s are necessarily franchises. (See *Beck v. Arthur Murray, Inc.*, *supra*, 245 Cal.App.2d at p. 981.) There was no signage or other indication that the particular Denny’s was actually operated by a franchisee. Finally, Ford testified that he had seen advertisements identifying Denny’s as “a family style restaurant . . . in which a patron could enjoy a good meal in a friendly, safe, and secure environment” and that this led him to conclude that “[h]e and [his] friends could enjoy a meal at the subject Denny’s” This was sufficient evidence of reliance.

The Denny’s entities do not even argue that ostensible agency did *not* apply. They do not discuss, much less distinguish, any of the cases cited above. However, they do raise the following policy argument: “[I]f the law ultimately holds franchisors routinely liable for the wrongful acts of its franchisees and their employees, franchisors will either quit franchising or, at the very least, charge much higher fees.” In *Beck*, however, the

court rejected a similar argument, stating: “Defendant correctly maintains that there are important economic advantages to society in the franchise system of doing business. However, our decision in no way endangers that system of enterprise; defendant could have easily protected itself by requiring that its licensee inform the public of his [franchisee] status in more effective ways” (*Beck v. Arthur Murray, Inc., supra*, 245 Cal.App.2d at p. 981.)

It could be argued that only DFO — as the actual franchisor — can be held liable on an ostensible agency theory. Ford’s complaint alleged that if one of the Denny’s entities was liable, they were all liable, on an alter ego theory. DC, DHI, DI, and DRI sought summary judgment, in part, on the ground that alter ego liability did not apply.

The trial court never ruled on this issue. Because we review the trial court’s ruling de novo, we could affirm on this ground, if it is meritorious. The Denny’s entities, however, have not asked us to do so. In their brief, they barely mentioned the alter ego theory; they did not discuss any of the relevant evidence. In his reply brief, Ford specifically stated that he was not going to discuss alter ego because the Denny’s entities had not raised it.

Under the circumstances, we deem the Denny’s entities to have forfeited any challenge to Ford’s alter ego allegations for purposes of this appeal. (See *Lyons v. Chinese Hospital Assn.* (2006) 136 Cal.App.4th 1331, 1336, fn. 2.) We do not mean to preclude them from raising such a challenge anew on remand.

VII

DISPOSITION

The judgments are reversed. Ford is awarded costs on appeal against Palmden and against the Denny's entities.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P. J.

MILLER
J.