Filed 11/20/18 K.G. v. HRMA CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

K.G., Plaintiff and Appellant, v. HRMA, Defendant and Respondent.	2d Civil No. B286516 (Super. Ct. No. 1487084) (Santa Barbara County)

K.G. contends that Louis Bristol, a former employee of HRMA doing business as Holiday Inn Express Carpinteria (Holiday Inn), committed two acts of sexual abuse against her while he was working at Holiday Inn. K.G. sued the hotel for damages arising from the incidents.

The trial court granted summary judgment in Holiday Inn's favor. It determined Bristol's conduct was not foreseeable and, as a result, Holiday Inn owed no duty to prevent Bristol's conduct or to protect K.G. from Bristol. We affirm.

FACTS AND PROCEDURAL HISTORY

K.G. was a 16-year-old when she met Bristol, who was then 20 years old, at a weekend retreat organized by a church group in the spring of 2005. Bristol was the church's youth group leader. K.G. began attending the youth group meetings. Bristol and K.G. also began talking on the phone outside of church events.

A few months after they met, Bristol started working as a Holiday Inn front desk clerk. The hotel followed its usual screening process prior to hiring Bristol. He completed an employment application and participated in a personal interview. Nothing disclosed during the hiring process suggested that Bristol was a danger to minors or harbored an intent to molest young girls.

Michael Ensign was, and still is, Holiday Inn's general manager. Ensign testified that he expects hotel employees to notify him of any unregistered guests on hotel property. He also expects to be notified if a male employee is observed socializing with teenage girls in the lobby during work hours, particularly after 8:00 p.m. Since employees may not engage in personal conversations of more than three minutes, Ensign expects to be told of any violations of this rule. Finally, he expects to be informed if an employee is observed bringing a nonemployee behind the front desk.

K.G. visited Bristol at Holiday Inn approximately eight times in the summer of 2005. Other youth group members also visited Bristol at the hotel. Most of the visits with K.G. occurred at night. The visits were mainly at the front desk, and generally lasted between 5 and 40 minutes. K.G. never went into a hotel room with Bristol.

On one occasion, K.G. and Bristol spoke in a hallway, rather than at the front desk. At the end of the conversation, they kissed. No one else saw them kiss on this or any other occasion.

On K.G.'s seventh or eighth visit to the hotel, K.G., Bristol and another employee, Larissa Campos, started talking at the front desk. Campos remained at the front desk, and Bristol took K.G. into a back office. Bristol closed the door, and K.G. sat in a chair across the desk from Bristol.

After approximately 10 to 15 minutes, Bristol asked K.G. to sit on the floor in front of him while he sat in a chair. K.G. complied. Bristol then asked K.G. a question about opening her mouth. K.G. felt the question was inappropriate and promptly stood up. K.G. believed, based on the nature of the question and her position on the floor, that the inquiry had something to do with Bristol's penis.

Bristol did not follow up on his question about K.G.'s mouth. At the time, Bristol was fully clothed in his regular work attire. He did not ask her for oral sex.

After she stood up, K.G. chatted with Bristol for approximately five minutes before she left the hotel. There was no physical contact between them except for a kiss goodnight.

K.G. said goodbye to Campos before leaving Holiday Inn, but did not say anything about the interaction with Bristol in the back office. K.G. did not report the incident to anyone until she told her mother about it in 2007 or 2008. K.G. also reported the incident to a detective in 2013.

The only other Holiday Inn employee K.G. recalls seeing during her visits with Bristol was a woman she believes is

named Hirsch. K.G. would greet Hirsch when they saw each other, but they did not have any conversations.

There is no record of any Holiday Inn employee suspecting Bristol of inappropriate behavior in 2005. Nor were there any complaints about him. Bristol received positive performance reviews in 2005 and 2006, and was promoted to assistant manager in 2010. There is no evidence that Bristol inappropriately touched or sexually abused a minor prior to his contact with K.G. in 2005.

In August 2005, K.G. visited Bristol at his home. K.G. alleges that Bristol raped her during that visit. Bristol was not working in any capacity for Holiday Inn at the time of the alleged rape. K.G. acknowledges visiting Bristol at Holiday Inn up to five more times after the incident at Bristol's home. The last time K.G. attempted to visit Bristol at the hotel was in October 2005. Bristol was not at work at the time.

Bristol admitted that when one of K.G.'s relatives asked to see him at work, he told a coworker at the hotel to tell the relative he was not available. Bristol later told the same coworker he did not want to see K.G.'s relatives because K.G. had told someone in the community that Bristol had raped her. Bristol said the accusation was not true, and the coworker assumed it was just a rumor.

No report was made to Holiday Inn management regarding the rape accusation until after Bristol was arrested in 2013. The hotel considered him a model employee prior to his arrest.

K.G.'s third amended complaint alleges causes of action against Holiday Inn for negligence (second cause of action), negligent supervision and failure to warn (third cause of action),

negligent hiring and retention (fourth cause of action), intentional infliction of emotional distress (ninth cause of action) and premises liability (eleventh cause of action). The trial court granted Holiday Inn's motion for summary judgment on all claims. It explained: "[K.G.'s] causes of action against [Holiday Inn] are alternatively based upon vicarious liability of [the hotel], either from respondeat superior or ratification, upon direct liability from its maintenance of the premises, upon direct liability from its failure to protect [K.G.] in the conduct of the hotel business, upon direct liability from its failure to supervise its employees, and upon direct liability from its retention of Bristol. As discussed [in the order granting summary judgment, Holiday Inn] has met its burden of showing the absence of liability and [K.G.] has failed to meet her burden showing a triable issue of material fact."[1]

DISCUSSION

Standard of Review

A party is entitled to summary judgment "if all the papers submitted show that there is no triable issue as to any

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[1] The Appellant's Appendix includes the trial court's September 25, 2017 order granting the motion for summary judgment but does not include a judgment. The order granting summary judgment is not an appealable order. (*Saben, Earlix & Associates v. Fillet* (2005) 134 Cal.App.4th 1024, 1030.) On our own motion, we take judicial notice of the judgment for Holiday Inn, which the court entered on October 13, 2017. (Evid. Code, §§ 452, subd. (d), 459.) K.G.'s November 21, 2017 notice of appeal reflects that she is appealing the order dated September 25, 2017, but the notice broadly states that the appeal is from the "[j]udgment after an order granting a summary judgment motion." We treat the appeal as an appeal from the judgment.

material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c); see *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) A defendant may move for summary judgment on the ground the plaintiff's action lacks merit. (Code Civ. Proc., § 437c, subd. (a)(1).) The defendant bears the burden of producing evidence "that the plaintiff has not established, and reasonably cannot be expected to establish, one or more elements of the cause of action in question." (*Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 500 (*Patterson*); Code Civ. Proc., § 437c, subd. (p)(2).) If the defendant carries that burden, the plaintiff may defeat summary judgment by presenting evidence "that a triable issue of one or more material facts exists as to the cause of action." (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, at p. 850.)

We review a grant of summary judgment de novo. (*Patterson*, *supra*, 60 Cal.4th at p. 499.) We consider the record before the trial court at the time of its ruling, with the exception of evidence to which the court appropriately sustained objections. (*Orange County Water Dist. v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 367-368.) Because the court ruled in the defendant's favor in this case, "we liberally construe [plaintiff's] evidentiary submissions and strictly scrutinize [defendant's] own evidence, in order to resolve any evidentiary doubts or ambiguities in [plaintiff's] favor." (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142 (*Wiener*).)

Negligence

K.G. contends the trial court erred by summarily adjudicating her negligence cause of action. We disagree.

To establish negligence, a plaintiff must prove (1) the existence of a legal duty of care, (2) breach of that duty, and (3)

proximate cause resulting in an injury. (*Castellon v. U.S. Bancorp* (2013) 220 Cal.App.4th 994, 998.) The existence of a legal duty is a question of law for the court to decide. (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 124.)

"Ordinarily, there is no duty to protect others from third party criminal activity." (*Ericson v. Federal Express Corp.* (2008) 162 Cal.App.4th 1291, 1300.) It is settled, however, that business proprietors, such as hotel, restaurant and bar owners, stand in a special relationship with their patrons and invitees and, as a result, owe a duty to their patrons and invitees to maintain their premises in a reasonably safe condition. (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 229, 235 (*Delgado*).) That duty includes the obligation to take "'reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures.' [Citation.]" (*Id*. at p. 235, italics omitted.) A proprietor's duty "'to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated.' [Citation.]" (*Wiener*, *supra*, 32 Cal.4th at p. 1146; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 676 (*Ann M.*), disapproved on another ground as stated in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527, fn. 5.)

The scope of the duty owed to patrons and invitees is determined in part by balancing the foreseeability of criminal acts by third parties against the burden, vagueness and efficacy of the proposed preventative measures. (*Delgado*, *supra*, 36 Cal.4th at pp. 237-238.) The Supreme Court has developed a "sliding-scale balancing formula." (*Id*. at pp. 237-238, 243.)

A heightened degree of foreseeability—shown by prior similar criminal incidents or other indications of a reasonably foreseeable risk of the type of conduct at issue—is required where the burden of preventing future harm caused by third party conduct is great or onerous. (*Delgado*, *supra*, 36 Cal.4th at pp. 237-238, 243 & fn. 24.) A heightened degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents on the premises. (*Id*. at p. 238; *Ann M.*, *supra*, 6 Cal.4th at p. 679.) Otherwise, an unfair burden would be imposed upon proprietors which, in effect, would force them to become the insurers of public safety, contrary to well-established policy in California. (*Delgado*, at p. 238.) In contrast, a lesser degree of foreseeability is required where there are strong policy reasons for preventing the harm or the harm can be prevented by imposing minimal burdens. (*Id*. at pp. 237-238, 243 & fn. 24.)

Regardless of whether a heightened or lesser degree of foreseeability is required, "'[t]he dispositive issue remains the foreseeability of the criminal act. Absent foreseeability of the particular criminal conduct, there is no duty to protect the plaintiff from that particular type of harm.' [Citation.]" (*Rinehart v. Boys & Girls Club of Chula Vista* (2005) 133 Cal.App.4th 419, 431; *Margaret W. v. Kelley R.* (2006) 139 Cal.App.4th 141, 150 (*Margaret W.*) ["If there is no duty, there can be no liability, no matter how easily one may have been able to prevent injury to another"].)

Since K.G. was an invitee of Holiday Inn, the hotel owed her a duty to take reasonable steps to prevent foreseeable criminal acts by third parties that were likely to occur in the absence of precautionary measures. (*Delgado*, *supra*, 36 Cal.4th at p. 244.) As the trial court correctly observed, Holiday Inn met

"its initial burden on summary judgment by presenting evidence that [the hotel] had no knowledge of the two incidents [at issue]. It is undisputed that the kissing incident was unobserved and unreported by any person to [the hotel]. It is also undisputed that the back office incident occurred in a closed room that was not observed, overheard, or reported."

K.G. responds that triable issues of material fact exist as to the foreseeability of these incidents. In addressing this argument, we need not decide whether the heightened foreseeability standard or the "regular" foreseeability standard applies, because K.G. has failed to meet her burden under either standard.

Heightened foreseeability is required when there has been a showing of prior similar criminal incidents. (*Delgado*, *supra*, 36 Cal.4th at p. 245.) Here, there is no evidence that Bristol was known or suspected to have engaged in any criminal activity prior to the alleged rape. There also is no evidence of any prior similar criminal incident that would have put Holiday Inn on notice of the foreseeability of such conduct.

Applying the regular foreseeability standard, K.G. contends there was no legitimate reason for an adult male employee to bring a nonguest teenage girl onto hotel property late in the evening. But as the trial court astutely stated, "[u]p through the time of the back room incident . . . there was nothing observed other than [K.G.] talking with Bristol in publicly observable places. As a matter of law, merely observing [K.G.] talking with Bristol at [Holiday Inn] is insufficient to put [the hotel] on notice of potential criminal conduct of Bristol towards [K.G.] . . . regardless of whether the existence of those conversations could have or should have been reported to [hotel]

management. It is only in retrospect that the activity takes on its more sinister implications. Foreseeability is not determined from events occurring after the fact." (See *Margaret W.*, *supra*, 139 Cal.App.4th at p. 156.)

The timing of the incidents is significant. The trial court noted that "[u]p through the time just before the back office incident, there is no evidence that [Holiday Inn] had any knowledge of Bristol's interactions with [K.G.] apart from [their] conversations. There is therefore no evidentiary basis upon which the back office incident would itself be foreseeable to [the hotel]. Drawing inferences in [K.G.'s] favor, [the court concludes] the back office incident itself is, as it was observed by Campos, merely a private conversation between Bristol and [K.G.] [K.G.] did not report anything untoward about the incident at the time, and when seen leaving the back office following the incident merely said goodbye and left. A reasonable trier of fact could not conclude from these facts that there was a danger to [K.G.] (or to anyone of the type of harm at issue here) foreseeable to [Holiday Inn] from Bristol (or from any other source of the same character)."

K.G. focuses on Ensign's general expectations that the presence of K.G. and other youth group members at the hotel should have been reported. But it is undisputed the incidents were not reported. As stated in *Margaret W.*, "foreseeability must be measured by what the defendant actually knew. . . . We are not aware of any case involving liability for third party criminal conduct that has held that a special relationship creates a duty to investigate or that has charged a defendant with making forecasts based on the information such an investigation might have revealed." (*Margaret W.*, *supra*, 139 Cal.App.4th at p. 156.)

Under these circumstances, Holiday Inn had no reason to suspect that Bristol would commit acts of sexual abuse toward K.G. Because Holiday Inn owed no legal duty to K.G., her negligence claim fails as a matter of law.

Negligent Supervision

K.G. contends the trial court erred by granting summary adjudication of her cause of action for negligent supervision. As stated in *Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 395 (*Juarez*), however, "there can be no liability for negligent supervision 'in the absence of knowledge by the principal that the agent or servant was a person who could not be trusted to act properly without being supervised.' [Citation.]" (Accord *Z.V. v. County of Riverside* (2015) 238 Cal.App.4th 889, 902 (*Z.V.*) ["To establish negligent supervision, a plaintiff must show that a person in a supervisorial position over the actor had prior knowledge of the actor's propensity to do the bad act"].) There was no evidence of such knowledge here.

In *Juarez*, the Court of Appeal rejected the plaintiff's contention that the Scouts organization was liable for negligence in the selection, supervision and retention of a scoutmaster who molested a troop member. (*Juarez*, *supra*, 81 Cal.App.4th at pp. 395-396.) As the court explained: "While the undisputed facts show with certainty that [the scout] was seriously harmed by [the scoutmaster's] misconduct, those same undisputed facts establish that there was nothing in [the scoutmaster's] background and nothing that was made known to the Scouts during his tenure as scoutmaster . . . that could be deemed a specific warning that [he] posed an unreasonable risk to minors." (*Id.* at p. 397.) The court therefore affirmed the trial court's grant of summary judgment

on the claims for negligent hiring, retention and supervision. (*Ibid*.)

Similarly, in *Z.V.*, *supra*, 238 Cal.App.4th 889, a child in foster care sued Riverside County after being sexually assaulted by a county social worker. The Court of Appeal affirmed the trial court's grant of summary adjudication in favor of the county on a negligent supervision cause of action. (*Id*. at pp. 892-893.) The court explained that there "are no facts that might have shown propensity or disposition on [the social worker's] part to sexually assault a foster child. And, since the case comes to us on a motion for summary judgment, it is a reasonable assumption that [the plaintiff] has had ample opportunity to discover whether Riverside County had some prior knowledge of a propensity on [the social worker's] part to sexually assault the county's dependent children." (*Id*. at p. 903; see *Romero v. Superior Court* (2001) 89 Cal. App.4th 1068, 1080 ["[W]e hold that notwithstanding the special relationship between the Romeros and the teenage invitees, the Romeros did not owe a duty of care to supervise Ryan at all times during her visit, to warn her, or to protect her against Joseph's sexual assault, because there is no evidence from which the trier of fact could find that the Romeros had prior actual knowledge of Joseph's propensity to sexually assault female minors"].)

K.G. relies upon *Deutsch v. Masonic Homes of California, Inc.* (2008) 164 Cal.App.4th 748, 783, for the proposition that a principal may be held liable for the acts of its agents where the principal is either negligent or reckless in the supervision of the agent. The court in that case determined that neither "'actual notice'" nor "'specific warning'" was required as

an element of the tort of negligent supervision. (*Id.* at pp. 783-784.)

We do not find *Deutsch* persuasive. Based on *Juarez*, *Z.V.* and *Romero*, we conclude a negligent supervision claim requires specific knowledge by the principal of the agent's propensity to sexually assault minors. This is consistent with the foreseeability requirement for ordinary negligence. (See *Delgado*, *supra*, 36 Cal.4th at pp. 237-238, 243 & fn. 24.) Here, it was not foreseeable prior to August 2005 that Bristol posed a danger to minor girls.

Because the "undisputed facts establish that there was nothing in [Bristol's] background and nothing that was made known to [Holiday Inn] . . . that could be deemed a specific warning that [Bristol] himself posed an unreasonable risk to minors," the court properly adjudicated the negligent supervision claim in the hotel's favor. (*Juarez*, *supra*, 81 Cal.App.4th at p. 397; see *Z.V.*, *supra*, 238 Cal.App.4th at pp. 902-903.)

Negligent Retention

Generally, "[a]n employer may be liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit."[2] (*Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556, 1564; *Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139.) To establish liability, a plaintiff must demonstrate negligence, i.e., duty, breach of duty, proximate causation, and damages. (*Phillips*, at p. 1139.) Both an employment relationship and foreseeability of injury are required for a duty to arise in a negligent retention case. (*Id.* at p. 1142.) "Liability for negligent

[2] K.G. has abandoned her claim for negligent hiring.

. . . retention of an employee is one of direct liability for negligence, not vicarious liability. [Citation.]" (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815.)

K.G. contends she has raised a triable issue of material fact regarding her negligent retention cause of action. She relies primarily on *Santillan v. Roman Catholic Bishop of Fresno* (2008) 163 Cal.App.4th 4 (*Santillan*). In that case, a housekeeper regularly let male minors into a priest's bedroom knowing the minors were alone with the priest behind his closed bedroom door. (*Id.* at p. 8.) The Court of Appeal determined that triable issues of fact existed regarding the housekeeper's contemporaneous knowledge of the priest's sexual abuse of the minors. (*Id.* at p. 11.) The housekeeper cried when the minors' mother accused her of knowing of the abuse and she later told the mother she was sorry. (*Id.* at pp. 11-12.) The court concluded the housekeeper's "conduct and statements [raised] an inference that she in fact knew about the alleged abuse while it was ongoing." (*Id.* at p. 12.)

K.G. claims Holiday Inn is similarly bound by its employees' knowledge of Bristol's conduct, particularly Campos's knowledge of K.G.'s presence in the back office with Bristol. K.G. argues that this knowledge, combined with Holiday Inn's failure to discipline or terminate Bristol, create a basis for liability for negligent retention.

K.G.'s reliance on *Santillan* is misplaced. There was evidence in that case that the housekeeper was contemporaneously aware of the ongoing sexual abuse of the minors in the priest's bedroom. (*Santillan*, *supra*, 163 Cal.App.4th at pp. 11-12.) No such evidence exists here. Campos spoke with K.G. and Bristol before they went into the back office.

Campos had no reason to believe that K.G. and Bristol were doing anything but talking in the back office. There was nothing to suggest the possibility of sexual abuse. This is insufficient to raise a triable issue regarding whether Holiday Inn negligently retained Bristol.

Premises Liability

K.G.'s briefs do not address her premises liability claim. Assuming she is still asserting this claim, we note that the elements of the cause of action are the same as those for negligence: duty, breach of duty, proximate causation, and damages. (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205; Civ. Code,[3] § 1714, subd. (a).) As previously discussed, Holiday Inn met its burden of showing that the duty element cannot be established, and K.G. failed to present evidence sufficient to raise a triable issue of material fact regarding that element.

Intentional Infliction of Emotional Distress

"'The elements of a prima facie case for the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. [Citations.] . . . Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.' [Citation.]" (*Wilson v. Hynek* (2012) 207 Cal.App.4th 999, 1009.)

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[3] All statutory references are to the Civil Code unless otherwise specified.

K.G. contends she has demonstrated a triable issue of fact regarding this claim. Holiday Inn responds that the claim fails because the conduct as it relates to the hotel is not outrageous and because no conduct can be attributed to the hotel. We agree. As the trial court aptly noted, "a general claim based on allowing an employee to talk to [K.G.] fails as not outrageous as a matter of law. The claim, to the extent that it exists at all, must relate to the two incidents of abuse. . . . . [T]orts based on Bristol's actions are outside the scope of Bristol's employment for which [Holiday Inn] has no liability under a respondeat superior theory."

K.G. clarifies that she is not seeking to hold Holiday Inn liable on a respondeat superior theory, but rather on a ratification theory. Under that theory, "an employer may be liable for an employee's act where the employer either authorized the tortious act or subsequently ratified an originally unauthorized tort. [Citation.] The failure to discharge an employee who has committed misconduct may be evidence of ratification. [Citation.] The theory of ratification is generally applied where an employer fails to investigate or respond to charges that an employee committed an intentional tort, such as assault or battery. [Citations.]" (*Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 169-170 (*Baptist*).)

The trial court properly rejected this theory. The kiss and back office incidents are the only incidents that fall within the scope of the intentional infliction of emotional distress claim. No evidence was presented that Holiday Inn knew of the kiss incident. The back office incident was not observed or reported beyond one employee's observation that Bristol took K.G. into a back office and then K.G. left without ever stating any complaint.

There is no evidence that hotel management had any knowledge of this incident.

K.G. asserts that Bristol's coworker's knowledge of the alleged August 2005 rape should be imputed to Holiday Inn. At most, the coworker had knowledge of an unsubstantiated rumor that K.G. had accused Bristol of rape. This information, which was not reported to hotel management, was insufficient to establish that Bristol committed misconduct necessitating his termination. (See *Baptist*, *supra*, 143 Cal.App.4th at pp. 169-170.) K.G. has failed to raise a triable issue of fact regarding the hotel's ratification of Bristol's acts of sexual abuse against K.G.

Evidence of Consent

K.G. sought to strike certain facts submitted by Holiday Inn on the basis that they suggested K.G.'s consent to Bristol's sexual abuse. The trial court properly denied the request, finding that section 1708.5.5 does not apply in this case.

Section 1708.5.5, subdivision (a) states that "consent shall not be a defense *in any civil action under* [*s*]*ection 1708.5* if the person who commits the sexual battery is an adult who is in a position of authority over the minor." (Italics added.) Section 1708.5 authorizes a civil cause of action for sexual battery.

Notwithstanding the clear language of section 1708.5.5, K.G. contends the statute prohibits the introduction of evidence of consent in "all actions arising [from] the sexual abuse of a child." We do not read the statute so broadly. The language plainly states that consent is not a defense "in any action *under* [*s*]*ection 1708.5* if the person who commits the sexual battery is an adult who is in a position of authority over the minor." (Italics added.) The instant case is not an action for sexual battery under section 1708.5. It is an action based on negligence, premises

liability and intentional infliction of emotional distress. These claims do not fall within the scope of section 1708.5.5.

K.G. points to the legislative history of section 1708.5.5 to support her argument that the Legislature intended a broader construction of the statute. Because we conclude the statutory language of section 1708.5.5 is clear and unambiguous, we do not consider its legislative history. (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 ["'If the plain language of a statute is unambiguous, no court need, or should, go beyond that pure expression of legislative intent'"]; *Mutual Life Ins. Co. v. City of Los Angeles* (1990) 50 Cal.3d 402, 413 ["'[[W]hen] statutory language is . . . clear and unambiguous there is no need for construction and *courts should not indulge in it*'"].)[4]

In any event, the evidence that K.G. claims shows her consent to Bristol's sexual abuse was not offered on the issue of consent. It was offered to prove that the abuse was not foreseeable by Holiday Inn. (See Evid. Code, § 1106.) The trial court did not err by considering the evidence.

DISPOSITION

The judgment is affirmed. Holiday Inn shall recover its costs on appeal.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J. YEGAN, J.

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[4] Because we do not consider section 1708.5.5's legislative history, we deny K.G.'s request to take judicial notice of that history. (Evid. Code, § 452, subd. (c).)

Colleen K. Sterne, Judge

Superior Court County of Santa Barbara

Nye, Peabody, Stirling, Hale & Miller and Timothy C. Hale, for Plaintiff and Appellant.

Mavredakis Cranert and Paul C. Kwong, for Defendant and Respondent.