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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

JANICE DICKINSON, Plaintiff and Appellant, v. THRIFTY PAYLESS, INC. DBA RITE AID CORP. et al., Defendants and Respondents.	B283252 (Los Angeles County Super. Ct. No. BC526984)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mitchell L. Beckloff, Judge. Affirmed.

Law Offices of Lee Arter, Lee C. Arter and Orly S. Talmor for Plaintiff and Appellant.

Manning & Kass, Ellrod, Ramirez, Trester, Sevan Gobel and Ladell Muhlestein for Defendant and Respondent Thrifty Payless, Inc., dba Rite Aid.

Schwartz Semerdjian Cauley & Moot, Dick A. Semerdjian and Sierra J. Spitzer for for Defendant and Respondent Ace Parking Management, Inc.

Plaintiff Janice Dickinson appeals from the summary judgment entered for defendants, the owners and operators of a parking lot where Dickinson was injured by a descending parking gate arm. We affirm because Dickinson's defective appellate briefs lead us to conclude that she has forfeited her appellate arguments. We alternatively affirm on the merits.

FACTS AND PROCEDURAL HISTORY

On July 11, 2013, Janice Dickinson was struck on the head by a parking gate arm after handing an apple to the parking attendant and then stepping into the path of travel of a descending exit gate arm at a parking lot adjacent to a Beverly Hills Rite Aid store. Dickinson sued Thrifty Payless, Inc., WEC 98G-1, LLC, and Excel Property Management Service, Inc. (collectively Rite Aid), and Ace Parking Management, Inc. (Ace Parking), which, in combination, either owned, operated, or managed the parking lot.[1] Her complaint alleged that the gate arm was a dangerous and hazardous condition that respondents failed to both remedy and warn of.

Respondents filed separate but similar summary judgment motions, arguing in part that they owed Dickinson no duty of care because the condition of the gate arm was open and obvious.

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[1] We will sometimes refer to Rite Aid and Ace Parking collectively as respondents.

The trial court granted the motions, and Dickinson has appealed.[2]

The undisputed evidence shows that a parking attendant's booth is situated on a raised center island that runs between the parking lot's vehicular entrance and exit lanes that lead to or from the street.[3] Because of its central location, the booth is to the driver's side of vehicles when either entering or exiting the lot. After the attendant collects the parking fee from the exiting driver, an electronic signal is transmitted from the cash register, causing the parking gate arm to rise. The gate arm automatically lowers after a weight sensor in the ground detects that a car has passed through the gate. The automatic movements of the gate arm cannot be overridden by the attendant from inside the booth.

Pedestrians can avoid encountering the parking gate arm by using a protected walkway on the right side of the vehicular

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[2] The trial court initially denied the motion, finding that even though the dangers posed by the gate arm's operation were open and obvious, triable issues of fact remained whether respondents had a duty to take steps to eliminate or warn of the dangers because there was evidence that many people passed by the gate arm. Respondents filed a petition for writ of mandate from that ruling. (B278623.) We issued an alternative writ and temporary stay of the trial date. The trial court then granted respondents' summary judgment motion and entered judgment for respondents, leading us to dismiss the petition and discharge the writ.

[3] The attendant is present from 10:00 a.m. to 1:00 a.m. daily. After 1:00 a.m., parking is free of charge, and the attendant leaves the parking gate arm locked in an upright position.

exit lane. The exit lane is bordered on the left, or driver's side of a departing vehicle, by the raised center island, which is protected by bollards (metal posts), and on the other side by an elevated and fenced walkway that is "rimmed with yellow paint." Photographs taken by an Ace Parking supervisor shortly after the accident showed that the parking gate arm had a red tip, a padded bottom edge, red flashing lights, and warnings that stated "Warning: Autos/Trucks Only" and "No Pedestrian Traffic."[4] It also had stickers that depicted a stick figure being hit on the head with the gate arm. Respondents had no record of a previous incident involving the parking gate arm.

The accident occurred on a clear and sunny day. Dickinson had been parking at the lot for 30 years and was therefore familiar with the operation of the gate arm. Dickinson worked out at a nearby gym and it was her custom to take a complimentary apple from the gym and give it to the lot attendant after her workout. She always did so from her car while exiting the lot, but on the date of the incident she chose to approach the attendant's booth on foot. After handing the apple to the attendant, Dickinson stepped down from the raised island into the vehicle exit lane and was struck by the gate arm.

In its separate statement, Ace Parking provided the following written narrative of the security camera video recording of the accident: On the video, Dickinson "can be seen approaching the parking attendant's booth from the street side, stepping up on to the [center] island platform area and walking along the inside of the poles adjacent to the vehicle exit. As she

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[4] Dickinson's objection to the lack of signage designating the area for vehicular traffic only was limited to the *pavement* of the exit lane.

approaches the booth, there is a car directly to her left just about to exit and the gate arm has just come up as she is walking up [to the booth]. Next, within the span of about 3-5 seconds, [she] reaches the booth, quickly hands the attendant an apple and, instead of retracing her path on the pedestrian [center] island platform, steps out into the *vehicle-only lane* (directly in front of another car that had just pulled forward adjacent to the booth) and starts walking. She takes about 4-5 steps (about 5-8 ft) before the descending gate arm makes contact with her head." (Italics added.)[5]

Respondents contend on appeal, as they did below, that they owed no duty of care to Dickinson because the manner in which the gate arm operated was an open and obvious condition of the property and that just as Dickinson had used the elevated center island to reach the parking attendant's booth, she could have safely retraced her steps across the island and avoided the parking gate arm.

Dickinson disputes whether the operating features of the gate arm were an open and obvious condition, contending that respondents had a duty to post better warnings and to install a sensor that would have stopped the gate arm's descent if it detected someone passing underneath. According to Dickinson's opposition declaration, there is a "common and reasonable belief

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[5] In her responsive separate statement, Dickinson objected to the narrative's use of the italicized words "vehicle-only lane" and argued that the exit lane pavement had no signage that designated it as a "'vehicle-only lane.'" In her opening brief, Dickinson refers to the vehicular exit lane as "the vehicular-traffic only area" and "an area that should be designated vehicular-traffic only." Dickinson otherwise does not challenge respondents' description of the video.

that parking control arms have safety features to prevent them from being lowered onto anything that would be in its path of descent."

Dickinson submitted her own deposition testimony to support her assertion that the public has a common and reasonable belief that the safety features of a parking gate arm will prevent the arm from striking objects in the path of its descent. She testified that as she turned to walk away from the booth, she did not notice whether the gate arm was up or down, and that it was her belief that the parking gate arm had a sensor that would prevent it from striking her. She stated that during the past 30 years, she had seen "hundreds of people" walking under the upright parking gate arm without incident.[6] She also testified that the vehicular exit lane was "very unclear" as to where pedestrians should and should not go, and referred to the lack of warnings on the pavement saying things such as "Walk Here," "Safety Zone," or "Pedestrians Use Caution."

Dickinson also provided a declaration by Mark J. Burns, an expert witness on safety, civil, and mechanical engineering issues, as well as code compliance, construction, risk management, human factors, and accident reconstruction. Burns described the parking lot based on observations he made two years after the accident. Burns stated that he saw "a substantial amount of vehicular and pedestrian traffic through the area, including three people who traversed the exiting vehicular driveway." He also observed that the flashing red light on the parking gate arm "was quite dim, and not bright enough to draw

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[6] Her testimony did not specify whether the gate arm was locked in an upright position when these observations were made.

the attention of a pedestrian walking through the area." Burns stated that the pedestrian warning stickers on the gate arm were "wholly inadequate." They were not posted in a conspicuous location, were not visible from a safe viewing distance, and were obstructed by bollards on the center island.

Burns also stated that various types of sensors that operate to stop the movement of gate arms when an object or person is detected were available, and that such a sensor could have been affixed to the gate arm.

STANDARD OF REVIEW

Summary judgment may be granted if all the papers submitted show there is no triable issue as to any issue of material fact and that the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)[7] A defendant moving for summary judgment bears the initial burden of showing that the plaintiff cannot establish one or more elements of the cause of action or that there is an affirmative defense to it. (§ 437c, subd. (p)(2).) If the defendant makes the required showing, the burden shifts to the plaintiff to show there is a triable issue of material fact. (*Ibid.*; *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 443 (*Jacobs*).)

We independently review the trial court's order granting summary judgment, and consider all evidence in the moving and opposing papers except where evidentiary objections were properly sustained. (*Jacobs, supra,* 14 Cal.App.5th at p. 443.)

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[7] All further section references are to the Code of Civil Procedure.

We liberally construe the opposing party's evidence, resolving all doubts in their favor. (*Ibid.*) The pleadings define and limit the scope of the issues to be determined by summary judgment. (*Id.* at p. 444.)

DISCUSSION

1. *Appellant Has Waived Her Appellate Challenges*

A plaintiff suing for negligence must, among other factors, show that the defendant owed her a duty of care. Whether a duty exists depends on several policy considerations, the most important being the foreseeability of harm to the plaintiff. (*Jacobs, supra,* 14 Cal.App.5th at p. 446.) In determining whether a duty exists, we do not examine the actual conduct of the parties to the case before us. Instead, we "'evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.'" (*Ibid.*, internal citations omitted.) Foreseeability in this context is a question of law for the court. (*Ibid.*)

Foreseeability of harm does not exist when a dangerous condition is open and obvious. (*Jacobs, supra,* 14 Cal.App.5th at p. 447 [plaintiff inspecting home for sale stepped on diving board and fell into empty swimming pool when the board broke; dangers of empty pool were open and obvious].) When a dangerous condition 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 to remedy or warn of the condition. [Citation.]" (*Krongos v. Pacific Gas & Electric Co.* (1992) 7 Cal.App.4th 387, 393 (*Krongos*).) Where a dangerous

condition is open and obvious, landowners can assume that persons coming upon their property will perceive the danger and take action to avoid it. (*Jacobs, supra,* 14 Cal.App.5th at p. 447; *Beauchamp v. Los Gatos Golf Course* (1969) 273 Cal.App.2d 20, 27–28 [invitation to use premises is to use them according to their openly and plainly visible condition].)

An exception to this rule exists: "[I]t is foreseeable that even an obvious danger may cause injury, if the practical necessity of encountering the danger, when weighed against the apparent risk involved, is such that under the circumstances, a person might choose to encounter the danger. The foreseeability of injury, in turn, when considered along with various other policy considerations such as the extent of the burden to the defendant and the consequences to the community of imposing a duty to remedy such danger [citation] may lead to the legal conclusion that the defendant" owes a duty of care to all those who may foreseeably be harmed by his conduct. (*Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 121 (*Osborn*).)

Decisions invoking that rule arise where there is evidence that the injured plaintiff was required to encounter the hazardous condition. (*Martinez v. Chippewa Enterprises, Inc.* (2004) 121 Cal.App.4th 1179, 1184–1185 (*Martinez*) [plaintiff injured after slipping on wet driveway; summary judgment for landowner reversed where there was evidence that traversing the driveway was the principal, if not the sole, means of accessing the building]; *Osborn, supra,* 224 Cal.App.3d at p. 122 [defendant had duty to warn or remedy obvious danger posed by concrete rubble that caused plaintiff to slip where plaintiff's job duties required him to traverse that area].)

Respondents contend that the operation of the gate arm was an open and obvious condition and that Dickinson was not required by necessity or other circumstances to walk in its path because: (1) a pedestrian walkway was available; and (2) she could have retraced her steps from the raised booth and avoided entering the path of the gate arm.

Dickinson's appellate briefs do virtually nothing to address these issues. At no point in her opening appellate brief does Dickinson address by way of discussion and analysis the photographic, video, and testimonial evidence concerning the gate arm, its surroundings, or its functional characteristics. Instead, her opening brief consists of a capsule summary of the nature of her action in the section designated as her statement of facts and perfunctory snippets of evidence favorable to her in the first two discussion sections of that brief. Based on this, Dickinson makes the blanket assertion that the gate arm was not an obvious danger because: there was evidence that she did not see the gate arm come down before it struck her; many pedestrians walked near or through the gate arm's location; and devices were available that would have detected her presence and stopped the gate arm's descent.[8]

Neither does she adequately cite to legal authority on the issues purportedly raised in her appellate brief. Dickinson cites as direct authority on the issues raised only to a pattern jury instruction (CACI No. 1004), along with an oblique citation to

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[8] That some people might ignore an obvious hazard or that steps to lessen the risks were available does not mean that the condition was any less open and obvious. This contention also overlooks Dickinson's concession that she was familiar with how the gate arm operated.

Osborn, supra, 224 Cal.App.3d at pages 121–122 for the proposition that a property owner may have a duty to warn of obvious dangers "if the condition is foreseeable." At no point does she cite, discuss, and analyze legal authority in light of all the relevant facts concerning whether the gate arm was an obvious danger or whether *Osborn's* language concerning the exception based on the plaintiff's necessity to encounter the hazard applied.[9]

In short, Dickinson has violated the fundamental rules of appellate practice concerning the need to affirmatively demonstrate error by furnishing and appropriately discussing pertinent legal authority and explaining how it applies to her case. (*Hodjat v. State Farm Mutual Auto Insurance Co.* (2012) 211 Cal.App.4th 1, 10.) "It is not the court's duty to attempt to resurrect an appellant's case or comb through the record for evidentiary items to create a disputed issue of material fact." (*Ibid.*, citation omitted.) "To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. [Citations.] When a point is asserted without argument and authority for the proposition," it is deemed forfeited. (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.) Based on these failures, we hold that Dickinson has forfeited these issues on appeal.[10]

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[9] Dickinson's reply brief is equally deficient, consisting solely of quoted portions of her own deposition testimony that she had seen other people walk under the gate arm.

[10] This is apparently a case of first impression in the California appellate courts, and, given its potentially far-reaching

2. *The Gate Arm Was An Open And Obvious Condition*

We alternatively hold on the merits that the trial court did not err. We begin by noting that both parties have mistakenly based their arguments in part on the particular circumstances of this case. As noted earlier, however, the correct focus is on whether, in general, the type of negligent conduct at issue is sufficiently likely to result in the kind of harm suffered so as to justify imposing a legal duty on the defendant. (*Jacobs, supra,* 14 Cal.App.5th at p. 446.)

Parking gate arms are ubiquitous and readily observable barriers in place at commercial parking lots throughout California and the nation that serve to deter motorists from leaving without first paying. Their operational characteristics—that the gate arm goes up after paying and then comes down after a vehicle exits—is readily apparent to all, making them open and obvious conditions.[11] Several courts from other states have reached the same conclusion, and we find their reasoning persuasive. (*Bernstein v. Marina District Development Co., LLC*, 2016 WL 4046768 (N.J.Super.App.Div.) [pedestrian struck by descending gate arm after seeing jitney pass by the raised arm; if plaintiff saw the gate arm or its attendant mechanisms, then the gate arm's danger would have been obvious]; *Matthews v. Cole* (2007) 22 Mass.L.Rptr. 658 [plaintiff talking to lot attendant fell from raised island where booth was located after being startled by rising gate arm; trial court granted summary judgment for

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impact on commercial parking lot operators, is worthy of far more comprehensive analysis and discussion.

[11] Dickinson herself acknowledged as much when she conceded her familiarity with the operation of the gate arm was an undisputed fact, another fact she chose not to address.

defendant because functioning of gate arm was open and obvious condition to a person of ordinary intelligence]; *Kirksey v. Summit City Parking Deck*, 2005 WL 3481536 (Ohio App. 9 Dist. 2005) [same]; *Waddell v. Trizec Hahn Office Properties*, 2001 WL 690897 (Mich.App. June 19, 2001) [same].)[12]

That leaves the issue whether, despite the obvious nature of the condition, respondents still owed a duty of care because Dickinson by necessity entered the path of the gate arm. As discussed previously, decisions invoking that rule arise where there is evidence that the injured plaintiff was required by some circumstance to encounter the hazardous condition. (*Martinez, supra,* 121 Cal.App.4th at pp. 1184–1185 [wet driveway was the principal, if not the sole, means of accessing the building]; *Osborn, supra,* 224 Cal.App.3d at p. 122 [plaintiff's job required him to traverse hazardous surface].)

This is not such a case. The undisputed evidence shows that Dickinson was not forced to step into the path of the gate arm as she left the attendant's booth. Instead, Dickinson could have come back the way she approached the booth in the first place, or could have delivered the apple to the attendant as she had done every time in the past—by handing it to the attendant from her car as she exited the lot. And because a pedestrian walkway existed alongside the vehicular exit lane, neither was anyone else required to walk under the gate arm to enter or exit the lot on foot. Based on the above, and in light of the record in

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[12] We are free to cite these unpublished decisions from other jurisdictions and rely on them as persuasive authority. (*Lebrilla v. Farmers Group, Inc.* (2004) 119 Cal.App.4th 1070, 1077; *Brown v. Franchise Tax Bd.* (1987) 197 Cal.App.3d 300, 306, fn. 6.) Respondents cited some of these decisions as well, but Dickinson did not mention or address them.

this case, we hold that the parking gate arm was an open and obvious condition.

DISPOSITION

The judgment is affirmed. Respondents shall recover their appellate costs.

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MICON, J.*

We concur:

MANELLA, P. J.

COLLINS, J.

*Judge of the Los Angeles County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.