

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

NO. 2022-P-0494

NORVELLA HILL-JUNIOUS, Individually and Administrator of
the Estate of DRAKE SCOTT, JR.,
Appellant/Plaintiff,

vs.

UTP REALTY, LLC,
Appellees/Defendant.

On Appeal from an Order on Summary Judgment of the
Norfolk Superior Court

BRIEF OF THE APPELLANT

Respectfully submitted,

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INTRODUCTION

The Superior Court decision in this matter abrogates the Commonwealth's well-established, common law criteria for determining "foreseeability" in a negligent security case. By eliminating any inquiry into what a commercial landlord "should have known" concerning prior crimes at her property, a Massachusetts landlord may now bury her head in the sand and plead ignorance to avoid liability. The Superior Court decision therefore is contrary to precedent and creates bad public policy.

STATEMENT OF THE ISSUES

The questions presented by the Superior Court decision, and to be answered on appeal are:

1. Whether the requisite element of "foreseeability" in the negligent security context includes inquiry into facts outside of a landlord's personal knowledge; and
2. Whether expert testimony may be used to create a dispute of material fact by concluding what a commercial landlord "should have known" when operating her premises?

STATEMENT OF THE CASE

On November 13, 2015, UTP Realty, LLC ("UTP Realty") purchased the commercial property known as 322-326 North Main Street, Randolph, Massachusetts (the "Property"). **RA.I.32.** The Property had approximately fifteen commercial tenants, one of which was a troubled nightclub with a history of murders and shootings. **RA.I.51; RA.I.41-48.** UTP Realty's sole member and owner, Uyen Phan ("Phan"), was familiar with the Property before she purchased it. Two years and eight months earlier, she became a tenant herself, owning and operating a nail salon there. **RA.I.32.**

Prior violent crimes at the Property - occurring over a ten-year period from 1/30/2005 to 12/12/2015 - included shootings, murders, stabbings, and fights. **RA.I.40.**

Much of the Property's prior crimes originated from the Property's nightclub tenant, a problem well known to police and the City of Randolph (the "City"). **RA.I.195; RA.I.201-203.** One of the City's detectives, Michael Tuitt, recommended police details during live music nights to curb late night violence. **RA.I.201-203.**

On the evening of February 17, 2016, the Appellant's decedent, a musician named Drake Scott, took part in an open mic night at the club. **RA.I.56.** At the end of the night, he exited the nightclub and stepped into a common area of the Property. **RA.I.56.** An assailant, Gregory Wright, waited outside of the entrance and shot Drake Scott in the face, killing him. **RA.I.56.**

The nightclub, City Limits Saloon ("City Limits") – a now defunct business – was allowed to operate by Appellee, UTP Realty, with no insurance. **R.A.I.30.**

Appellant brought a negligence action against UTP Realty for failure to warn and failure to provide adequate security at the Property. **RA.I.21-22.** Appellant alleges that UTP Realty, given the lengthy history of trouble at the Property, had a responsibility to provide reasonable security measures to deter against foreseeable violence. **RA.I.21-23.**

Appellant does not suggest UTP Realty had any control over circumstances within the four walls of the nightclub; only outside, in the Property's immediately adjacent common area.

At her deposition, UTP Realty's Phan testified that she knew nothing of prior violent crime at the

Property. **RA.II.52.** This despite the fact she was both a tenant and later landlord at the Property when police responded to numerous gun crimes and fights, and one incident in 2014 where three people were shot. **RA.I.40; RA.II.5-6.**

At the close of discovery, UTP Realty moved for summary judgment, arguing 1) no duty of care could exist between UTP Realty and Drake Scott, and 2) no security measures would have prevented Scott's death. **RA.II.51.**

A justice of the Superior Court found for UTP Realty on the duty issue alone. It was determined that because UTP Realty's principal, Uyen Phan, denied knowledge of any prior crimes at the Property, there could not as a matter of law be a duty owed to Drake Scott. **RA.II.52-54.**

The trial judge did not address the second argument concerning security measures, noting:

Because I conclude that UTP had no duty to protect Scott against Wright's unlawful acts, I do not reach UTP's alternative argument that certain security measures would not have prevented Wright from shooting Scott.

RA.II.51. This issue is not on appeal.

Appellant's record evidence in opposition to Appellee's summary judgment motion included testimony

from expert witness Russell Kolins. Mr. Kolins opined that the security risk for a property with a troubled nightclub is distinct from other properties.

RA.II.4-11. Further, he stated that UTP Realty should have made some inquiry concerning past crime and security when it purchased the Property because there was an active nightclub as a tenant. **RA.II.4-11.**

Appellant argued at summary judgment therefore that Ms. Phan "should have known" of the prior crimes at the Property prior to Mr. Scott's killing. **RA.II.52;**
RA.I.57-60.

SUMMARY OF APPELLANT'S ARGUMENT

Appellant contends that the Superior Court decision ignores a critical component of the Commonwealth's traditional foreseeability inquiry in negligent security cases. To wit, the lower court failed to consider what a commercial landlord "should have known" with regard to similar, prior crimes on the premises she operates.

Appellant further argues that it provided sufficient evidence - via expert disclosure - of a genuine issue of material fact concerning the obligations of a commercial landlord when purchasing

and operating a property with a troubled nightclub on premises.

Finally, Appellant highlights the illogical results that the lower court decision will produce. Namely, a commercial landlord will become immune to liability where she is deemed unaware of prior, similar crimes at the premises. In effect, a commercial landlord will be rewarded for turning a blind eye to and ignoring security issues that existed at the premises prior to her purchase and continue throughout her ownership.

Accordingly, Appellant respectfully prays that this Honorable Court vacate the Superior Court's award of summary judgment and remand this case for trial.

FACTUAL RECORD

I. Property History

At the center of this negligent security case is the Property at 322-326 North Main Street, Randolph, Massachusetts. The Property includes a commercial building, which was home to approximately fifteen commercial tenants, including a nightclub. **RA.I.51;**
R.I.41-48. In January of 2013, Ms. Uyen Phan became a

tenant at the Property, where she operated a nail salon business, Vina Nails. **RA.I.32.**

At that time, the Property was owned by TJB, LLC. **RA.I.32.** A nightclub tenant, City Limits, operated on the ground floor of the building. **RA.I.32.**

TJB, LLC offered the Property for sale and on November 13, 2015, tired of paying rent to somebody else, Phan purchased it through her newly formed company, UTP Realty, LLC. **RA.I.32; RA.I.177.** Phan testified in her deposition that she had no experience owning and/or operating commercial properties. **RA.I.179-180.** The sale included an assignment of existing tenant leases to UTP Realty. **RA.I.159.**

II. Prior Violent Crime at the Property

In the decade leading up to Drake Scott's death, the Property was plagued with crime, including shootings, murders, gun crimes, and other instances of violence:

A. Prior to Uyen Phan's tenancy:

1/30/2005 Shooting/murder: *Murder at the Property.*

2/21/2009 Shooting/survived: *Man shot at the Property's parking lot.*

B. During Uyen Phan's tenancy:

2/23/2014 Fight: *Randolph police respond to*

break up large fight outside of Property's nightclub.

- 3/7/2014 Fight: Police respond to fight outside Property's nightclub.
- 7/25/2014 Fight: Police respond to fight in front of Property's nightclub.
- 2/19/2015 Fight: Fight outside of Property's nightclub.
- 10/18/2014 Shooting/survived: Three individuals shot at the Property outside of the nightclub.
- 5/3/2015 Shots fired: Patrons of nightclub complain shots fired in parking lot at the Property.
- 10/31/2015 Man with gun: Caller reports man outside of Property's nightclub with gun.

C. After UTP Realty purchased the Property:

- 12/12/2015 RPD responded to a call of a patron hit in the head with a bottle at City Limits. The entire shift and mutual aid responded to the call due to the volume of patrons at the Licensed Premises. **RA.I.40, 201; RA. II.5-6.**

Following the death of Drake Scott, the Randolph Licensing Board held a hearing and issued a Decision concerning City Limits and the history of crime at the Property. **RA.I.195-206.**

After hearing testimony from Randolph Police and, specifically, Detective Michael Tuitt, the Licensing Board concluded:

From the outset of its operations, City Limits began a pattern of operation that caused the RPD to have concerns about its management. In 2013 and 2014, City Limits attracted a volume of police calls which was by itself concerning. What was a matter of concern was City Limits' failure to notify the RPD of disturbances and dangerous situations. **RA.I.200.**

It further found:

Following 2013, City Limits became the focus of serious and violent criminal activity, including:

- (a) February 23, 2014 (Sunday, 12:00am) - RPD called to the Licensed Premises to break up a large fight. Exhibit 9.
- (b) March 7, 2014 (Friday, 10:30pm) - RPD responded to a call concerning a group that was fighting. Group had left area by the time of the response. Exhibit 10.
- (c) May 5, 2014 - (Monday, 11:30pm) - drug arrest in front of Licensed Premises involving patrons of City Limits. Exhibit 11.
- (d) June 6, 2014 - (Friday, 1:20am) - altercation in front of Licensed Premises spilled over into North Main and Pleasant Streets. Exhibit 12.
- (e) July 25, 2014 - (Friday 1:10am) - RPD comes upon unreported fight in parking lot, Licensed premises observed to be open at 1:10am. Exhibit 13.
- (f) October 18, 2014 - (Saturday, 1:11am) - three individuals shot outside Licensed Premises. Initial report called in by patron. Exhibit 14.
- (g) October 19, 2014 - (Sunday, 1:00am) - officer checking on Licensed Premises on night following shooting finds patrons drinking after licensed hours. Exhibit 15.

- (h) May 3, 2015 - patron of City Limits reports gun shots while in parking lot. Multiple shell casing found in parking area. Exhibit 16.
- (i) December 12, 2015 - RPD responded to a call of a patron hit in the head with a bottle at City Limits. The entire shift and mutual aid responded to the call due to the volume of patrons at the Licensed Premises. Exhibit 17. **RA.I.201**

Lastly, the Board found that before the Scott shooting, Randolph police took notice and strongly counseled City Limits against the use of "open mic" nights, advising that such live music events are the most likely occasion for audience violence. **RA.I.202.**

Appellant's expert witness, Russell Kolins, noted an additional gun crime at the Property:

10/31/2015 - Man threatened another with a gun

RA.II.6.

The Property was also home to a human trafficking ring. **RA.II.10.** A tenant at the Property exploited young women and forced them to provide sexual services, and if they refused, would face harm themselves. **RA.II.10.** The girls were forced to sleep in one unit and had sex with men in the other. **RA.I.189-192.** Tenants at the Property, Dr. Armstrong, Jean Taylor, and Shantilal Patel spoke with police to

discuss the problem. **RA.I.190-191.** Jean Taylor complained to police that: “[s]he observed four to five mattresses on the floor of their living quarters at (Unit) No. 8.” **RA.I.190.** March 15, 2016, police obtained a search warrant and raided the Property. **RA.I.188.** Phan testified she knew nothing about it prior to the raid, and denied it happened even after Detective Tuitt instructed her to the contrary.

RA.I.188-189;192.¹

III. UTP Realty, LLC as Tenant and Owner

Uyen Phan had no experience as a commercial property owner or landlord before purchasing the Property. **RA.I.179-180.** She denied there was crime at the Property, including shootings and gun crimes, both before her tenancy and during it. **RA.I.192.** Even after confronted with the list of violent crime at the Property, she maintained no such crime existed:

Q. Would you agree with me that when you purchased 326 North Main Street, you were

¹ Appellant understands this crime is dissimilar from that which caused Scott’s death, and therefore, irrelevant to the issue of foreseeability. Appellant raises it solely to challenge the veracity of Uyen Phan’s testimony because she claims that she knew nothing of prior and present-day crime at her own property.

purchasing a commercial property that had a nightclub which was the focus of violence and criminal activity?

A. I don't agree.

Q. Okay. And would you agree with me, then, that when you purchased the 326 North Main Street, you were purchasing a commercial property that had a nightclub with a history of prior shootings?

A. I don't agree. **R.A. I. 192, p.87-88.**

Ms. Phan testified too that she did not know there was prostitution and human trafficking at the Property. **RA.I.192.** After a police raid, she continued to deny that the human trafficking happened, suggesting instead that the tenant complaints were fueled by racism:

Q. Okay. Do you think that the people complaining, which are identified in paragraph 37, 38 and 39, were doing it because they were racist?

MR. DAVIS: Objection.

A. Yes. I think they just - they are racist and into other people's business. **RA.I.192, p. 86.**

Ms. Phan's shortcomings as a landlord were not limited to security. Although UTP Realty's lease with

City Limits required City Limits to carry liability insurance, Ms. Phan never enforced this provision. **RA.I.126; RA.I.159.** City Limit's had no known liability coverage when Drake Scott was murdered and defaulted in this case. **RA.I.30.**

IV. Conclusions of Expert Witness, Russell Kolins

Plaintiff hired expert witness, Russell Kolins. Kolins, a property security expert, reviewed case materials and authored a report which was disclosed and made part of the summary judgment record. **RA.I.41.**

Kolins concluded: 1.) there existed a long and continuous history of crime at the property before and during Phan's tenancy; and 2.) there was also an incident of serious violent crime during UTP Realty's ownership of the Property but prior to Scott's death. **RA.I.41-43.** That incident, a brawl, required a response from the entire City of Randolph police shift, as well as mutual aid from neighboring police departments due to the size of the crowd and the seriousness of the incident. **RA.I.201.**

Kolins also concluded that a reasonably prudent commercial landlord would make inquiry upon purchase to understand the risk profile of a Property with a nightclub in it. **RA.I.43.** He states:

Materials reviewed demonstrate there was overt evidence of prior crime at the Property. UTP's suggestion to the contrary denotes it did not understand the risk profile of this property prior to purchasing it, or alternatively, is disingenuous about its awareness. **RA.I.43.**

Kolins further opined that UTP Realty failed to act as a reasonably prudent commercial building owner. **RA.I.**

48.

Lastly, he reports that a reasonably prudent commercial landowner would have addressed the long history and ongoing, foreseeable threat of preventable harm. **RA.I.47-48.**

V. Shooting Death of Drake Scott

On the evening of February 17, 2016, the Appellant's decedent, Drake Scott, took part in an open mic live music event at the City Limits nightclub. **RA.I.56.** At the end of the night, he exited and stepped outside onto the envelope of the Property. **RA.I.56.** Gregory Wright was outside of the entrance and shot Drake Scott in the face, killing him.

RA.I.56.

Despite it being a live music event, there was no uniformed police detail at the end of the night like Randolph Police recommended. **RA.I.56.** Coincidentally, Randolph Police Detective Michael Tuitt was there,

although he was off duty, in plain clothes. **RA.I.56.**

Tuitt drove his personal vehicle that evening, not his unmarked detective's cruiser. **RA.I.56.** Tuitt heard some rumblings of trouble from patrons, so he called the precinct and asked for a police response. **RA.I.31.** Scott was killed before they arrived. **RA.I.31.**

STANDARD OF REVIEW

Review of the grant or denial of summary judgment is *de novo*. *Merrimack College v. KPMG LLP*, 480 Mass. 614, 619 (2018). Where the movant fails to show the absence of disputed material fact and entitlement to judgment as a matter of law, the reviewing court must vacate the judgment. *Brown v. Savings Bank Life Ins. Co. of Mass.*, 93 Mass. App. Ct. 572, 578 (2018). "The movant is held to a stringent standard . . . any doubt as to the existence of a genuine issue of material fact will be resolved against [him]. Because the burden is on the movant, the evidence presented . . . always is construed in favor of the party opposing the motion and he is given the benefit of all favorable inferences that can be drawn from it." *Foley v. Matulewicz*, 17 Mass. App. Ct. 1004, 1005 (1984) (internal citations omitted; ellipses in original). Summary judgment should not be

granted merely because the moving party offers a more plausible version of facts than the opposing party or appears more likely to prevail at trial. Id. "In addition, summary judgment is rarely granted on the merits of a negligence action because of the jury's 'unique competence in applying the reasonable man standard to a given fact situation.'" Id., quoting 10A Wright & Miller, Federal Practice and Procedure Section 2729, at 194 (2d ed. 1983). See also *Picard v. Thomas*, 60 Mass. App. Ct. 362, 364 (2004).

ARGUMENT

The lower court's decision ignores Massachusetts precedent, effectively narrowing the standard for establishing foreseeability in a negligent security case. Indeed, the entirety of the summary judgment decision rests upon the theory that UTP Realty and its only member, Uyen Phan, had no actual knowledge of prior, similar crimes at the Property. This reasoning falls short because it was never contemplated what evidence existed to show UTP Realty and its owner *should have known* of prior, similar crimes given the circumstances. Accordingly, the lower court's decision must be reversed, and this matter remanded for trial.

- I. The Superior Court decision narrows the common law standard for determining foreseeability in the negligent security context by eliminating any inquiry into what a commercial landlord *should have known* concerning prior, similar crimes at her premises.

To establish a duty of care in a negligent security case, the harm suffered by a plaintiff must be foreseeable. Foreseeability requires evidence:

1. of prior, similar crimes at the property;
and
2. that the commercial landlord knew or should have known of these prior, similar crimes.

See *Fund v. Hotel Lenox of Boston, Inc.*, 418 Mass. 191, 193-195 (1994). Where both elements are present, a property owner owes a duty to provide reasonable security measures aimed at preventing foreseeable harm. *Northrup v. Nat'l Amusements, Inc.*, 93 Mass. App. Ct. 1117 (Mass. App. Ct. 2018).

Here, it is undisputed that there were prior, similar crimes at the property before Drake Scott was shot and killed. There was a murder, three additional shootings, and another gun crime that did not culminate in a shooting. **RA.I.40**. There were also five violent incidents in 2014 requiring police response at

the Property, and one more in 2015. **RA.I.40; RA.I.201.** Most of these incidents occurred at night as crowds exited the City Limits nightclub. **RA.I.201.**

Notwithstanding, the lower court judge found there was no duty owed to Mr. Scott because there existed "[n]o evidence that Ms. Phan knew or should have known of prior criminal activities at City Limits." **RA.II.52.** In his analysis, Judge Wilson cites to *Griffiths*, 425 Mass. at 35, and writes:

[t]he question is not whether there was past criminal activity on the premises, but whether the owner or landlord knew of or should have known of the prior violent crimes and was therefore on notice of further potential criminal activity if preventive measures were not taken.

RA.II.53.

The *Griffiths* case, however, does not stand for this proposition.

In *Griffiths*, the court found for the property owner because there was no prior crime to begin with. The *Griffiths* court states, "[t]he plaintiff did not offer any evidence of prior shootings." *Griffiths v. Campbell*, 425 Mass. 31, 35 (Mass. 1997).

In the instant case, the lower court decision, relying on *Griffiths*, incorrectly suggests that the mere presence of crime is insufficient, and there must

be evidence demonstrating actual knowledge of prior crimes on the part of the defendant. The *Griffiths* court never made this distinction and never reached the inquiry of what constitutes the standard "knew or should have known." It follows that the issue manifested in *Griffiths* has nothing to do with whether the plaintiff proved that the defendant was aware or *should have been aware* of the prior crimes. Of course, this is because there were not any prior, similar crimes in that matter.

The lower court decision here also cites and quotes *Whittaker*, 418 Mass. at 200 for the same, flawed reason. In *Whittaker*, a woman was attacked and raped in the common area of an office building. The plaintiffs in *Whittaker* offered no evidence of prior violent attacks or similar crime. They offered evidence of car jackings, a far cry from the seriousness of rape crime:

There was no evidence of previous crimes within the office portion of the building in which the plaintiff was attacked, and certainly none of which the landlord was aware. There was evidence of the theft of a vehicle and the theft of the contents of vehicles in the building's parking area. There was also evidence of malicious damage to and the theft of vehicles and the contents of vehicles in other areas of the office park during the year prior to the attack on the plaintiff. There was no evidence that physical attacks had

occurred in the office park or that unauthorized persons had committed any crimes in buildings in the office park, which the police described as a low crime area.

Whittaker v. Saraceno, 418 Mass. 196, 200 (Mass. 1994)

In this case, unlike *Griffiths* and *Whittaker*, the record unequivocally demonstrates prior, similar crime at the property. There was a murder, three (3) additional shootings, and another gun crime that did not culminate in a shooting. **RA.I.40**. There were also five (5) violent incidents in 2014 requiring police response at the Property, and one (1) in 2015 requiring mutual aid from neighboring police departments. **RA.I.40; RA.I.201**. The vast majority of these prior crimes, similar to the shooting of Scott, occurred at night as crowds exited the City Limits nightclub. **RA.I.201**.

Despite a record replete with prior, similar crimes at the property, the Superior Court decision cast these instances aside as if they never happened. The lower court judge took at face-value Ms. Phan's statements that she had no knowledge of these crimes. To compound this mistake, the court never took the next step to examine what Ms. Phan *should have known* as a prior tenant and now commercial landlord.

Taken in a light most favorable to Plaintiff, the answers to these questions preclude a finding that there can be no duty owed to Drake Scott *as a matter of law*. Foreseeability looks not only to what a commercial landlord knows concerning prior, similar crimes, but also to what a commercial landlord *should have known*. No such inquiry was made in this case. In fact, the lower court judge misapplies *Griffiths* and *Whittaker* to find authority for a more rigid standard.

RA.II.53.

This is not however in accordance with well-established precedent. The SJC expressly determined that a proper foreseeability inquire mandates prior, similar crimes, and investigation into what Ms. Phan “should have known” of or about these crimes at the time Drake Scott was murdered. See *Fund v. Hotel Lenox of Boston, Inc.*, 418 Mass. 191, 193-195 (1994). In short, the summary judgment decision effectively changes the common law standard by limiting the possibility of foreseeability (and therefore duty) only to instances where a plaintiff can prove a landlord has actual knowledge of prior crimes. This is not the standard contemplated by the SJC.

II. Appellant's expert opinion creates a dispute of material fact as to whether UTP Realty - the owner/operator of a commercial property with a troubled history - *should have known* of prior, similar crimes when Drake Scott was murdered in a common area of the premises.

Even if we take Ms. Phan's testimony at face-value - that she had no knowledge whatsoever of prior, similar crimes at the Property - the inquiry into foreseeability is not over. The trier must also examine whether a property owner *should have known* that prior like-crimes occurred on her property. *Fund v. Hotel Lenox of Boston, Inc.*, 418 Mass. 191, 193-195 (1994). The lower court decision is void of this analysis.

Appellant nevertheless presented evidence that given there was a nightclub operating on the Property, UTP Realty had an obligation to perform due diligence on security issues that this might present going forward. **RA.I.57-60**. Appellant's expert, Russell Kolins, offers the requisite industry standard in his report. **RA.I.46-48**. His report concludes that, if we are to believe UTP Realty had no knowledge of prior crime at the Property, then it failed to understand

the risk profile of the property upon purchase.

RA.I.43. For that reason, it did not carry out the duties of a reasonable and prudent commercial property owner. **RA.I.43; RA.I.47-48.**

Had UTP Realty fulfilled its obligations of a reasonably prudent commercial landlord when it took ownership of the Property, it very quickly would have discovered the history of prior shootings and murder at the Property. The lower court therefore erred when it summarily found that UTP Realty's lack of knowledge concerning prior crimes eliminates the possibility of a duty of care to Drake Scott. In the face of expert testimony establishing the standard of care, a material dispute arises as to UTP Realty's obligations. Accordingly, the question becomes what UTP Realty *should have known* at the time Drake Scott was murdered. The lower court erred when it failed to make this inquiry because courts have long held that an expert report is sufficient to create a question of material fact on issues challenged at summary judgment (e.g., "[a]n expert's opinion based on facts in evidence is sufficient proof of causation. *Black v. Boston Consol. Gas. Co.*, 325 Mass. 505 (1950)."

Mullins v. Pine Manor College, 389 Mass. 47, 58 (Mass. 1983)).

III. If enforced, the Superior Court decision would produce absurd results whereby commercial landlords could simply plead ignorance to prior crimes in order to avoid liability.

The “should have known” prong of the Commonwealth’s foreseeability analysis is a backstop against a willfully ignorant landlord. If the question of duty turns on a mere denial of having information, then simply suggesting “I didn’t know” would rule the day. For that reason, the “should have known” standard speaks to what a reasonable purchaser, owner and operator of commercial property would have done under the circumstances.

Here, the lower court decision forecloses any investigation into what a reasonable commercial landlord should have known concerning prior crimes on her property. Even more concerning, the lower court decision explicitly accepted Ms. Phan’s testimony as truth. There was no mention of witness motive or credibility. Where a landlord denies knowledge of prior crimes at her property therefore, the possibility of duty in a negligent security context becomes untenable 100% of the time. This is not what

the SJC intended when it created the test for determining foreseeability.

In this case, as it relates to what the defendant knew about prior crimes, the lower court judge concluded:

Plaintiff has not pointed to any countervailing evidence suggesting this testimony is not credible or creating a genuine issue of material fact regarding what Phan knew at that time.
RA.II.52.

The lower court judge erred when he failed to consider the following:

a) During her tenancy at the Property, Phan spoke with customers in her nail salon about the City Limits nightclub, yet claims she knew nothing of the fights, stabbings, and shootings that occurred there. **RA.II.68;**

RA.I.181.

b) During her ownership of the Property, Phan's tenants complained to police of ongoing human trafficking at the Property.

RA.I.190-191. Even after a police raid, and a discussion with detectives, Phan claimed she knew nothing and denied it had ever happened. **RA.I.191 - 192.** Her credibility is

called into question as she demonstrates a pattern of ignoring crime at the Property. Additionally, there were two shooting incidents during her tenancy, one in which three people were shot.

RA.I.40; RA.I.43.

It would be reasonable for a jury to conclude that Ms. Phan's ignorance was disingenuous in the face of such robust evidence. A trier could and should question her credibility on these issues, especially in light of the factual evidence and expert testimony Appellant made part of the record.

By ignoring relevant evidence and relying solely on the truthfulness of Ms. Phan (who has everything to gain from lying), the lower court effectively eliminated the "should have known" prong from our analysis and simultaneously excluded any challenge to witness credibility. Accordingly, the summary judgment decision renders the SJC standard on foreseeability no longer the law of the land and incentivizes commercial landlords to ignore potential security risks to would-be visitors.

CONCLUSION

For the reasons stated herein,
Plaintiff/Appellant respectfully requests this

Honorable Court to vacate the Superior Court's order granting summary judgment and to remand the case for jury trial.

Respectfully submitted,
Norvella Hill-Junious, Individually
and as Administrator of the Estate
of Drake Scott,
By her attorneys,

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CERTIFICATE OF COMPLIANCE

I hereby certify, under the pains and penalties of perjury, this this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including, but not limited to:

Rule 16(a)(6) (pertinent findings or memorandum of decision);

Rule 16(e) (references to the record);

Rule 16(f) (reproduction of statutes, rules, regulations);

Rule 16(h) (length of briefs);

Rule 18 (appendix to the briefs); and

Rule 20 (type size, margins, and form of briefs and appendices).

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CERTIFICATE OF SERVICE

Pursuant to Mass. R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on August 30th, 2022, I have made service of this Brief upon the attorney of record for each party, by the Electronic Filing System on:

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COMMONWEALTH OF MASSACHUSETTS

**SUPERIOR COURT
 CIVIL ACTION
 NO. 2019-00192**

NORVELLA HILL-JUNIOUS¹

vs.

CITY LIMITS, INC. & another²

**MEMORANDUM OF DECISION AND ORDER ON
 DEFENDANT UTP REALTY LLC'S MOTION FOR SUMMARY JUDGMENT**

On February 17, 2016, George Wright shot and killed Drake Scott outside of City Limits, a nightclub in Randolph, Massachusetts. A jury later convicted Wright of first-degree murder. On behalf of Scott's estate, Plaintiff filed this action against City Limits and its landlord UTP Realty, LLC ("UTP"), alleging that they were negligent in failing to warn Scott of dangers in the area and failing to provide adequate security from those dangers.

UTP now moves for summary judgment on the ground that it owed no such duties to Scott as a matter of law, and it did not cause the harm that befell Scott. I heard argument on October 14, 2021. I will now allow UTP's motion.

BACKGROUND

I view the summary judgment record in the light most favorable to Plaintiff, who is the non-moving party.

¹ Individually and as Administrator of the Estate of Drake Scott, Jr.

² UTP Realty, LLC

In 2017, City Limits was one of several tenants in a building located at 326 Main Street in Randolph (the “Property”). City Limits originally leased the premises from TJB, LLC under the terms of a lease dated February 18, 2013. On November 13, 2015, TJB, LLC sold the Property to UTP and assigned UTP City Limits’ lease.

Uyen Phan is UTP’s manager and sole member. Although UTP acquired the Property in 2015, Phan had been a tenant there since 2013, operating a nail salon on the first floor of the Property. Phan had no experience owning or managing commercial property prior to UTP’s purchase. She knew there was a nightclub in the building when she purchased the Property through UTP, but she did not consider it to be dangerous.

On the night of February 16, 2016, City Limits hosted an open mic night. Off-duty Randolph Police Officer Michael Tuitt arrived at City Limits around 12:15 a.m. (now February 17, 2016) in plain clothes and his personal vehicle to drive his friend, the bartender, home from her shift. An unidentified woman approached Officer Tuitt inside City Limits and told him that she had overheard an unidentified male patron state that “the kid who killed my family member is here and he is going to get dealt with after the club.” See Joint Appendix (“JA”), Exh. Q at 53. Officer Tuitt informed City Limits security about the comment and called the Randolph Police Department to report the possibility of problems that might occur in the parking lot after closing.

Both Scott and Wright were at City Limits on the night of February 16 and early morning of February 17, 2016, but they did not interact. At approximately 12:28 a.m., after the announcement for last call for alcohol, Scott exited City Limits into the parking lot. Wright shot Scott in the head multiples times just outside the building and then fled on foot. Police apprehended him shortly after.

On March 30, 2016, the Randolph Licensing Board held a hearing to consider suspending, canceling, or revoking City Limits' liquor and entertainment licenses in the wake of the murder. Specifically, the Board was to consider whether City Limits was, among other things, "not providing sufficient security measures to ensure the safety and security of patrons and the public during its hours of operation, and in particular after 11pm." J.A., Exh. O at 2. Documentary evidence taken by the Board included several police reports dating back to 2013.

The Board issued its decision on April 12, 2016. The decision noted that "[f]rom the outset of its operations, City Limits began a pattern of operation that caused the [Randolph Police Department] to have concerns about its management. In 2013 and 2014, City Limits attracted a volume of police calls which was by itself concerning." *Id.* at 6. The decision went on to cite a number of examples of incidents from 2013 and 2014 as detailed in police reports before the Board, including a shooting outside the premises on October 18, 2014. It also cited an incident on December 12, 2015 where the Randolph Police Department responded to a call of a patron hit in the head with a bottle at City Limits. The decision noted that the Randolph Police Department had counseled City Limits to refrain from holding open mic nights because they "attract rival elements and are the most likely occasion for audience violence" and "to avoid certain promoters and DJs . . . [who] could lead to disruption or violence in the venue." *Id.* at 8-9. City Limits did not heed the advice. The Board voted to reduce City Limits' operating hours based in part on its findings that City Limits had "failed to report violent conduct on its premises" and "become a location in which violent conduct is frequent." *Id.* at 9.

After the shooting at issue here, Phan spoke with the owner of City Limits. He told Phan that he was going to hire police officers to work at the nightclub. Phan thought he should have hired police officers to work at City Limits before the shooting.

DISCUSSION

“Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Helpman v. Northeastern Univ.*, 485 Mass. 308, 314 (2020), quoting *Godfrey v. Globe Newspaper Co.*, 457 Mass. 113, 118-119 (2010). “The moving party bears the burden of demonstrating the absence of a triable issue of fact on every relevant issue.” *Scholz v. Delp*, 473 Mass. 242, 249 (2015). The moving party may satisfy this burden by submitting affirmative evidence negating an essential element of the opposing party’s case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of her case at trial. *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). Once the moving party establishes the absence of a triable issue, “the nonmoving party must respond and make specific allegations sufficient to establish a genuine issue of material fact.” *Barron Chiropractic & Rehab., P.C. v. Norfolk & Dedham Grp.*, 469 Mass. 800, 804 (2014). “Bare assertions made in the nonmoving party’s opposition will not defeat a motion for summary judgment.” *Id.*

“In deciding whether summary judgment is appropriate, a judge considers evidence presented in the pleadings, depositions, answers to interrogatories, admissions on file, and any affidavits.” *O’Connor v. Redstone*, 452 Mass. 537, 550 (2008), citing Mass. R. Civ. P. 56(c). The evidence and all reasonable inferences that can be drawn from that evidence are construed in favor of the party opposing the motion. *Borden Chem., Inc. v. Jahn Foundry Corp.*, 64 Mass. App. Ct. 638, 645 (2005).

To establish a negligence claim, “a plaintiff must prove that the defendant owed the plaintiff a duty of reasonable care, that the defendant breached this duty, that damage resulted, and that there was a causal relation between the breach of duty and the damage.” *Jupin v.*

Kask, 447 Mass. 141, 146 (2006). The existence of a duty is a question of law and, thus, may be resolved on summary judgment. *Id.*

UTP contends that Plaintiff cannot establish it owed a duty to Scott because the harm was not foreseeable. I agree that UTP is entitled to summary judgment because it had no duty to protect against or warn of the violent attack.³

“As a general rule, a landowner does not owe a duty to take affirmative steps to protect against dangerous or unlawful acts of third persons.” *Belizaire v. Furr*, 88 Mass. App. Ct. 299, 304 (2015), quoting from *Luoni v. Berube*, 431 Mass. 729, 731 (2000). See *Whittaker v. Saraceno*, 418 Mass. 196, 197 (1994) (“A landlord . . . is not a guarantor of the safety of persons in a building’s common area”). In “exceptional” circumstances, however, “Landlords may be liable for ignoring criminal activities that occur on [their] premises and were known or should have been known to them.” *Belizaire*, 88 Mass. App. Ct. at 304, quoting from *Griffiths v. Campbell*, 425 Mass. 31, 34 (1997). “Landlords have a responsibility to protect persons on their property from reasonably foreseeable risks of harm.” *Griffiths*, 425 Mass. at 34. Thus, a landlord may be liable if “a person legally on the premises is attacked, and the owner or landlord knew of or should have known of both the previous attacks and the potential for a recurrence based on a failure to take measures to make the premises safer.” *Id.* at 35. See, e.g., *Fund v. Hotel Lenox of Boston, Inc.*, 418 Mass. 191, 193-195 (1994) (where hotel was aware of numerous crimes within hotel and at nearby hotels but failed to take certain measures to protect its guests from criminal acts of third persons, risk of violent attack upon one of its guests was within foreseeable risk of harm resulting from that failure).

³ Because I conclude that UTP had no duty to protect Scott against Wright’s unlawful acts, I do not reach UTP’s alternative argument that certain security measures would not have prevented Wright from shooting Scott.

The record here lacks evidence from which a jury could conclude that the attack on Scott was reasonably foreseeable to UTP. There is no evidence that Phan knew or should have known of prior criminal activities at City Limits. Phan testified at her deposition that during her time as a tenant operating a nail salon at the Property in 2013 and 2014, she did not know that the police responded to calls at City Limits, she was unaware that the nightclub failed to notify the police of dangerous disturbances or situations, and she did not know of any prior shootings at the Property. See J.A., Exh. N at 49-52. Plaintiff has not pointed to any countervailing evidence suggesting this testimony is not credible or creating a genuine issue of material fact regarding what Phan knew at that time.

During the three months between UTP's purchase of the Property on November 13, 2015 and Scott's murder on February 17, 2016, there is evidence of only one criminal act at City Limits: inside City Limits, a patron hit another in the head with a bottle. There is no evidence that Phan knew about this incident. Even if, as the owner of the Property at the time, she should have known about this event, knowledge of this incident would be insufficient to support a finding that she should have foreseen that a shooting would occur outside the building. See *Belizaire*, 88 Mass. App. Ct. at 305 (prior criminal activity must be similar in nature to support finding of foreseeability); *Northrup v. National Amusements, Inc.*, 93 Mass. App. Ct. 1117, 2018 WL 3150514 at *3 (2018) (Rule 1:28 Decision) (one alleged incident of fight at establishment did not support finding that defendants should have reasonably foreseen sudden and unprovoked act of violence).

Despite the absence of evidence in the record that Phan knew about any of the prior incidents of violence at City Limits, Plaintiff contends that the murder was foreseeable because "the record is replete with evidence of prior violent crimes (including two shootings) at the

Premises.” Plaintiff’s Opposition at 11. However, the question is not whether there was past criminal activity on the premises, but whether “the owner or landlord knew of or should have known of” the prior violent crimes and was therefore on notice of further potential criminal activity if preventive measures were not taken. *Griffiths*, 425 Mass. at 35. See also *Luisi v. Foodmaster Supermarkets, Inc.*, 50 Mass. App. Ct. 575, 577 (2000), quoting *Whittaker*, 418 Mass. at 200 (“we have not placed the ‘burden of all harm caused by random violent criminal conduct on the owner of the property where the harmful act occurred, without proof that the landowner knew or had reason to know of a threat to the safety of persons lawfully on the premises against which the landowner could have taken reasonable preventive steps’”). Thus, there is no merit to Plaintiff’s suggestion that the crimes and information detailed in the Randolph Licensing Board’s decision, which was issued *after* the murder, provide evidence that UTP knew or should have known a potential violent crime could have occurred at the premises. Indeed, the Board’s decision indicates that the police communicated only with City Limits about ways to deter crime at the nightclub prior to the murder.

Furthermore, UTP did not own the Property at the time of every incident cited by Plaintiff save the one assault by beer bottle. Plaintiff has cited no case law suggesting that a purchaser of commercial property has an obligation to learn about the history of past criminal activity on the premises to avoid liability for the future criminal acts of a third party. Plaintiff’s expert disclosure, which opines that UTP had a duty “to detect and address crime at the Property,” does not create a dispute of fact on the issue because “duty is a question of law to be determined by [the] court.” See *Commerce Ins. Co. v. Ultimate Livery Serv., Inc.*, 452 Mass. 639, 646 (2008).

Without evidence that UTP knew or should have known that a shooting might occur on the premises, the shooting death of Scott was not foreseeable to UTP. This case does not present the “exceptional” circumstances in which a landlord can be held liable for the unfortunate results of criminal activity on or near its premises. *Belizaire*, 88 Mass. App. Ct. at 304. Accordingly, because UTP had no duty to protect Scott, I will allow UTP’s motion for summary judgment.

CONCLUSION AND ORDER

For these reasons, UTP Realty, LLC’s motion for summary judgment is **ALLOWED**.

December 8, 2021

A handwritten signature in black ink, appearing to read "Paul Wilson", written over a horizontal line.

Paul D. Wilson
Justice of the Superior Court