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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

KALI HAIS, Plaintiff and Appellant, v. UNIVERSAL PROTECTION SERVICE, LP, Defendant and Respondent.	B283654 (Los Angeles County Super. Ct. No. BC548226)

APPEAL from a judgment of the Superior Court of Los Angeles County. Randolph M. Hammock, Judge. Affirmed.

McNulty Law Firm, Peter J. McNulty, Brett L. Rosenthal, and Jordan R. Magazine for Plaintiff and Appellant.

Horvitz & Levy, Frederic D. Cohen and Steven S. Fleischman; Bradley & Gmelich, Barry A. Bradley and John K. Flock for Defendant and Respondent.

Kali Hais (appellant) appeals from a judgment entered after the trial court granted summary judgment on her claims of general negligence and premises liability against Universal Protection Service, LP (respondent).[1] We find no error, therefore we affirm the judgment.

FACTUAL BACKGROUND

At approximately 4:00 p.m. on June 20, 2012, appellant and a friend arrived at the rooftop bar at the Standard Hotel to have cocktails and talk. Appellant recalled ordering two drinks over a period of time. After that, her memory was vague.

At approximately 7:00 p.m., appellant and her friend were approached by a female who introduced herself as a production assistant for a company filming a movie at the Standard Hotel. This production company employee asked whether appellant and her friend would be available to act as extras in a film starring Christian Bale that was being filmed by the pool at the Standard

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[1] Appellant's original complaint, filed August 8, 2014, named as defendants the Standard Hotel also known as Standard International Management, LLC; KMG Security; MPG Office Trust, Inc.; Maguire Gardens; Maguire Properties, Inc.; Westlawn Garage; and Does 1 to 100. On February 28, 2017, respondent was substituted in as Does 40 and 52. The first cause of action for general negligence was alleged against Does 1-42 and 51-92, thus was alleged against respondent. The second cause of action for premises liability was alleged against Does 20-30 and 70-80. Accordingly, the premises liability cause of action was not technically asserted against respondent. However, the trial court found that respondent waived its objection to the technical pleading defect. Respondent's motion for summary judgment or, in the alternative, motion for summary adjudication as to appellant's first amended complaint (summary judgment motion) addressed these two causes of action, as did the trial court.

Hotel. Appellant and her friend agreed and were escorted to a sitting area by the pool at the rooftop of the Standard Hotel.

During the filming of the movie, appellant and her friend were approached by a male employee of the Standard Hotel. He gave appellant and her friend "prop drinks" for filming. Within 30 minutes of consuming the "prop drinks," both appellant and her friend started having trouble speaking. Appellant alleges that she was given some kind of drug in the "prop drinks." By 8:00 p.m., appellant was visibly intoxicated, unable to protect or care for herself and was at risk of harm.

Respondent was under contract to provide security services for the nearby Westlawn Parking Garage and surrounding areas, including the Maguire Gardens. Ramiro Villagomez was employed by respondent as a security officer on the date of the incident. He was assigned to work at Maguire Gardens, and was responsible for observing and reporting any criminal or unauthorized activity. He was also present to deter criminal or unauthorized activity.

After they left the hotel, appellant and her friend encountered Villagomez, who was patrolling on Flower Street adjacent to the parking garage. Appellant and her friend began talking to Villagomez. He recalled them telling him that they were from Australia. Villagomez then observed appellant enter the Maguire Gardens park on a rocky path. Villagomez wanted to tell her that the park was closed and she was not permitted inside at that time. Villagomez did not follow appellant but took a different path so that he would meet her where the paths intersect. However, when he got to the spot where he believed he would intercept her, she was not there. He went looking for her, backtracking on the path on which he had seen her earlier. Villagomez then heard a loud noise, like a slam. He ran toward the sound, and observed appellant lying on the driveway ramp

leading to the underground parking garage. The driveway ramp was well lit with good visibility. Villagomez called the command center operator to get an ambulance. Appellant had fallen onto the concrete driveway. She suffered severe brain damage and had to undergo a left decompressive heicraniectomy. Appellant remained in the hospital for over three months.

Adrian Marquez was a security supervisor working for respondent on the date of the incident. Marquez created a report documenting the incident. The incident was reported to Marquez at 9:22 p.m. The location was Westlawn Parking Entrance, the entrance to library parking. Marquez took six pictures of the scene. Los Angeles Fire Department was on the scene in about two minutes. Paramedics stated that they would be taking appellant to "LACUSC" because of a possible fractured skull.

That same night, Marquez and Villagomez did a "walk-through" of the scene and discovered appellant's sandal on the top right side of the parking entrance ramp. Marquez took a picture of the sandal. Marquez then documented the following statement from Villagomez:

> "After the incident was cleared, S/P Villagomez stated that the female individual was walking with another female right before the incident on Flower [Street] heading towards 5th Street. S/P Villagomez also stated that the individuals had made contact with him and had advised him that they were intoxicated and that they had just finished visiting a bar. S/P Villgomez stated that they were talking to him about being from Australia and the two females started to walk in opposite directions, the victim started walking inside of the Gardens while her friend continued to [*sic*] on the sidewalk. S/P Villagomez then informed the friend that she should not leave her friend. But that the female continued walking on. S/P Villagomez then stated while he was looking for the victim he heard a loud thump and

> seen [*sic*] that it was the victim laying on the floor and radioed it in."

It is undisputed that appellant has no memory or recollection of anything which occurred after the filming of the movie at the Standard Hotel.

PROCEDURAL HISTORY

Appellant's first amended complaint, filed August 8, 2014, against six defendants plus does 1 to 100 alleged three causes of action: general negligence, premises liability, and battery. The complaint acknowledged appellant's ingestion of "prop drinks" and her intoxicated state.

On February 28, 2017, appellant filed a doe amendment adding respondent as does 40 and 52. Respondent was alleged to be liable as to the general negligence and premises liability causes of action. On March 22, 2017, respondent filed its answer, denying the allegations and alleging numerous affirmative defenses.

On April 14, 2017, respondent filed its summary judgment motion. The summary judgment motion primarily focused on three issues: (1) lack of causation; (2) lack of a breach of duty; and (3) the absence of a dangerous condition. The motion was supported by portions of the deposition of appellant and a declaration from Villagomez. Appellant filed an opposition. She supported her opposition with the deposition transcripts of Villagomez and Marquez. Appellant did not file a declaration describing her version of the events leading up to her accident.

The hearing on respondent's motion took place on June 13, 2017. The court stated its tentative position that respondent met its initial burden of proof on the issue of causation, shifting the burden to appellant to show a triable issue of fact. Appellant's counsel argued that the missing sandal, combined with Villagomez's use of the word "intercept" created a reasonable

inference that Villagomez had pursued appellant, thus causing her accident. Respondent's counsel argued that there was absolutely no evidence that Villagomez chased appellant. The trial court indicated it would consider appellant's argument.

The court filed a written decision on the summary judgment motion on June 13, 2017. The court ruled that appellant's first cause of action for negligence must fail because appellant produced no admissible evidence that respondent was a substantial factor in causing appellant's injuries. Because respondent had met its burden showing a lack of causation, the burden shifted to appellant to create a triable issue of fact. Appellant failed to do so. Appellant's position that she may have lost her sandal because she was being chased was entirely speculation. The court rejected appellant's argument that Villagomez's use of the word "intercept" suggested that he pursued her or chased her. The court noted that appellant's counsel had conceded at the hearing that if the court found that summary adjudication was proper in favor of the moving party on the first cause of action for negligence, then the same result must occur as to the second cause of action for premises liability.[2]

Respondent's motion for summary judgment as to appellant's first amended complaint was granted. On June 27, 2017, judgment was entered in favor of respondent.

On July 6, 2017, appellant filed her notice of appeal from the judgment.

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[2] Appellant acknowledged at the hearing that in order to prove premises liability, she must demonstrate a dangerous condition. Appellant argued that the dangerous condition was Villagomez's alleged "pursuit" of appellant.

DISCUSSION

I. Standard of review

We review a grant of summary judgment de novo, deciding independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 253 (*Nazir*).) The appellate court's task is to make "'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court . . . .' [Citations.]" (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 234-235.)

A defendant moving for summary judgment bears the initial burden of showing that one or more elements of the cause of action in question cannot be established or that there is a complete defense thereto. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*); Code Civ. Proc., § 437c, subd. (o) & (p)(2).) If the defendant meets this burden, the burden shifts to the plaintiff to produce evidence showing the existence of a triable issue of material fact. (*Aguilar*, at p. 850.) "We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party. [Citation.]" (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.)

The Court of Appeal undertakes the same three-step analysis required of the trial court. (*Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 931.) "'We begin by identifying the issues framed by the pleadings since it is these allegations to which the motion must respond.'" (*Ibid.*) Next, we determine whether the respondent has established facts justifying a judgment in its favor. (*Ibid.*) Finally, we must determine whether the opposition demonstrates the existence of a triable, material fact issue. (*Id.* at p. 932.)

II. Applicable law

The elements of a cause of action for negligence are: (1) a legal duty to use reasonable care; (2) breach of that duty; (3) proximate cause; and (4) injury to the plaintiff. (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139.)

To show causation, a plaintiff must "establish, by nonspeculative evidence, some actual causal link between the plaintiff's injury" and the defendant's act or omission. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 774 (*Saelzler*).) "'[P]roof of causation cannot be based on mere speculation, conjecture and inferences drawn from other inferences to reach a conclusion unsupported by any real evidence.'" (*Id.* at p. 775.)

"The elements of a negligence claim and a premises liability claim are the same: a legal duty of care, breach of that duty, and proximate cause resulting in injury. [Citations.]" (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158.) "Premises liability "'is grounded in the possession of the premises and the attendant right to control and manage the premises.'". . . ." (*Ibid.*) An owner or possessor of land must inspect the premises to ensure that the premises are reasonably safe from dangerous conditions. (*Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 715.) Thus, "summary judgment properly may be granted where a defendant unequivocally establishes its lack of ownership, possession, or control of property alleged to be in a dangerous or defective condition. [Citation.]" (*Id.* at p. 714.)

III. Respondent met its burden of showing lack of causation

Both general negligence and premises liability require a showing that respondent's act or omission caused appellant's injuries. Here, respondent successfully demonstrated that appellant cannot establish the element of causation.

A. Respondent's evidence

Initially, respondent bore the burden of showing that one or more elements of the causes of action in question could not be established. (*Aguilar, supra,* 25 Cal.4th at p. 850.) Respondent successfully showed that appellant had produced no evidence that any act of respondent or Villagomez was a substantial factor in causing her accident. Appellant admitted that she had no recollection of anything which occurred after the filming of the movie at the Standard Hotel. Thus, she provided no evidence that respondent was the cause of her injuries. According to Villagomez, after he saw appellant enter the Maguire Gardens he decided to inform her that the park was closed. He took a different path from her in an unsuccessful effort to intercept her. When he did not find her, he backtracked to locate her, and then heard a loud slam. Villagomez ran toward the sound, and found appellant lying on the ground in the entrance to the parking garage.

As there was no evidence to contradict Villagomez's testimony, respondent successfully showed that appellant could not meet her burden of proving causation. The burden shifted to appellant to produce evidence showing the existence of a triable issue of material fact on this element. (*Aguilar, supra,* 25 Cal.4th at p. 850.)

B. Appellant failed to establish a triable issue of fact

In her opposition to respondent's motion for summary judgment, appellant argued that, in violation of his duties, Villagomez had made the decision to pursue appellant, thereby causing her injuries. Appellant argued that Villagomez acted unreasonably by pursuing her through the park when she was intoxicated.

There is no evidence to support appellant's position that Villagomez pursued appellant. Appellant's theory is pure

speculation, unsupported by any evidence, including a declaration from her. This speculative theory does not serve to establish an actual causal link between the plaintiff's injury and the defendant's act or omission. (*Saelzler, supra*, 25 Cal.4th at p. 774.)

Appellant points to the lost sandal as evidence that a pursuit took place. Appellant argues that, viewing the evidence in the light most favorable to her, a reasonable juror could conclude that appellant lost the sandal while Villagomez pursued her. Appellant argues that the trial court improperly weighed the evidence, rather than simply determining that there was a triable issue of fact and allowing a jury to weigh the evidence.

We disagree. In order to withstand a summary judgment motion, there must be actual evidence creating a triable issue of fact. The lost sandal is insufficient evidence that a pursuit occurred. As the trial court noted, in order for a jury to conclude that such a pursuit occurred, and that such a pursuit caused the loss of the sandal and the fall, the jury would have to fabricate appellant's state of mind as well as all of the events that led to her fall. Thus, the lost sandal is insufficient evidence of causation to withstand a motion for summary judgment. (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 484 [proof of causation must be based on substantial evidence, and evidence "'which leaves the determination of these essential facts in the realm of mere speculation and conjecture is insufficient'"].) A mere possibility of causation is not enough, "'and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, *it becomes the duty of the court to direct a verdict for the defendant*.' [Citations.]" (*Saelzler, supra,* 25 Cal.4th at pp. 775-776.)

Appellant cites *Trujillo v. G.A. Enterprises, Inc.* (1995) 36 Cal.App.4th 1105, 1109 (*Trujillo*) for the proposition that

"[w]hether the security guard acted reasonably under the circumstances and whether his acts were a substantial factor in causing [the plaintiff's] injuries are questions of fact to be resolved by trial, not summary judgment. [Citations.]" *Trujillo* is factually distinguishable. In *Trujillo*, a security guard witnessed a group of youths surrounding the plaintiff and witnessed the youths making threats against the plaintiff. The security guard removed the first youth who took a swing at the plaintiff, leaving the scene of the assault. The security guard did not return to the scene until a melee ensued, injuring the plaintiff. The security guard then called the police. (*Id.* at p. 1107.) Under the circumstances, there existed questions of fact as to whether the security guard acted reasonably, and whether his acts were a substantial factor in causing the plaintiff's injuries. (*Id.* at p. 1109.) Here, in contrast, there is no evidence from which a trier of fact could deduce that Villagomez was a cause of appellant's injuries.

C. A presumption of due care does not preclude summary judgment

Appellant presents a new argument in her reply brief on appeal. She argues that due to her memory loss, she was entitled to a presumption of due care. Normally this court does not consider arguments made for the first time in a reply brief on appeal absent a showing of good cause for not presenting such arguments earlier. (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52.) The reason for this rule is fairness -- it is unfair to allow a party to withhold a point until the closing brief, which deprives the opposing party of the opportunity to file a written response unless supplemental briefing is ordered. (*Ibid.*) To be thorough, we have permitted respondent to file a supplemental brief concerning appellant's new evidentiary argument, which we briefly address.

In support of her argument that she is entitled to a presumption of due care, appellant cites *Brown v. Connolly* (1965) 62 Cal.2d 391, 393-394, where our Supreme Court noted that "[u]nder ordinary circumstances," if a party cannot testify to events as a result of a lack of memory caused by injuries induced by the accident, "he is entitled to a presumption that he acted with due care." (*Id.* at p. 393.) In making this general statement of the law, the *Brown* court relied on former Code of Civil Procedure section 1963, subdivision 4 (repealed 1965; Stats. 1965, ch. 299, § 109, operative Jan. 1, 1967). Because the statute has been repealed, this presumption no longer exists in the law. (*Alber v. Owens* (1967) 66 Cal.2d 790, 799-800 [citing Evidence Code section 12, subdivisions (a) and (b); and section 600, subdivision (a), as support for the position that a presumption of due care based on the plaintiff's retrograde amnesia would no longer have the effect of evidence].)

Appellant concedes that former Code of Civil Procedure section 1963 was repealed in 1965. However, appellant points to Evidence Code section 600. Specifically, the comments in the Evidence Code state that although the presumption at issue has not been listed as a presumption in the Evidence Code, "the fact that a statutory presumption has been repealed will not preclude the drawing of any appropriate inferences from the facts that would have given rise to the presumption." (Assem. Com. on Judiciary com., Thomson Reuters Desktop Cal. Evid. Code (2018 ed.) foll. § 600, pp. 57-58.) However, appellant cites no case post-dating the repeal of section 1963 in which the presumption she advocates has been applied.[3] In particular, appellant presents no

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[3] Each of the cases appellant cites pre-dates the repeal of former Code of Civil Procedure section 1963 in 1965: *Brown, supra,* 62 Cal.2d at page 391; *Hom v. Clark* (1963) 221 Cal.App.2d 622, 652-653; *Gioldi v. Sartorio* (1953) 119

authority that such a presumption could defeat a summary judgment motion.

Further, appellant's own admission in her complaint that she was "visibly intoxicated and incapable of protecting or caring for herself, and at forseeable and immediate risk of physical harm," distinguishes this case from those where the presumption was applied. Appellant has cited no authority that the presumption applies where the injured party was intoxicated and allegedly drugged.

Finally, even if the memory loss presumption remained current law, the presumption only applies when the memory loss was caused by the accident. (*Hom v. Clark, supra*, 221 Cal.App.2d at p. 653.) Appellant has presented no expert testimony or other evidence that her loss of memory was caused by the accident, as opposed to her inebriated, and possibly drugged, condition. Appellant presented evidence that she recalled seeing actor Christian Bale "near a car" and the next thing she remembered was waking up in the hospital. This is insufficient to suggest that her memory loss was caused by the accident.

For these reasons, we reject appellant's argument that the presumption stated in *Brown* applies to preclude summary judgment.

Appellant did not provide evidence creating a triable issue of material fact on the question of causation. Therefore, summary judgment in favor of respondent was properly granted.[4]

Cal.App.2d 198; and *Williams v. Pacific Gas & Electric Co.* (1960) 181 Cal.App.2d 691, 705.

[4] Because appellant has not provided evidence creating a triable issue of fact on the issue of causation, we decline to

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

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_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT

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consider respondent's alternative argument that respondent owed no duty to appellant.