

Supreme Court of Louisiana

FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE #022

FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **10th day of May, 2024** are as follows:

BY Hughes, J.:

2023-CC-00955

CATHERINE EVANS, ET AL. VS. ABUBAKER, INC., ET AL. (Parish of Natchitoches)

REVERSED; SUMMARY JUDGMENT GRANTED; REMANDED. SEE OPINION.

Weimer, C.J., concurs in the result and assigns reasons.
Genovese, J., dissents and assigns reasons.
Crain, J., concurs and assigns reasons.
Griffin, J., concurs for the reasons assigned by Chief Justice Weimer and Justice Crain.

SUPREME COURT OF LOUISIANA

No. 2023-CC-00955

CATHERINE EVANS, ET AL.

VERSUS

ABUBAKER, INC., ET AL.

**On Supervisory Writ to the 10th Judicial District Court,
Parish of Natchitoches**

HUGHES, J.

In this wrongful death suit, arising out of a shooting in a convenience store parking lot, the defendant store owner filed a motion for summary judgment seeking dismissal of the action against it, asserting it had no duty to protect against the criminal actions of the decedent and other third parties on its premises. The district court denied the motion for summary judgment, finding questions of fact remained. The appellate court denied the defendant’s writ application. For the following reasons, we reverse, grant the motion for summary judgment, and remand for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

The shooting in question occurred on November 7, 2016, in the parking lot of the “Super Stop” convenience store, owned by the defendant, Abubaker, Inc. (“Abubaker”). The plaintiff’s decedent, Tommy Wiley, allegedly went to the parking lot to shop at Super Stop, and a verbal altercation ensued between Mr. Wiley and Cedric Daniels. It is undisputed that Mr. Wiley struck Mr. Daniels in the face with his hand, and Mr. Daniels shot and killed Mr. Wiley.¹

¹ In the plaintiff’s petition, she alleges that “on or about November 7, 2016 between approximately 10:00-10:30 p.m. Tommy Wiley went to the Super Stop parking lot ... to shop at Super Stop.” The plaintiff further states, in Item No. (6) of her “statement of contested facts,” filed in the district court in connection with the Abubaker’s motion for summary judgment, that she “do[es] not

Thereafter, the plaintiff/mother of Mr. Wiley's children, Catherine Evans, filed this wrongful death and survival action on behalf of Mr. Wiley's four minor children, naming Abubaker as a defendant.

The petition alleged, in essence, that the shooting of Mr. Wiley was foreseeable, as the convenience store parking lot was known to be a site of frequent criminal activity; therefore, the store owner had a duty to provide heightened security measures on its premises to deter criminal activity. The petition further alleged this duty was breached by Abubaker's failure to implement appropriate security measures, such as hiring a security guard to patrol its premises, rendering Abubaker liable for the pain and suffering of Mr. Wiley prior to his death and for his wrongful death.

After filing an answer denying liability, Abubaker filed a motion for summary judgment, essentially arguing that the shooting was not foreseeable and pointing out that Mr. Wiley was not an innocent bystander, since he was engaged in criminal activity at the time of the shooting. In support of the motion, Abubaker relied on the deposition of Lt. Victor Pinkney of the Natchitoches Police Department, who testified he was familiar with Mr. Wiley, who had been involved in prior criminal activity. Lt. Pinkney also testified as to significant criminal activity at or near the Super Stop store, prior to the incident at issue herein, indicating that the store is located in a high crime area.

The deposition testimony of Majed Abubaker also accompanied the motion for summary judgment. Mr. Abubaker testified that his business has security measures in place, including extensive interior and exterior lighting, interior and exterior security cameras, exterior chain-link fencing on both sides of the store, and

contest that during the verbal altercation" Tommy Wiley "struck" the shooter, Cedric Daniels, "in the face with his hand in the parking lot of the Super Stop on November 7, 2016." In Item No. (8) of the plaintiff's "statement of contested facts," she states that she "do[es] not contest that Tommy Wiley, Jr. was shot and killed by Cedric Daniels on November 7, 2016."

signage facing the parking lot expressly prohibiting loitering, drinking, and loud music on the premises. Mr. Abubaker also stated that his company has a security policy in place requiring employees to call the police if prohibited activities occur or if any fights break out on the premises.

In opposition to the motion for summary judgment, the plaintiff argued that Abubaker had notice of prior criminal activity that had occurred in its parking lot (its employees having frequently called for police assistance), and it should have provided heightened security measures to deter criminal activity. Lt. Pinkney also testified that Mr. Wiley's shooting was not the only shooting that occurred in the defendant's parking lot in 2016.

After a hearing, the district court judge denied the defendant's motion for summary judgment and issued a written judgment, which included rulings on objections made to evidence submitted and provided reasons for the rulings, stating in pertinent part as follows:

... Plaintiff's objection to the exhibits to the Deposition of Lt. Pinkney attached to Abubaker's Motion for Summary Judgment ... is **SUSTAINED IN PART AND OVERRULED IN PART**: The objection as to

... Exhibits 1-11 *in globo* is **OVERRULED** and the exhibits [are] admissible finding the subject photos are pictures of the crime scene at which Lt. Pinkney was present at the time the photos were taken and had personal knowledge of their content ...

... Exhibit 12 to the Deposition of Lt. Pinkney is **SUSTAINED** and is struck from the motion for summary judgment finding it is a police report authored by one other than the deponent ...

... Exhibit 13 is **SUSTAINED** and the exhibit is struck from the motion finding the subject rap sheet is not certified as a record of the Louisiana Bureau of Criminal Identification and Information pursuant to La. R.S. 15:585, and movants have not laid the proper foundation to show that this document falls into the business records exception of the hearsay rule. ...

... Exhibit 14 is **OVERRULED** and the exhibit [is] admissible finding the exhibit is a handwritten list of witnesses who Lt. Pinkney testified by personal knowledge as to those he interviewed and those he did not ...

... Exhibit 15 is **SUSTAINED** and the exhibit is struck from the motion finding the transcript unsworn out-of-court testimony being offered for the truth of the matters asserted therein. La. Code E. art. 801(C) ...

... Exhibit 16 is **OVERRULED** and the exhibit [is] admissible but is limited only to what particular facts therein of which Lt. Pinkney had personal knowledge, and that there was a finding of sufficient probable cause for the arrest of Cedric Daniels.

... ABUBAKER's Motion for Summary Judgment be and is hereby respectfully **DENIED** finding:

... a genuine issue of material fact exists as to whether the subject crime was foreseeable given [the] number of calls made to the Natchitoches Police Department over the preceding years concerning crimes reported being committed at the subject location ... and Lt. Pinkney's testimony that he personally spoke with Abubaker about additional security because of [the] number of police calls about crimes being committed at McFarland's Center and the Super Stop;

... Abubaker relies heavily on the contradictory hearsay statements made by witnesses interviewed by Lt. Pinkney as well as Lt. Pinkney's self-described "speculation" as to events leading up to the date in question requiring this court to weigh the credibility of the various declarants. Such testimony requires credibility determinations thus precluding summary judgment. ...

(Emphasis original.)

Abubaker's application for supervisory review to the appellate court was denied, on the appellate court's summary ruling that "[w]e find no error in the trial court's ruling." **Evans v. Abubaker, Inc.**, 23-00092 (La. 6/15/23) (unpublished). This court granted Abubaker's writ application. **Evans v. Abubaker, Inc.**, 23-00955 (La. 12/19/23), 374 So.3d 971.

In this court, Abubaker assigns as error the denial by "[t]he lower court" of summary judgment "on the basis that the shooting of Mr. Wiley was foreseeable without first addressing whether Defendant/Applicant owed a duty to provide security measures to protect the criminal element intruding on the premises of the business." In support of this assignment of error, Abubaker argues that "[n]o court in Louisiana has ever extended the duty to provide reasonable security measures to a person involved in the commission of a violent crime, nor should they," and that Mr. Wiley had engaged in a battery on Mr. Daniels (striking Daniels in the face with his hand) before Mr. Daniels shot and killed Mr. Wiley. Abubaker further asserts that the duty of merchants to implement security measures is for the protection of

patrons, not those engaged in criminal activity; therefore, summary judgment should have been granted in its favor, dismissing it from the lawsuit.

LAW AND ANALYSIS

This court applies a *de novo* standard of review in considering lower court rulings on summary judgment motions. **Bolden v. Tisdale**, 21-00224, pp. 10-11 (La. 1/28/22), 347 So.3d 697, 706-07; **Bufkin v. Felipe’s Louisiana, LLC**, 14-0288, p. 3 (La. 10/15/14), 171 So.3d 851, 854; **Catahoula Parish School Board v. Louisiana Machinery Rentals, LLC**, 12-2504, p. 8 (La. 10/15/13), 124 So.3d 1065, 1071. Thus, we use the same criteria that govern the district court’s consideration of whether summary judgment is appropriate. **Id.** Pursuant to La. C.C.P. art. 966(A)(3)-(4), a court must grant a motion for summary judgment if the pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, certified copies of public documents or public records, certified copies of insurance policies, authentic acts, private acts duly acknowledged, promissory notes and assignments thereof, written stipulations, and admissions show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law.² **Id.** The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by Article 969; the procedure is favored and shall be construed to accomplish these ends. La. C.C.P. art. 966(A)(2).

The burden of proof rests with the mover; nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover’s burden on the motion does not require him to

² Article 966 was amended by 2023 La. Acts, Nos. 317 and 368 and revised the language of this provision to, *inter alia*, add to the list of documents that may be filed, or referenced, on motion for summary judgment, as set forth in Subsection (A)(4)(a): “certified copies of public documents or public records, certified copies of insurance policies, authentic acts, private acts duly acknowledged, promissory notes and assignments thereof...”

negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. La. C.C.P. art. 966(D)(1). The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. **Id.** "When a motion for summary judgment is made and supported as provided [in La. C.C.P. art. 967(A)³], an adverse party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided [in La. C.C.P. art. 967(A)], must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be rendered against him." La. C.C.P. art. 967(B). A motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(A)(3).

The district court based its decision to deny Abubaker's motion for summary judgment on a finding that material questions of fact remain in this case as to whether prior criminal activity on and around its premises made it foreseeable that the instant shooting could occur, such that Abubaker had a duty to provide additional security.

A fact is material if its existence or nonexistence may be essential to a plaintiff's cause of action under the applicable theory of recovery. **Penalber v. Blount**, 550 So.2d 577, 583 (La. 1989). Facts are material if they potentially insure or preclude recovery, affect a litigant's ultimate success, or determine the outcome

³ Paragraph (A) of Article 967 provides: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The supporting and opposing affidavits of experts may set forth such experts' opinions on the facts as would be admissible in evidence under Louisiana Code of Evidence Article 702, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

of the legal dispute. **Id.** Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material for summary judgment purposes can be seen only in light of the substantive law applicable to the case. **Jackson v. City of New Orleans**, 12-2742, p. 6 (La. 1/28/14), 144 So.3d 876, 882; **Richard v. Hall**, 03-1488, p. 5 (La. 4/23/04), 874 So.2d 131, 137.

Because a plaintiff bears the burden of proof at trial, a defendant's burden on summary judgment is to show an absence of factual support for one or more elements essential to a plaintiff's claim. See **Hester v. Walker**, 20-01278, p. 5 (La. 5/13/21), 320 So.3d 362, 366 (per curiam). The threshold issue in any negligence action is whether the defendant owed the plaintiff a duty, and whether a duty is owed is a question of law.⁴ **Bufkin**, 14-0288 at p. 5, 171 So.3d at 855; **Milbert v. Answering Bureau, Inc.**, 13-0022 (La. 6/28/13), 120 So.3d 678, 688; **Pinsonneault v. Merchants & Farmers Bank & Trust Co.**, 01-2217, p. 7 (La. 4/3/02), 816 So.2d 270, 276.

The duty, upon which the petition in the instant case alleges a right to damages for the wrongful death of Tommy Wiley, arises from a business owner's duty under La. C.C. art. 2317 ("We are responsible, not only for the damage occasioned by our own act, but for that which is caused by ... the things which we have in our custody.") and La. C.C. art. 2317.1 ("The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect

⁴ As we stated in **Christy v. McCalla**, 11-0366 (La. 12/6/11), 79 So.3d 293, Louisiana courts have adopted a duty-risk analysis in determining whether liability exists under the facts of a particular case. Under this analysis, a plaintiff must prove five separate elements: (1) the defendant had a duty to conform his or her conduct to a specific standard of care; (2) the defendant failed to conform his or her conduct to the appropriate standard of care; (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries; (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries; and (5) actual damages were sustained. **Christy**, 11-0366 at pp. 8-9, 79 So.3d at 299 (citing **Pinsonneault v. Merchants & Farmers Bank & Trust Co.**, 01-2217, p. 6 (La. 4/3/02), 816 So.2d 270, 275-76). See also **Bufkin**, 14-0288 at pp. 4-5, 171 So.3d at 855.

which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care....”). See **Bufkin**, 14-0288 at p. 5, 171 So.3d at 855. While business owners generally have no duty to protect others from the criminal acts of third persons (a *vice*) on their business premises, they do have a duty to implement reasonable measures to protect *their patrons* from criminal acts when those acts are foreseeable. **Pinsonneault**, 01-2217 at p. 7, 816 So.2d at 276; **Posecai v. Wal-Mart Stores, Inc.**, 99-1222, p. 5 (La. 11/30/99), 752 So.2d 762, 766.

There is an allegation in the plaintiff’s petition that Mr. Wiley went to the parking lot at Abubaker’s convenience store to shop. An argument with Mr. Daniels ensued in the parking lot. Thus, it is unclear whether Mr. Wiley actually entered the store. Regardless, when Mr. Wiley entered into an argument with Mr. Daniels, he was certainly not acting as a store patron, but acting on his own behalf on a personal matter. Furthermore, when Mr. Wiley struck Mr. Daniels in the face with his hand, he was committing the crime of battery, in violation of La. R.S. 14:33 (“Battery is the intentional use of force or violence upon the person of another....”). When Mr. Wiley began to engage in criminal behavior, he became the type of person a business owner, such as Abubaker, had the duty to protect its current patrons from, if such activity was foreseeable.

Our jurisprudence has exonerated business owners from negligence liability in circumstances when a former business patron intentionally chooses to engage another person in a verbal altercation, which escalates to physical violence and results in personal injury, outside of the business premises (in a parking lot or adjoining public area), on the basis that a business is unable to prevent the voluntary criminal actions of former patrons when they have no specific warning of impending criminal behavior. See **Albritton v. Woods**, 34,073, pp. 9-10 (La. App. 2 Cir. 9/28/01), 795 So.2d 1239, 1244. Further, when a former business patron chooses to

escalate his or her verbal altercation with another person outside of the business premises, by engaging in non-consensual physical contact, he or she becomes an aggressor and may be found completely responsible for any injuries incurred, including when the other person responds in self-defense. See e.g. Seymour v. House of Blues New Orleans Restaurant Corp., 20-0297, pp. 10-11 (La. App. 4 Cir. 11/25/20), 309 So.3d 805, 813, writ denied, 20-01441 (La. 2/9/21), 310 So.3d 181; **Broussard v. Gallo**, 12-0239, p. 5 (La. App. 1 Cir. 11/2/12) (unpublished); **Landry v. Bellanger**, 02-1443, p. 16 (La. 5/20/03), 851 So.2d 943, 955.

In the instant case, Mr. Wiley intentionally engaged in non-consensual physical contact against Mr. Daniels when he struck Mr. Daniels in the face, committing the crime of battery, and no evidence was submitted in opposition to Abubaker's motion for summary judgment to suggest that such behavior was imminent and/or foreseeable. Therefore, under the particular facts and circumstances of this case, Abubaker had no duty to protect Mr. Wiley against the consequences of his own intentionally criminal actions.

Since Abubaker had no duty to this particular person under these circumstances, an essential element (the duty element) of the plaintiff's negligence action was lacking; therefore, Abubaker's motion for summary judgment should have been granted without regard to whether the defendant conformed its conduct to the applicable standard of care.

Once Abubaker demonstrated that the plaintiff would be unable to bear her burden to prove an essential element of her negligence action - that a duty was owed by Abubaker to Mr. Wiley - then the burden shifted to the plaintiff to demonstrate that she would be able to meet her burden at trial. See Bufkin, 14-0288 at p. 10, 171 So.3d at 858; **Schultz v. Guoth**, 10-0343, p. 6 (La. 1/19/11), 57 So.3d 1002, 1006. Yet the plaintiff failed to produce any affidavit, deposition, or other evidence admissible on motion for summary judgment to show that Abubaker did have a duty

to protect Mr. Wiley from his own intentional criminal behavior under the particular circumstances of this case.

As stated by La. C.C.P. art. 967(B), when a motion for summary judgment is made and supported, an adverse party may not rest on the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in Article 967, must set forth specific facts showing that there is a genuine issue for trial. See **Bufkin**, 14-0288 at p. 11, 171 So.3d at 858; **Luther v. IOM Company LLC**, 13-0353, p. 6 (La. 10/15/13), 130 So.3d 817, 822; **Cheramie Services, Inc. v. Shell Deepwater Production, Inc.**, 09-1633, p. 16 (La. 4/23/10), 35 So.3d 1053, 1062. Once a motion for summary judgment has been properly supported by the moving party, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion. **Bufkin**, 14-0288 at p. 11, 171 So.3d at 858; **Dauzat v. Curnest Guillot Logging Inc.**, 08-0528, p. 6 (La. 12/2/08), 995 So.2d 1184, 1187; **Babin v. Winn-Dixie Louisiana, Inc.**, 00-0078, p. 4 (La. 6/30/00), 764 So.2d 37, 40. See also **Alexander v. Toyota Motor Sales, U.S.A.**, 13-0756, p. 4 (La. 9/27/13), 123 So.3d 712, 714 (per curiam) (“All elements must be proven to succeed on this claim; therefore, a lack of factual support for just one element renders summary judgment in favor of [the defendant] appropriate.”).

Because the plaintiff in this case failed to show (on the defendant’s motion for summary judgment) that she would be able to bear her burden at trial to prove a duty was owed by Abubaker, summary judgment in favor of Abubaker should have been granted. See **Bufkin**, 14-0288 at pp. 11-12, 171 So.3d at 858; **Cheramie**, 09-1633 at pp. 9-17, 35 So.3d at 1059-63; **Dejoie v. Medley**, 08-2223, p. 10 (La. 5/5/09), 9 So.3d 826, 832 (“If he does not so respond, summary judgment, if appropriate, shall be rendered against him.”).

Therefore, we conclude the district court erred in failing to consider whether there was a duty owed by Abubaker to Mr. Wiley, prior to ruling on whether the

general duty a merchant owes to a patron was breached. Abubaker's motion for summary judgment should be granted on the basis that it did not owe a duty to Mr. Wiley under the particular facts and circumstances of this case, as herein expressed.

DECREE

For the reasons stated, we reverse the district court's denial of the motion for summary judgment filed by the defendant, Abubaker, Inc., and we hereby order that summary judgment be entered in favor of Abubaker, Inc., dismissing it as a defendant in this action. The matter is remanded to the district court for further proceedings consistent with this opinion.

REVERSED; SUMMARY JUDGMENT GRANTED; REMANDED.

SUPREME COURT OF LOUISIANA

No. 2023-CC-00955

CATHERINE EVANS, ET AL.

VS.

ABUBAKER, INC., ET AL.

*On Supervisory Writ to the 10th Judicial District Court,
Parish of Natchitoches*

WEIMER, C.J., concurring.

I agree with the result reached by the majority opinion, but find the issue presented is more appropriately analyzed as a “scope of duty” question.

Whether a claim arises in negligence under La. C.C. art. 2315 or in premises liability under La. C.C. art. 2317.1,¹ determining whether liability exists under a particular set of facts uses the same duty/risk analysis. **Farrell v. Circle K Stores, Inc.**, 22-00849, p. 5 (La. 3/17/23), 359 So.3d 467, 473; **Malta v. Herbert S. Hiller Corp.**, 21-00209, p. 11 (La. 12/10/21), 333 So.3d 384, 395. Under the duty/risk analysis, the plaintiff must prove five separate elements: (1) the defendant had a duty to conform his conduct to a specific standard (the duty element); (2) the defendant’s conduct failed to conform to the appropriate standard (the breach of duty element); (3) the defendant’s substandard conduct was a cause-in-fact of the plaintiff’s injuries (the cause-in-fact element); (4) the defendant’s substandard conduct was a legal cause of the plaintiff’s injuries (the scope of duty element); and (5) proof of actual damages (the damages element). **Malta**, 21-00209 at 11, 333 So.3d at 395; **Pinsonneault v.**

¹ Although the majority employs La. C.C. art. 2317 and 2317.1, addressing damages caused by a thing, I find the alleged negligence concerning the failure of a business to provide adequate security is more aligned with La. C.C. art. 2315, addressing damages caused by an action. See, e.g., Pinsonneault v. Merchants & Farmers Bank & Trust Co., 01-2217, p. 6 (La. 4/3/02), 816 So.2d 270, 275.

Merchants & Farmers Bank & Trust Co., 01-2217, p. 6 (La. 4/3/02), 816 So.2d 270, 276.

The threshold issue in any negligence action is whether the defendant owed the plaintiff a duty. **Malta**, 21-0209 at 11, 333 So. 3d 384 at 395; **Pinsonneault**, 01-2217 at 7, 816 So.2d at 276; **Posecai v. Wal-Mart Stores, Inc.**, 99-1222, p. 4 (La. 11/30/99), 752 So. 2d 762, 766. Louisiana C.C. arts. 2315 and 2317.1 create broad accountability for fault, imposing general obligations to use reasonable care. See **Doe v. Mckesson**, 21-00929 (La. 3/25/22), 339 So.3d 524, 537 (Weimer, C.J., concurring). The “duty” inquiry can narrow the scope of potential liability and financial responsibility. *Id.* (citing **Posecai**, 99-1222 at 4, 752 So.2d at 766). Determining whether a duty is owed is a policy-driven decision that considers various moral, social, and economic factors. *Id.*

This court previously established a duty on business owners “to implement reasonable measures to protect their patrons from criminal acts when those acts are foreseeable.” **Posecai**, 99-1222 at 5, 752 So.2d at 766. While that duty is clearly intended to protect usual patrons conducting business on the premises, the question in this case concerns whether that duty encompasses the risk of harm to a patron (or one otherwise on the business premises) who intentionally instigates and engages in criminal conduct.

This court recently discussed “scope of duty” in **Malta**:

There is no rule for determining the scope of the duty. The scope-of-the-duty inquiry is fact sensitive and ultimately turns on a question of policy as to whether the particular risk falls within the scope of the duty. The determination of legal cause/scope of the duty involves a purely legal question.

In some instances a risk may not be found within the scope of a duty where the circumstances of that particular injury to that plaintiff

could not be reasonably foreseen or anticipated because there was no ease of association between that risk and the legal duty. Foreseeability, as the determining test, is neither always reliable nor the only criterion for comparing the relationship between a duty and a risk. Some risks that arise because of a defendant's conduct are not within the scope of the duty owed to a particular plaintiff simply because they are unforeseeable. Ease of association is the proper inquiry. Such an inquiry questions how easily one associates the plaintiff's complained of harm with the defendant's conduct. Although ease of association encompasses the idea of foreseeability, it is not based on foreseeability alone.

Malta, 21-0209 at 17-18, 333 So.3d at 399 (internal citations removed).

Determination of the risks encompassed within the duty was also explained in **Hill**

v. Lundin & Associates, Inc., 260 La. 542, 256 So.2d 620 (1972):

The same policy considerations which would motivate a legislative body to impose duties to protect from certain risks are applied by the court in making its determination. All rules of conduct, irrespective of whether they are the product of a legislature or are a part of the fabric of the court-made law of negligence, exist for purposes. They are designed to protect Some persons under Some circumstances against Some risks. Seldom does a rule protect every victim against every risk that may befall him, merely because it is shown that the violation of the rule played a part in producing the injury. The task of defining the proper reach or thrust of a rule in its policy aspects is one that must be undertaken by the court in each case as it arises. How appropriate is the rule to the facts of this controversy? This is a question that the court cannot escape.

Hill, 260 La. at 550, 256 So.2d at 623 (internal citation omitted).

After examining the policy considerations underlying this court's imposition of the duty in **Posecai**, it is clear that a duty should not be extended to encompass the harm incurred in this case.² Mr. Wiley engaged in intentional criminal conduct which

² In **Posecai**, the court identified the following factors to be used in making a policy decision on duty: the fairness of imposing liability; the economic impact on the defendant and on similarly situated parties; the need for an incentive to prevent future harm; the nature of defendant's activity; the potential for an unmanageable flow of litigation; the historical development of precedent; and the direction in which society and its institutions are evolving. **Posecai**, 99-1222 at 4-5, 752 So.2d at 766. In **Reynolds v. Bordelon**, 14-2362, pp. 9-12 (La. 6/30/15), 172 So.3d 589, 597-99, this court delineated similar policy considerations for determining whether a duty should be imposed: deterrence of undesirable conduct; compensation of the victim; satisfaction of the community's sense of justice; proper allocation of resources, including judicial resources; and deference owed to the

unfortunately led to his death. The question becomes: does the duty to implement reasonable measures to protect patrons from foreseeable criminal acts on business premises encompass the risk of harm to a patron who intentionally instigates and engages in criminal behavior. Regardless of whether Mr. Wiley was a patron, there is no ease of association between Abubaker's duty to use reasonable measures to protect its usual patrons from criminal acts and the risk that a patron will be harmed because he instigated and engaged in violent behavior with a third person while he happened to be on the business's premises.

Finding plaintiff cannot prove the "scope of duty" element of the duty/risk analysis, I agree with the holding of the majority opinion granting summary judgment in favor of defendant.

legislature.

SUPREME COURT OF LOUISIANA

No. 2023-CC-00955

CATHERINE EVANS, ET AL.

VS.

ABUBAKER, INC., ET AL.

**On Supervisory Writ to the 10th Judicial District Court,
Parish of Natchitoches**

Genovese, J., dissents and assigns reasons.

I respectfully dissent from the majority opinion reversing the lower courts' denial of Defendant's motion for summary judgment. Specifically, I disagree with the majority's conclusion, given the procedural posture of this case, that Defendant owed no duty to the decedent. This matter arises in the context of a motion for summary judgment. In my view, in this fact-intensive case, genuine issues of material fact remain which preclude a grant of summary judgment in favor of Defendant. For these reasons, I find that the lower courts did not err in denying Defendant's motion for summary judgment. I would affirm the lower courts' rulings and remand.

SUPREME COURT OF LOUISIANA

No. 2023-CC-00955

CATHERINE EVANS, ET AL.

VS.

ABUBAKER, INC., ET AL.

On Supervisory Writ to the 10th Judicial District Court, Parish of Natchitoches

CRAIN, J. concurs and assigns reasons.

I agree with the decision to grant the defendant’s motion for summary judgment but write separately to clarify my views on this negligence claim.

As I stated in my concurring opinion in *Doe v. McKesson*, 21-0929 (La. 3/25/22), 339 So.3d 524, “it is important to separate the duty and scope of the duty questions because each has considerations unique to itself.” The former asks whether an entire category of defendants should be excluded from liability based on policy-driven factors. The latter narrows the analysis to the facts of the case at hand. “The line between these distinct elements is often blurred.” *Id.* Here, the majority states:

[U]nder the *particular facts and circumstances of this case*, [the defendant] had *no duty* to protect Mr. Wiley against the consequences of his own intentionally criminal actions.

Since [the defendant] had *no duty to this particular person under these circumstances*, an essential element (the duty element) of the plaintiff’s negligence action was lacking

(Emphasis added). I believe these statements address themselves to scope of duty, not duty.

I would frame the duty question as: “Does a store owner owe a duty to keep its premises reasonably safe?”¹ Considering the relevant policy factors of deterrence, economic considerations, justice in imposing liability, allocation of judicial resources, and predictability, there is no reason to categorically refuse to recognize a storeowner’s duty to keep a store’s premises safe. Thus, I find the duty element is satisfied.

As explained in my previous concurrence in *Doe*, 339 So.3d at 544, the inquiry then requires “a determination of whether that duty extends to cover the injury in this case, which is the ‘scope of the duty’ element.” This is where the specific facts must be scrutinized. “The extent of protection owed a particular plaintiff depends on the particular facts and circumstances of the case and is determined on a case-by-case basis to avoid making a defendant the insurer of all persons against all harms.” *Id.* The majority blends the two elements by analyzing, at the duty stage, the particular plaintiff (a person committing a battery rather than an innocent bystander) and the particular facts (someone acting on his own behalf on a personal matter rather than a store patron just in the wrong place at the wrong time).

There are two relevant considerations at the scope of the duty stage: foreseeability and ease of association. Thus, it is crucial to analyze whether the defendant’s alleged actions (or inactions) with regard to security foreseeably resulted in Mr. Wiley’s death and whether that injury is easily associated with the duty to keep a store’s premises reasonably safe.

¹ From this standpoint, I question the analysis performed in *Posecai v. Wal-Mart Stores, Inc.*, 99-1222 (La. 11/30/99), 752 20 So.2d 762. There, the court found business owners generally owe no duty to protect *others* from the criminal acts of third parties but have a duty to put reasonable safety measures in place to protect their *patrons* from foreseeable criminal acts. Extending a general duty of reasonable safety to the specific facts of the case (patrons as opposed to others) improperly merged the separate duty-risk elements.

The plaintiff alleges the shooting of Mr. Wiley was foreseeable because of the high-crime area, numerous reports of crime in the store's parking lot, the late hours the store was open, and the sale of alcohol. The defendant contends it could not possibly have predicted a violent altercation would occur at all, much less on its premises. The incident was unrelated to the store's business purposes and was the result of an interpersonal conflict—a conflict the defendant could not foresee or prevent. I agree.

The cases cited by the majority support this conclusion.² The jurisprudence precludes liability against a business for voluntary criminal actions when there is no specific warning or threat that such criminal behavior will occur. Thus, the foreseeability element is not met.

Further, the facts alleged do not sufficiently establish an ease of association between a business's duty to keep its property safe and the death of an individual as a result of a violent altercation that is unrelated to the business. Thus, I find the scope of the duty element is lacking.

Procedurally, I recognize this matter arises on a motion for summary judgment, and the scope of the duty presents a mixed question of fact and law. *Parents of Minor Child v. Charlet*, 13-2879, p. 6 (La. 4/4/14), 135 So.3d 1177, 1181. As this court held in *Farrell v. Circle K Stores, Inc.*, 22-0849, p. 13 (La. 3/17/23), 359 So.3d 467, 478, summary judgment is not necessarily prohibited when the element involves a mixed question of law and fact.³ In *Farrell*, a premises liability case, we found summary judgment may be granted “upon a finding that reasonable minds could only agree that the condition was not unreasonably dangerous;

² See *Albritton v. Woods*, 34, 073, pp. 9-10 (La. App. 2 Cir. 9/28/01), 795 So.2d 1239, 1244; *Seymour v. House of Blues*, 20-0297, pp. 10-11 (La. App. 4 Cir. 11/25/20), 309 So.3d 805, 813; *Broussard v. Gallo*, 12-0239, p. 5 (La. App. 1 Cir. 11/2/12); *Landry v. Bellanger*, 02-1443, p. 16 (La. 5/20/03), 851 So.2d 9943, 955.

³ The *Farrell* case was analyzed at the breach stage of the duty-risk analysis, which, like scope of duty, is a mixed question of law and fact.

therefore, the defendant did not breach the duty of reasonable care owed.” Similarly, here, I find reasonable jurors could only agree that the fatal shooting of Mr. Wiley was not foreseeable by the defendant in carrying out its duty to keep its premises reasonably safe. Nor could reasonable jurors conclude there was an ease of association between that duty and the harm suffered. Thus, the scope of the duty element was not proven and summary judgment is appropriate.