

Court of Appeal, Fourth District, Division 3, California.

Reba F. NEWMAN, Plaintiff and Appellant,

v.

Santiago CREEK, Defendant and Respondent.

No. G037975.

(Super.Ct.No. 05CC09713).

Dec. 20, 2007.

Appeal from a judgment of the Superior Court of Orange County, [Daniel J. Didier](#), Judge. Affirmed.

OPINION

[SILLS](#), P.J.

*1 On Sunday July 3, 2005, Joel Martin, a resident of Santiago Creek mobilehome park, burst into the coach of plaintiff Reba Newman and her mother, Adean Bright, and shot them both, killing Bright and wounding Newman. Newman has brought this suit against the Santiago Creek park, and against Joel Martin's wife, Carol Martin. The trial court granted summary judgment in favor of Santiago Creek (only), particularly noting a lack of causation between the sudden attack and anything that the park management might have done to prevent it. (See generally, [Saelzler v. Advanced Group 400 \(2001\) 25 Cal.4th 763](#) [jury could not reasonably find causation of attack of UPS delivery woman from lack of daytime security in crime-ridden 300-unit Bellflower apartment complex].) We affirm.

The key facts are that Martin had engaged in no prior violence, and had not uttered any threats of violence toward the victims. (There were only threats against the *resident park manager herself*, and those threats had been made so many times that the park manager felt no fear from them.) In terms of precedent, this case presents facts that resemble those in other decisions that have held, where there was no previous violence and no specific threats against the ultimate victim, that there was no duty to prevent the attack. (E.g., [Castaneda v. Olsher \(2007\) 41 Cal.4th 1205](#); [Andrews v. Mobile Aire Estates \(2005\) 125 Cal.App.4th 578](#); [Davis v. Gomez \(1989\) 207 Cal.App.3d 1401](#).)

Further, none of the specific measures which the plaintiff claims the park had a duty to undertake avails her. Under scrutiny, all the proffered specific measures fail, either because of an absence of duty, a duty that had already been fulfilled, or because there was no *possible* causation.

I. FACTS

In setting out our statement of facts, we bear in mind that because this is a summary judgment case, all conflicts and reasonable inferences must be resolved in favor of the responding party, here the plaintiff. Further, we bear in mind that the validity of a summary judgment motion is tested by all the "papers submitted," not the lawyers' paraphrase of the facts set forth in the competing separate statements. (See [Code Civ. Proc., § 437c](#), subd. (c) ["The motion for summary judgment shall be granted if *all the papers submitted* show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Italics added.)].)

In other words, the standard of review favors plaintiff Newman in this case. And, because the standard of review favors her, our narrative of the facts will cover all the "bad stuff" involving the shooter, Joel Martin. Also, because the grant of summary judgment is based on "the papers submitted," we liberally quote from the *actual evidence* submitted to the court—basically, the deposition testimony of various witnesses—as distinct from mere relying on the competing separate statements, each filtered and paraphrased through counsel.

A. Facts Concerning Joel Martin's

History at the Park

*2 The resident manager of Santiago Creek was Helen Hayes. She testified at her deposition that when she began working for Santiago Creek mobilehome park in 2004, Joel Martin introduced himself by essentially complaining that everybody in the park hated him, and then proceeded to demonstrate why: "Martin came to my office to tell me what my job was and to tell me that he hated everybody in the park, and everybody hated him. And he proceeded to use foul language at me and cuss at me."

For the next year, Martin harassed Hayes on a regular basis, including making almost regular threats against her life: "I would be delivering the rents or complaints or letters. And he would get on his bicycle and follow right alongside me and cuss me out and say that my turn was coming, he was going to come after me and he was going to get me, just wait and see. And that I was a bitch and all that kind of stuff." He did this "at least 12 times."

Not surprisingly Hayes discovered in the course of her tenure as resident park manager that Martin required medication to control his anger. She testified that Joel Martin had told her that "he was in Mexico drinking in a bar. And he got drunk and got in a fight. And these people mugged him, beat him up, and ever since then he has been put on some medication to control his anger."

While Hayes *did* relay the fact of Martin's continual threats against her to her supervisor, she personally never felt afraid of Martin or took the threats against her "seriously."

Management apparently took the threats to one of its employees more seriously than Hayes herself did. When Hayes mentioned the threats to a supervisor in

conversation, the supervisor would typically ask her if she “was scared or nervous.” Hayes always said no. The supervisor asked Hayes if she ever made a police report. Hayes said she talked to the police “several times and that officers would tell me, do you want to make out a report. I said, Well, can you do anything about it? And they would say, No, not until he actually does something. Then I said, Then what's the purpose of a report if you can't do anything?”

And so she left it at that. In that regard, it is undisputed that Martin was never actually violent toward anyone, including Hayes, until the July 3 shooting. Ironically, the only incident of actual violence concerning Martin was one where he was the *victim*. Around Christmas 2003, Martin apparently got into an argument over dog owner etiquette with a neighbor, and the neighbor (long since gone from the park) struck Martin three times with a metal tube of some sort.

But there were no incidents of Martin *himself* being violent, or-with the singular exception of his monthly threats to Hayes-threatening violence toward any particular person. Robert Turman, a neighbor who was closest to Martin-and perhaps his only friend in the complex-testified that Martin was not violent himself. Turman had no knowledge of “any dangerous propensities” on Joel's part. Nor did he ever see him threaten anyone. The same sentiments were also echoed by Robert Turman's wife, Wanda. Indeed, the record is devoid of evidence that *anyone* thought that Martin had any “violent propensities.”

*3 Perhaps the worst incident (in terms of casting Martin in a bad light) found in the record is this: Another set of neighbors, the Andersons, had a 10-year-old boy with [Lou Gehrig's disease](#), who would sit on the porch in his wheelchair. Martin apparently did not like being reminded of the mortality represented by the boy's condition. About four weeks before the July shooting, Martin showed a gun to the paralyzed Anderson boy, and also to a little girl. Hayes was aware of these incidents, since the little girl told her about them. When Hayes talked to the little girl's parents about the incident, she *encouraged* them to get a restraining order against Martin, since Hayes herself could not do it. For their part, the Andersons were afraid to write out a formal complaint even to the park management because they feared retaliation.

However, as the trial judge would later note, there was nothing to suggest that the Andersons interpreted Martin's showing a gun to their paralyzed son as threatening. The record thus will not support the verb “brandish” to describe the incident. (For his part, the trial judge wrote in his statement of decision that these neighbors “didn't think anything of learning from their son that Martin had a gun approximately 3 months before the shooting.”)

Park management (Hayes and her off-site superiors) never sought a restraining order against Martin because: “He wasn't breaking any rules other than being nasty and rude.” Along the same lines, management consciously rejected the idea of formal eviction proceedings on the theory that Martin constituted a “substantial annoyance” to the other park residents because no other tenants would provide written documentation to support an action for eviction.

B. The Ill Feelings Between the Newmans and Martin

The Santiago Creek mobilehome park is-at least ostensibly-a park for senior citizens. But-apropos the old saw about no good deed goes unpunished-the park management had a heart concerning the younger relatives of the tenants. It was (perhaps still is) not uncommon for the children of tenants, who had perhaps experienced hard times themselves, to move in with their tenant parents. One Santiago Creek park executive (not Hayes) testified: “It happens all the time. And people, just their kids don't have a place to live, and they suddenly move in.... And so we say, Okay, you know, let's have a time frame and let's see what we can do. And we try to work with them.”

So it was with the Newmans. Reba Newman's adopted brother was a man named Steve, and he and his two boys needed a place to live. (The age of the boys is not specified in the record, but they were easily old enough to cuss at Martin.) In September 2004, Reba let them live with her and her mother in the mobilehome, which was close Martin's. There was a lot of “bickering back and forth” between the Newman boys and Martin. And, while Martin “was doing most of the yelling and screaming,” the boys were perfectly capable of cussing back.

*4 Meanwhile the management took a tolerant view of Steve's plight. An executive later testified that the Newmans “maintained that they [Steve and the boys] were going to leave, and so we believed the homeowner.”

C. The Thursday Before the Sunday Shooting

1. *The Threat to Hayes*

Thursday June 30, was a day for yet another of Martin's usual threats against Hayes. It started when Hayes gave Martin a note admonishing him for leaving a mess in front of the Newman home. Martin came by and screamed at her because she “was making him clean up the mess.” It was in that context that Joel said to Hayes, “he was going to kill” her. As Hayes described the scene, Martin came by and: “So he said to me, started using the F word and cussing me out. And he said he had a gun. And he showed me the gun one time in the back of his-he didn't pull it out, he just made sure I could see it.” The gun was stuck in his pants.

On the other hand, Hayes did not perceive any threat from the gun as such. She pointed out in a deposition that: “He didn't say he was going to *shoot* me. He

said he was going to *kill me.*"(Italics added.)

2. *The Hearsay Report from the Turmans*

Later that same Thursday, Bob and Wanda Turman spoke to Hayes. They told Hayes that Carol, Joel's wife "had come to their home and was crying and upset saying that Joel was swinging a gun around saying he was going to shoot some people, and what they-and they were concerned about it...." As Hayes interpreted the communication: "Carol was scared because he was swinging a gun around. So Carol was concerned for herself, not for the park, but for herself."

In that conversation with the Turmans, Hayes did *not* tell them that about Joel having shown her a gun in his pants "Because it would have scared them even more."But Hayes thought, "I knew they couldn't do anything about it unless someone actually called the police on him. Since he didn't do it to me or my supervisors, the people that came to my office are the ones that have to do it."

D. The Friday Before the Shooting

1. *A Repeat of the Threat Against Hayes*

The next day would see yet another threat by Martin to kill Hayes. "The Friday of the shooting, that morning, he threatened to kill me. He was going to come get me and come for me. My turn was coming. He would always say that to me."

There is no absolutely no evidence in the record that Hayes was in any way afraid of Martin, or his threats. In that regard, though, there is evidence that she was not applying park rules *as regards to herself*. A supervisor would later testify that Martin's display of a gun should have been met with (a) a call to the police and (b) an internal park citation for the brandishing of the weapon: "If any resident brandished a weapon and a manager saw it, the first call should be to the police. They should not take no for an answer. And then it should be followed up with a 7-day notice [a kind of informal warning citation used by the park internally]." (As we have previously noted, there is no evidence that Martin "brandished" his handgun in a threatening manner to any *other* tenant or resident, including the Anderson's paralyzed boy. The strongest evidence we have in that regard is that a little girl became scared when Martin *showed* her the gun.)

2. *The Newmans' Call to the Police*

*5 That Friday there was also the call to the police by the Newmans, precipitated by Martin's anger over the Newmans' swinging screen door. The door would often open and hit an adjacent wood railing, making noise as it went back and forth. Martin went over to the Newmans and threatened to rip off the Newmans' screen door. He also called Reba Newman a "fat lesbian." Apparently there was also a note that Martin left on the door.

Martin's anger precipitated a call by the Newmans to the police. The officers showed Martin a certain deference because of his age. (One officer would later say in his deposition that Martin had obviously "been around the block.") They asked Martin "what the problem was." He replied about how annoying it was for the screen door to constantly hit the railing "back and forth, back and forth, back and forth."

The officer took a familial tone with Martin. The officer told him "You're acting just like my dad, seriously."Martin "laughed" like he understood where the officer "was coming from." In fact, "[h]e giggled and said to the officer, 'You know what, you're alright.'" His wife kept telling him to relax, and the officer recognized that Martin had calmed down "a little bit."

As they were leaving one of the two officers remarked to his partner about the sheer triviality of the dispute: "And we walked back to our cars, and we kind of like, 'Screen door, I can't believe it. Another one of those calls,' and we drove away."

3. *Hayes' Conversation With the Police*

But the police didn't leave without talking to Hayes. It turned out that one of the reasons that Hayes did not pass on to management Martin's threat that morning was because she had a conversation with the police officers as they were leaving. Hayes described the conversation: "And when the officer came back up to report to me that there was nothing they could do back there, because there was some tenants fighting or there was a note on their house." (This refers to Martin's "nasty note that he had pinned" on the Newman's door.)

In that conversation, Hayes also informed the police of Martin's possession of a gun.

Here is the relevant deposition testimony:

“Q. Okay. When Mr. Martin showed you the gun, did you have any more fear?”

“A. No.

“Q. Okay. And you did not go to the police at that point?”

“A. Yes. That's-that was Friday-no, Thursday he showed me the gun. On Friday I asked the police officer again about what could be done.”

There is no way, given the context of the question being Hayes' response to Martin's showing her the gun, that the statement, “On Friday I asked the police officer again about what could be done” could refer to anything *other* than the fact that Martin had displayed a gun to Hayes. (Indeed, the comment might be stretched to suggest that Hayes told the officers of all the problems regarding Martin, but, since the standard of review favors the plaintiff and she gets the benefit of the ambiguity on that point, we proceed on the basis that Hayes confined her comments to the fact of the gun and did not tell the officer about the threats to herself.)

E. The Sunday Shooting

*6 As related above, on Sunday July 3 Martin “entered” the Newmans' coach and shot dead Adean Bright, Reba Newman's mother, and also shot and wounded Newman twice. Up to that Sunday there had been no incidents at the park involving the discharge of a firearm. There is no evidence in the record as to precisely *how* Martin entered the Newmans' residence, even though Newmans' brief uses the word “forcibly.” We have found nothing in our own independent review of the record to indicate that the door was locked, or that the Newmans had taken any measures (locking and barring the door, vacating the premises, having lookouts) to defend against the attack that was coming. (And, if it does exist, the parties have certainly not brought it to our attention.)

F. What Happened to Hayes

Sometime that month Hayes was fired for incompetence.

II. DISCUSSION

A. Case Law

The reported decisions involving the liability of landowners or business owners for the criminal acts of others tend to fall into two broad categories: One category is location specific cases where the criminal attacker is part of a general *ambient* threat that is *site-specific*. Typical of such cases are [Ann M. v. Pacific Plaza Shopping Center \(1993\) 6 Cal.4th 666](#), arising out of a rape at a shop in a secluded portion of a shopping center, and [Saelzler v. Advanced Group 400, supra, 25 Cal.4th 763](#), which involved an attempted rape during the day at a 300-unit apartment complex frequented by gang members in a high crime city. In such cases, the *individual* identities of the miscreants who actually inflict the harm on the plaintiff generally tend not to be important: The point is that *villains generally* tend to be encountered at a certain place. ^{FN1}

^{FN1} A subset of this category concerns criminal attacks at or near businesses, where the location or nature of the businesses themselves may attract a less-than-polite clientele, such as [Delgado v. Trax Bar & Grill \(2005\) 36 Cal.4th 224](#) [attack in bar parking lot of bar that regularly experienced fights between patrons].

Here, however, we are dealing with the other major category, involving specific individuals who, at least in retrospect, were perceived as *themselves* posing a discrete *individual* danger. There is no issue in the case before us, for example, concerning any duty Santiago Creek park had because it is in a high crime area (it isn't), or that gang members or criminals frequent the area (they don't).

Cases in this category include, most recently from this court, [Barber v. Chang \(2007\) 151 Cal.App.4th 1456](#), as well as [Andrews v. Mobile Aire Estates, supra, 125 Cal.App.4th 578](#), [Madhani v. Cooper \(2003\) 106 Cal.App.4th 412](#); [Davis v. Gomez, supra, 207 Cal.App.3d 1401](#), and most recently, from the Supreme Court, [Castaneda v. Olsher, supra, 41 Cal.4th 1205](#).

The granddaddy of the individual-specific threat cases, of course, is [*Tarasoff v. Regents of University of California* \(1976\) 17 Cal.3d. 425](#). Though *Tarasoff* is not a premises liability case (it really is a psychiatrist malpractice case), it is similar to such cases as *Barber* and *Madhani* in that it involved a specific, targeted, identifiable victim. In *Tarasoff*, the defendant psychiatrist had been told by the criminal—who was his patient—of the criminal's specific intentions toward that individual victim.

*7 Of these cases, *Tarasoff*, *Barber*, and *Madhani* all held that there was some sort of duty on the part of the defendant to prevent the ultimate attack, while the other three, *Castaneda*, *Andrews* and *Davis*, didn't.

Because there is no evidence of any previous violence or threats of violence by Martin *against the Newmans*, the present case falls on the side of the cases which have held there was no duty. In *Andrews* the court held that there was *no* duty to prevent an assault between feuding neighbors in a mobilehome park, even though their relationship had been marked by “harassment, verbal insults, and annoyances” without any actual violence or threats of violence. ([*Andrews, supra, 125 Cal.App.4th at pp. 584, 596.*](#)) In *Davis*, there was no duty to prevent a gun attack by a cranky elderly person who possessed a firearm, again because of the absence of prior acts of actual violence or threats of violence toward the ultimate victim. And *Castaneda* squarely held that there must be a high probability of crime before a landlord has a duty to evict a troublesome tenant—a quantum of probable criminality that not even the *presence of known gang* members frequenting a particular mobilehome unit was sufficient to trigger.

By contrast, the cases which held there was a duty are distinguishable. *Tarasoff* involved *first hand* knowledge of the criminal's intentions gained in a professional setting—indeed, the case is essentially a species of psychiatric malpractice case based on a *professionals'* insufficient care in diagnosing the fact that a particular patient posed a danger to a specific third party target. In *Barber*, the landlord was given information that a certain tenant was threatening a *particular* person. And in *Madhani*, the troublesome tenant had previously engaged in actual violence toward the ultimate victim (forcibly entering the victim's apartment, blocking the victim's path in the stairway, and shoving the victim), and also specifically threatened the ultimate victim's life.

B. The Castaneda “Template”

Indeed, it was in the *Castaneda* case (decided during the pendency of this appeal ^{FN2}), that our Supreme Court has clarified the template for trial and appellate courts to use in premises liability litigation arising out of criminal attacks. That case, like this one, arose out of a mobilehome park shooting.

^{FN2}. At oral argument the court specifically invited briefing on the case and delayed submission of the case to afford the parties an opportunity to give their views on the applicability of the case.

Castaneda teaches us this: It is not enough for courts to analyze a landowner's duty vis-à-vis a tenant or invitee in terms of a kind of nebulous Should-Have-Done-Something Standard, without saying what that “Something” is.

To elaborate, the *Castaneda* decision lays out this approach: The “court in each case (whether trial or appellate)” must first “identify the specific action or actions the plaintiff claims the defendant had a duty to undertake.” ([*Castaneda, supra, 41 Cal.4th at p. 1214.*](#))

Only then is the court in a position to “ ‘meaningfully undertake the balancing analysis of the risks and burdens present in a given case to determine whether the specific obligations should or should not be imposed on the landlord.’ ” ([*Castaneda, supra, 41 Cal.4th at p. 1214*](#), quoting [*Vasquez v. Residential Investments, Inc. \(2004\) 118 Cal.App.4th 269, 280.*](#))

*8 This balancing breaks down into five discrete steps: (1) Determine the “ ‘specific measures’ ” which the “ ‘plaintiff asserts the defendant should have taken to prevent the harm,’ ” (2) analyze “ ‘how financially and socially burdensome these proposed measures would be to a landlord,’ ” (3) “ ‘identify the nature of the third party conduct that the plaintiff claims could have been prevented had the landlord taken the proposed measures,’ ” (4) “ ‘assess how foreseeable (on a continuum from a mere possibility to a reasonable probability) it was that this conduct would occur,’ ” and then, (5) compare the burden and foreseeability to determine the “ ‘scope of the duty the court imposes on a given defendant.’ ” ([*Castaneda, supra, 41 Cal.4th at p. 1214*](#), quoting [*Vasquez v. Residential Investments, Inc. \(2004\) 118 Cal.App.4th 269, 285.*](#))

This approach—by requiring a court to first ask specifically what a property owner should have done to prevent a given attack—has the added benefit of enabling the court to determine whether a plaintiff has sufficient evidence to go to the jury on the subject of causation. In *Castaneda*, for example, the Supreme Court held that there was no *duty* as regard certain measures (in that case, either not renting to persons who would house probable gang members in the first place, or of evicting them after they there are), but also held there was *no possible causation* as regards two other measures (hiring security guards and having brighter lighting), even assuming that there was a duty to implement those measure.^{FN3}

^{FN3}. Newman asserts that since she does not (retroactively) argue in favor of the *specific* measures of screening tenants, evicting Martin or providing security guards and lighting that *Castaneda's* holding “on its particulars is irrelevant” to her position. But that is reading *Castaneda* too narrowly:

No one can read the opinion with gaining a sense that our Supreme Court was outlining an approach or “template” that appellate courts may use to gauge landlord liability for third-party attacks regardless of the *specific* measures that a plaintiff may, in retrospect, assert the landlord had a duty to implement.

Not finding any direct support in case law to require reversal of the judgment in favor of Santiago Creek, we now consider the four “specific measures” [FN4](#) which Santiago Creek might have undertaken to prevent the attack:

[FN4](#). A fifth measure that Newman suggests in her opening brief-that Hayes should have communicated the threats against her to higher management, both fails factually (Hayes did) and logically. (Since Hayes was the park's agent, saying that she should have asked higher management to do something is tautological. The park is already being sued for what Hayes did.)

1. *Evict, or threaten to evict, the Martins*

Eviction, or threat of eviction, fails for lack of causation, even assuming (as the *Castaneda* court did concerning extra lighting) a duty. As both the *Castaneda* court ([Castaneda, supra, 41 Cal.4th at p. 1219](#)) and the trial judge have pointed out, evicting tenants under the Mobilehome Residency Law (see [Civ.Code, §§ 798. 56, 798.57](#)) is no easy matter. And even assuming a duty to evict, it could not possibly have come into existence any earlier than Thursday, when hearsay came to Hayes about the Turmans' concern over what Carol Martin had told them about what Martin was supposedly ranting about (a desire to “shoot somebody”).

Few things are *absolutely* certain in law. But one of those is that no court will evict a senior couple in a mobilehome park in proceedings that could have been filed on a Friday such that the tenant will be out by the next day, so the tenant will not be there on Sunday.

2. *Evict, or threaten to evict, the Newmans*

This idea is proffered in Carol Martin's amicus brief. The idea is that if the park had actually enforced its rules and removed Steve's young boys, Joel Martin would never have been provoked into the attack in the first place. While the amicus brief is otherwise well-written and cogent, the idea that park management has a *duty* to preemptively evict people whose presence poses a potential to *provoke* a wrongdoer is literally blaming a victim for “getting in the way” of a wrongdoer's attack. In more legal terms, any duty on the part of park management *that ran to Martin* to evict fellow tenants not following association rules was a duty *he* had the right to enforce in a civil action.

3. Call the Police

a. *Duty*

*9 Newman argues that Hayes had a duty to call the police, but any duty in that regard is obviated by the fact she in fact fulfilled it when she talked to them on that Friday after they (at least partially) calmed Martin down. The undisputed facts are that Hayes talked to the police on the Friday when the Newmans called them out, told them about Martin having a gun, and asked what could be done. And the police said: Nothing until he actually did something.

So the only fault that can be imputed against Hayes is that she did not tell the police about certain items of information in her possession, namely: (a) the Thursday and Friday threats against her and (b) the report from the Turmans about what Carol Martin had said Joel Martin had said. She had a right to do so, of course-reports to the police are *absolutely* privileged under [Civil Code section 47\(a\)](#). (See [Hagberg v. California Federal Bank \(2004\) 32 Cal.4th 350, 355.](#))

But-the report from the Turmans was so obviously hearsay that even someone who never took a class in evidence would be justified in considering it insufficiently important to communicate to police officers, particularly officers who had themselves *just personally interviewed the perceived source of any threat*. Hayes could reasonably conclude that the officers were the professionals in assessing Martin's volatility. They could see for themselves just how likely it was that Martin would do anything violent.

Moreover, the threats against her had been made so many times-Martin cried wolf on a monthly basis-without him doing anything violent that Hayes could reasonably assume that Martin was nothing more than an elderly blusterer.

To impose a duty on Hayes to have volunteered these additional, marginal bits of information in the absence of any specific threats made against any other park tenant would be to impose on landlords a duty of psychoanalytic foresight out of all proportion to the service they provide their tenants.

b. Causation

However, even if we assume a duty to have told the police those two marginal bits of information, the *Saelzler* case's requirement that causation cannot be established by "mere speculation, conjecture, and inferences" (*Saelzler, supra, 25 Cal.4th at p. 775*). In that regard, however, Newman has presented no evidence that the police would have actually arrested Martin based on any additional information that Hayes might have told them.

4. Warn the Newmans

a. Duty

The question of a warning to the Newmans, of course, presupposes some content: Warn the Newmans of precisely what? We will presume that the items of information that Hayes might have conveyed to them were, as with the police, the (a) report from the Turmans of what Carol Martin had said Joel Martin had said; (b) the fact that Joel Martin had a gun; and (c) the fact that Joel Martin had threatened *Hayes*.

The problem with (a) is this: A warning to the Newmans would *not* have been absolutely privileged from a defamation suit (as distinct from telling the same thing to the police). Under [Civil Code section 47](#), subdivision (c), it would only have been privileged if made without malice.^{[FN5](#)}

^{[FN5](#)}. In Justice Rylaarsdam's separate concurring opinion in *Barber*, he cautioned, in the context of whether there *was* a duty to evict, that an eviction might itself expose a landlord to liabilities. (See *Barber, supra, 151 Cal.App.4th at p. 1471* (conc. opn. of Rylaarsdam, J.)) *Barber* was decided before *Castaneda*, but, as we soon note, demonstrated Justice Rylaarsdam's prescience. In *Castaneda*, the possibility of exposure to litigation precisely because a landlord rented to a particular person, or did not evict a particular person, served as a major reason for concluding that there was duty to evict in that case. Newman's assertion, made at oral argument in the case before us, that a raw public policy in favor of safety should take precedence over palpable risks of litigation to a potential defendant arising out of taking the absolutely "safest" course (e.g., evicting or not renting to probable gang members) is simply not consistent with *Castaneda*.

***10** One can just imagine what would have happened if Hayes *had* reported to the Newmans what the Turmans had said about Martin. Joel Martin would have sued her and Santiago Creek for defamation, and there is no way short of trial, given the animosity which Martin had already shown Hayes (hence a jury could think that the report was made to get back at him), that she or the park could have shown a lack of malice. True, a trier of fact might very likely conclude she acted without malice in relaying a defamatory story based on hearsay, but "very likely" still means the horrendous uncertainty of a lawsuit and the incursion of attorney fees.

To hold Hayes had a duty to warn the Newmans of the report of Martin's general rant about wanting to shoot "somebody" would thus put her into precisely the sort of legal cross-fire which led the Supreme Court recently in *Castaneda* to hold that there was no duty on the part of a landlord to refuse to rent to people who were probable gang members. (*Castaneda, supra, 41 Cal.4th at p. 1219*.) *Castaneda's* point is that landlords cannot be put in the damned-if-you-do-and-damned-if-you-don't position of choosing between an action which exposes them to a lawsuit, or not acting and then being sued for not taking the action that might have exposed them to a lawsuit. (See also *Barber, supra, 151 Cal.App.4th at p. 1471* (conc. opn. of Rylaarsdam, J.) [noting that landlord might incur "liabilities" if report of prior brandishing incident proved to be false].)

Moreover, the actual threat from the hearsay report in the case was too general to serve as the basis for a duty to warn. It was not susceptible of any reasonable boundaries. Martin was reported to have said he was going to shoot "somebody." But we must remember: Martin introduced himself to Hayes by saying that the *whole park* hated him. *Who*, exactly, was Hayes to warn? To be sure, one can extract from the record some special animus between Martin and the *Newmans*-but the same thing happened in *Andrews* where the court held there was no duty. Was Hayes to single out the Newmans for a warning without telling the rest of the park who also hated Joel Martin-particularly when the hearsay report from the Turmans only mentioned "somebody" and not the Newmans in particular?

The amorphousness of the generalized threat stands in contrast:

- to *Tarasoff*, where a trained psychoanalyst was in position to professionally evaluate the threat posed by a patient who directly told the psychoanalyst that he intended to harm a named victim;

- to *Barber*, where the miscreant specifically named his potential victim; and

- to *Madhani*, where the miscreant had already engaged in numerous prior acts of violence toward a particular fellow tenant.

And one can just imagine the consequences that might have flowed if, instead of singling out the Newmans for a warning, Hayes had posted some general warning *to the community* about Martin's reported rant: The opprobrium and probable ostracization of such a move would not only invite a defamation suit, but a suit for intentional infliction of emotional distress, and perhaps even invasion of privacy as well.

*11 But there are still two other items of information—the fact of gun possession and the threats against Hayes herself. It seems, of course, that Hayes would have been on firmer footing telling the Newmans about these items, because they were directly within her personal knowledge. But even then one can imagine Martin asserting they were false and defamatory and making it her word against his. In *Barber*, for example, the sole witness to the brandishing incident which majority opinion thought required some sort of “precautionary act” was told by police that it would only be her word against the ultimate miscreant's. (See *Barber, supra*, 151 Cal.App.4th at p. 1471 (conc. opn. of Rylaarsdam, J.))

In short, even reporting the gun and threats required at least *some* exposure to litigation. Hence there was still a palpable burden—in the form of the “juridical risk” of having to prove in court the truth of the matters constituting the warning—even if the actual physical task of warning the Newmans would have been relatively easy.

Assuming arguendo, however, that the risk of exposure to litigation from telling the Newmans about the gun and the threats to Hayes was sufficiently minimal to not be an *a priori* bar to the imposition of a duty, we now turn to the five-part balancing articulated by the *Castaneda*. In that five-part test we will assume that the “specific measure” which the park should have taken was that Hayes should have told the Newmans at least about those two things.

The next step is a determination of the financial and social burdensomeness of such a warning. Here, even discounting the juridical risk of litigation, the problem is where Hayes should have drawn the line as to who was to receive the warning, given the information she had at the time. There simply was no place where Hayes could have drawn a reasonable cut-off point. We reiterate: There had been no specific threat made against the Newmans. By what right could Hayes have confined any warning to just them alone? We have already noted that generally giving the park residents information about Martin would be quite burdensome in terms of the risk of litigation.

Castaneda's next prong, the “nature of the third party conduct that the plaintiff claims could have been prevented had the landlord taken the proposed measures,” is also problematic.

Martin had never been actually *violent* previously. And with each passing unacted-upon threat to Hayes, the very repetitiveness of those threats tended to confirm a all-bark-and-no-bite harmlessness. As indicated by the *Andrews* court (where there too was arguably a heightened animus between a neighbor and his victim) it is too much of a leap to go from *bickering* to a *suicide-murder* without previous violence or specific threat. Put another way, it is easy to write something like, “Martin was an angry, cantankerous human time bomb waiting to go off, a walking threat of which the Newmans needed warning,” but such a sentence insinuates facts that this record doesn't have—*any* prior actual violence or any specific threat against anybody besides Hayes.^{FN6}

^{FN6}. At oral argument, Newman asserted that there is no need for specific threats. That position is not correct in cases where the danger emanates from specific human beings, as distinct from ambient circumstances. It may very well be that in “high crime area” cases such as gave rise to the facts in *Ann M.* or *Saelzler*, a landlord may have a duty to take reasonable steps to prevent third-party crime, despite a lack of any threats against specific individuals. In such cases, the miscreants are, in essence, a function of *geography*. In cases like the instant one, though, where the danger is not a function of geography but of the individual character of specific human beings, the case law is clear that specific threats against victims are required.

*12 Moreover, the precise circumstances of Friday must be taken into account. Hayes knew the police had been called regarding Martin, she could infer that they had calmed him down—*they* were leaving without giving *her* any warning, and she still asked them what she could do. The police answered nothing—not even suggesting a warning to the Newmans or anybody else. The *law enforcement professionals*, in short, apparently done as much as could be done about any threat posed by Martin as an individual.^{FN7}

^{FN7}. There is evidence that Martin ceased medication just after the police visit. But one cannot reasonably say that Hayes was required to assume that a police visit would cause Martin to cease taking his medication and thereby become violent. One would reasonably expect the opposite: Knowing that Martin had been given a good talking to by police officers, Hayes could legitimately infer that Martin would be on his best behavior and would thus probably take his medication, at least for a while.

Finally, the record shows that the Friday visit was not the first time police had come out to the park because of Martin. They had been out “several times” and had spoken with Hayes about Martin. He was a cantankerous troublemaker, that was clear. But each time they had told Hayes there was nothing to be done until he became actually violent. We can hardly say that a layperson has a duty to be more prescient about a future attack than trained law enforcement officers.

Under such circumstances, foreseeing the attack required an attenuated concatenation of inferences that the law cannot reasonably require. It would have taken detective-like ratiocination for Hayes to have concluded that morning that

(a) despite the only threats being directed against Hayes personally, Martin's real target of violence would be the Newmans;

(b) despite the absence of any previous violence, Martin would suddenly turn violent, and in such a way that he wouldn't care about the consequences (i.e., he would commit suicide);

(c) despite the fact that the police had just *calmed Martin down*, that Martin would suddenly act violently and with such immediacy that the Newmans had to be warned immediately.

The final of the five-part balancing is a comparison of the burden together with the foreseeability to determine the “ ‘scope of the duty the court imposes on a given defendant.’ ” ([Castaneda, supra, 41 Cal.4th at p. 1214](#), quoting [Vasquez v. Residential Investments, Inc. \(2004\) 118 Cal.App.4th 269, 285.](#))

The burden of warning the Newmans, was problematic (the risk of suit) and the foreseeability of this attack was highly attenuated. It required a quantum leap from Martin's non-violent cantankerousness without specific threat to a murder-suicide involving a specific target. We therefore cannot say that Hayes had a *duty* to warn the Newmans of the threats made against Hayes (and only Hayes), or of the fact Martin's possession of a handgun.

b. Causation

In its reply to Carol Martin's amicus brief, Santiago Creek points out one, albeit counterintuitive, aspect of the record: The Newmans did not present any evidence that the shootings could have been prevented even if Hayes had “warned” them. Because we have determined that there was no duty to apprise the Newmans of Martin's possession of a handgun or the threats against Hayes, we do not deal with whether the Newmans proffered sufficient evidence of causation.

III. DISPOSITION

*13 The judgment is affirmed. Respondents are recover their costs on appeal.

WE CONCUR: [BEDSWORTH](#) and [MOORE](#), JJ.

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Not Reported in Cal.Rptr.3d, 2007 WL 4465809 (Cal.App. 4 Dist.)

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