10/00 - SAELZER V. ADVANCED GROUP [AC]

S085736

IN THE SUPREME COURT OF CALIFORNIA

MARIANNE SAELZLER,

Plaintiff and Respondent,

vs.

ADVANCED GROUP 400, et al.,

Defendants and Petitioners.

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SEVEN
CASE NO. B125896

REQUEST FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANTS AND PETITIONERS ADVANCED GROUP 400, ET AL.

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THE UNIVERSITY OF SOUTHERN CALIFORNIA, THE UNIVERSITY OF CALIFORNIA, CALIFORNIA STATE UNIVERSITY, THE BOARD OF TRUSTEES OF THE LELAND STANFORD JUNIOR UNIVERSITY, CALIFORNIA INSTITUTE OF TECHNOLOGY, LOMA LINDA UNIVERSITY, PEPPERDINE UNIVERSITY, SUTTER HEALTH, STATE FARM GENERAL INSURANCE COMPANY, TRUCK INSURANCE EXCHANGE, FIRE INSURANCE EXCHANGE, MID-CENTURY INSURANCE COMPANY, CIVIC PROPERTY AND CASUALTY COMPANY, EXACT PROPERTY

AND CASUALTY COMPANY, AND NEIGHBORHOOD SPIRIT PROPERTY AND CASUALTY COMPANY

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REQUEST BY THE UNIVERSITY OF SOUTHERN CALIFORNIA, THE UNIVERSITY OF CALIFORNIA, CALIFORNIA STATE UNIVERSITY, THE BOARD OF TRUSTEES OF THE LELAND STANFORD JUNIOR UNIVERSITY (STANFORD UNIVERSITY), CALIFORNIA INSTITUTE OF TECHNOLOGY, LOMA LINDA UNIVERSITY, PEPPERDINE UNIVERSITY, SUTTER HEALTH, STATE FARM GENERAL INSURANCE COMPANY, TRUCK INSURANCE EXCHANGE, FIRE INSURANCE EXCHANGE, MID-CENTURY INSURANCE COMPANY, CIVIC PROPERTY AND CASUALTY COMPANY, EXACT PROPERTY AND CASUALTY COMPANY, AND NEIGHBORHOOD SPIRIT PROPERTY AND CASUALTY COMPANY, FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANTS AND PETITIONERS

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to California Rules of Court, rule 14(b), the University of Southern California, the University of California, California State University, the Board of Trustees of the Leland Stanford Junior University (Stanford University), California Institute of Technology, Loma Linda University, and Pepperdine University (collectively, "the Universities"); Sutter Health, a nonprofit organization of hospitals; and State Farm General Insurance Company, Truck Insurance Exchange, Fire Insurance Exchange, Mid-Century

Insurance Company, Civic Property and Casualty Company, Exact Property and Casualty Company, and Neighborhood Spirit Property and Casualty Company (collectively, "the Insurance Carriers") respectfully request permission to file the attached brief as amici curiae in support of defendants and petitioners Advanced Group 400, et al.[1/]

The University of Southern California (USC) is a private university with a diverse student body, located near downtown Los Angeles. Its two campuses, which include administrative facilities, classrooms, laboratories, libraries, dormatories, hospital facilities, athletic fields, parking garages, and park-like open spaces, are located on 186 acres of property. Over 28,000 students and countless members of the public have constant access to USC's facilities from early in the morning until late at night. USC was the defendant in one of the leading landowner liability cases, *Nola M. v. University of Southern California* (1993) 16 Cal.App.4th 421, the validity of which is at issue here.

The University of California (UC) is a public university system that includes nine university campuses located throughout California, in or near Santa Cruz, San Francisco, Davis, Berkeley, Santa Barbara, Los Angeles, Irvine, Riverside and San Diego. Approximately 178,410 students attend the nine UC campuses, and approximately 150,640 employees work on the campuses. The campuses contain a total of approximately 5,200 buildings, most of which are regularly accessible to all UC's students and employees, as well as to the general public. In particular, the campus libraries are open to the public, and members of the public regularly attend athletic events at the many sporting facilities on the campuses. In addition, five of the UC

1/ This application and proposed brief are timely filed. On September 7, 2000, this Court extended the time for filing the application and proposed brief to and including October 10, 2000.

campuses (San Francisco, Davis, Irvine, Los Angeles and San Diego) have medical schools with hospitals that service the general public.

California State University (Cal State) is a public university system composed of 23 campuses located throughout California. The 23 Cal State campuses occupy a total of 17,819 acres of property consisting of classrooms, laboratories, libraries, parking structures, gymnasiums, athletic fields, administrative facilities, and open spaces. Approximately 360,000 students and 20,000 faculty members have constant access to the Cal State campuses throughout the day and into the night. The campuses also are open to the general public.

Stanford University is a private university located in Silicon Valley on over 8,000 acres of land in Santa Clara County and San Mateo County. Stanford's campus includes classrooms, laboratories, stadiums, athletic facilities, utilities plants, administrative buildings, two hospitals, a church, an art museum, a linear accelerator, student residences, faculty housing, lakes, and thousands of acres of open space. The campus has more than 46 miles of roads and is essentially open to the public. There are over 14,000 students at Stanford and more than 9,000 faculty and staff.

California Institute of Technology (Caltech) is an independent, privately supported university located in Pasadena, with approximately 900 undergraduate and 1,100 graduate students. Caltech's campus encompasses 124 acres with some 40 laboratory and research buildings. Caltech also has administrative, parking, and athletic facilities, classrooms, and student housing for both undergraduate and graduate students. Caltech is a major presence in a small community, and this presence includes maintaining an open campus policy. However, at some point, liability concerns could become sufficiently onerous as to affect Caltech's ability to make its campus facilities available to the public.

Loma Linda University is a private university that enrolls more than 3,500 students in six schools emphasizing the health sciences. Loma Linda's campus consists of approximately 100 acres plus an additional 80 acres occupied by the Loma Linda University Medical Center and its related facilities. Besides administrative facilities, classrooms, laboratories, libraries, dormatories, recreational facilities and open spaces, the Loma Linda campus includes numerous clinics that provide health care to patients. The Loma Linda medical institutions are the primary regional tertiary medical center for inland Southern California with 880 patient beds, more than 5,500 employees, and a medical staff in excess of 950. The institutions admit more than 35,000 inpatients each year and serve more than 750,000 outpatients. Countless members of the public have 24-hour access to Loma Linda's medical center and day and evening access to the campus and its related facilities.

Pepperdine University is a private, nonprofit university located in Malibu, California. Pepperdine's campus rests on 830 acres and includes administrative facilities, classrooms, athletic facilities, museums, theaters, and housing for students, faculty and staff. More than 9,000 students, faculty and staff have access to Pepperdine's campus facilities. The general public also frequently visits the campus to attend, among other things, athletic competitions and theatrical, musical and other performances.

The Universities take significant measures to protect their campuses against crime, including retaining highly trained security guards to patrol the campuses 24 hours a day. Nonetheless, the Universities are acutely aware that there is always the possibility random crime will occur on their property because, unfortunately, "[a]bsolute safety is not an achievable goal," especially given the vast number of people who regularly come upon the university campuses and use the Universities' facilities. (*Nola M. v. University of Southern California, supra,* 16 Cal.App.4th at p. 436.) The Universities are

interested in assuring that they are not subjected to the new and potentially limitless standard of liability for third-party crimes on their premises that the majority opinion in this case sets forth.

Sutter Health is a nonprofit organization of hospitals with 28 hospitals in Northern California, serving both rural and urban areas. Like the Universities, Sutter Health's hospitals go to great lengths to secure their premises against crime. However, extensive public access to the hospital facilities, which is crucial to effective health service, makes Sutter Health a potential target of actions resulting from any expansion of the rules pertaining to premises liability.

State Farm General Insurance Company (State Farm General) is a stock company wholly owned by State Farm Mutual Automobile Insurance Company, which does not issue shares to the public. State Farm General provides general liability insurance coverage to over three million business owners, office buildings, condominium and apartment complexes, churches, and other commercial and private property owners throughout California. Any and all of State Farm General's insureds, and therefore State Farm General itself, stand to be affected by any expansion of the rules governing landowner liability for third-party crimes.

Truck Insurance Exchange, Fire Insurance Exchange, Mid-Century Insurance Company, Civic Property and Casualty Company, Exact Property and Casualty Company, and Neighborhood Spirit Property and Casualty Company are independent insurance carriers that, for business promotional purposes, operate, along with many other insurers, using the federally registered servicemark "Farmers Insurance Group of Companies." These insurance carriers provide general liability insurance coverage to hundreds of thousands of commercial and private property owners throughout California. Truck Insurance Exchange provides liability insurance coverage to Advanced

Group 400, one of the defendants in the instant action. Wholly apart from the outcome of this case, Truck, like State Farm and the other insurance carriers that use the servicemark "Farmers Insurance Group of Companies," has a vital interest in the rules that govern the liability of its insureds in all cases that arise out of third-party criminal assaults.

Counsel for the Universities, Sutter Health, and the Insurance Carriers have reviewed the briefs on the merits filed in this case and believe this Court will benefit from additional briefing on the proof necessary to establish causation in premises liability cases arising from third-party crime.

INTRODUCTION

The past years "have seen a proliferation of cases . . . in which plaintiffs seek to impose liability on the owners or occupiers of land for injuries resulting from the criminal conduct of some third party." (*Gregorian v. National Convenience Stores, Inc.* (1985) 174 Cal.App.3d 944, 947.) In these cases, the criminals, who are unquestionably directly responsible for the plaintiffs' injuries (if not, as some would argue, exclusively so), often cannot be found or are insolvent. In our litigious society, where individuals seek financial compensation "for virtually every wrong, accident or inconvenience that befalls [them]," the crime victims typically look to the "deep pockets" of the owner of the property on which the crime occurred. (Sharp, *Paying for the Crimes of Others? Landowner Liability for Crimes on the Premises* (1987) 29 S. Tex. L.Rev. 11, 16.)

This Court has recognized the need to place rational limits on landowners' exposure to liability for criminal acts perpetrated on their property by others. In *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666,

the Court acknowledged that, "[u]nfortunately, random, violent crime is endemic in today's society," and "[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.) The Court also recognized that "'[n]o one really knows why people commit crime'" or what will deter them. (*Id*. at p. 679, quoting *7735 Hollywood Blvd. Venture v. Superior Court* (1981) 116 Cal.App.3d 901, 905.) In light of these realities, the Court reiterated the "well-established policy in this state" that landowners are not insurers of the safety of everyone who comes upon their property. (*Id.* at p. 679.)

More recently, in *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, this Court cited with approval *Nola M. v. University of Southern California* (1993) 16 Cal.App.4th 421, and other, earlier Court of Appeal decisions that "rejected claims of abstract negligence [by landowners pertaining to the absence of security measures on their property] where no connection to the alleged injuries was shown." (*Sharon P. v. Arman, Ltd., supra*, 21 Cal.4th at pp. 1196-1197.) Again emphasizing the need to rationally limit landowner liability for others' crimes, the Court confirmed the need for plaintiffs to show that "proposed [security] measures would have been effective to protect against the type of violent assault that occurred." (*Id*. at p. 1196.)

The majority decision in *Saelzler v. Advanced Group 400* (1999) 77 Cal.App.4th 1001, ignores these pronouncements by this Court, explicitly rejects and declines to follow the *Nola M*. line of cases, and dramatically expands the potential for landowner liability for third-party crime. According to the *Saelzler* majority, whenever a plaintiff offers evidence that inadequate security was provided on a landowner's property (evidence which, of course, can always be presented with the benefit of hindsight after a crime has occurred), a *presumption* of causation arises based on the "common sense" notion that security measures generally "reduce the probability crime will

occur at locations enjoying these protections." (*Id*. at pp. 1011, 1013-1014.) The burden then shifts to the defendant landowner to demonstrate, if it can, that the particular crime perpetrated against the plaintiff would have happened even if the plaintiff's proposed security precautions were in place. (*Id.* at p. 1014.) The court in *Saelzler* suggested the landlord rarely will succeed in satisfying this burden if the criminal assailant is not available to testify. (*Ibid.*)

In departing so dramatically from existing law, the *Saelzler* majority obviously was influenced by the facts of the case before it, which involved a delivery person whose job required that she enter an apartment complex that was rampant with violent crime and where, arguably, no indicia of security existed, at least during the time of day when the attack against the plaintiff occurred. (*Saelzler v. Advanced Group 400*, *supra*, 77 Cal.App.4th at pp. 1003-1005.) But the *Saelzler* decision has broad implications for *all* landowners, including highly responsible ones like amici Universities and Sutter Health, as well as the vast majority of property owners insured by amici Insurance Carriers. Under *Saelzler*, even the most responsible landowners could be held "vicariously" liable for the acts of criminals on their property, regardless how many security measures they take. This follows because, in hindsight, a plaintiff will virtually *always* be able to argue the defendant property owner could have taken more or different steps to prevent the specific crime that occurred. (See *Sharon P. v. Arman, Ltd.*, *supra*, 21 Cal.4th at p. 1194 ["[t]he mere fact that a crime has occurred almost always allows one to draw the conclusion, after the fact, that the premises were inherently dangerous," quoting Kaufman, *When Crime Pays: Business Landlords' Duty to Protect Customers from Criminal Acts Committed on the Premises* (1990) 31 S. Tex. L.Rev. 89, 112-113, fns. omitted].) There will *always* be a "security expert" willing to offer such testimony. (See *Noble v. Los Angeles Dodgers, Inc*. (1985) 168 Cal.App.3d 912, 916 [recognizing a troublesome

"growth industry is developing consisting of experts who will advise and testify as to what, in their opinion, constitutes 'adequate security'"].)

The *Saelzler* majority opinion is a classic example of bad facts making bad law. Its effect is to subject property owners generally to potentially unlimited liability for third-party crime, and to make them the virtual insurers of the safety of others on their property, contrary to "well-established policy in this state." (*Ann M. v. Pacific Plaza Shopping Center, supra,* 6 Cal.4th at p. 679.) Accordingly, this Court should reverse *Saelzler* and reaffirm the fundamental requirement that, to prevail in a premises liability action based on third-party crime, a plaintiff must affirmatively demonstrate the "proposed [security] measures would have been effective to protect against the type of violent assault that occurred." (*Sharon P. v. Arman, Ltd.*, *supra*, 21 Cal.4th at p. 1196.)

LEGAL DISCUSSION

I.

SAELZLER'S NOVEL APPROACH TO PROVING CAUSATION CONFLICTS WITH EXISTING CALIFORNIA AUTHORITY, INCLUDING PRIOR DECISIONS OF THIS COURT, AND WITH CASE LAW FROM OTHER JURISDICTIONS

A. *Saelzler* Directly Conflicts with *Every* Other Decision by the California Courts of Appeal that Has Addressed the Issue of

Causation in the Context of Landowner Liability for Third-Party Crime

Prior to *Saelzler*, the seemingly settled test for causation in premises liability cases arising from third-party crime was the rule enunciated in *Nola M. v. University of Southern California*, *supra*, 16 Cal.App.4th 421. In broad terms, *Nola M*. held that unless a plaintiff demonstrates that it is substantially likely a third-party criminal assault would not have occurred had the defendant landowner taken additional security precautions, the defendant is not the legal cause of injuries sustained in such an attack. (*Id*. at pp. 435-439.)

Under *Nola M*., simply criticizing the defendant's security measures by offering expert opinion that additional measures – another guard, more lights, fewer trees – would have made the property safer is not enough to get a case to the jury, much less to prevail at trial. The plaintiff also must demonstrate with specific facts that a substantial probability exists these additional measures would have prevented the crime. (See *id*. at pp. 424, 435-439.) In other words, the plaintiff must demonstrate a causal connection between the absence of additional security measures and the criminal assault.

Nola M. based its conclusion on numerous other landowner liability cases which all held liability cannot be premised on "abstract negligence," i.e., negligence that has no demonstrable causal connection with the plaintiff's injuries. (*Id*. at pp. 429-436; see also, e.g., *Noble v. Los Angeles Dodgers, Inc*., *supra*, 168 Cal.App.3d at p. 916 ["We understand the law still to require that a plaintiff, in order to establish liability, must prove more than abstract negligence unconnected to the injury" and are "unaware of any case in which a judgment against the property owner has been affirmed solely on the basis of a failure to provide an adequate deterrence to criminal conduct in general"]; *Lopez v. McDonald's Corp*. (1987) 193 Cal.App.3d 495, 515-516 ["This case

constitutes a classic example of plaintiffs establishing 'abstract negligence' in that [defendant's] security failed to conform with their expert's notion of adequacy . . ., without establishing any causal nexus between this failure and the resulting injuries"]; *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 488 [negligence action against landlord "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"]; accord *Constance B. v. State of California* (1986) 178 Cal.App.3d 200; *Thai v. Stang* (1989) 214 Cal.App.3d 1264).

Without exception, these cases, including *Nola M.*, rejected the notion that a plaintiff can satisfy the burden to show causation by proffering conclusory testimony from a security expert who opines generally, without specific substantiation, that whatever security measures the defendant did not have in place would have prevented the crime. (*Leslie G. v. Perry & Associates, supra*, 43 Cal App.4th at p. 488 ["proof of causation cannot be based on . . . an expert's opinion based on inferences, speculation and conjecture"]*; Nola M. v. University of Southern California*, *supra*, 16 Cal.App.4th at p. 435; *Lopez v. McDonald's Corp*., *supra*, 193 Cal.App.3d at p. 516; *Noble v. Los Angeles Dodgers, Inc, supra*, 168 Cal.App.3d at p. 917; *Constance B. v. State of California, supra*, 178 Cal.App.3d at p. 211.)

Rather, these cases required plaintiffs to prove the element of causation based on specific facts or "real evidence." (*Leslie G. v. Perry & Associates, supra*, 43 Cal.App.4th at p. 488; see also *id.* at p. 483 ["Since there is no direct evidence that the rapist entered or departed through the broken gate (or even that the broken gate was the only way he could have entered or departed), Leslie cannot survive summary judgment simply because it is *possible* that he *might* have entered through the broken gate," emphasis in original]; *Gregorian v. National Convenience Stores, Inc*., *supra*, 174 Cal.App.3d at p. 949

[rejecting as "conclusionary" and "totally unsupported" plaintiff's argument that his attack would not have occurred had there been adequate lighting and patrolling security guards on the premises]; *7735 Hollywood Blvd. Venture v. Superior Court*, *supra*, 116 Cal.App.3d at p. 903 [plaintiff cannot "construct a bridge of causation" between landlord's alleged negligence and plaintiff's rape with "purely conclusionary allegations that the burglar-rapist would not have committed the crime had there been 'adequate lighting'"].)

Saelzler is now the sole exception to this consistent line of authority. The *Saelzler* majority not only found "admissible and credible" on the issue of causation the unsubstantiated, conclusory testimony of the plaintiff's security expert, it went further and concluded that such questionable testimony was not even necessary to establish the plaintiff's case. (*Saelzler v. Advanced Group 400, supra,* 77 Cal.App. at pp. 1014-1016.) This is because, according to *Saelzler*, the burden is on the *defendant* to prove the *absence* of causation in every case in which the plaintiff presents evidence of "abstract negligence." (*Id*. at p. 1014.) This holding directly contradicts every previous case in California on this issue.

B. *Saelzler* Conflicts with This Court's Recent Decision in *Sharon P. v. Arman, Ltd.*

This Court has not yet directly considered what sort of proof it takes to establish causation in premises liability actions arising from third-party crime. Very recently, however, in *Sharon P. v. Arman, Ltd.*, *supra,* 21 Cal.4th 1181, the Court broached the subject indirectly and expressed its agreement with the reasoning set forth in the *Nola M.* line of cases.

In *Sharon P.*, the plaintiff was attacked and sexually assaulted in a commercial parking garage. (*Id*. at p. 1185.) She sued the owners of the

garage, claiming they were negligent in failing to provide security guards, working security cameras, and sufficiently bright lights on the premises, and in failing to keep the garage clean to discourage criminal element. (*Id*. at pp. 1185-1186, 1188-1189.)

The issue presented in *Sharon P*. involved the garage owners' duty to provide the plaintiff's proposed security measures. In addressing this issue, this Court commented: "[I]t is difficult to quarrel with the abstract proposition that the provision of improved lighting and maintenance, operational service cameras and periodic walk-throughs of the tenant garage owned and operated by defendants might have diminished the risk of criminal attacks." (*Id*. at p. 1199.) Nonetheless, the Court stated that "it is questionable whether [these] proposed measures would have been effective to protect against the type of violent assault that occurred here." (*Id*. at p. 1196.) The Court noted the record "contain[ed] no evidence that the security camera at issue was even aimed toward the area of the parking garage where plaintiff was attacked. Moreover, surveillance cameras do not deter all crime and criminals do not confine their activities to locations that are untidy and unkempt." (*Ibid*.) The Court further noted that the record "contain[ed] no evidence [the plaintiff's] attacker actually used any of the darkened areas [of the garage] to facilitate his assault." (*Id*. at p. 1197, fn. 5.)

In making these observations, the Court cited with approval *Nola M*. and its predecessors for "reject[ing] claims of abstract negligence pertaining to the lighting and maintenance of property where no connection to the alleged injury was shown." (*Id*. at pp. 1196-1197.)

These comments by the Court in *Sharon P*. are completely at odds and cannot be reconciled with *Saelzler*. Although the Court implicitly acknowledged *Saelzler*'s "common sense" assumption that security generally reduces the probability that crime will occur (*id*. at p. 1199), the Court also

recognized this general proposition cannot substitute for the plaintiff's proof on the issue of causation in a particular case (*id*. at pp. 1196-1197). *Saelzler* holds precisely the opposite.

C. *Saelzler* Conflicts with Authority From Other Jurisdictions Concerning Proof of Causation in the Landowner Liability Context

Decisions from other jurisdictions concerning proof of causation in cases involving landlord liability for third-party crime are consistent with the *Nola M*. line of cases and with this Court's comments in *Sharon P*., and directly contrary to *Saelzler*. These authorities require the plaintiff to *affirmatively* prove the absence of adequate security substantially contributed to the occurrence of the *particular* crime at issue. (See, e.g. *Fallon v. Metropolitan Life Insurance Co.* (Ga.Ct.App.1999) 518 S.E.2d 170, 171 [affirming summary judgment for defendant because plaintiff "submitted no evidence tending to show that a security guard in the common area could have prevented" the attack]; *Kolodziejzak v. Melvin Simon & Associates* (Ill.App.Ct. 1997) 685 N.E.2d 985, 991 [reversing jury verdict for plaintiff because "whether Kolodziejzak's death could have been prevented by the addition of another security guard [was] at best speculation and conjecture"]; *Pietila v. Congdon* (Minn. 1985) 362 N.W.2d 328, 333 [reversing jury verdict for plaintiff because no evidence either bodyguards or security alarm system would have prevented murders]; *Pagano v. Mesirow* (Mich.Ct.App. 1985) 383 N.W.2d 103, 105 [affirming summary judgment for defendant because no evidence different lighting or security patrol would have prevented killing]; *Goldberg v. Housing Authority* (N.J. 1962) 186 A.2d 291, 297 [reversing jury verdict for plaintiff because of "guessing game [required] to determine

whether some unknown thug of unknowable character and mentality would have been deterred if the owner had furnished some or some additional policemen"]; *Schwartz v. Niki Trading Corp*. (N.Y.App.Div. 1995) 634 N.Y.S.2d 481, 481 [affirming summary judgment for defendant because "plaintiffs failed to provide any evidence indicating that the person who attacked plaintiff was an intruder or gained access to the building because of any lapse in security"].)[2/]

Moreover, like California in the *Nola M*. line of cases, other jurisdictions reject attempts by plaintiffs to satisfy the burden of establishing causation by presenting security experts who opine, without reliance on any specific factual support, that additional security measures would have prevented the crime. (See, e.g. *Wright v. New York City Housing Authority* (N.Y.App.Div. 1995) 624 N.Y.S.2d 144 ["affidavit of plaintiff's expert stating that the murder would not have occurred if the elevators were working properly and the stairwells had been properly illuminated consists of bald conclusions calculated to show fault but is devoid of any evidentiary showing based on knowledge of the facts"]; *Mkrtchyan v. 61st Woodside Associates*

2/ See also *Blumenthal v. Cairo Hotel Corp*. (D.C. 1969) 256 A.2d 400; *Post Properties, Inc. v. Doe* (Ga.Ct.App. 1997) 495 S.E.2d 573; *Stephens v. Clairmont Center, Inc.* (Ga.Ct.App. 1998) 498 S.E.2d 307; *N.W. v. Amalgamated Trust & Savings Bank* (Ill.App.Ct. 1990) 554 N.E.2d 629; *Gant v. Flint-Goodridge Hospital of Dillard University* (La.Ct.App. 1978) 359 So.2d 279; *Rullman v. Fisher* (Minn.Ct.App. 1985) 371 N.W.2d 588; *Vittengl v. Fox* (Mo.Ct.App. 1998) 967 S.W.2d 269; *Sakhai v. 411 East 57th Street Corp*. (N.Y.App.Div. 2000) 707 N.Y.S.2d 630; *Dawson v. New York City Housing Authority* (N.Y.App.Div. 1994) 610 N.Y.S.2d 28, *Pagan v. Hampton Houses, Inc*. (N.Y.App.Div. 1992) 589 N.Y.S.2d 471; *Clarke v. J.R.D. Management Corp*. (N.Y.Civ.Ct. 1983) 461 N.Y.S.2d 168; *Kistoo v. City of New York* (N.Y.App.Div. 1993) 600 N.Y.S.2d 693; *Hall v. Fraknoi* (N.Y.Civ.Ct. 1972) 330 N.Y.S.2d 637; *Carmichael v. Colonial Square Apartments* (Ohio Ct.App. 1987) 528 N.E.2d 585; *East Texas Theatres, Inc. v. Rutledge* (Tex.Ct.App. 1970) 453 S.W.2d 466.

(N.Y.App.Div. 1994) 618 N.Y.S.2d 825 [summary judgment for defendant proper because "[o]ther than mere speculation in the affidavit of the plaintiffs' 'security expert,' there [was] no indication in the record that the absence of a functioning intercom was a 'substantial causative factor in the sequence of events' that led to the assailant's presence in the lobby of the building"]; accord *Fallon v. Metroplitan Life Insurance Co., supra,* 518 S.E.2d at p. 171; *Post Properties, Inc. v. Doe, supra,* 495 S.E.2d at pp. 577-578; *Vittengl v. Fox, supra,* 967 S.W.2d at pp. 278-282.)

In contrast to these cases, *Saelzler* permits a plaintiff to meet the burden of establishing causation based on nothing more than an expert's opinion, not tied to any specific facts, that additional security would have prevented the crime. This is not surprising, because *Saelzler* also stands for the even more novel proposition that a plaintiff can establish causation by demonstrating nothing more than "abstract negligence," based on the vague "common sense" notion that security generally reduces the probability that crime will occur.[3/]

II.

SAELZLER'S APPROACH TO PROVING CAUSATION VIOLATES ESTABLISHED LEGAL PRINCIPLES AND POLICY CONSIDERATIONS

3/ Although our search has revealed a very small number of out-of-state cases that seem to apply a more liberal standard of causation than the *Nola M.* line of cases in premises liability actions based on third party crime (see e.g., *Orlando Executive Park, Inc. v. P.D.R.* (Fla.Dist.Ct.App. 1981) 402 So.2d 442), *no* case goes so far as *Saelzler* to affirmatively relieve the plaintiff of producing *any* evidence on the question of causation. Moreover, the limited liberalization of the plaintiff's proof on causation that these few cases allow is contrary to established legal principles and policy considerations, for the reasons discussed *infra*.

A. The "Common Sense" Premise that Security Generally Reduces Crime Is Insufficient, by Itself, to Satisfy a Plaintiff's Burden of Proof on the Issue of Causation

According to *Saelzler*, "*common sense* tells judges as well as jurors security measures – whether they be gates or lights or guards or more sophisticated approaches – . . . reduce the probability crime will occur at locations enjoying these protections. Thus, . . . the absence of these measures is a contributing cause of most crimes that occur on those premises." (*Saelzler v. Advanced Group 400*, *supra*, 77 Cal.App.4th at p. 1011 [emphasis added].) Based on this premise, *Saelzler* holds that whenever a plaintiff establishes inadequate security was provided at a given location, the necessary causal link to the crime that occurred is *presumed*. (*Id.* at pp. 1011-1014.)

Given what little is known about the workings of the criminal mind, it is possible to quarrel, in the first instance, with *Saelzler*'s premise that security precautions are effective in deterring crime. (See Opening Brief on the Merits, at pp. 37-39.) But it is not necessary to do so in order to perceive the flaw in *Saelzler*'s analysis, and to understand why other cases have not adopted its rationale. For even if it is true that security measures generally reduce the probability crime will occur, this premise is insufficient, by itself, to satisfy a plaintiff's burden to establish causation to the degree of certainty required by elemental principles of tort law.

In any negligence action, including premises liability actions arising from third-party crime, the plaintiff bears the burden to demonstrate the causal link between the defendant's negligence and the plaintiff's injury is *more likely than not*. (Prosser & Keeton, Torts (5th ed. 1984) § 41, p. 269.) "[P]laintiffs cannot recover where there is only a mere *possibility* the defendant's negligence caused the wrong." (*Simmons v. West Covina Medical*

Clinic (1989) 212 Cal.App.3d 696, 702, emphasis added; see also *Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402-402.) There must be "'a reasonably probable causal connection'" between the defendant's conduct and the plaintiff's injury or, in other words, a greater than 50-50 possibility that the defendant's act or omission substantially contributed to the harm. (*Simmons v. West Covina Medical Clinic, supra*, 212 Cal.App.3d at pp. 702-703; see also Prosser & Keeton, *supra*, § 41 at p. 269 ["A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, *or the probabilities are at best evenly balanced*, it becomes the duty of the court to direct a verdict for the defendant," emphasis added, footnotes omitted]; *Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 133.)

Common sense sometimes indicates a defendant's negligent act or omission more likely than not substantially contributed to the plaintiff's injury. When it does, the plaintiff may satisfy the burden to establish causation based on that fact alone. (See Prosser & Keeton, *supra*, § 41 at p. 270 [explaining that "ordinary experience" and "common knowledge" may provide the basis for showing causation].) But if common sense only suggests the defendant's negligence increased *by some unknown degree the likelihood* that the plaintiff would be injured, something more in the way of proof is required to establish causation.

So, for example, common sense tells us that properly operating seat belts reduce the likelihood of serious injury resulting from automobile accidents. But this does not mean that, in every case where a defectively designed seat belt ruptures during impact, the seat belt manufacturer is responsible for the plaintiff's injuries, or even for enhancement of the plaintiff's injuries. Rather, the plaintiff bears the burden of establishing, based on the specific facts of the case, that he would not have sustained the degree

of injury that occurred if the seat belt had operated properly. (See *Endicott v. Nissan Motor Corp*. (1977) 73 Cal.App.3d 917, 927.)

Similarly, common experience also tells us early detection of cancer increases the likelihood of survival. Yet, a doctor who negligently fails to diagnose cancer in a patient is not necessarily responsible for the patient's subsequent, cancer-related death. The plaintiff still bears the burden to show that, absent the doctor's negligence, this *particular* patient probably would have beaten the disease and lived. (See *Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, 1499; *Dumas v. Cooney* (1991) 235 Cal.App.3d 1593, 1603.)

When the subject is deterrence of crime, common sense only goes so far. "'No one really knows why people commit crime'" and, therefore, no one knows how effectively security measures prevent it. (*Ann M. v. Pacific Plaza Shopping Center, supra,* 6 Cal.4th at p. 679, quoting *7735 Hollywood Blvd. Venture v. Superior Court* (1981) 116 Cal.App.3d 901, 905.) Common sense may arguably suggest that added security measures reduce crime *to some extent*. But it is impossible to conclude, based on common sense alone and without reliance on any concrete facts, that a particular security precaution more likely than not would have prevented a particular crime, i.e., would have reduced the chance of the crime occurring by *more than 50 percent*. Yet that is precisely what a plaintiff must show to satisfy the burden of proving "a reasonably probable causal connection" between the absence of additional security precautions and the actual crime that occurred. (See *Simmons v. West Covina Medical Clinic, supra,* 212 Cal.App.3d at pp. 702-703 ["A less than 50-50 possibility that defendants' omission caused the harm does not meet the requisite reasonable medical probability test of proximate cause"]; accord *Williams v. Wraxall, supra,* 33 Cal.App.4th at p. 133.) To satisfy the burden to prove causation, the plaintiff therefore cannot rely solely on common sense;

rather, the plaintiff must present case-specific *facts* demonstrating a causal connection between the absent security measure and a particular crime.[4/]

Saelzler wrongly assumes that because security arguably deters *some* crime, inadequate security substantially contributes to the occurrence of *most* crime. (See *Saelzler v. Advanced Group 400, supra*, 77 Cal.App.4th at p. 1011, 1014.) In doing so, *Saelzler* effectively adopts a relaxed standard of causation that permits plaintiffs to prevail in premises liability actions when causation

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4/ For example, fingerprint analysis might create a reasonable basis to conclude the perpetrator of the crime entered the property through a broken door (see *Leslie G. v. Perry & Associates, supra*, 43 Cal.App.4th at p. 488, fn. 8), or other evidence might show the broken door was the only feasible means of entry. (See *Brewster v. Prince Apartments, Inc.* (N.Y.App.Div. 1999) 695 N.Y.S.2d 315, 318-319.) Or, there may be evidence the plaintiff's proposed security precautions deterred the assailant from committing crimes at other locations (See *Dickinson Arms-Reo, L.P. v. Campbell* (Tex.Ct.App.1999) 4 S.W.3d 333, 349.) There are myriad other ways for plaintiffs to prove causation, depending on the facts of the particular case. (See *Leslie G. v. Perry & Associates, supra,* 43 Cal.App.4th at p. 488, fn. 8; see also *Roettger v. United Hospitals of St. Paul, Inc.* (Minn.Ct.App. 1986) 380 N.W.2d 856, 861, 862 (assailant was openly present in hospital lounge area for extended period, with liquor on his breath, pacing, smoking cigarettes, and disturbing hospital visitors, but was not ejected by hospital security); *Walker v. St. Paul Apartments, Inc.* (Ga.Ct.App. 1997) 489 S.E.2d 317 (assailant entered through unlocked door while security guard was away from post; defendants failed to provide guard with key to lock door despite repeated requests); *Mayer v. Housing Authority* (N.J.Super.Ct.App.Div. 1964) 202 A.2d 439 (although identity of person who threw stone that injured plaintiff was unknown, evidence showed defendant had knowledge of stone-throwing by children in playground area for 11 months prior to the incident, incident occurred during time when children would be expected to make use of playground, and guards (who were not on duty at the time of the incident) previously stopped children from "fooling around" there); *Lincoln Property Co. v. DeShazo* (Tex.Ct.App. 1999) 4 S.W.3d 55 (evidence showed one security guard could not single-handedly control size of crowd that regularly gathered in defendant's parking lot on "college nights"); *Virginia D. v. Madesco Investment Corp.* (Mo. 1983) 648 S.W.2d 881 (security guard or television monitor in empty lower lobby area of hotel would have substantially increased probability that male assailant would have been noticed as he entered ladies' room).

is merely *possible*. This result directly contradicts established tort principles and should not be sanctioned by this Court.

B. An Expert's Unsupported Hindsight Opinion About the Deterrent Effect of Recommended Security Measures Cannot Create a Triable Issue of Fact on Causation

Although the *Saelzler* majority found "common sense" sufficient to create a triable issue of fact on causation, in an alternative holding the majority also found the testimony of plaintiff's security expert "admissible and credible" on the issue. (*Saelzler v. Advanced Group 400*, *supra*, 77 Cal.App.4th at p. 1016.) Plaintiff's expert testified, without any factual support, "that this attack, assault and battery, and attempted rape on the plaintiff would not have occurred had there been daytime security and a more concerted effort to keep the gates repaired and closed. . . . It is my opinion that the premises were a haven for gangsters and hoodlums which further encouraged criminal activity as evidence [*sic*] by the long history of criminal activity in the only one year prior to this incident." (*Id*. at pp. 1005-1006.) In sanctioning this testimony by plaintiff's expert, the *Saelzler* majority neglected to so much as mention the long line of authority from this and other jurisdictions finding similar, conclusory testimony entirely speculative and therefore inadequate to prove causation. (See section I, at pp. 5-11, *ante*.)

It is settled law that an expert's opinion must be based on established facts; "[w]here an expert bases his conclusion upon . . . factors which are speculative, remote or conjectural, . . . the expert's opinion cannot rise to the dignity of substantial evidence." (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135.) *Saelzler*'s holding flies in the face of this fundamental legal principle. It creates a dangerous precedent permitting

plaintiffs to prevail in premises liability cases based on unsupported, hindsight opinions of partisan "security experts" who opine without any factual basis that whatever security measures the defendant did not have in place would have prevented the particular crime that occurred. This type of inherently speculative and unreliable testimony cannot be accorded the status of actual evidence adequate to create a triable issue on causation.

C. There Is No Legitimate Basis For Shifting to Defendant Landowners the Burden to Disprove Causation

Saelzler holds that a plaintiff in a premises liability action based on a third-party's crime need not produce evidence to prove the connection between the defendant's conduct and the plaintiff's injury is "more likely than not." Under *Saelzler*, once the plaintiff establishes inadequate security was provided (in other words, duty and breach), the burden shifts to the defendant to *disprove* the element of causation – that is, the defendant must prove the particular crime perpetrated against the plaintiff would have happened even if proper security measures, as defined by plaintiff's expert, were in place. (*Saelzler v. Advanced Group 400, supra,* 77 Cal.App.4th at p. 1014.)

In negligence actions, the plaintiff typically bears the burden to prove causation. (*Rutherford v. Owens-Illinois, Inc*. (1997) 16 Cal.4th 953, 968; *Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409, 1415; Prosser & Keeton, *supra*, § 41 at p. 269; Rest.2d Torts, §433B.) Under very limited circumstances, for public policy reasons, the burden on the issue of causation may be shifted to the defendant. (Prosser & Keeton, *supra*, § 41 at pp. 270-271; Rest.2d Torts §433B.) However, shifting the burden of proof on causation constitutes a "fundamental departure" from general tort principles, and can only be justified under particular, unusual and recognized

circumstances. (*Rutherford v. Owens-Illinois, Inc*., *supra*, 16 Cal.4th at p. 969.) Premises liability actions based on third-party crime do not fall under any category of cases where burden-shifting on the causation question has been allowed.

For example, a shift in the burden of proof is proper "[w]here the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by *only one* of them, but there is uncertainty as to which one has caused it."[5/] (Rest.2d Torts, §433B, emphasis added; See also Prosser & Keeton, *supra*, § 41 at p. 271; *Sindell v. Abbott Laboratories, supra*, 26 Cal.3d at p. 598; *Rutherford v. Owens-Illinois, Inc*., *supra*, 16 Cal.4th at pp. 970-71.) This "alternative liability" situation justifies deviation from the usual allocation of the burden of proof because of "the injustice of permitting proved wrongdoers, who among them have inflicted injury upon the entirely innocent plaintiff, to escape liability merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of them has caused the harm." (Rest.2d Torts, §433B, com. f, p. 446.) This "alternative liability" principle has no application to actions involving premises liability for third-party crime, where the plaintiff necessarily claims *both* the criminal and the property owner are responsible, but in different ways, for the plaintiff's injury.

Another principle permitting a shift in the burden of proof on causation, and the only one on which plaintiff here relies (see Answer Brief on the Merits

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5/ The classic example of this "alternative liability" situation is the case of *Summers v. Tice* (1948) 33 Cal.2d 80. (See *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588, 598; *Lineaweaver v. Plant Insulation Co., supra*, 31 Cal.App.4th at p. 1417.) There, the plaintiff was injured by a single shot while hunting with two companions who each negligently fired their shotguns in his direction at about the same time. (*Summers v. Tice, supra*, 33 Cal.2d at pp. 82-83.) One of the defendants was clearly the cause of the plaintiff's injury, but it was impossible for the plaintiff to prove which one.

at pp. 36-37), was first enunciated in the celebrated case of *Haft v. Lone Palm Hotel* (1970) 3 Cal.3d 756. In *Haft*, a father and son drowned in a motel pool where, in violation of law, no lifeguard was provided. There were no witnesses, so it was impossible for the plaintiff to adduce definitive evidence on the manner in which the drownings occurred, or to establish whether a lifeguard could have prevented them. Nonetheless, the "chances of a successful rescue [were] very high." (*Id.* at p. 772, fn. 18.) The motel pool was very small, and the decedents were the only two persons in the entire pool area when the drownings occurred, so "a reasonably attentive lifeguard would without doubt have been aware of their activities at the moment that the . . . emergency arose." (*Ibid*.) Recognizing the motel's conduct created the "evidentiary void" on the issue of causation (because a lifeguard, if he did not rescue the decedents, at least would have witnessed the accident), the *Haft* court shifted the burden of proof to the defendant to prove a lifeguard would not have averted the tragedy. (*Id*. at pp. 771, 773.) The court explained:

> [T]he shift of the burden of proof . . . may be said to rest on a policy judgment that when there is a *substantial probability* that a defendant's negligence was a cause of an accident, and when the *defendant's negligence* makes it *impossible*, as a practical matter, for plaintiff to prove "proximate causation" conclusively, it is more appropriate to hold the defendant liable than to deny an innocent plaintiff recovery, unless the defendant can prove that his negligence was *not* a cause of the injury.

(*Id*. at p. 774, fn. 19, emphasis added, final emphasis in original.)

The *Haft* doctrine is not generally applicable to premises liability actions based on third-party crime. In fact, *Haft* does not apply under the facts of *Saelzler* itself.

Under *Haft*, a plaintiff must establish a "prima facie" case or "substantial probability" of causation as a condition precedent to a shift in the burden of proof. (*Thomas v. Lusk* (1994) 27 Cal.App.4th 1709, 1719;

Williams v. Wraxall, supra, 33 Cal.App.4th at p. 137; see also *Endicott v. Nissan Motor Corp., supra*, 73 Cal.App.3d at pp. 927-928 [refusing to apply *Haft* because it was "pure speculation to assume that differently designed seat belts would have prevented plaintiff's injuries"]; *Simmons v. West Covina Medical Center, supra*, 212 Cal.App.3d at p. 703 [finding *Haft* inapplicable because the evidence did not establish a "reasonable degree of medical probability" plaintiff would have obtained a different result absent defendant's medical negligence]; *Smith v. Americania Motor Lodge* (1974) 39 Cal.App.3d 1, 6 [distinguishing *Haft* where it was "fully as logical that the [drowning] deaths were caused by the [decedents'] mere inability to swim as by the fact that the [statutorily required safety rope] was missing [from the pool]"]; *Jones v. Ortho Pharmaceutical Corp., supra*, 163 Cal.App.3d at p. 405 [explaining the *Haft* rationale "is in reality merely an extension of the doctrine of res ipsa loquitur"].)

The plaintiff in *Saelzler* did not make this threshold showing. There was *no* evidence, much less a substantial probability, that gates with working locks would have kept the perpetrators out of the defendants' apartment complex and thereby prevented the attack, for it was just as likely the perpetrators were residents of the complex, or guests of residents, as intruders. (*Saelzler v. Advanced Group 400, supra*, 77 Cal.App.4th at p. 1016 (dis. opn. of Neal, J.).) Similarly, there was *no* evidence addition of daytime security guards would have prevented the attack. (*Id*. at p. 1016 (dis. opn. of Neal, J.).) "A 300-unit, 28-building apartment complex contains many rooms, halls, entries, garages, and other spaces where a rape could take place despite extensive security patrols." (*Id*. (dis. opn. of Neal, J.) .) Indeed, the evidence showed the defendants did provide night-time security patrols on the property, but crime continued to occur despite this precaution. (*Ibid*. (dis. opn. of Neal, J.).) And, while locked gates and additional security patrols might have

lessened by some unknown extent the general probability of criminal activity on the property, there was *no* evidence these precautions would have decreased crime by more than 50 percent, so as to render the necessary causal link to the attack on the plaintiff more likely than not. (*Ibid.* (dis. opn. of Neal, J.).)

Moreover, the *Haft* rule applies only when the defendant's negligence creates an "evidentiary void" on the issue of causation and makes proof of causation impossible for the plaintiff as a practical matter, or when the defendant has greater access to evidence pertaining to causation because the instrumentality that caused the injury is within his control. (*Haft v. Lone Palm Hotel, supra,* 3 Cal.3d at pp. 771-73; *Jones v. Ortho Pharmaceutical Corp., supra,* 163 Cal.App.3d at p. 405; *Endicott v. Nissan Motor Corp., supra,* 73 Cal.App.3d at p. 928; *Williams v. Wraxall, supra,* 33 Cal.App.4th at p. 136; *Smith v. Americania Motor Lodge, supra,* 39 Cal.App.3d at pp. 6-7; *Thomas v. Lusk, supra,* 27 Cal.App.4th at p. 1720.)

In *Saelzler*, the defendants obviously did not control the instrumentality that caused the plaintiff's injury – the unknown assailants – nor did the defendants have any better access than the plaintiff to information concerning the identities of the assailants, how they came upon the property, or what might have deterred then from committing the crime. Moreover, the "evidentiary void" on the issue of causation was not caused by the defendants' failure to provide adequate security. Unlike the absence of a lifeguard in *Haft*, the absence of working locks on the apartment complex's perimeter gates did not make it more difficult for the plaintiff to prove her case. Nor did the failure to provide more security patrols impede the plaintiff's case, since it was pure speculation whether a security guard patrolling the 28-building, 300-unit apartment complex would have happened to witness the attack.

Finally, proof of causation was not "impossible." For example, instead of relying on a conclusory "expert" opinion based on nothing more than the

general proposition that increased security would have made the property safer, the plaintiff might have presented expert testimony based on a statistical comparison of the crime rate at the defendants' apartment complex with the crime rates at other complexes of similar size, in comparable neighborhoods, that have in place the type and level of security plaintiff claimed the defendants should have provided. If the statistics showed the properly secured location experienced over 50 percent fewer crimes than the defendants' apartment complex, that would have been sufficient to get the case to a jury.[6/]

Undoubtedly, proving causation under the facts of *Saelzler* would have been difficult, and it likely is not easy to prove causation in some other premises liability actions based on third-party crime. But that is simply a function of the tenuous connection between added security measures and crime, and it does not justify shifting the burden of proof on the causation question to the defendant. Indeed, when a plaintiff seeks to recover from a defendant for injuries suffered at the hands of *another person* over whom the defendant had no control, it is *appropriate* that proof of causation be difficult. (See *Lineaweaver v. Plant Insulation Co., supra*, 31 Cal.App.4th at p. 1418 ["We recognize that plaintiffs sometimes have difficulty in proving causation . . . and are not insensitive to their claims that it would be unfair to deny them a remedy for the wrong inflicted upon them. But . . . it serves no justice to fashion rules which . . . demand[] [defendants] to compensate a loss they did not create"].) Moreover, "[t]he fact that a determination of causation is difficult to establish cannot . . . provide a plaintiff with an excuse to dispense with the introduction of some reasonably reliable evidence proving this essential element of his case." (*Jones v. Ortho Pharmaceutical, Corp., supra,*

6/ Other premises liability cases demonstrate there are myriad additional ways for plaintiffs to establish causation based on specific evidentiary facts. (See, e.g., cases discussed at p. 15, fn. 4, *ante*. See also *Center Management Corp. v. Bowman* (Ind.Ct.App. 1988) 526 N.E.2d 228, 230-231.)

163 Cal.App.3d at p. 403.) "Difficult" is not the same is "impossible," and *Haft* only permits a shift in the burden when causation is *impossible* for the plaintiff to prove because of some action or inaction on the part of the defendant.

This Court has stated that, "in the absence of a compelling need for shifting the burden [of proof on the issue of causation], it should remain with the plaintiff." (*Rutherford v. Owens-Illinois, Inc.*, *supra*, 16 Cal.4th at p. 977.) The *Saelzler* majority ignored this pronouncement when it placed on defendant property owners the burden to disprove causation, despite the absence of any legal authority supporting a burden shift in the premises liability context. Reversal of *Saelzler* is necessary to correct the majority's error.

D. Public Policy Demands that Plaintiffs in Premises Liability Actions Based on Third-Party Crime Affirmatively Demonstrate Causation.

Today, there is no question that landowners in California have a duty "to take 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." (*Ann M. v. Pacific Plaza Shopping Center*, *supra*, 6 Cal.4th at p. 674.) It also is unquestionable, however, that "in this day of an inordinate volume of criminal activity, . . . [a]nyone can foresee that a crime may be committed anywhere at any time." (*7735 Hollywood Blvd. Venture v. Superior Court*, *supra*, 116 Cal.App.3d at pp. 905-906; see also *Ann M. v. Pacific Plaza Shopping Center*, *supra*, 6 Cal.4th at p. 678 ["Unfortunately, random, violent crime is endemic in today's society. It is difficult, if not impossible, to envision any locale open to the public where the occurrence of violent crime seems improbable"].) What's more, "[n]o one really knows why

people commit crime, hence no one knows what is 'adequate' deterrence in any given situation." (*Ann M. v. Pacific Plaza Shopping Center*, *supra*, 6 Cal.4th at p. 679, quoting *7735 Hollywood Blvd. Venture v. Superior Court*, *supra*, 116 Cal.App.3d at p. 905.)

Given all this, discharging the duty to reasonably secure their property against crime is no easy task for landowners. It is often a guessing game to determine in advance what measures will suffice. Even worse, crime inevitably continues to occur notwithstanding the implementation of security precautions. (See *7735 Hollywood Blvd. Venture v. Superior Court*, *supra*, 116 Cal.App.3d at p. 905 ["While [security measures] may deter some, they will not deter all. Some persons cannot be deterred by anything short of impenetrable walls and armed guards "]; *Noble v. Los Angeles Dodgers, Inc.*, *supra*, 168 Cal.App.3d at p. 918 ["No one can reasonably contend that even a significant increase in police personnel will prevent all crime or any particular crime"]; *Goldberg v. Housing Authority*, *supra*, 186 A.2d at p. 297 [noting the "extraordinary speculation inherent in the subject of deterrence of men bent upon criminal ventures" and that "police protection does not, and cannot, provide assurance against all criminal attacks, . . . so the topic presupposes that inevitably crimes will be committed notwithstanding the sufficiency of the force"]; *Pietila v. Congdon*, *supra*, 362 N.W.2d at p. 334 ["That a skilled and dedicated troop of bodyguards equipped with the most sophisticated weaponry and electronic devices does not always restrain even one man bent on murder is all too familiar to a generation which has witnessed the assassination of one United States president and the near fatal shooting of another"].)

Consequently, even responsible landowners who go to great lengths to meet their duty to secure their property face the specter of a lawsuit whenever a criminal finds a way to elude their defenses. In retrospect, with the benefit

of hindsight, it is always possible a lay jury will determine the security precautions these property owners had in place were "inadequate." There will virtually always be a "security expert" willing to offer such testimony, and to hypothesize about additional security measures the property owners could have taken. (See *Noble v. Los Angeles Dodgers, Inc*., *supra*, 168 Cal.App.3d at p. 916 [recognizing a troublesome "growth industry is developing consisting of experts who will advise and testify as to what, in their opinion, constitutes 'adequate security'"].) Moreover, "[t]he mere fact that a crime has occurred almost always allows one to draw the conclusion, after the fact, that the premises were inherently dangerous." (*Sharon P. v. Arman, Ltd*., *supra*, 21 Cal.4th at p. 1194, quoting Kaufman, *When Crime Pays: Business Landlords' Duty to Protect Customers from Criminal Acts Committed on the Premises* (1990) 31 S. Tex. L.Rev. 89, 112-113, fns. omitted.)

Therefore, "causation is a critical question" in premises liability actions based on third-party crime, and it is important to hold plaintiffs strictly to their proof on this issue. (*Noble v. Los Angeles Dodgers, Inc*., *supra*, 168 Cal.App.3d at p. 917.) The *Saelzler* majority opinion ignores this, exposing landowners to liability even when there is no evidence any lapse in security had anything to do with facilitating the crime against the plaintiff. In doing so, *Saelzler* makes landowners virtual insurers of the absolute safety of others on their property, contrary to "well-established policy in this state." (*Ann M. v. Pacific Plaza Shopping Center, supra,* 6 Cal.4th at p. 679.) This Court should reverse *Saelzler* to avoid creating a new and unfair rule that, in essence, makes landowners strictly liable for all crimes perpetrated by others on their property.

CONCLUSION

The *Saelzler* majority opinion is based on false assumptions and faulty legal reasoning. The new causation test it announces threatens to profoundly

impact property owners who already have gone to great lengths to protect their property, exposing such owners to liability whenever a person intent upon committing crime finds a way to circumvent the property owner's defenses. In order to protect the "well-established policy in this state" that landowners are not insurers of the safety of others on their property (*Ann M. v. Pacific Plaza Shopping Center, supra,* 6 Cal.4th at p. 679), this Court should reverse *Saelzler* and confirm the continued vitality of the *Nola M.* line of cases that *Saelzler* rejects.