Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

Nos. 04-16-00761-CV & 04-16-00768-CV

Jana Lee **FLANAGAN** and Lucas Matthew Flanagan,
Appellants

v.

RBD SAN ANTONIO L.P., Davidson Hotel Company LLC
and G4S Secure Solutions (USA) Inc.,
Appellees

From the 224th Judicial District Court, Bexar County, Texas
Trial Court Nos. 2012-CI-20044 & 2016-CI-18601
Honorable David A. Canales, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: November 22, 2017

AFFIRMED

Jana Lee and Lucas Matthew Flanagan appeal traditional and no-evidence summary judgments granted in favor of RBD San Antonio L.P., Davidson Hotel Company LLC, and G4S Secure Solutions (USA) Inc. in a premises liability case based on an alleged aggravated assault at a hotel. The Flanagans contend the trial court erred in granting the summary judgments and in sustaining objections to their summary judgment evidence. We affirm the trial court's orders.

BACKGROUND

Between 4:30 a.m. and 5:00 a.m. on November 29, 2012, Jason Salmon was parked in a truck in the loading and unloading area of an airport hotel. Salmon's truck was observed by hotel employees and hotel security, but no one approached the truck.

Jana Lee Flanagan, a flight attendant for an airline, began loading her suitcases into an airport shuttle van around 5:00 a.m. As she loaded her suitcases, Salmon struck Jana with his truck, trapping her between the truck and the van. Salmon continued to press on the accelerator pedal for twenty to thirty additional seconds before hotel security opened the truck door and placed the truck in park.

Andres Doctor, a hotel employee who serves as a bellman and a shuttle driver, testified in his deposition Salmon appeared to be under the influence of something and his eyes looked glassy. Although Doctor did not smell any alcohol, he believed Salmon was not in the right frame of mind. After Salmon's truck was placed in park, Salmon appeared to be attempting to leave the scene, so Doctor restrained him.[1]

Charles Funderbunk, another hotel employee, went outside after hearing the commotion and saw Doctor restraining Salmon. Funderbunk briefly spoke to Salmon who told him he was dropping off a lady. Funderbunk also believed Salmon appeared to be impaired by alcohol or drugs based on his manner of speech, his glassy eyes, and his fidgeting. Funderbunk did not smell any alcohol on Salmon's breath.[2]

[1] This testimony is from deposition excerpts attached to the Flanagans' supplemental response. Although the security company objected to the excerpts attached as Exhibit C to the Flanagans' initial reply, the security company did not object to the excerpts attached as Exhibit R to the Flanagans' supplemental response.

[2] This testimony is from deposition excerpts attached to the Flanagans' supplemental response. Although the security company objected to the excerpts attached as Exhibit D to the Flanagans' initial reply, the security company did not object to the excerpts attached as Exhibit S to the Flanagans' supplemental response.

Robert Luis Diaz, a security company employee, testified he believed Salmon was under the influence because another security guard reported Salmon was slurring his words and tried to leave the scene.

Police officers arrived in response to a 911 call and questioned Salmon. Salmon stated he was picking someone up from the hotel, and his foot must have slipped. Salmon could not, however, provide the person's name. In his subsequent deposition, Salmon stated he was dropping someone off at the hotel, but again could not provide the person's name. The police officers conducted field sobriety tests and determined Salmon was not intoxicated. The officers allowed Salmon to leave the scene, and Salmon was never charged with a criminal offense.

The Flanagans subsequently sued Salmon, the owners of the truck, G4S Secure Solutions (USA) Inc. (the "Security Company"), which was the hotel's security company, and RBD San Antonio L.P. and Davidson Hotel Company LLC (collectively the "Hotel"), the hotel's owners. After the Flanagans settled their claims against the owners of the truck, the trial court granted traditional and no evidence summary judgments in favor of the Hotel and the Security Company and severed the Flanagans' claims against them, making the judgments final for purposes of appeal. The Flanagans appeal.

STANDARD OF REVIEW

"We review the grant of [a] summary judgment de novo." *Katy Venture, Ltd. v. Cremona Bistro Corp.*, 469 S.W.3d 160, 163 (Tex. 2015). To prevail on a traditional motion for summary judgment, the movant must show "there is no genuine issue as to any material fact and the [movant] is entitled to judgment as a matter of law." TEX. R. CIV. P. 166a(c). A trial court must grant a no-evidence motion for summary judgment unless the nonmovant raises a genuine issue of material fact on each challenged element of the nonmovant's claims. *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 79 (Tex. 2015). We take as true all evidence favorable to the nonmovant, resolve all

conflicts in the evidence in the nonmovant's favor, and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Katy Venture, Ltd.*, 469 S.W.3d at 163.

PREMISES LIABILITY CLAIM BASED ON PARKED TRUCK

In their pleadings, the Flanagans alleged two premises liability theories. One theory was based on the parked truck being a premises defect. The other theory was based on Salmon's actions being a foreseeable criminal act, namely an alleged aggravated assault.

The Hotel and the Security Company both assert the Flanagans waived any complaint regarding their first theory because they do not challenge the summary judgment as to that claim. The Flanagans do not appear to disagree that they waived any complaint as to the first theory, but they assert their failure to challenge the first theory does not waive their complaint as to the second theory. We agree the Flanagans' challenge to the second theory is not waived by their failure to challenge the first theory. *See Flutobo, Inc. v. Holloway*, 419 S.W.3d 622, 638 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (addressing theory of liability the appellants briefed and holding theories of liability that were not briefed were waived). Therefore, we only address whether summary judgment was proper on the Flanagans' second theory.

CRIMINAL ACT

With regard to the Flanagans' allegation that Salmon's actions were a foreseeable criminal act, namely an alleged aggravated assault, the Hotel and Security Company initially challenge whether Salmon even engaged in a criminal act. The Hotel and the Security Company point to the evidence that Salmon passed the field sobriety tests and was never charged with a criminal offense. In addition, the Hotel and the Security Company cite to Salmon's testimony that his foot slipped. The Flanagans rely on the testimony regarding Salmon's appearance at the scene and his attempt to leave the scene.

A person commits the offense of assault if he intentionally, knowingly, or recklessly causes bodily injury to another person. TEX. PENAL CODE ANN. § 22.01 (West Supp. 2016). A person commits the offense of aggravated assault if he commits assault and causes serious bodily injury to the other person or uses or exhibits a deadly weapon during the commission of the assault. *Id.* at § 22.02 (West 2011).

As previously noted, the evidence included witness testimony that Salmon continued to accelerate for twenty to thirty additional seconds after he pinned Jana between his truck and the hotel van. The evidence also included witness testimony that Salmon appeared to be impaired and that he attempted to leave the scene. Viewing this evidence in the light most favorable to the Flanagans and drawing all reasonable inferences in their favor, we hold the evidence raises a genuine issue of material fact with regard to whether Salmon engaged in a criminal act. Therefore, in determining whether summary judgment was proper, we must consider whether Salmon's alleged criminal act was foreseeable.

NO EVIDENCE OF DUTY – FORESEEABILITY OF CRIMINAL ACT

"In a premises liability case, the plaintiff must establish a duty owed to the plaintiff, a breach of the duty, and damages proximately caused by the breach." *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 767 (Tex. 2010). "Whether a duty exists is a question of law for the court." *Id.*

One of the elements of the Flanagans' premises liability claim that the Hotel and the Security Company challenged in their no evidence motion for summary judgment was the element of duty. "Generally, property owners have no legal duty to protect persons from third-party criminal acts." *UDR Tex. Props., L.P. v. Petrie*, 517 S.W.3d 98, 100 (Tex. 2017). A property owner who controls the premises, however, "does have a duty to use ordinary care to protect

invitees from criminal acts of third parties if he knows or has reason to know of an unreasonable and foreseeable risk of harm to the invitee." *Id.*

"When evaluating foreseeability, Texas courts first narrow the relevant criminal history to be included in the foreseeability analysis." *Jenkins v. C.R.E.S. Mgmt., L.L.C.*, 811 F.3d 753, 756 (5th Cir. 2016). "The courts then compare that narrowed criminal history with the crime in question based on the five *Timberwalk* factors: proximity, publicity, recency, frequency, and similarity." *Id.* (citing *Timberwalk Apts., Partners, Inc. v. Cain*, 972 S.W.2d 749, 759 (Tex. 1998)).

In *Trammel Crow Cent. Tex., Ltd. v. Gutierrez*, the Texas Supreme Court stated, "Foreseeability is established through evidence of 'specific previous crimes on or near the premises.'" 267 S.W.3d 9, 12 (Tex. 2008) (quoting *Timberwalk*, 972 S.W.2d at 756). In *Trammel Crow*, the court was analyzing the foreseeability of a murder at the Quarry Market, a shopping mall. *Id.* at 11-12. In narrowing the relevant criminal history to be included in its foreseeability analysis, the court noted:

> In the two years prior to Luis's death, 227 crimes were reported at the Quarry Market. Of these reported crimes, 203 were property and property-related crimes—mostly thefts, but also a handful of burglaries, auto thefts, and incidents of vandalism. Fourteen "other crimes" occurred— thirteen simple assaults[3] and one incident of weapon possession. The remaining ten crimes, all robberies, were classified as violent crimes—a category that also includes murder, manslaughter, rape, and aggravated assault.
>
> Although criminal conduct is difficult to compartmentalize, some lines can be drawn. For instance, we have held that reports of vandalism, theft, and neighborhood disturbances are not enough to make a stabbing death foreseeable. Similarly, although the repeated occurrences of theft, vandalism, and simple assaults at the Quarry Market signal that future property crimes are possible, they do not suggest the likelihood of murder. Accordingly, like the court of appeals, we

[3] The court noted the FBI's uniform crime classification system defines "simple assaults" as "all assaults which do not involve the use of a firearm, knife, cutting instrument, or other dangerous weapon and in which the victim did not sustain serious or aggravated injuries." *Id.* at 13 n.9.

> limit our review to the ten instances of violent crime that took place at the Quarry Market during the two years prior to Luis's death.

Id. at 13.

The Flanagans contend the relevant criminal history in the instant case includes violent crimes occurring within a one-mile or one-half-mile radius of the hotel. In support of this contention, the Flanagans cite *Tex. Real Estate Holdings, Inc. v. Quach*, 95 S.W.3d 395, 398-99 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (considering crime occurring within census tract which encompassed 3.5 square miles in area where apartment complex was located); *Dikinson Arms-REO, L.P. v. Campbell*, 4 S.W.3d 333, 338 (Tex. App.—Houston [1st Dist.] 1999) (considering crime occurring in city's sector which covered less than one square mile), *pet. denied*, 35 S.W.3d 633 (Tex. 2000); and *Plowman v. Glen Willows Apts.*, 978 S.W.2d 612, 618 (Tex. App.—Corpus Christi 1998, pet. denied) (noting summary judgment evidence did not show any report of violent personal crime at apartment complex or in the neighborhood surrounding the apartment complex). We note each of the cases cited by the Flanagans were decided before the Texas Supreme Court's decision in *Trammel Crow*.

The Hotel and the Security Company contend the relevant criminal history includes only violent crimes occurring at the hotel. They primarily rely on *Trammel Crow*, noting the Texas Supreme Court narrowed the relevant criminal history in that case to violent crimes that occurred at the mall. 267 S.W.3d at 13. In addition, the Hotel and Security Company cite *Park v. Exxon Mobil Corp.*, 429 S.W.3d 142, 147 (Tex. App.—Dallas 2014, pet. denied) (limiting crimes to those occurring at a gas station or immediately adjacent to the gas station and rejecting reliance on evidence of violent crimes reported within a one-mile radius of the gas station); *Perez v. DNT Global Star, L.L.C.*, 339 S.W.3d 692, 702-03 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (holding crimes occurring at apartment complexes within one-mile radius of apartment complex

where offense in question occurred not relevant to foreseeability analysis and limiting consideration to five crimes occurring at apartment complex in question); *Mayer v. Willowbrook Plaza Ltd. P'ship*, 278 S.W.3d 901, 921 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (rejecting evidence regarding crimes occurring in police beat which included two other shopping malls in addition to shopping mall in question).

Based on the Texas Supreme Court's analysis in *Trammel Crow*, we must conclude the relevant criminal history is limited to the hotel and its immediate vicinity. As a result, the summary judgment evidence presented by the Flanagans relying on crimes that occurred within a one-mile or one-half-mile radius was not sufficiently narrowed. Accordingly, the trial court did not abuse its discretion in sustaining the objections to that evidence and refusing to consider it in the trial court's foreseeability analysis.

The only summary judgment evidence presented by the Flanagans of crimes that occurred at the hotel was: a February 2011 sexual assault; multiple burglaries of a vehicle; multiple thefts; and a simple assault that occurred when a security guard was taking a man he discovered inside the security officer's vehicle to the hotel office, and the man pushed the security officer to the ground and ran away. In *Trammel Crow*, the court excluded evidence of thefts and simple assaults in its analysis determining the foreseeability of a violent crime. 267 S.W.3d at 13. Similarly, we also do not consider the evidence of the thefts and the simple assault at the hotel in our foreseeability analysis.[4] *See id.*

The Flanagans contend the evidence of the vehicle burglaries should be included in the analysis. We disagree. The Texas Supreme Court has indicated residential burglaries may be

[4] The Flanagans also rely on multiple suspicious vehicle reports; however, a suspicious vehicle is not a violent crime, and reports do not necessarily equate to a crime. *See Trammel Crow*, 267 S.W.3d at 12-13; *see also Quach*, 95 S.W.3d at 399 (excluding call reports from foreseeability analysis).

relevant in considering the foreseeability of a violent crime because "[a]n apartment intruder initially intent upon stealing may decide to assault a tenant discovered inside, even if the tenant avoids confrontation." *Timberwalk*, 972 S.W.2d at 758. In reliance on this reasoning, the Fifth Circuit held "residential burglaries, by their very nature, may suggest the foreseeability of violent crimes." *Jenkins*, 811 F.3d at 758. This same analysis, however, does not extend to vehicle burglaries. The Fifth Circuit recognized this distinction in *Jenkins*, holding the district court erred in refusing to consider residential burglaries but did not find error in the district court's exclusion of vehicle burglaries in its analysis. *Id*. at 755, 758 (noting district court excluded seven motor vehicle burglaries and fourteen residential burglaries and holding district court erred in refusing to consider residential burglaries). In *Timberwalk*, the Texas Supreme Court also refused to consider vandalism to automobiles in its foreseeability analysis, asserting "vandalism to automobiles in an apartment complex's parking lot can be a serious concern, but it does not suggest the likelihood of sexual assault." 972 S.W.2d at 758. Similarly, vehicle burglaries in a hotel's parking lot can be a serious concern, but they do not suggest the likelihood of violent crime. *See id*. Accordingly, we do not consider the evidence of the vehicle burglaries in our foreseeability analysis.

After narrowing the relevant criminal history, the evidence establishes only one violent crime occurred at the hotel in February of 2011, which was a sexual assault inside the hotel. Having narrowed the relevant criminal history, we must now consider the five *Timberwalk* factors: proximity, publicity, recency, frequency, and similarity.

The Texas Supreme Court generally examines recency and frequency "in tandem." *Trammel Crow*, 267 S.W.3d at 15. "A criminal act is more likely foreseeable if numerous prior crimes are concentrated within a short time span than if few prior crimes are diffused across a long time span." *Id*. With regard to similarity, "[t]he previous crimes must be sufficiently similar to the crime in question as to place the landowner on notice of the specific danger," but the crimes

are not required to have "the [same] exact sequence of events" to satisfy this factor. *Timberwalk*, 972 S.W.2d at 756, 758. The proximity factor again focuses on whether the other crimes occurred on the property or in its immediate vicinity. *Id*. at 757. "Criminal activity occurring farther from the landowner's property bears little relevance because crime rates may be expected to vary significantly within a large geographic area." *Id*. Finally, "[t]he publicity surrounding the previous crimes helps determine whether a landowner knew or should have known of a foreseeable danger." *Id*. at 758.

Because the violent crime occurred at the hotel, the proximity and publicity factors are present. However, evidence of one violent crime in two years is not sufficient to satisfy the recency and frequency factors. In addition, we believe Salmon driving his truck into Flanagan is not similar to a sexual assault inside the hotel. Accordingly, the Flanagans failed to establish Salmon's alleged criminal act was sufficiently foreseeable to impose a duty on the Hotel. Finally, because the Security Company was not in control of the hotel premises, the Flanagans also failed to establish the Security Company owed them a duty under this premises liability theory. *See UDR Tex. Props., L.P.*, 517 S.W.3d at 100 (imposing duty on property owners who control the premises to protect invitees from foreseeable criminal acts of third parties).

NO EVIDENCE OF DUTY — IMMEDIATELY PRECEDING CONDUCT

The Flanagans also argue the Hotel and the Security Company owed them a duty under the analysis set forth by the Texas Supreme Court in *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762 (Tex. 2010).

In *Del Lago*, the court noted the appeal concerned "a bar owner's liability for injuries caused when one person assaulted another during a closing-time melee involving twenty to forty 'very intoxicated' customers." 307 S.W.3d at 764. The court further noted "[t]he brawl erupted after ninety minutes of recurrent threats, cursing, and shoving by two rival groups of patrons." *Id*.

Noting the *Timberwalk* factors were inapplicable to the case, the court asserted "[t]he nature and character of the premises can be a factor that makes criminal activity more foreseeable," and "intoxication is often associated with aggressive behavior." *Id*. at 768. The court further asserted "criminal misconduct is sometimes foreseeable because of immediately preceding conduct." *Id*. at 769. For example, "when a property owner by reason of location, mode of doing business, or observation or past experience should reasonably anticipate criminal conduct on the part of third persons," then the property owner "has a duty to take precautions against it." *Id*. (internal quotations omitted). "This duty is recognized because the party with the power of control or expulsion is in the best position to protect against the harm." *Id*. The court then held under the facts in that case, Del Lago had a duty because it had "actual and direct knowledge that a violent brawl was imminent between drunk, belligerent patrons and had ample time and means to defuse the situation." *Id*.

The Flanagans seek to compare Salmon's parked truck with the brawl that was brewing in *Del Lago*, arguing the truck was suspicious and the Hotel and the Security Company could have defused the alleged assault by approaching the truck and making inquiries. We disagree that the situations are comparable. Although Salmon's truck was parked for approximately thirty minutes in the loading area, the area was not busy at that time. Furthermore, neither the Hotel nor the Security Company had any actual and direct knowledge that Salmon's acceleration of his truck into Jana was imminent. Accordingly, neither the Hotel nor the Security Company owed the Flanagans a duty based on the Texas Supreme Court's analysis in *Del Lago*.

NO EVIDENCE OF DUTY – SECURITY COMPANY NEGLIGENT UNDERTAKING

The Flanagans next argue the Security Company owed them a duty because the Security Company undertook to make the hotel premises safe and was negligent in its performance of that duty.

"The critical inquiry concerning the duty element of a negligent-undertaking theory is whether a defendant acted in a way that requires the imposition of a duty where one otherwise would not exist." *Nall v. Plunkett*, 404 S.W.3d 552, 555 (Tex. 2013). The rule for liability to third persons based on a negligent undertaking theory is set forth in section 324A of the Restatement (Second) of Torts and provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

RESTATEMENT (SECOND) OF TORTS § 324A (1965); *see also Fort Bend County Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 396 (Tex. 1991); *Kuentz v. Cole Sys. Group, Inc.*, No. 14-15-01031-CV, 2017 WL 3090007, at *3 (Tex. App.—Houston [14th Dist.] July 20, 2017, no pet.).

The Flanagans base their argument on the Security Company's undertaking to provide security services for the Hotel. Security companies, however, "owe no generalized duty to provide security services beyond their contract terms." *Mayer v. Willowbrook Plaza Ltd. P'ship*, 278 S.W.3d 901, 910-11 (Tex. App.—Houston [14th Dist.] 2009, no pet.). "Although Section 324A expands the class of person to whom the duty of care is owed, it does not expand the scope of the undertaking." *Kuentz*, 2017 WL 3090007, at *4. "Section 324A imposes a duty to perform without negligence only the task that the actor has undertaken to accomplish." *Id*.

In *Banzhaf v. ADT Sec. Sys. Sw., Inc.*, one employee was severely injured and another was killed during a robbery at a sporting goods store. 28 S.W.3d 180, 183 (Tex. App.—Eastland 2000,

pet. denied). The injured employee and the parents of the deceased employee sued ADT Security Systems Southwest, Inc., which provided security services to the store. *Id*. Pursuant to the contract between the store and ADT, however, ADT only provided services when the store was closed and all employees had left the premises. *Id*. at 184. At the time of the robbery, employees were in the store, and ADT's alarm and monitoring service was not activated. *Id*.

The plaintiffs cited Section 324A as a basis for ADT's duty. *Id*. at 186. The Eastland court rejected their argument noting Section 324A imposes a duty only based on the particular services that are undertaken, and "the uncontroverted evidence showed that ADT provided only those security devices and services for which [the store] contracted." *Id*. The court further explained:

> Plaintiffs contend that ADT owed a duty under tort principles because ADT, as a security company, had a duty to prevent foreseeable crimes and that the violent crime against King and Banzhaf was foreseeable to someone in the security business. We disagree with placing such a broad non-contractual duty on security companies. Plaintiffs' argument would shift the responsibility for protection against crime, without any contractual basis, from law enforcement agencies to security companies. Purchasers are free to contract for the particular security devices and services that they consider to be necessary. We are not aware of any case extending the duty of security companies beyond their contracts as suggested by plaintiffs, nor have plaintiffs cited any. ADT owed no duty to plaintiffs based on tort principles.

Id.; *see also Mayer*, 278 S.W.3d at 911 (holding security company had no duty under Section 324A where company contracted to provide services during normal business hours and crime occurred after those hours). Therefore, whether the Security Company owed a duty to provide services to protect Jana against Salmon's actions depends on its contract with the Hotel.

Pursuant to the contract, the Security Company agreed to provide one security officer in the garage from 11:00 p.m. to 7:00 a.m. and one security officer in the hotel lobby. The garage security monitor was required to "monitor parking garage, stairwells and perimeter of property in order to maintain a visual deterrence" and to "observe the property for any illegal or safety related activity." If a security officer observed an intoxicated guest who wanted to drive, the officer would

"politely advise the person that [he] can arrange a taxi," but if the guest insisted on driving, the officer would "take his license plate down and immediately notify the authorities." The "post orders" which supplement the duties listed in the contract state, "The Client [Hotel] makes the rules and you merely report violations of these rules."

Doctor testified the Hotel did not have a rule or policy regarding the length of time a vehicle could be parked in front of the Hotel. Similarly, Lopez testified the Hotel had no guidelines about how long a vehicle can park in front of the Hotel and further testified guests sometimes forget to move their cars and are parked in that location for two to three hours. Doctor testified it was not unusual for a truck to be parked where Salmon was parked, and Lopez testified he thought Salmon was waiting for someone and did not consider the vehicle to be suspicious. Although there was testimony from some Security Company employees that they would approach a vehicle parked in front of the Hotel for more than ten minutes, the Security Company's undertaking is defined by its contract with the Hotel. Because there is no evidence that Salmon's truck was parked in violation of a Hotel rule, nothing contained in the contract required a Security Company employee to report Salmon's truck. Furthermore, nothing in the contract required a Security Company employee to approach Salmon's truck. Accordingly, the Security Company did not have a duty to report or to approach Salmon's truck because it was not a service the Security Company had contracted to undertake.[5]

SUMMARY JUDGMENT EVIDENCE

The Flanagans also contend the trial court erred in sustaining the objections made by the Hotel and the Security Company to their summary judgment evidence.

[5] Based on our holding that neither the Security Company nor the Hotel owed the Flanagans a duty, we need not address whether summary judgment would have been proper on any other elements of the Flanagans' claims.

"On appeal, we review a trial court's ruling sustaining an objection to summary judgment evidence for abuse of discretion." *Tyson v. Boren*, Nos. 04-14-00824-CV & 04-15-00006-CV, 2015 WL 10382908, at *2 (Tex. App.—San Antonio Mar. 2, 2015, no pet.) (mem. op.) (citing *In re Estate of Abernethy*, 390 S.W.3d 431, 436 (Tex. App.—El Paso 2012, no pet.), and *Owens v. Comerica Bank*, 229 S.W.3d 544, 548 (Tex. App.—Dallas 2007, no pet.)). "To show the trial court abused its discretion in excluding evidence, a complaining party must demonstrate that (1) the trial court erred in excluding the evidence; (2) the erroneously excluded evidence was controlling on a material issue dispositive of the case and was not cumulative; and (3) the error probably caused rendition of an improper judgment in the case." *Id*.

We hold the Flanagans have failed to demonstrate how the exclusion of any of the evidence about which they complain probably caused rendition of an improper judgment. The affidavit of William R. Kelly provides the crime statistics within the one-mile and one-half-mile radius of the Hotel which we have previously held is not relevant. The affidavit of Richard G. Hudak opined on the duties the Security Company agreed to undertake; however, under the applicable standard of review, both the trial court and this court are required to independently review the contract between the Hotel and the Security Company to resolve the legal question of whether a duty was owed. In his supplemental affidavit, Hudak criticized the Hotel for failing to implement policies and security post orders regarding parked vehicles and to install security cameras; however, the affidavit was not timely filed and Hudak did not criticize the Hotel in his earlier affidavit. Similarly, the SAPD records are only relevant to the extent they relate to the crimes at the hotel and its immediate vicinity. In our analysis, we considered the SAPD records relating to crimes at the hotel and its immediate vicinity. Because the other SAPD records are not from the hotel and its immediate vicinity, they are not relevant, and their exclusion could not have caused the rendition of an improper judgment. Finally, Max Westbrook's affidavit opined Salmon committed

an aggravated assault and faulted the SAPD's investigation. Because we held the summary judgment evidence raises a fact issue on whether a criminal act occurred, the exclusion of this affidavit could not have caused the rendition of an improper judgment.

CONCLUSION

Because the Flanagans failed to produce any evidence of any duty owed to them by the Hotel or the Security Company, the trial court's summary judgments are affirmed.

Sandee Bryan Marion, Chief Justice