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| DISTRICT COURT, DENVER COUNTY, STATE OF D  FI  COLORADO C  Court Address: 1437 Bannock Street  Denver, CO 80202  **Plaintiff(s):** ROBERT ABRAMS  **v.**  **Defendant(s):** SHAWN BEESON, and individual, and CALIFORNIA STREET PARKING GARAGE, LLLP, a  Colorado limited liability limited partnership  Attorney for Defendant California Street Parking Garage, LLLP  Name: Thomas E. Hames, Esq. Address: 6060 S. Willow Drive, Suite 100  Greenwood Village, Colorado 80111 Phone No.: (720) 963-7019  Atty. Reg. 13743 | TE FILED: December 4, 2015 2:58 PM  LING ID: CD8277A8C7516 SE NUMBER: 2015CV31709  **▲ COURT USE ONLY ▲**  Case Number: 2015 CV 31709  Division: 409 |
| **DEFENDANT CALIFORNIA STREET PARKING GARAGE, LLLP’S REPLY TO PLAINTIFF’S RESPONSE TO DEFENDANT’S MOTION TO DISMISS** | |

California Street Parking Garage, LLLP (hereinafter referred to as “Defendant California”), by and through its attorneys Ray Lego & Associates hereby submits its Reply to Plaintiff’s Response to the Defense Motion to Dismiss, and as grounds therefore states:

# NATURE OF PLAINTIFF AND PLAINTIFF’S CLAIMS

Plaintiff attempts to ignore his own allegations that the fight he so readily started, occurred on public property. See Plaintiff’s Second Amended Complaint paragraph 14. The dangerous condition he complains of was not on the Defendant’s property, was not created or controlled by this Defendant and was created by Plaintiff’s own hand. The fact it is a former client he alleges attacked and injured him is also remarkable.

For this Plaintiff, a licensed attorney in the State of Colorado now represented by counsel, to be unclear about the Colorado Premises Liability Act is disingenuous. Plaintiff claims to have been injured by a condition on the property of the Defendant, but must acknowledge the dangerous condition was the acts of Co-Defendant Beeson. For Plaintiff to initiate a fight with Co-Defendant Beeson, then attempt to withdraw from that fight into the Defendant’s unsecured

premises claiming the open premises was or should have been secure, is fanciful and incredible. This Court should look to the nature of the claimed dangerous condition on the property and decline to allow Plaintiff’s case to continue by dismissing Plaintiff’s claims against this Defendant.

# NATURE OF THE DEFENDANT’S PROPERTY

Plaintiff cannot dispute the open nature of the parking facility. The fact he parked at this facility and drove past the entrance sign, Exhibit D to Defendant’s Motion to Dismiss, for over three years is undisputed. His expectation of a secure facility is simply incorrect. The facility is open 7 days a week, 24 hours a day as represented on the sign.

Plaintiff concedes no report of any violence or criminal activity to the Defendant.

Plaintiff also concedes he did not tell the Defendant of the reported threats made against him. While Plaintiff claims the verbal altercations were significant enough to plead them against Defendant Beeson, he did not report them to this Defendant. Plaintiff only claims he reported homeless sleeping at the facility to the Defendant. Without more, this is insufficient to claim this Defendant knew or should have known this Plaintiff was at risk for any type of injury.

# THE LACK OF A DUTY OWED BY THE DEFENDANT TO PLAINTIFF MANDATES DISMISSAL OF PLAINITFF’S CLAIM AGAINST DEFENDANT CALIFORNIA

Plaintiff concedes this Defendant owed no duty to Plaintiff for any condition or person that existed on the public sidewalk. The only duty owned must arise out of the condition of the Defendant’s property or the activities conducted by the Defendant on that property. *Pierson v. Black Canyon Aggregates, Inc.* 48 P3d 1215, (Colo. 2002). Plaintiff is attempting to show the condition he created, a fight, followed him on the Defendant’s property, and is somehow a breach of a duty by this Defendant to this Plaintiff. As such Plaintiff must show security that is provided on the property. Plaintiff cannot do so. Under *Pierson*, Defendant California must have either created the dangerous condition or been conducting activities that created the dangerous condition.

Plaintiff’s argument is that the pedestrian door to the north where he attempted to enter was unlocked, but the south door is locked. Plaintiff fails to account for the open nature of the parking structure, the open vehicle entrances just to the south of the northern pedestrian door. Plaintiff is claiming the Defense should have met his expectation of security, when reality was the property is held out to be open to the public at all times. Defendant’s failure to meet Plaintiff’s expectations does not create a duty for this Defendant.

Plaintiff claims that the after-hours access is somehow responsible for the fight Plaintiff caused. See Plaintiff’s Response at paragraph 20. The difficulty is the fight Plaintiff claimed caused his claimed injuries damages or losses occurred during the day, during the lunch hour, not after hours. See Plaintiff’s Second Amended Complaint paragraph 14. The undisputed time the incident occurred requires Plaintiff’s claim must be dismissed. Plaintiff had no expectation of a

secure door into the facility at this time of day. As such his expectation is incorrect and is not basis for liability to attach to this Defendant.

# PLAINTIFF’S AFFIDAVIT

Plaintiff’s affidavit attempts to establish that homeless frequent the Defendant’s parking structure and loiter there. This evidence is not relevant to this case. There is no argument that the homeless injured Plaintiff or that the Co-Defendant was himself homeless. The fact that homeless can be present at the Defendant’s parking structure does not establish any condition on the property that injured Plaintiff or that is relevant to this Court’s inquiry. At best, for this Defendant, it establishes the open access the public has to the structure. Plaintiff appears to be equating homeless loitering with a danger, which has not been shown and likely cannot be shown. Defendant also requests that the patrons parking at the parking structure call police when they see anyone loitering, but does not request patrons call this Defendant if they see homeless at the parking structure.

# APPLICATION OF EXISTING AUTHORITY TO THIS CASE

Plaintiff appears to acknowledge Defendant cannot be responsible for a dangerous condition on another’s land. See paragraph 6 of Plaintiff’s Response. That dangerous condition was Co-Defendant Beeson who Plaintiff contends attacked him. As that was the dangerous condition that caused Plaintiff’s injury, Plaintiff’s case should be dismissed.

Plaintiff also concedes that he entered the Defendant’s unsecured garage at the inception of the incident. See Plaintiff’s Response paragraph 8. Plaintiff cannot refute the photographs of the facility that show it is open 24 hours a day and 7 days as week. Plaintiff contends it is Defendant’s activities or other activities on its premises that give rise to Defendant’s duty to Plaintiff. The fact Co-Defendant Beeson and Plaintiff continued their fight on this Defendant property does not make this Defendant liable. The only condition Plaintiff contends is dangerous is the failure to lock the north pedestrian door. Plaintiff’s contends that door should have been locked to keep violence, that Plaintiff created, from coming into the facility.

With no notice of any threats and no prior criminal activity alleged by Plaintiff, Plaintiff’s case is missing a critical element, notice. Beyond the open unsecured nature of the facility, Plaintiff cannot show this Defendant knew there was a risk of violence because Plaintiff did not tell this Defendant of that risk. The only contention Plaintiff can make is the Defendant should have known to secure the one door. Plaintiff fails to assert any facts to give rise to imputed knowledge or any reason to secure the facility. Plaintiff has failed to allege the standard of care in parking structures is to secure them. At this late date Plaintiff cannot make such an allegation. Under C.R.S section 13-21-114(5)(c)(1), Plaintiff must establish that this Defendant knew or should have known of the danger of violence and unreasonably failed to take reasonable care in light of that knowledge.

Plaintiff also claims Defendant California failed to supervise or train its employees. See Plaintiff’s Response paragraph 15. This is a claim based in general negligence, not under the Colorado Premises Liability Act. Plaintiff concedes his claim is only made under the Colorado Premises Liability Act, no claim of negligence can be allowed. The Premises Liability Act is the exclusive remedy for a person who claims injury on the property of another. While Plaintiff appears to concede this point in his Response, he nonetheless makes the general negligence claim in paragraph 15 of this Response.

It appears that Plaintiff restates the legal duty owed under C.R.S. section 13-21- 115(5)(c)(1) and claims it applies and the Defense Motion should be denied. See Plaintiff’s Response at paragraphs 11 and 12. The difficulty with Plaintiff’s position is the facts of this case do not support any such position.

In an unpublished opinion, *Jordan v. Panorama Orthopedics* 2015 CO 24 No 13SC545, the Court addresses a similar issue. A copy of that case is attached for the Court’s review and use and marked as “**Exhibit A**”. In that case a patient of the medical practice was injured on the common area side walk in the medical office building when she tripped on uneven concrete. The Supreme Court determined that the tenant Panorama was not in possession of the side walk and was not responsible for the condition of the sidewalk. Plaintiff attempted to argue since she was walking across that sidewalk to the medical practice that constituted sufficient activity by the Defendant to make that Defendant’s medical practice liable for her injuries. Plaintiff here argues that because he was a patron of the parking garage, he had some expectation of a door being locked which imposes a duty on the Defendant parking structure to lock its doors. Without actual knowledge or any facts giving rise to notice to the Defendant that its facility should have been locked, Plaintiff’s claim fails and should be dismissed.

Whether a particular defendant owes a duty to a particular plaintiff is a question of law for the court to decide. *Metro. Gas Repair Serv., Inc. v. Kulik*, 621 P.2d 313, 317 (Colo. 1980). This is well-settled case law and has been followed consistently throughout Colorado. See *Martinez v. Lewis*, 969 P.2d 213, 218 (Colo. 1998); *Perriera v. State*, 768 P.2d 1198, 1208 (Colo. 1989); *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 50 (Colo. 1987); *Imperial Distr. Svcs., Inc.*

*v. Forrest*, 741 P.2d 1251, 1258 (Colo. 1987); *Metro. Gas Repair Svc., Inc. v. Kulik*, 621 at 317- 18; *Wycoff v. Grace Comm. Church of Assemblies of God*, 251 P.3d 1260, 1271 (Colo. App. 2000); *Lewis v. Emil Clayton Plumbing Co.*, 25 P.3d 1254, 1256 (Colo. App. 2000); *Turkey Creek, LLC v. Rosania*, 953 P.2d 1306, 1312 (Colo. App. 1998); *Glover v. Southard*, 894 P.2d 21, 24 (Colo. App. 1994).

# PLAINTIFF’S ROLE IN CAUSING HIS OWN INJURIES NEEDS ASSESSMENT BY THIS COURT

Defendant requests that the September 11, 2015 hearing establishing that Plaintiff was the aggressor be transcribed for use with this Motion. After that hearing the Court denied Plaintiff’s request for a no contact order against Defendant Beeson. That transcript was ordered by Defendant California on October 16, 2105 and a deposit for the same in the amount of $1,077

was sent to AVTRAN on that same date. To date that hearing transcript has not be received by Defendant California. However, the September 11, 2015 transcript was available to Plaintiff and part of that transcript was attached to the Plaintiff’s Response to Defendant’s Motion to Dismiss. Analysis of that transcript is in order.

The partial transcript attached to Plaintiff’s Response confirms Plaintiff was the aggressor.

Transcript of the September 11, 2105 hearing, eye witness Osborne at page 17 lines 5-9 testified as follows:

Q: Question by Abrams And what did the punch look like? What did you see? Describe what you saw.

A: What I saw was you opened up the door and *you were bracing it open* and turned around and swung a punch at Mr. Beeson. (Emphasis provided)

The partial transcript also shows that whether the door was locked or not, would make no difference in this incident. The above testimony shows Plaintiff had the door braced open.

Transcript of the September 11, 2105 hearing, eye witness Osborne testifying at page 19 Lines 14-19.

Q---Question by Abrams “toward the door, and I’m ---you just said that I was halfway through the door. That was---so is that---

A: *You were propping the door open*.

Q: OK; so propping open the door. (Emphasis provided).

(Of note, it is Plaintiff Abrams cross examining eye witness Osbourne, who then repeats the answer of propping the door open without objection or follow up).

Transcript of the September 11, 2105 hearing eye witness Osborne , page 22 lines 2-7.

Q: Question by Abrams He proceeded to shove the suited man through the parking garage doorway. So then he’s attacking me. So allegedly, I hit him. He stopped. Qualified with your group, then he attacked me and shoved me through the doorway?

A: He shoved you through the doorway, correct.

Transcript of the September 11, 2105 hearing page 40, lines 8-14. This appears to be testimony by Co-Defendant Beeson, although there is no ability to confirm this with the partial transcript provided by Plaintiff.

A: Question by Abrams He immediately I think at this point, turned around and did the same thing, continued to the garage. And I did the same thing, which was kind of follow him a bit to the garage. That’s when he opened the door and, as Mr. Osborne testified, *braced the door*

*with his left foot* and turned around and punched me in the face at that point. (Emphasis provided).

From the eyewitness account, not only was Plaintiff the aggressor who threw a punch at Co-Defendant Beeson, but it was Plaintiff that was bracing and propping the door to the parking structure open. This bracing and propping the door open would have defeated any lock system, active or not on May 13, 2015. It is disingenuous for Plaintiff to claim Defendant California had a duty to provide locking doors to its parking garage, only to have Plaintiff brace or prop the door in question open during the fight. It appears Plaintiff thought he could throw a punch and then flee into the parking structure. However based upon his expectation, Plaintiff was wrong, he braced the door open, which allowed Defendant Beeson to shove Plaintiff into the parking garage through the open door. This Court is not bound by Plaintiff’s expectation of a locking door establishing a duty on Defendant California’s part. This Court must rule as a matter of law due to the published open nature of this parking structure, Defendant California had no duty to protect Plaintiff from violence he created prior to fleeing into Defendant California’s parking structure.

Defendant California requests the ability to review the entire transcript of the September 11, 2015 hearing so as to possible provide additional relevant portions of that transcript for the Court’s review. Until that time, Defendant California requested no ruling from this Court on the Defense Motion to Dismiss.

Defendant California refers this Court to the original Motion to Dismiss at page 6, paragraph 23, for its request for attorney fees and costs. Defendant California further incorporates that paragraph into this Reply as if fully repeated herein. Defendant California requests a finding by this Court that Plaintiff’s claim lacked substantial merit and warrants an award of attorney fees and costs against Plaintiff.

WHEREFORE, Defendant California Street Parking Garage, LLLP respectfully requests the Court to consider this Reply in Response to Plaintiff’s opposition to the Defense Motion to Dismiss this matter and to grant said Motion, for Defendant California’s costs and attorney fees in having to file this Motion to Dismiss and to enter such other and further relief that the Court deems necessary and just under the circumstances of this case.

DATED this 4th day of December, 2015.

Respectfully submitted,

A duly signed copy of the foregoing is on file in the office of Ray Lego & Associates

/s/ Thomas E. Hames Thomas E. Hames, Esq.

*ATTORNEY FOR DEFENDANT CALIFORNIA STREET PARKING GARAGE, LLLP*

# CERTIFICATE OF SERVICE

This is to certify that on this 4th day of December, 2015 a true and correct copy of the foregoing **DEFENDANT CALIFORNIA STREET PARKING GARAGE, LLLP’S REPLY TO PLAINTIFF’S RESPONSE TO DEFENDANT’S MOTION TO DISMISS** as forwarded via

either U.S. Mail, postage prepaid or ICCES, file and serve, and addressed to the following:

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A duly signed copy of the foregoing is on file in the office of Ray Lego & Associates

/s/ Karen A. Taylor Karen A. Taylor