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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MARY OAXACA, Plaintiff and Appellant, v. GERRISH SWIM AND TENNIS CLUB, Defendant and Respondent.	B234950 (Los Angeles County Super. Ct. No. GC045147)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jan A. Pluim, Judge. Reversed and remanded.

Law Offices of Richard M. Foster, Richard M. Foster and Arutyun Topchyan for Plaintiff and Appellant.

Hosp, Gilbert, Bergsten & Hough, Robert T. Bergsten and Warren L. Gilbert for Defendant and Respondent.

Appellant Mary Oaxaca appeals from the judgment entered upon the trial court's order granting respondent Gerrish Swim and Tennis Club's motion for summary judgment. Appellant asserts that the court erred in concluding as a matter of law that the protruding curb she tripped over on respondent's property did not constitute a dangerous condition because it was so open and obvious that any reasonable person would have seen it, and thus there was no triable issue of fact regarding respondent's breach of its duty of care to appellant as invitee. As we explain more fully herein, respondent did not meet its initial burden on summary judgment to demonstrate the nonexistence of a material fact as to the element of duty. Thus, the trial court erred in granting judgment for respondent. Accordingly, we reverse.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On June 6, 2008, appellant Mary Oaxaca tripped and fell on a curb near the top of a concrete stairway adjacent to the pool and an area of picnic tables on respondent's property. Appellant was on the property as a guest of the Engstrom family, who had hired her to take the children to the club for swimming lessons several times per week. She had been to the club on prior occasions and had sat at the tables in the area, though she could not recall whether she ever sat at the table closest to the curb and stairway.

Although the record before this court does not contain evidence of the exact dimensions of the curb, based on the photographs submitted to the court, the curb appears to be made of concrete blocks. The curb is approximately two blocks in height, extending more than a foot out of the corner of a block wall (supporting a wrought iron fence) at the top of the stairway leading to the area of picnic tables. Appellant testified in her deposition that she carried a bag in her hands as she walked up the stairs leading to the tables. She further testified that although she could see the ground in front of her, there were trash cans near the curb which blocked her view as she walked up the stairs

toward the area of tables.[1] When asked whether she had ever noticed the curb when she had been at the club on prior occasions, she testified as follows:

> Question: Is it your testimony that you never noticed the wall that goes alongside the stairs that you can see in [the photographs] the end of which you tripped over on the date of the incident on all those other occasions when you'd go back to the table for a snack?
>
> Oaxaca: I never said that. I never said that I saw or that I didn't see it. My priority was to follow the children, not to go looking how it was. I would just go there and follow the children. I possibly saw it, but I did not pay attention. I went by a few times, but my priority was always to run behind the children. I am not testifying that I didn't see it.

Appellant filed negligence and premises liability claims against respondent to recover for the injuries she suffered when she tripped over the curb. In her complaint appellant alleged that respondent negligently maintained the property because the protruding curb was a dangerous condition, that the respondent had constructive knowledge of the condition and had a duty to warn invitees about it. She also alleged that the curb was concealed by shadows at the time of the accident.

Respondent filed a motion for summary judgment, arguing that appellant could not establish the element of duty under either cause of action because the curb was an open and obvious condition, for which respondent had no duty to warn. In support of its argument, respondent submitted photographs of the curb that were used in the deposition, arguing that "it is readily apparent from the photographic exhibits that the curb over which plaintiff tripped was open and obvious. . . ." Respondent also cited to appellant's deposition testimony, stating that "she had possibly seen the curb before the incident and had gone by it a few times," and that "she had previously been in the area several times."

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[1] The photographs in the record were taken several months after the accident. The photographs depict the trash cans on the stairs, rather than adjacent to the curb. During her deposition, Oaxaca estimated the location of the trash cans on the day she fell by marking the photographs with two circles.

In response, appellant filed an opposition to the motion for summary judgment, stating that trash cans blocked her view of the curb on the day she fell and therefore appellant did not see the curb despite her prior visits to the club. Appellant also argued that the patio furniture near the curb distracted appellant and the curb's extension out of the natural line of the fence created a misleading belief that the patio area was a clear walkway. Appellant also argued, in the alternative, that apart from whether the condition was open and obvious, respondent nonetheless had a duty to remedy the condition and had sufficient opportunity to provide notice of the curb or fix the curb. Thus, appellant asserted that these issues created material facts for the jury to determine.

In the reply brief, respondent argued that if the trashcans blocked the curb, appellant would not have been able to trip on the curb and it would not be foreseeable that anyone would trip on an open and obvious curb.[2] As for the argument that respondent should have remedied the condition, respondent claimed that there had been no other reported incidents of anyone tripping over the curb.

The trial court heard the motion for summary judgment and entered judgment in favor of respondent. In the lower court's view, the curb was an open and obvious condition, and thus the court ruled as a matter of law that appellant failed to meet her burden of proving that there is a triable issue of material fact regarding respondent's duty of care.

Appellant filed a timely appeal.

DISCUSSION

Appellant asserts that the trial court erred in granting respondent's summary judgment motion. She argues triable issues of material fact exist as to the open and obvious nature of the curb. In any event, she claims that even if the curb was an open and obvious danger, negating a duty to warn, a triable issue nonetheless remained as to

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[2] Below respondent also raised procedural issues in its reply brief, including appellant's untimely filed and served opposition and improper formatting of the separate statement of undisputed facts; however, the trial court did not address these issues at the summary judgment hearing, and none of these issues have been raised on appeal.

whether respondent breached its duty to remedy the condition. As we shall explain, the court erred in granting summary judgment.

I. The Summary Judgment Standard of Review

On appeal from an order granting summary judgment, we apply a *de novo*, or independent standard of review to determine whether triable issues of material fact exist and whether the moving party is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 860 (*Aguilar*); *Wiener v. Southcoast Childcare Ctrs., Inc.* (2004) 32 Cal.4th 1138, 1142.) "In ruling on the motion, the court must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom, and must view such evidence and such inferences in the light most favorable to the opposing party." (*Aguilar*, *supra*, 25 Cal.4th at p. 843.) As such, the court will "liberally construe plaintiff's evidentiary submissions and strictly scrutinize defendants' own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiffs' favor." (*Wiener*, *supra*, 32 Cal.4th at p. 1142.) Further, we must consider "all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained." (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 334.)

Ultimately, the purpose of summary judgment is to "provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar*, *supra*, 25 Cal.4th at p. 844.) "A defendant moving for summary judgment has the initial burden of showing that a cause of action lacks merit because one or more elements of the cause of action cannot be established or there is an affirmative defense to that cause of action." (Code Civ. Proc. § 437c, subd. (o); *Aguilar, supra,* 25 Cal.4th at p. 850.) If the defendant meets that burden, then the burden shifts to the plaintiff to make a prima facie showing that a triable issue of fact exists as to the cause of action set forth. (*Id.* at p. 849.)

"There is a genuine issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra,* 25 Cal.4th

at p. 850, fn. omitted.) "The court may not 'grant[]' the defendants' motion for summary judgment 'based on inferences . . . , if contradicted by other inferences or evidence, which raise a triable issue as to any material fact." (Code Civ. Proc., §437c, subd. (c); *Aguilar, supra,* 25 Cal.4th at p. 856.) Thus, the court must deny the motion for summary judgment if it concludes that plaintiff's evidence or inferences raise a triable issue of material fact. With these principles in mind we turn to the merits.

II. The Trial Court Erred in Granting Summary Judgment

A. Open and Obvious Dangerous Condition

In the exercise of ordinary care, the possessor of land owes a duty to an invitee to make the property reasonably safe for the intended use, and to warn of latent or concealed dangers. (*Danieley v. Goldmine Ski Associates, Inc.* (1990) 218 Cal.App.3d 111, 121.) There is no duty to warn, however, of an obvious danger but the possessor of land does have a duty to warn an invitee not only of conditions known by him to be dangerous but also of conditions which might have been found dangerous by the exercise of ordinary care. (*Beauchamp v. Los Gatos Golf Course* (1969) 273 Cal.App.2d 20, 27; *Danieley v. Goldmine Ski Associates, Inc., supra,* 218 Cal.App.3d at p. 121 ["[B]ecause the possessor or operator of a given premises is not an insurer of the safety of invitees onto his premises, he is entitled to assume that any such invitee will perceive that which should be obvious to him in the ordinary use of his senses"].) "[I]f the danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty unless harm was foreseeable despite the obvious nature of the danger." (*Id.* at p. 121.)

Whether a condition is dangerous is ordinarily a question of fact, which may be resolved as a question of law only if reasonable minds can come to but one conclusion. (*Davis v. City of Pasadena* (1996) 42 Cal.App.4th 701, 704.) "[W]hen the evidence is so conflicting that different conclusions may reasonably be drawn regarding the dangerous character of the defects . . . , the determination of such questions should be left to the jury. . . ." (*Balkwill v. City of Stockton* (1942) 50 Cal.App. 2nd 661, 667, abrogated by statute on another ground.)

Applying the above principles, we conclude that respondent failed to meet its burden of showing the nonexistence of a genuine issue of material fact as to whether the curb was an open and obvious condition obviating the duty to warn of its presence on the property.

In support of its motion, respondent relied only on the photographs of the curb, and on the deposition testimony of Oaxaca. Respondent did not present any evidence of the exact dimensions of the curb, its composition or function.

With respect to the photographic evidence, we note that appellate review of photographs is subject to a *de novo* standard and therefore, the trial court's determinations are not binding on the reviewing court. In examining photographs, the court, whether the trial or reviewing court, should take into account such factors as: (1) the photograph's subject (i.e., its focal point); (2) the view of the subject (e.g., close-up, distant, isolated, in context); (3) the photograph's perspective (e.g., eye-level, overhead, ground-level); (4) the use of any plain-view altering devices (e.g., camera color filter, fish-eye lens, computer-manipulation); (5) the characteristics of the photograph (e.g., sharp and clear, blurry, grainy, color or black and white); (6) whether the photograph was taken under identical or substantially similar conditions (e.g., timing, lighting, weather); and (7) any other relevant circumstances (e.g., addition of extrinsic aids, such as a ruler or pointer). (*Kasparian v. AvalonBay Communities* (2007) 156 Cal.App.4th 11, 24-25.)

As a reviewing court, we examine anew the photographs and reach our own independent conclusions.

There are six black and white photographs in the record before this court which depict the curb, adjacent stairway and area of tables where the accident occurred. There is no evidence in the record as to who took the photographs, or the camera or lens used to capture the images. It appears that the photographs were taken some time after the accident; appellant stated in her deposition that the photographs did not depict the exact layout of the location on the day she fell. Appellant testified that the trash cans were near the curb, but the photographs show the trash cans located on the steps. In addition, there is no evidence in the record as to whether the time of day the photographs were taken was

the same as the time of the incident. While the photographs show several different angles of the area and curb, there is no evidence in the record indicating the distance between the locations depicted and the camera. Also, without exact dimensions of the curb it is impossible to assess the degree to which it would have presented an obvious condition to someone walking in the area on the day of the incident. In our view these pictures, standing alone, are of limited evidentiary value on the issue of whether the curb was open and obvious from a pedestrian's point of view. Respondent has not presented any other evidence to shed light on those aspects of the curb (i.e., its dimensions) and the surrounding area which the photographs depict. Thus, photographic evidence does not support only one conclusion—it neither proves the condition is open and obvious, nor does it negate such a conclusion.

This case stands in contrast to others in which photographic evidence was viewed as sufficient to support summary judgment. For example in *Ursino v. Big Boy Restaurants* (1987) 192 Cal.App.3d 394, 397 the plaintiff suffered a fractured hip, among other injuries, when she allegedly tripped over the raised edge of one section of the defendant's walkway. In conjunction with a defense summary judgment motion, the parties stipulated to various facts, including "the edge of the cement section in question was raised no higher than three-fourths of an inch" and "the 32 photographs presented to the trial court accurately depicted the sidewalk in question on the day of the accident." (*Id.* at pp. 395-396.) In granting summary judgment, the trial court concluded in view of the stipulated facts, "reasonable minds could not differ as to the triviality of the defect." (*Id.* at p. 397.) The appellate court stated it had "reviewed the pictures of the sidewalk and agree[d] with the trial court that reasonable minds could not differ and that the defect was in fact trivial." (*Ibid.*)

Similarly, in *Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, the appellate court affirmed a summary judgment based on its own review of the photographs relied upon by the trial court. In that case, plaintiff Josephine Caloroso allegedly tripped over a crack in the walkway in front of defendant's home, which walkway allegedly consisted of "individual concrete slabs" that were "cracked, jagged, and depressed[.]" (*Id*. at p. 925.)

"It was undisputed that the difference in elevation created by the crack in [defendant]'s walkway was less than half an inch at the highest point." (*Id*. at p. 927; fn. omitted.) The reviewing court concluded: "Here, the trial court did not abuse its discretion in finding that, in this case, no expert was needed to decide whether the size or irregular shape of the crack rendered it dangerous. The photographs of the crack submitted by both sides demonstrate that the crack is minor and any irregularity in shape is minimal." (*Id*. at p. 928.)

Contrary to the photographic evidence the trial courts found conclusive in *Ursino* and *Caloroso*, our review of the photographs leads us to conclude that reasonable minds could differ as to whether this condition was open and obvious. Here the photographs are of limited probative value on the issue of whether the defect was open and obvious, and thus they were not sufficient for respondent to carry its burden on summary judgment.

Similarly Oaxaca's deposition testimony is equivocal, and does not assist respondent in carrying its initial burden on the motion for summary judgment. Respondent argued that Oaxaca was aware of the curb because her deposition testimony revealed she had been in the area before and observed it. Oaxaca's testimony on this point is ambiguous, however. Oaxaca did not testify she saw the curb on the day she fell; rather she claimed that her view was blocked by trash cans. She also stated that she "possibly" saw the curb, but was not paying attention at the time; she simply did not know whether or not she saw the curb, because her focus was on the children. Her testimony is inconclusive and does not resolve the issue as a matter of law.[3] Thus, Oaxaca's deposition testimony provides inadequate support to satisfy respondent's burden on summary judgment to prove that the curb was an open and obvious danger.

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[3] We note that even if Oaxaca had conceded she had seen the curb on the day she fell, such a concession would support respondent's claim that the condition was open and obvious, but would not dispose of the issue. The test for whether a condition is open and obvious is objective—focusing on whether the condition is obvious to a "reasonable person" (not specifically the plaintiff). (See *Danieley v. Goldmine Ski Associates, Inc.*, *supra*, 218 Cal.App.3d at p. 121.)

In sum, on the record in this case neither the photographs nor any other evidence presented justified the conclusion the curb was an open and obvious condition as a matter of law, warranting summary judgment for respondent.

B. Duty to Remedy

In addition, the court erred in granting respondent's motion for summary judgment because respondent's motion failed to address the alternative theory of duty presented by Oaxaca's causes of action.

In *Martinez v. Chippewa Enterprises, Inc*. (2004) 121 Cal.App.4th 1179, a premises liability action where plaintiff fell because there was a wet area in front of defendant's building, the court of appeal held that respondent was not relieved of all possible duty or breach of duty with respect to a dangerous condition even if it is open and obvious. (*Id.* at p. 1184.) The court specifically stated that "although the obviousness of a danger may obviate the duty to warn of its existence, if it is foreseeable that the danger may cause injury despite the fact that it is obvious (e.g., when necessity requires person to encounter it), there may be a duty to remedy the danger, and the breach of that duty may in turn form the basis for liability[.]" (*Martinez v. Chippewa Enterprises, Inc., supra*, 121 Cal.App.4th at p. 1184, citing *Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 122; see also *Rowland v. Christian* (1968) 69 Cal.2d 108, 119 ["[w]here the occupier of land is aware of a concealed condition involving in the absence of precautions an unreasonable risk of harm to those coming in contact with it and is aware that a person on the premises is about to come in contact with it, the trier of fact can reasonably conclude that a failure to warn or to repair the condition constitutes negligence."].) Whether such a duty to remedy existed in this case depends upon a number of as yet unresolved factors, such as the foreseeability of harm, respondent's advance knowledge vel non of the dangerous condition, and the burden of discharging the duty.

Respondent's moving papers do not address this duty theory at all, and instead focuses exclusively on the theory that the curb was an open and obvious condition. Nonetheless, in its reply brief in response to Oaxaca's argument that respondent had a

duty to remedy the curb, respondent boldly asserted "it is not necessarily foreseeable that a person will walk headlong into an open and obvious wall rather than walk around it or step over it, and there have been no other reported incidents of anyone tripping over the subject wall." Respondent, however, presented no evidence to support its claim that there were no other reported incidents of injuries caused by the curb.[4]

In view of the foregoing, the trial court erred in granting respondent's motion for summary judgment.[5]

DISPOSITION

The judgment is reversed. Appellant is entitled to costs on appeal.

WOODS, J.

We concur:

PERLUSS, P. J. **ZELON, J.**

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[4] In any event, the absence of prior incidents would not provide a complete defense or preclude appellant's claim because prior incidents are merely "helpful to determine foreseeability but are not necessary." (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 126.) Second, respondent attempts to shift respondent's duty to remedy the curb onto Oaxaca by describing the accident as purely the result of Oaxaca walking headlong into the curb. In *Martinez*, respondent suggested that it was plaintiff's duty to walk carefully and to see the puddle of water, however the court stated that "[d]epending on the ultimate evidence, how plaintiff navigated the area may pose an issue of comparative negligence," reserved for the jury. (See *Wright v. Stang Manufacturing Co.* (1997) 54 Cal.App.4th 1218, 1233 ["Where a case is subject to comparative fault principles, it is inappropriate for summary judgment"].)

[5] We do not hold that there was anything improper or unduly dangerous about the curb, or that its placement should lead to liability on respondent's part; we hold only that the trial court was not justified in finding that the evidence supports only the opposite conclusion. These questions—whether the curb was a dangerous condition (i.e., whether it was open and obvious) and whether respondent had a duty to remedy it—require factual determinations that cannot properly be made on summary judgment based on the evidence and arguments that respondent presented below.