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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

IRENE FENTON et al., Plaintiffs and Appellants, v. SAFETYPARK, INC., Defendant and Respondent.	B275230 (Los Angeles County Super. Ct. No. BC538437)

APPEAL from a judgment of the Superior Court of Los Angeles County. David Sotelo, Judge. Affirmed.

Herzog, Yuhas, Ehrlich & Ardell, Ian Herzog and Susan E. Abitanta for Plaintiffs and Appellants.

Lewis Brisbois Bisgaard & Smith, Judith M. Tishkoff for Defendant and Respondent.

* * * * * *

A woman slipped and fell on the step just outside of a restaurant's front entrance. She and her husband sued the restaurant and the parking valet company for her injuries. The trial court granted summary judgment to the valet company, finding no evidence that the valet had any control over the steps on the restaurant's property or that it otherwise agreed to guide restaurant patrons safely from their cars into the restaurant and back out again. The woman and her husband appeal. We conclude the trial court's ruling is correct, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Over Labor Day weekend in 2012, plaintiff Irene Fenton and her husband, plaintiff Michael Fenton,[1] went to the Ivy at the Shore restaurant (the Ivy) in Santa Monica, California, for dinner. They pulled up to the curbside valet stand, and upon exiting their car, walked across the sidewalk and up a single step located outside the Ivy's front door. When they exited the restaurant after dining, Irene missed the step and fell to the ground; one of the valets rushed to her aid, stating, "This happens all the time. I don't know why they don't fix it." Irene suffered injuries to her back, neck, and foot.

At the time Irene fell, one of the step's two embedded lights was out, and the black safety strip across its surface was worn away. There was a handrail right next to the step, but Irene had decided not to use it when entering or exiting the Ivy.

The year before, the owners of the Ivy, defendant L.A. Desserts, Inc. (L.A. Desserts), had hired defendant SafetyPark, Inc. (SafetyPark) as a valet. In their written contract,

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1 Because the plaintiffs share the same last name, we use their first names for clarity. We mean no disrespect.

SafetyPark agreed to "provide valet parking services to restaurant customers in a first class and efficient manner," and, toward that end, to obtain garage keepers legal liability insurance, workers' compensation insurance, and general comprehensive liability insurance. The contract specifically disclaimed "the creation of a partnership [or] joint venture between the parties."

II. Procedural Background

Irene and Michael (collectively, plaintiffs) sued L.A. Desserts and SafetyPark for (1) negligence, (2) premises liability, and, as to Michael alone, (3) loss of consortium. As to SafetyPark, plaintiffs alleged only that "the valets knew of the dangerous condition [of the step] but failed to warn guests, including [Irene]."

SafetyPark moved for summary judgment. Following briefing and a hearing, the trial court granted the motion. In its written order, the court cited the general rule that a defendant is liable for the dangerous condition of property only if it "owns, possesses, or controls the premises." Because "[i]t is undisputed that SafetyPark does not own, possess, or control Ivy's premises," the court ruled that SafetyPark owed plaintiffs no duty under the general rule. The court rejected, as unsupported by the evidence, plaintiffs' further arguments that SafetyPark owed a duty to plaintiffs because (1) it had "'attracted' patrons to its valet service," (2) it had "undertook to 'guide Plaintiffs' ingress and egress to the Ivy restaurant safely,'" and (3) it had agreed to obtain insurance.

After judgment was entered, plaintiffs timely appealed.

DISCUSSION

Plaintiffs assail the grant of summary judgment. Summary judgment is appropriate when the moving party demonstrates that "[it] is entitled to judgment as a matter of law" (Code Civ. Proc., § 473c, subd. (c)) because, among other things, the nonmoving party (here, plaintiffs) cannot establish "[o]ne or more of the elements of [their] cause of action" (*id.*, § 437c, subds. (*o*)(1) & (p)(2)). Here, both plaintiffs' negligence-based claims require, as an element, proof that SafetyPark owed them a duty of care (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158 (*Kesner*)), and Michael's loss of consortium claim survives only if the negligence claims are viable (*Montague v. AMN Healthcare, Inc.* (2014) 223 Cal.App.4th 1515, 1526). Whether a duty exists—and whether summary judgment was appropriately granted—are questions we review de novo. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1146 [duty]; *Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347 [summary judgment].)

"The general rule in California is that . . . 'each person has a duty to use ordinary care and is liable for injuries caused by [its] failure to exercise reasonable care in the circumstances . . .' [Citation.]" (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 771; Civ. Code, § 1714, subd. (a).) A person (or, in this case, an entity) may be liable for a "defective or dangerous condition of property" if it does not protect or warn against that condition, but generally only if it "owns, possesses, or controls" that property. (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 134 (*Isaacs*); *Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1157-1158; *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 807.) Because an entity who owns or possesses

property also controls it, the "crucial element is control." (*Alcaraz*, at p. 1159.) Control is "crucial" because "[i]t would be inequitable to impose a regulatory and maintenance duty on an entity [that lacks] the authority to control use." (*Seaber v. Hotel Del Coronado* (1991) 1 Cal.App.4th 481, 492 (*Seaber*).)

Courts have nevertheless recognized a limited number of situations in which an entity may be liable for injuries to another that occur on property over which the entity does not have control. Those situations include: (1) when the entity has voluntarily "assum[ed] a duty to act"—either by contract or by its actions—because "one who undertakes to do an act must do it with care" (*Bloomberg v. Interinsurance Exchange* (1984) 162 Cal.App.3d 571, 575; *Merrill v. Buck* (1962) 58 Cal.2d 552, 561-562; *Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 613; *Mukthar v. Latin American Security Service* (2006) 139 Cal.App.4th 284, 289; *Schwartz v. Helms Bakery Limited* (1967) 67 Cal.2d 232, 238-240); (2) when the entity "create[s] the danger" that causes the plaintiff harm (*Vasilenko v. Grace Family Church* (2016) 248 Cal.App.4th 146, 157, review granted Sept. 21, 2016, S235412; *Seaber*, *supra*, 1 Cal.App.4th at pp. 488-490); (3) when the entity is acting as the agent of someone who controls the property (*Hall v. Rockcliff Realtors* (2013) 215 Cal.App.4th 1134, 1140-1141); and (4) when the entity is a public entity that maintains a "dangerous condition" as defined in Government Code sections 830 and 835 (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 147-152; *Joyce v. Simi Valley Unified School Dist.* (2003) 110 Cal.App.4th 292, 298-299; Gov. Code, §§ 830 & 835).

The trial court did not err in granting summary judgment.

Plaintiffs adduced no evidence that SafetyPark owned, possessed, or controlled the front steps of the Ivy. (*Isaacs*, *supra*, 38 Cal.3d at p. 134 ["Where the absence of ownership, possession, or control has been unequivocally established, summary judgment is proper"].)

Contrary to what they assert, plaintiffs also presented no facts bringing SafetyPark within any of the exceptions to the general rule requiring proof of control. SafetyPark did not assume any duty to safely escort patrons using its valet service to the Ivy's front door: Plaintiffs broadly declare that SafetyPark "exists for no other purpose than to facilitate [the Ivy's] customers into and out of the restaurant" and thus to "guide plaintiffs' ingress and egress to the Ivy restaurant safely," but the contract between SafetyPark and L.A. Desserts contains no such duty, and there is no evidence that SafetyPark's valets aided Irene or any other Ivy customer in walking to and from the Ivy's front door. Further, SafetyPark did not create the danger of the poorly lit and marked steps. In this regard, plaintiffs seem to fault SafetyPark for placing its valet stand "directly in the path" of the Ivy's entrance, but submit no evidence linking the valet stand's location to Irene's decision to use the step while exiting the Ivy. The remaining exceptions do not apply because SafetyPark is not the Ivy's agent, and neither SafetyPark nor the Ivy are public landowners. (Accord, *Swaner v. City of Santa Monica* (1984) 150 Cal.App.3d 789, 809-810 [Government Code sections 830 and 835 codify a liability rule for public landowners that differs from the common law rules governing private landowners].)

Plaintiffs raise five further arguments to attack the trial court's ruling. First, they contend that SafetyPark voluntarily

assumed a duty to warn because its sole function as valet was to "induce customers" to enter the Ivy. This contention rests on the premise that SafetyPark and the Ivy were jointly in the business of obtaining patrons for the restaurant. The parties' contract is specifically to the contrary: SafetyPark's job was to "provide valet parking services to restaurant customers in a first class and efficient manner," and Irene herself admitted that eating at the Ivy was her idea, not SafetyPark's.

Second, plaintiffs assert that SafetyPark's contractual duty to obtain insurance amounts to a duty to insure against injuries on the Ivy's property. They are wrong. The insurance SafetyPark was contractually bound to obtain was the insurance necessary to park cars and cover employee injuries, not to insure against injuries on *the Ivy's property*.

Third, plaintiffs suggest that because SafetyPark's "first name" is, literally, "safety," it should be obligated to safely provide passage to and from its valet stand. By this logic, a "duty-free" shop at an airport could never be liable for negligence, as it would be "free" of any "duty" of care. We decline to endorse such "logic."

Fourth, plaintiffs argue that the potential that a customer might fall on the Ivy's step was foreseeable and, indeed, was actually foreseen by SafetyPark's valets. This should be enough by itself, plaintiffs continue, to create a duty.[2] It is not, for as our

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2 Plaintiffs posit that SafetyPark not only had a duty to warn *plaintiffs* of the step, but also a duty to warn *the Ivy*. Plaintiffs did not plead the latter theory below, so it is not properly before us. (*Wang v. Nibbelink* (2016) 4 Cal.App.5th 1, 27 ["the complaint . . . delimits the scope of issues material to summary

Supreme Court recently noted, "'foreseeability alone is not sufficient to create an independent tort duty.'" (*Kesner*, *supra*, 1 Cal.5th at p. 1149.)

Lastly, plaintiffs assert that SafetyPark financially benefitted from its valet parking contract with the Ivy, and that this benefit makes it appropriate to impose upon SafetyPark a duty to protect against all defects on the Ivy's property. If accepted, this assertion would make anyone who obtains any financial benefit from a landowner liable for any and all dangerous conditions on the landowner's property. We reject such an expansive—and seemingly limitless—notion of duty. (Accord, *Steinmetz v. Stockton City Chamber of Commerce* (1985) 169 Cal.App.3d 1142, 1147.)

DISPOSITION

The order is affirmed. SafetyPark is entitled to its costs on appeal.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
CHAVEZ

_____, J.*
GOODMAN

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judgment"].) Even if it were before us, SafetyPark owes *no* duty to warn—anyone—for the reasons set forth in this opinion.

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