

ORAL ARGUMENT — 2/4/98
97-0384
MIRZADEH V. MIRZADEH

HALL: A brief resuscitation of the facts is important because some of the facts are in dispute. I think the key issue in this case, at least in my mind, is foreseeability. This involves a murder at a restaurant on August 14, 1992. The restaurant was being closed in Fort Worth, Texas, the Monte Carlo Bar & Grill. At the time there were only two people present. The restaurant had closed at 10:30, this took place around 12 midnight. The decedent Yousef Mirzadeh and a waiter Sean Shamaei were closing up. And as was their custom they went to the backdoor where the manager had parked his car in the alley behind the restaurant. The manager would go through the backdoor, and the waiter would close it and lock it, and then meet the manager at the front of the restaurant, give him the cash receipts, and they would go home for the day. That was the procedure.

SPECTOR: The cash receipts went home with someone?

HALL: They either went home or sometimes they would be left on the premises to be delivered to another restaurant the next day. In any event if they were going to be going at that night the waiter would bring them to the front and load them up in the manager's car and then they would go home.

SPECTOR: That was the day's receipts from the restaurant?

HALL: Yes. On this particular occasion, and this is very important, _____ foreseeability issue. They go to the backdoor, which is a metal door, the manager who is Jousef Mirzadeh, the man who was shot, pushes the door open, steps out and is immediately accosted by three men in ski masks with guns. They force him back into the restaurant and begin to beat the waiter and the manager. As they force him back into the restaurant and ask for the money at some point in time the manager runs. He runs to a fire exit on another part of the restaurant. One of the individuals chases him out through that exist. They go into the parking lot and unfortunately the shooter shoots the manager three times and kills him there in the parking lot.

Fortunately the fire exit door closes. The assailant cannot get back in. Two of the robbers are still in the restaurant, they panic, they run, they open the backdoor and run out the backdoor, and they leave. And so the waiter is spared. He calls 911 and the police and the ambulance get there, but it's too late. Mr. Yousef Mirzadeh is dead.

The only evidence to me is the question is foreseeability because in a situation like this foreseeability goes both to duty and the proximate cause. You're going to have to kind of weigh it in both respects.

ENOCH: You concede though that in your briefing at least that there is a duty by the

employer to provide a safe place to work. And the only issue you've really raised in terms of foreseeability is the causation issue?

HALL: I've tried to raise it also with regard to whether or not they were even negligent. And in fact, the affidavits that were filed address that.

ENOCH: Goes to the breach of the duty not to the existence of the duty?

HALL: Exactly. It goes to the breach of the duty and proximate cause. If you look at what summary judgment was before the court with regard to other crimes, because that seems to be something you focus on when you're looking at foreseeability (other crimes at or near the premises in a summary judgment context like this) the only evidence that you have are two affidavits: one by my client, Seyyed Mirzadeh who was the brother of the decedent, and the other one from Larry Steffler who was the detective who investigated this killing. My client indicates that there was no crime at or near the premises or at the shopping center before this death that he was ever aware of and no one ever reported to their employees or customers that were reported any, and the management company told them there had been no crimes.

The other is the affidavit of Steffler. And he says, "On the west side of Fort Worth after he investigated the homicide and he began to think, 'You know, I am going to see if there are any other robberies with the same type of procedure where they wait behind the restaurant for the backdoor to open and rush in,' and so he starts his investigation and finds there were 3-4 other robberies on the west side of Fort Worth is all he says, that seem to have the same modus operandi."

HECHT: He doesn't give a time period?

HALL: He doesn't give a time and he doesn't give a space either.

HECHT: West side of Ft. Worth?

HALL: West side of Ft. Worth. And as was put into the summary judgment record, Ft. Worth was the 4th largest metropolitan area in Texas, and this restaurant was in the southwest part of town. There was absolutely no evidence that there was a crime of any type on the premises or in the shopping center where this restaurant was located.

OWEN: You said in your brief, you said that, "this case afforded this court a chance to precisely articulate standards for the determining of foreseeability of criminal conduct and the liability of third-parties." Can you tell us if you were to write an opinion in this case or cases like it, would what those precise standards be?

HALL: First off, I would start with *Walker v. Harris*, because I think y'all have

addressed it. And in that decision, you all focused on what kind of crime was committed. And you indicated that was it foreseeable to see violent crime occurring as occurred in that case. In *Walker*, you seem to hone in on the type of crime that was committed. Now obviously, you've held in the past that when you talk about foreseeability it's not foreseeability to the exact chain of events, it's just foreseeability of what happens of a general character. But in *Walker* you tended to go into a little bit more detail violent crime. There was violent crime involved in *Walker*, and you said, "Was violent crime foreseeable?" And then you held as a matter of law that it wasn't, because in *Walker*, the only evidence was that the area was located in a moderate to low crime area and there had never been any assaults or rapes or murders anywhere around there. And you said, "As a matter of law that type of violent crime wasn't foreseeable."

So if you're asking me how would I draft a standard, I think you have to specify more in foreseeability the time of occurrence. Is that type of occurrence, such as violent crime, when you're dealing with a murder, as opposed to just generally saying, "Was a criminal activity foreseeable," without any further definition of that criminal activity? So if I was writing the opinion I would specify was "violent crime." Was this type of violent crime foreseeable? And then look to whether there were assaults or rapes or murders or something of that nature to measure foreseeability.

ENOCH: But doesn't *Walker v. Harris* go to whether or not there is a duty to provide security on the premises?

HALL: It does. And I think before you get to that duty, which is a question of law, I think part of your determination of that duty, you have to look at foreseeability. As you know, generally criminal activity is an intervening cause as a matter of law.

ENOCH: But in this case haven't you already conceded that the restaurant owner had a duty to provide a safe place to work? Aren't we already past the issue of whether or not there was a duty? We're simply discussing now whether there is any evidence here that that duty was breached, that there was a failure to provide a safe place to work based on the events that occurred? Isn't that where we are in the posture of this case?

HALL: I think I see where you're going and I'm trying to give you a complete answer. I think it has to be undisputed that any restaurant owner any premises' owner owes a duty to provide a safe place to work for its employees. That has to be undisputed. That's obviously been the law in this state. But when we talk about guarding against criminal activities, then I think the foreseeability comes in, because criminal activities usually are treated as a matter of law as an intervening cause that interrupts the negligence. It doesn't just go to proximate cause. It also goes to the duty when you're talking about providing reasonable security to prevent the type of thing that happened in this case, the employees being a victim of a crime.

ENOCH: Defining a safe place to work does not necessarily include security?

HALL: I think it does. But when you're talking about security, when you're focusing on security, then you have to ask yourself, "it has to be the type of security that would prevent what is known or what should have been known about criminal..."

ENOCH: Security reasonable in light of the surrounding circumstances?

HALL: Exactly. But that goes to duty though. See, that's why I am having a little trouble answering your question, because I think it does go to duty when you talk about providing security against criminal acts. Because I think as part of a duty question foreseeability comes up. I think you all have said what a reasonably intelligent person, *Nixon*, when you're talking about foreseeability, would know or what they should know about the criminal activity over the thing you are providing security for. And that does go into that duty question.

SPECTOR: Here the security is as much for the activity on the premises as the premises itself. In other words, the transporting of cash to a safe place would there be some foreseeability that that activity might have problems?

HALL: I think that when you talk about foreseeability even in transporting money, taking it out the front door to a waiting car right in front of the front door on those occasions when they did it, I still think you have to look at the history of the area. Has there been crime there? What kind of crime has been there? Because I think that is what a reasonably intelligent person, which is the standard that we use for foreseeability, I think that's something that they would view. The fact that there had never been any burglaries or robberies here, I think plays very, very much into that determination. But, to answer your question even more broadly, I think what you're looking at it's the security of the patronage. You are running a restaurant in a strip shopping center. That's a highly traveled area. And I think you have to look at that as well. You have to look at what's the security for your patrons as well as your employees. I don't think it's just one particular aspect. But again, foreseeability has got to go into that determination on what kind of duty you would have. I really do feel like that's part of a duty question. And if it is, then you have to go back to that reasonable intelligent person and what they would have known or should have known. And in a crime free area such as this, that's all you have before you on the summary judgment record, I think that plays very much into it. And then if we take it further and say as you said in *Walker*, "How about violent crime?" it even more plays into that, that this was an area where a reasonable intelligent person would not have foreseen this happen because it never happened before.

HANKINSON: When you use the word "area" what geographic area are you talking about and what should the standard be?

HALL: I think the duty is on us not just inside the restaurant, but I think a reasonable area around the restaurant, and I accept that.

HANKINSON: Is that a question of fact?

HALL: Well to the extent that duty is a question of law and foreseeability is part of that determination, I think it's a question of law. On proximate cause, I think it's a question of fact.

HANKINSON: How would the standard define a reasonable area?

HALL: In my view, I think reasonably has to be the premises that are under your control, which in this part would be the restaurant and the sidewalk area outside of the restaurant. But I even think a reasonable portion of the parking lot that's around the restaurant would also be...if you know there was criminal activity in your parking lot in front of your restaurant, I think you would be charged for that. I think you would have to be.

HANKINSON: What if there was criminal activity in the strip shopping center a mile down the road - violent criminal activity as you describe it?

HALL: I think then you would have to look at again the proximity and the frequency. Had you had one the year before? Had you had a dozen that year? If you had a dozen that year and its right down the road, then I think arguably you could consider that. Or if it was across the street. But every time you all have looked at the question of foreseeability, you have focused on the premises themselves, such as *Nixon*, which was an easy call because right there on the premises there had been a whole history of violent crime.

One other issue y'all were interested in was alter ego in this case. I would just say the summary judgment evidence clearly established that there was no injustice, which is one of the elements you have to show to pierce the corporate veil. I admit there was none, that the decedent himself was an officer of the corporation constantly involved in the daily management decisions. There was nothing done to his detriment. There was nothing deceiving him. He was an officer of the corporation and actively involved in all decisions including security.

ENOCH: The CA recites some facts that it says is the basis for saying there is alter ego liability. The briefs from the respondent have allegations of additional facts. From your position, what are the worst facts that are in the record in the case against you on the alter ego?

HALL: My client was the sole shareholder of Little Venice, and the president of it. Little Venice, Inc. owned the restaurant. My client was the only one that was allowed to sign checks and it was a signatory on the checks. My client owned other corporations that ran other restaurants where he was the president and where he was the sole shareholder. If that's what they argue, and I guess that could be the worse fact. There is an insurance that was purchased by several of the corporations - Little Venice was not one of them.

ENOCH: There was one comment about payments that were made to each of the brothers?

HALL: The brothers would rotate through each of the restaurants as a manager. And so in that extent they were all paid from different corporations. But the only evidence you have before you, because they were brothers, was my client testified that if his brothers needed any money or needed anything from him, that he would make sure that they got it. They were going to school and also working as managers. And from that they tried to imply that he would just shift bank accounts around and just pay them whatever he wanted to, and there was absolutely no evidence of that. In fact there is no evidence that corporate formalities were in anyway disregarded.

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WORLEY: I represent Reza Mirzadeh and Little Venice. Little Venice is my client in this case. I am just going to hit on one thing, and that's the nearness issue. I believe that the nearness question needs to be more addressed as to something so near that as a matter of law the landowner or owner of the premises should have known that there is something going on. If you take a mile radius around the Monte Carlo restaurant at Hewlett and Victory, you get substantially different neighborhoods. You, and us, and society doesn't necessarily know what's going on 1/2 mile away or a mile away. We are talking about incidents that must be so close to the premises that it brings home to the landowner or the owner of the business that information. In the cases you've cited, the incidents were in the hotel or in the buildings. Those incidents obviously they know about. We need some guidance on the nearness question.

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RESPONDENT

LAWYER: The foreseeability arising out of prior crime, prior crime within a reasonable area has to be a question of fact. The area that's relevant is going to be different from city to city, from business to business, from neighborhood to neighborhood. And in this case, I agree that there are a lot of facts in dispute.

PHILLIPS: Is the real question, what the actual facts were in the area prior to the incident, which is the basis of the suit, or is it what a person should reasonably know?

LAWYER: Should have known, which obviously implies at some level the fact finder is going to impose a duty of some sort upon business owners or premises owners charged with the duty. What should you have known? This is not an ostrich standard of, "Well I didn't know there was any crime, because I never ever bothered to look into it." That can't be the standard. I couldn't come up with facts that I think would create foreseeability better. I couldn't have gone out and created...there was actually 4-5 similar armed robberies in the same part of Ft. Worth of the same type of businesses, businesses apparently doing the exact same thing, because these folks are waiting behind a restaurant after closing for employees to exit.

GONZALEZ: How far from the restaurant?

LAWYER: The important thing there is we're resolving all doubts in favor of the nonmovant. This is an affidavit that they offered into evidence by the investigating officer, Det. Steffler. And I agree with what the CA said on this issue, "Det. Steffler's investigating this homicide it's reasonable to infer he would have limited his investigation to things that were relevant to his investigation to things that would help him catch this group of ski mask wearing restaurant robbers." The inference we're asking on summary judgment is, well if Det. Steffler found that these were similar crimes and were relevant to his homicide investigation, and he used the phrase "they were all over on the West side of Ft. Worth," he felt they were relevant for his purposes. I think that we can infer resolving doubts against them that the area and the time frame were relevant.

OWEN: What evidence were there about when these crimes occurred? And what evidence was there that they were publically known and that these owners should have known about them?

LAWYER: In the summary judgment record there is not evidence of the fact that there had been a series of ongoing...this groups of folks with the ski masks waiting for restaurants.

HECHT: So why should a restaurant owner have the same duty as a detective to go and try to find out if there is any crime happening around it?

LAWYER: The detective is a homicide detective and he came in after there was a homicide. He was not generally charged with that neighborhood before there was a homicide of keeping up with the crime. That may have well been his partner who he says in his affidavit was aware of even more similar robberies.

HECHT: But do you think the owner was charged with the duty of keeping up with crime in the vicinity?

LAWYER: He was charged with some duty. I'm not saying that he should have known of these as a matter of law.

HECHT: What duty?

LAWYER: He has a duty to exercise ordinary prudence of this business owner under the same or similar circumstances. And that varies a lot. Business owner circumstances vary a lot. There's going to be a very different degree of duty that's going to be placed on a small business owner in a high crime area. What can they do? They can only do what a reasonable entity under those circumstances can do. That's going to be a very different standard from the security provided by an apartment complex in a high rent area that advertises itself as very secure. There's going to be different standards and there's going to be different duties. We do that all the time in negligence cases. We always just evaluate people - reasonable prudent under same or similar circumstances.

OWEN: If you were going to try precisely articulate the standards that would give people some guidance on foreseeability and what they should or what standards they are going to be held to, and you were writing an opinion in this type of case, what would you articulate as precise standards?

LAWYER: I actually feel that the ordinary care of standard provides the guidance. And I think what's important for the court to recognize and it's been over 10 years since *Nixon*, and there hasn't been a verdict up here yet that I'm aware of where that really was a problem, where juries and fact finders really had that. The issue hasn't come up. I think that people are able to evaluate whether a business owner provided adequate security. I think they are able to make that determination using the negligence standard.

ENOCH: In the summary judgment record, what is the standard? You said the ordinary care. But ordinary care is generally defined by some sort of conduct. What standard do you have in the summary judgment record of the type of care that should have been provided here?

LAWYER: They have not proven as a matter of law that they provided adequate security.

ENOCH: Well Steffler's affidavit says that, he investigated this crime, he's familiar with this crime, and this type of crime there was not a security system that could have prevented this from happening, which is people wait until the employee leaves the premises locked or otherwise, they accost him by gun, force him back into the building with weapons drawn, and he claims there is no security that could solve that. In responding to that, what do you have that says there was something that could have been done that would have...

LAWYER: The CA in that conclusory opinion without any incite to where it comes from and you're going to see that sentence show up in every premises security case. You're going to start seeing that sentence in products' liability cases: Nothing could have made the product safe, nothing could have prevented the car wreck. That's not how we do things.

ENOCH: He investigated this crime. He described how the crime occurred. Then what more could he say to say there is nothing that the owner could have done to have prevented this crime?

LAWYER: The sentence says, "There is no reliable defense." We don't know what point he's picking up the story and saying that. There is no reliable defense in the general sense of being murdered. That's a risk that we do run. We do know that there are reliable defenses to armed robbery from the situation ever getting started. In the context they knew that it was unsafe to take the money out of the backdoor. Every night they went and brought the car around to the front to walk the money out. Foreseeability, they knew it was an unsafe practice to be out in that back alley.

ENOCH: I guess I was leading up to Billy Prince's affidavit is in their summary

judgment record. The courts didn't consider part of it. But in that affidavit is there anything that Billy Prince identifies as being the thing the restaurant owner could have done that would have prevented this tragedy?

LAWYER: I can say that the restaurant owner testified that he provided security at closing time at his other restaurants that there used to be a roving security patrol at this restaurant that was discontinued by the tenants who are the movants here today, the petitioners, to reduce their common area maintenance fee.

ENOCH: But in Billy Prince's affidavit that was used is there anything in there that he identifies?

LAWYER: I don't believe. He says, "I think they should have done this instead." There is an invitation from the petitioners to say that this question needs to be like medical malpractice and decided only by experts. I would caution the court not to bite on that baby. I couldn't disagree more strongly. I think that Justice Owen had raised a lot of interesting and good questions in the *leftmart* decision about some of the issues that are raised by security cases. And what I think is the answer to all of those questions are, "Well those are all the kinds of things that fact finders deal with every day and those are the kind of things that ordinary people understand these issues." I don't think that we need to elevate security cases to some particularly troublesome area. It doesn't show. It doesn't show in the 10 years since *Nixon*.

OWEN: There seemed to be some evidence that there was a security guard's car on the premises at the time of the assault. What is the record on that?

LAWYER: It may be that defendant Reza said that there was security, a roving security patrol.

OWEN: I thought there was specific evidence that the car was in the parking lot or somewhere near the premises. What's the evidence on that?

LAWYER: No, the evidence that I recall is _____ Yoakum who is one of the property management people's witnesses testifying that, "It is my recollection that they were not by that time. I believe the tenants had reflected they wanted to reflect different numbers in 1992 on their CAN." Later on he says, "I can't remember for sure that day." But that's exactly the kind of credibility determination. The evidence favorable to me is right there: "It is my recollection they were not by that time."

Owen: Is there evidence that had there been a security guard this would not have occurred?

LAWYER: An expert doesn't say that.

OWEN: Does anybody say that?

LAWYER: No, it's a decision the fact finder would make and is an inference that we can make. If *Nixon* was decided right, then the CA was right in this case. The way we make that inference is, the fact in *Nixon* was they went to the vacant apartment for the rape.

OWEN: There was a specific statutory duty in that case. It said precisely what you had to do.

LAWYER: I am talking about proximate cause.

OWEN: I'm talking about what your duty was. They said you didn't comply with that statutory duty and you had reason to know that people had been in that apartment. That's not the case here is it?

LAWYER: I thought we have moved beyond that accepting that there was foreseeability, then that gave rise to a duty. And on the question of breach and proximate cause, the only fact in *Nixon* was, they went to the vacant apartment. And we can assume given the statute on vacant apartments that the crook probably knew there was a vacant apartment and took advantage of that. In this case what we're saying is look at the evidence, it's obvious they went to a restaurant that didn't have security, that went out the backdoor at night when they were all by themselves. That's exactly what the group of ski mask wearing gun totting guys had one on 4-5 prior occasions. All that evidence wasn't even in *Nixon*. It's really reasonable to infer that these criminals knew there would be no security, knew that these guys were just going to walk out.

OWEN: Once again, let's be specific. Is there any evidence that there were prior occurrences?

LAWYER: Yes, the Det. Steffler affidavit sets out 4 extremely very similar...

OWEN: It says that all four happened before this assault?

LAWYER: Yes. His affidavit says that. It says, "I felt there were probably similar offenses. I investigated and discovered that there had been 4-5 additional robberies." And as the CA pointed out, robbery is threat of violence. I would hate to think that as a matter of the law you can foresee this, that someone is going to rob you but not foresee a violent crime.

Reza Mirzadeh is the individual who owned all of these corporations and is named as an individual defendant. He testified he couldn't remember a single time with anybody involved in any of his businesses, whichever corporation, didn't go along with what he said. The entity Royal bought the insurance that applied to Little Venice, the Monte Carlo. The corporation Royal, which his testimony was had no connection. Little Venice, Monte Carlo paid all its money

to Royal when there is no connection. The testimony is, "At the end of every month they paid Royal."

ENOCH: Other than what the CA recites as the evidence that supports a finding of the fact issue on piercing the corporate veil, is there anything in the summary judgment record that you think should be considered additionally for piercing the corporate veil?

LAWYER: I think that the CA did not discuss that he freely used corporate funds to pay his brothers, buy them cars, give them things, and that the receipts every day went to a common restaurant, a different corporation. But the receipts every day went to one of the restaurants that Reza owned.

GONZALEZ: Focus on the issue of injustice that counsel raised?

LAWYER: I think that the prior decisions on injustice say that this is a valid reason for injustice. All of the money went to Royal. There is no money in Little Venice. That's why we have the alter ego doctrine, is so people can't do that.

BAKER: Why do we have a corporate entity theory in the first place?

LAWYER: Well we don't do it so you can get the money every single day

BAKER: Isn't it the theory that it's to insulate the individuals who own it for personal liability for acts that the corporation engages in?

LAWYER: We are also trying to just pierce it towards Royal...

BAKER: Well I understand. You just articulated why you want to _____ the individual, because there's no money in Little Venice.

LAWYER: Right. And I think that that's a ground for injustice. The reason I think it should be done is not just because of money, it's because of all of the other factors, the factors that they disregarded the corporate fiction.

BAKER: But the main factor you're arguing is the fact that funds go to a certain area

LAWYER: As for the element of injustice, that is the main factor.

SPECTOR: Was there evidence in the record that there was different security at the other restaurants?

LAWYER: It was limited to, "I had security available at my other restaurants at closing."

That is the extent of that.

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REBUTTAL

HALL: In reference to the security car being there at the time in Mirzadeh's deposition transcript, attached to their reply it was a Smith's security car that was there. Mr. Yoakum indicated very clearly (if you read all his deposition excerpt that was in the record) he had to admit he didn't know if there was roving security there or not at the time of the occurrence. He just didn't know.

OWEN: Where was the security guard?

HALL: What it was was a roving security guard in a car that would drive around and just see if there was anything unusual in the premises. He wouldn't get out on foot necessarily and check. He just drove around. The evidence that you will see when you read that deposition excerpt was that the Smith security car was right in front of the restaurant, that this was seen right after the occurrence.

In *Mancorp v. Culpepper*, you defined what injustice is in piercing the corporate veil and you say, "Where a corporate entity is owned or controlled by an individual who operates the company in a manner indistinguishable from its personal affairs, and in a manner calculated to mislead those who are dealing with him to their detriment, that's the standard for injustice in piercing the corporate veil. And there was no evidence whatsoever to show that anything was done to lead the decedent to his detriment. In fact he was intimately involved in the corporations. He was an officer in the corporations and made all the management decisions together with his brother. So there was nothing to show there was any injustice. And that standard is laid out in *Mancorp v. Culpepper*."

Finally, you asked another question about, "Is there anything in any of the affidavits laying out the standard?" In Mr. Mirzadeh's affidavit, which was unchallenged by anybody and was accepted by the court, the last paragraph he says, "I've been in the restaurant business 17 years, I'm aware of security needs for a restaurant." He lays out the standard and says he didn't breach it. And it's right there in his affidavit.