I. EVIDENCE IN THE RECORD DEMONSTRATES THAT RESPONDENT'S SECURITY INTERRUPTED NUMEROUS ASSAULTS PRIOR TO APPELLANT'S SEXUAL ASSAULT

On pages 11-12 of Respondent's Opening Brief, addressing the Declaration of Fred Del Marva, Respondent states:

> "...[T]he court *does* know that these assailants were brazen enough to accost Appellant in the presence of other adult patrons, in the midst of a crowded amusement park, and then drag Appellant in a restroom where other adults were located. The juvenile assailants allegedly continued the forcible rape in the men's restroom despite such adults being present in the restroom. The assailants were further cavalier enough to remain the park after allegedly committing the rape...These facts emphasize the wanton, mindless acts of juveniles, whose conduct **cannot** be predicted. These facts further highlight the utter indifference these particular assailants had to being caught. Thus, determining what would have prevented these bold juveniles from carrying out the sexual assault upon Appellant is nothing more than **pure speculation**." (Emphasis in original.)

Respectfully, Appellant disagrees with Respondent's contention. Evidence in the record demonstrates that, on numerous occasions prior to Appellant's sexual assault, security guards and other employees at Respondent's park had successfully intervened, interrupted or deterred assaultive behavior involving both adult *and juvenile* participants.

On April 24, 2000, for example, Security Officer Rahsaan Essex prepared a Security Department Incident Report on behalf of Respondent in which he wrote:

> "...I and Shift Supervisor #506 Matt McGiffert responded to a 415 P.C. (fight) at the exit side of front admissions. When I arrived on scene I viewed loss prevention manager Shannon Ledford #600 and security officer Joe Lester #535 *restraining two different subjects...Both subjects*

> *and their party's were separated and detained.* (CT 304) (Emphasis added.)

Loss Prevention Manager Shannon Ledford and Security Officer Joe Lester also submitted reports regarding this April 24, 2000 incident. Ms. Ledford stated:

> "...I was working as a Loss Prevention Manager at Six Flags Marine World...I was at the front of the park...when I heard people yelling 'call the police'. I looked at the exit turn-styles and just outside the park a large group had gathered and I saw a young boy running around the crowd trying to hit people. I called for additional Security Personnel via the radio...I observed a male adult and female adult in a struggle with their arms entangled...The man then 'cranked' the woman's thumb downward. The woman screamed and dropped to the ground. At this time *I could pull the man away from the crowd...*" (CT 305) (Emphasis added.)

Security Officer Lester stated:

> "...[W]hen I arrived on scene the two parties were *already separated.* (CT 306) (Emphasis in original.)

On July 4, 1999, Security Officer Chapman prepared an incident report in which he recounted an occasion when he and Vallejo Police Department officers interrupted a "confrontation" involving an adult and a juvenile. This incident also involved "numerous" juvenile onlookers. Chapman wrote:

> "On Sunday, July 4, 1999...I responded to a physical disturbance at admissions. I witnessed *numerous teenagers running towards the area of the disturbance.* As I came on scene I witnessed an adult white male in a confrontation with a black male *juvenile* with blond hair. *Vallejo police detained and arrested the white male.* I immediately proceeded to make contact with the black male juvenile..." (CT 382) (Emphasis added.)

On July 10, 1999, Security Officer Matt McGiffert prepared an incident report in

which he wrote that he "responded to a 415 (PC) physical at Attitudes between two female employees. *Loss prevention employees...broke up the fight...*" (CT 386) (Emphasis added.)

On June 27, 1999, Security Officer McGiffert again prepared an incident report. In this report, Officer McGiffert stated that he "...broke from a 602 (PC) call at Roar to respond to a 415 (PC) physical call at Hammerhead. *Officer Trent Freitas arrived on scene first and separated the subjects*." (CT 402) (Emphasis added.)

On June 6, 1999, Security Officer Aldwin Donaldo prepared an incident report, illustrating an incident when the mere presence of Respondent's security was enough *to deter assaultive behavior by juveniles taking place in the presence of adults*. Officer Donaldo wrote:

> "On June 6, 1999 at around 1800hrs I came upon a 415 physical in front of Monsoon falls. *When I showed up the two groups stopped fighting and separated*. One statement I got was from...a witness...Her statement says 'We were walking and 2 boys came up on us and they were asking my boys What's up. Then, they started fighting with my boys'..." (CT 407) (Emphasis added.)

Finally, on June 1, 1999, Security Officer Donaldo prepared another incident report wherein he responded to a "verbal argument at the tram line." Officer Donaldo stated in his report that "when I arrived I *separated the two parties with the help of the VPD and several other security officers.*" (CT 412) (Emphasis added.)

These examples taken from the record undercut Respondent's assertion that its

security officers could not have done anything to prevent or deter Appellant's sexual assault. The purpose of security is for protection of patrons. (*Marois v. Royal Investigation & Patrol, Inc.* (1984) 162 Cal.App.3d 193, 200.) Respondent's security had previously been able to intervene and interrupt assaultive behavior in the park involving both adults and juveniles, preventing such behavior from escalating.

Furthermore, in the June 6, 1999 incident, the mere presence of Security Officer Donaldo effectively deterred juvenile combatants from continuing their assaultive behavior. This evidence is sufficient to create a triable issue of fact on the question of whether the presence of uniformed security officers in the Violet area of Respondent's park, patrolling the restrooms in that area, would have deterred Appellant's attackers from assaulting her.

In the recent case of *Mukthar v. Latin American Security Service* (2006) 139 Cal.App.4th 284, the Court of Appeal reversed Summary Judgment, addressing this situation:

> "We disagree with the trial court that it is *conjectural* whether a 'security guard could have prevented the attack on the Plaintiff.' The issue is whether it is a question of fact whether the woman would have struck [the Plaintiff] in the face, if an armed, uniformed security guard, equipped with a baton and handcuffs would have stood next to [the Plaintiff]...We think the inferences are not evenly balanced on this issue. It is more likely than not that the woman
>
> would not have hit Mukthar in the face in the close proximity of an armed guard...[I]t is not for us to decide this question of fact, which is consigned to the trier of fact."

(*Id.* at 291.) (Emphasis added.)

The *Mukthar* Court's opinion conforms to an earlier observation made by Justice Kennard in her dissenting opinion in *Saelzler v. Advanced Group 400:*

> "Although there may be some criminals so reckless as to attack a person in broad daylight notwithstanding the presence of security guards, common sense suggests that such criminals are a minority."

(*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 784 [107 Cal.Rptr.2d 617, 23 P.3d 1143] (dis. opn. of Kennard, J.).)

For this reason, Appellant's security expert, Mr. Del Marva, was not engaging in "pure speculation" when he opined that Appellant's attack could have been prevented if the Respondent had (1) allocated its security resources to the violence-prone Violet area of the park and (2) included bathroom sweeps as part of its regular security patrols. In addition to Del Marva's expert opinion, evidence from the record demonstrates that, if Respondent had implemented these minimally-burdensome measures, Appellant's sexual assault could have been prevented or, *at the very least*, shortened in its duration. If Appellant's sexual assault could have been shortened in its duration by the presence or intervention of Respondent's security, then Appellant has a right to take her case to a jury. In fact, the Trial Court specifically rejected Respondent's argument that, because the sexual assault had already begun, Appellant could not establish causation. The Trial Court acknowledged that *"every second of a crime such as this causes some degree of damage."* (CT 506) (Emphasis added.)

Thus, a reasonable jury could conclude that Respondent's lapse in security – its

failure to allocate its security to the Violet area of the park during "Fright Fest" and failing to include bathroom sweeps in the area as part of its security patrols – was a substantial factor contributing to Appellant's injuries.

II. RESPONDENT'S SECURITY WOULD HAVE HAD SUFFICIENT TIME TO INTERRUPT THE PROLONGED ASSAULT ON APPELLANT IF THEY HAD BEEN ALLOCATED TO THE VIOLET AREA OF THE PARK

On page 13 of Respondent's Opening Brief, Respondent takes issue with the "prolonged" nature of the assault on the Appellant, stating that "according to the most liberal estimate...Appellant's entire incident occurred in the span of between 13 and 14 minutes." Respondent again implies that there was nothing that its security could have done to prevent or deter Appellant's assault because it was a brief and unpredictable event. (*See, also,* Respondent's Opening Brief at page 12, characterizing juvenile criminal behavior as being unpredictable, and page 17, characterizing Appellant's assault as "a random unexpected occurrence.")

Appellant, again, respectfully disagrees because Respondent's assertion is at odds with both the Trial Court's ruling and the evidence in the record. In this case, the Trial Court found a sufficient number of prior similar incidents of assaults, including sexual assaults, to establish foreseeability under *Ann M.* (CT 504.) Therefore, Respondent cannot argue in good faith that assaultive behavior by juveniles in its park was "random" or "unpredictable."

Furthermore, in several Security Department Incident Reports, security officers

employed by Respondent described the length of time that it took them to travel between given locations within Respondent's park in response to assaults. On June 22, 2000, for example, Security Officers Jeff Coburn, Charles Steele, and Steve Todd prepared incident reports in which each described responding to a physical disturbance in progress at the "Scatabout" ride. (CT 260-264) Security Officer Coburn arrived at the "Scatabout" ride at "approx. 1812 hrs." (CT 260) Security Officer Steele "arrived on the scene along with officer Coburn" at 1814 hrs. (CT 263) Security Officer Todd arrived at 1815 hrs. (CT 264)

When these officers arrived at the "Scatabout" ride, they were each informed that the physical altercation was actually taking place at the "Jambo" ride. (CT 260-264) According to Security Officer Steele, he and Security Officer Coburn were approached by a guest "down by 'Boomerang'" and told "that the fight had happened by 'Jambo'." (CT 263) Security Officer Coburn reported that this encounter with the guest took place at "approx. 1815 hrs." (CT 260)

From this encounter with the guest, Security Officer Coburn and Steele went to the "Jambo" ride. Coburn reported that he and Steele arrived at the "Jambo" ride "at 1817 hrs."

According to the map of Respondent's park, "Scatabout" is identified as number 72, "Boomerang" is identified as number 91, and "Jambo" is identified as number 103. (*See,* Appellant's Opening Brief, Exhibit "A," CT 437) Based on the incident reports prepared by these security officers, the officers were able to travel from point number 72

to point number 103 in approximately 3-5 minutes. Although the record does not reflect the actual distance between point numbers 72 and 103, a visual inspection of the map reveals that they traveled a considerable distance in a short period of time.

Similarly, on April 25, 2000, Security Officer Charles Malonzo described an incident when he and Security Officer Matt McGiffert responded to a report of a "physical fight consisting of twenty or more participants." (CT 300) Malonzo stated in his incident report that he and McGiffert received the call for response at "1803 hrs" as the two officers "were nearing Tiger Island Exhibit." (CT 300) According to Malonzo, he and McGiffert responded, arriving on the scene at "1806 hrs." (CT 300) McGiffert concurred in this time estimate. (CT 298)

The "Tiger Island" exhibit is identified on the map of Respondent's park as number 107. (*See,* Appellant's Opening Brief, Exhibit "A," CT 437) As reported by Security Officer McGiffert, the scene of this large physical fight was "Medusa Plaza." The "Medusa" ride is identified as number 1 on the map.[1] (*See,* Appellant's Opening Brief, Exhibit "A," CT 437) Therefore, according to these officers' reports, they apparently traveled the distance between point numbers 107 and 1 in 3 minutes.

A visual inspection of Respondent's map shows that these security officers were able to travel an even larger distance in Respondent's park in a short period of time when

[1]Security Officer Malonzo referred to the scene as the "Main Plaza," which is not identified on Respondent's map. For purposes of this argument, Appellant assumes that the "Medusa Plaza" is in the vicinity of the "Medusa" ride, which is identified as number 1 on Respondent's map.

they responded to an assault. In fact, the distance between point number 107 and point number 1 on Respondent's map visually appears to be a similar distance as one end of the Violet area of the park to the other.[2]

Assuming for argument's sake that Appellant's assault took 13-14 minutes to complete, this evidence creates at least a triable issue of fact on the question of causation. Based on the security officers' incident reports, Respondent's security would have had sufficient time to come upon and interrupt Appellant's assault *if* Respondent had allocated its security in the Violet area of the park where juvenile assaults were most prevalent.

Based on this evidence, a reasonable jury could conclude that Respondent's failure to allocate its security in the violence-prone Violet area of the park during "Fright Fest" was a substantial factor contributing to Appellant's injuries. Thus, summary judgment in Respondent's favor must be reversed.

III. RESPONDENT'S ARGUMENT IMPROPERLY BURDENS APPELLANT WITH PROVING "CAUSATION TO A CERTAINTY," WHICH PROMOTES A PUBLIC POLICY ENDANGERING PATRON SAFETY

Relying upon *Saelzler*, *Nola M.* and *Noble*, Respondent asserts that summary

[2]Here, Appellant refers to the end of the Violet area of the park that is nearest to the "SF Kids Shop, identified on Respondent's map as number 13, to the end nearest to the "Reserved Picnic Groves," identified as number 26.

judgment was proper because Appellant cannot establish – as a matter of law – that her sexual assault *would have been prevented* had Respondent allocated its security to the Violet area of the park where juvenile crime was most prevalent and incorporated bathroom sweeps as part of its already-scheduled security patrols. Respectfully, that was, and is, not Appellant's burden in opposing Respondent's Motion for Summary Judgment. As Justice Kennard correctly observed in her dissenting opinion in *Saelzler*[3]*:*

> "[T]he critical inquiry at the summary judgment stage is *not* whether the court ruling on a summary judgment motion, or an appellate court reviewing that ruling, concludes the plaintiff has produced evidence that an element of the plaintiff's cause of action is more probable than not. Rather, it is whether the plaintiff has produced evidence from which *a reasonable trier of fact* could conclude that the evidence is sufficient to establish that an element of the cause of action is more probable than not."

(*Saelzler, supra,* 25 Cal.4th at 784.) (Emphasis in original.)

In this case, the Trial Court adopted the argument now asserted by Respondent, mis-applying the standard that Justice Kennard wrote about in *Saelzler*. In its Order, the Trial Court found that the "plaintiff presented insufficient evidence to show it was more likely than not that the assaults *would have been prevented* if additional security had been hired, or certain areas in which more of the prior criminal activity had taken place were focused on by security guards." (CT 504) (Emphasis added.) This argument improperly burdened Appellant with proving "causation to a certainty" at the summary judgment

[3]Justices Werdegar and Mosk also dissented in *Saelzler* for reasons that were similar to Justice Kennard's opinion.

stage.

"Even at trial, a plaintiff need not establish causation with certainty." (*Saelzler, supra,* 25 Cal.4th at 783, citing *Valdez v. J.D. Diffenbaugh Co.* (1975) 51 Cal.App.3d 494, 509; *Ahrentzen v. Westburg* (1968) 263 Cal.App.2d 749, 751.) (dis. opn. Kennard, J.). Quoting from Dean Prosser, Justice Kennard wrote:

> "...Proof of the relation of cause and effect can never be more than 'the projection of our habit of expecting certain consequents to follow certain antecedents merely because we have observed those sequences on prior occasions.' When a child is drowned in a pool, no one can say with certainty that a lifeguard would have saved him; but the experience of the community is that with guards present people are commonly saved, and this affords a sufficient basis for the conclusion that it is more likely than not that the absence of the guard played a significant part in the drowning. *Such questions are peculiarly for the jury.*"

(*Saelzler, supra,* 25 Cal.4th at 783.) (Emphasis in original.)

For this reason, as Justice Werdegar wrote in her dissent in *Saelzler*, California recognizes that causation is a question of *fact* if and only if reasonable men and women will not dispute the absence of causality. (*Saelzler, supra,* 25 Cal.4th at 785, citing *Constance B. v. State of California* (1986) 178 Cal.App.3d 200, 207.) Specifically, Justice Werdegar noted that, in these types of premises liability cases, "our prior pronouncements...recognize that causation is a question of fact...; i.e., where the issue is whether the defendant's negligence was a substantial factor in causing injuries inflicted during a criminal attack by a third party." (*Saelzler, supra,* 25 Cal.4th at 785, citing *Landeros v. Flood* (1976) 17 Cal.3d 399, 411.)

The causation rule described by Justice Werdegar is particularly true when security guards fail to deter third-party crime. "[W]here security guards fail to deter criminal activity, the issue of causation is be resolved by the trier of fact." (*Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225, 1236., fn. 3.) In these types of cases, the jury should decide whether it is reasonably probable that adequate security for an event could have prevented the criminal activity either by serving as a deterrent or by intervening to prevent the injury. (*Mukthar, supra,* 139 Cal.App.4th 284; *Madhani v. Cooper* (2003) 106 Cal.App.4th 412, 418.)

Aside from unfairly burdening the plaintiff at the summary judgment stage with a mis-guided "causation to a certainty" rule, the Trial Court's ruling in this case (and Respondent's argument on Appeal) promotes a public policy that potentially endangers patron safety. Under the "causation to a certainty" rule, adequate proof of causation will be most lacking in those cases where the risk of harm to patrons caused by third-party criminal activity is highest. Stated another way, the greater the number of prior incidents of third-party criminal activity or the more severe the incidents become, the more difficult it becomes for a plaintiff to show that additional or different security precautions *would have prevented* any given criminal attack. The logical end result of this dilemma is that a "causation to a certainty" rule insulates property owners from liability in those cases where security precautions for patrons are most needed. (*See,* Yokoyama, *The Law of Causation in Actions Involving Third-Party Assaults When the Landowner Negligently Fails to Hire Security Guards: A Critical Examination of Saelzler v. Advanced Group 400*

(2003) 40 Cal. W. L. Rev. 79; Davies, *Undercutting Premises Liability: Reflections on the Use and Abuse of Causation Doctrine* (2003) 40 San Diego L. Rev. 971.) This result is not sound public policy.

Moreover, this result is particularly troublesome in a case such as this one. Here, the Court is faced with a business property that is not only held open to the public, but is held open particularly to children as a fun and safe environment. In this case, Appellant submitted – in addition to credible, non-speculative expert opinion – substantial evidence of prior incidents of violent, injury-producing physical and sexual assaults occurring in Respondent's park, especially in the Violet area where Appellant was sexually assaulted, *which the Trial Court accepted as sufficient to satisfy Ann M.'s "heightened foreseeability" requirement*. Appellant also submitted evidence that, when Respondent's security guards responded to assaultive behavior in the park (whether it involved adults or juveniles), they were able to quickly travel long distances in the park, intervene in the assaults, deter the assaults, or prevent the assaults from escalating. This proof should have been sufficient to create a triable issue of fact on the question of causation and defeat Respondent's Motion for Summary Judgment.

In addition to the above, however, Appellant presented compelling deposition testimony that created a triable issue of fact on causation. Respondent's own security manager, Dale Arnold, admitted that Respondent *knew* that "Fright Fest" – the event during which Appellant was sexually assaulted – tended to attract more teenagers, which

is why Respondent increased its security operations for that event. (CT 467) Despite this knowledge, and despite his position as the overseer of park security, Arnold admitted that he did not know how security patrols were organized inside the park, did not know how large the park was, did not know what type of training the security personnel went through, did not know how many patrol areas there were inside the park, did not know where any surveillance cameras were located inside the park, did not know if security personnel received any instructions about patrolling restroom areas inside the park, and did not know if there were any written guidelines regarding how to deploy security in the park. (CT 464-469) In short, the person most responsible for security in Respondent's park, apparently, knew little about Respondent's security measures.

Based on this strong evidence and the important public policy implications, this case should not be treated as one of "abstract negligence" as was *Saelzler, Nola M.*, and *Noble*.[4] Evidence in this case strongly suggests that Appellant's assailants were able to take "advantage of the defendant's lapse" in security. (*Saelzler, supra*, 25 Cal.4th at 779.) Moreover, the mere fact that *some* of Appellant's proof was in the form of expert witness testimony does not mean that Appellant cannot, as a matter of law, establish causation. "The cases are legion in which expert testimony is accepted as competent evidence of causation." (*Saelzler*, *supra*, 25 Cal.4th 763, 788. (dis. opn. Werdegar, J.).) (Citations omitted.)

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[4]Appellant maintains, for the reasons stated in her Opening Brief, that *Saelzler, Nola M.* and *Noble* need not be followed because each is factually distinguishable from the instant case.

Finally, this case does not involve "an open area which could be fully protected, if at all, only by a Berlin Wall..." (*Nola M. v. University of Southern California* (1993) 16 Cal.App.4th 421, 437.) This case involves allocating security to a specific quadrant of Respondent's park – the Violet area – where violent juvenile assaults were most prevalent and particularly during the "Fright Fest" event that had a prior history of violent misconduct by juveniles. Even more specifically, this case involves the patrolling of the restrooms in the Violet area, including the men's restroom where Appellant was sexually assaulted and at least one other park patron had previously been physically assaulted.

IV. JANITOR LARRY MOORE HAD SUFFICIENT KNOWLEDGE OF IMPROPER CONDUCT TAKING PLACE IN THE MEN'S RESTROOM WHEN APPELLANT WAS SEXUALLY ASSAULTED TO TAKE THE MINIMALLY-BURDENSOME STEP OF SUMMONING AID

On page 17 of Respondent's Opening Brief, Respondent argues that janitor Larry Moore owed no duty to summon aid when he was in the men's restroom while appellant was sexually assaulted "because he did not have reason to suspect that Appellant was being raped." Respondent's argument is an attempt to avoid the force of the Supreme Court's most recent opinions regarding landowner's duties as stated in *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224 [30 Cal.Rptr.3d 145, 113 P.3d 1159 and *Morris v. De La Torre* (2005) 36 Cal.4th 260 [30 Cal.Rptr.3d 173, 113 P.3d 1182]. Contrary to Respondent's assertion, *Delgado* does not require that a business owner's employee know the precise nature of the criminal activity that is taking place before the minimal duty to summon aid is imposed.

It is true that the employees in *Morris* had reason to suspect that a violent assault was about to take place on the landowner's premises because, among other facts, the assailant went into the restaurant's kitchen to obtain a knife that he subsequently used to stab the plaintiff. In *Delgado*, although the bar's employees knew that a fight was likely to occur because the "plaintiff's wife approached Nichols (the interior guard) and expressed concern that 'there was going to be a fight'"...and... "Nichols himself observed the hostile stares between plaintiff and Joseph and his companions," (*Delgado, supra,* 36 Cal.4th at 231), the employees of the bar did not necessarily know that the plaintiff would be assaulted by Joseph, his companions, and approximately 12 to 20 other men in the bar's parking lot. (*Id.* at 231, fn. 6.) Such a high degree of foreseeability was not required in *Delgado,* and it is not required in this case.

The *Delgado* Court made three important points that are instructive here. First, in reaching its conclusion, the *Delgado* Court relied, in principal part, on the Supreme Court's earlier decision in *Taylor v. Centennial Bowl, Inc.* (1966) 65 Cal.2d 114 [52 Cal.Rptr. 561, 416 P.2d 793, which Respondent failed to address in its Opening Brief. In *Taylor*, a female bar patron was twice offensively propositioned by a male patron. The female bar patron rebuffed these advances, which a bouncer overheard. Later in the evening, as the female patron was preparing to leave the bar, the bouncer warned her not to go outside "because that goofball is out there." (*Id.* at 118.) The female patron left the bar anyway, was approached by the male patron in the parking lot, and was viciously stabbed and slashed numerous times with a knife. The female patron sustained such

severe injuries that, at the time of the trial of her case, she was partially paralyzed and was "a ward of Los Angeles County." (*Id.*)

At no time during the encounter inside the bar did the male patron ever display a knife, a weapon of any kind, nor did he threaten the female patron with bodily harm. No proof was presented that the bar's bouncer knew the male patron was armed or even dangerous – he was simply "that goofball." Nevertheless, as the Supreme Court observed in *Delgado*, *Taylor* correctly imposed a duty of care on the defendant.

Second, *Delgado* specifically disapproved of *Hassoon v. Shamieh* (2001) 89 Cal.App.4th 1191. In *Hassoon*, the Court of Appeal concluded that *Ann M.'s* "heightened foreseeability" analysis was a "factual precondition to premises liability." (*Delgado, supra,* 36 Cal.4th at 243.) The *Delgado* Court rejected this "broad proposition," finding that *Ann M.'s* "heightened foreseeability" is required only when the correlating burden of preventing future harm is great or onerous as is the case when the plaintiff asserts that the defendant owed a duty to hire security guards. (*Id.*, fn. 24.) "Heightened foreseeability" is not required when the issue is whether a defendant owes a minimal duty to summon aid as events are unfolding.

Third, and most significant for deciding the instant case, the majority in *Delgado* rejected the argument that "the existence and scope of a business owner's duty...*depends on the foreseeability of the sort of criminal conduct that actually occurred.*" (*Delgado, supra,* 36 Cal.4th at 247, fn. 27.) Instead, the majority wrote:

"As a matter of logic, it is difficult to understand how the existence of scope

> of a proprietor's duty properly could depend upon the nature of the criminal conduct 'that actually occurred,' rather than the danger of which the defendant was or should have been aware...[T]he circumstance that the precise size of the actual gang attack that occurred may not have been reasonably foreseeable does not absolve defendant of the duty to take reasonable steps based upon the nature of the danger that its employee could...foresee."

(*Delgado, supra,* 36 Cal.4th at 247, fn. 27.)

Applying these principles to the facts of this case, janitor Larry Moore had a duty to take the minimally-burdensome step of summoning aid even if he did not know, as a matter of fact, that Appellant was being raped in the men's restroom of Respondent's park. Moore testified that he "suspected that there might have been something going on...," and he felt that "there wasn't anything good going on" in the men's restroom at the time the sexual assault occurred. (Supp. Chron Index, 020) For a duty to summon aid to arise, Moore did not need to "know" that Appellant was being raped any more than the bar's bouncer in *Taylor* needed to foresee that the female patron would be viciously stabbed and slashed with a knife. Likewise, Moore did not need to know that Appellant was being raped any more than the bar's bouncer in *Delgado* needed to foresee that the plaintiff would be attacked by a large, organized gang in the bar's parking lot.

Furthermore, according to the testimony of Arthur Mattmiller, Respondent's employees are told they are to report *any suspicious activity*, not just the activity the employees knew for a fact was occurring. (Supp. Chron Index, 056) By his own testimony, Moore certainly did not comply with this directive, which was part of his job duties as a park janitor. This failure on Moore's part can be attributed to Respondent

under the doctrine of *respondeat superior*. (Cf. *Colson v. Johnson* (La. Ct. App. 2001) 801 So.2d 648, Exhibit "B," Appellant's Opening Brief.)

V. CONCLUSION

For the reasons stated in Appellant's Opening Brief, and for the reasons stated in this Reply Brief, Appellant respectfully requests that this Court reverse the Order granting Summary Judgment in Respondent's favor.

Respectfully submitted,

Dated: March 14, 2007

LAW OFFICES OF ERIC G. YOUNG

By:_____
Eric G. Young, Attorneys for C.M., a Minor, by and through her Guardian ad Litem, Zina BRITT

Dated: March 14, 2007

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BRITT