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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SALUD LEON-GUERRERO, Plaintiff and Respondent, v. RONALD SMITH et al., Defendants and Appellants.	B232462 (Los Angeles County Super. Ct. No. VC51679)

APPEAL from an order of the Superior Court of Los Angeles County, Patrick T. Meyers, Judge. Affirmed.

Donald R. Davidson III, for Defendants and Appellants.

Law Firm of Peyman & Rahmana and Diane B. Weissburg for Plaintiff and Respondent.

I. INTRODUCTION

Defendants, Ronald Smith, Carpoforo Carrera and Maria Vargas, appeal from a February 16, 2011 judgment entered in favor of plaintiff, Salud Leon-Guerrero, after a three-day bench trial. The trial court found both sides were negligent, determining

plaintiff was 45 percent and defendants were 55 percent at fault for her injuries arising from her fall down an apartment staircase. Defendants argue the trial court erred in failing to apply the duties set forth in the lease agreement and instead applied general negligence principles. Defendants further assert plaintiff was completely at fault because: they had no duty to prevent an unforeseen accident; they had no duty because she assumed the risk of causing injury to herself; and they had insufficient notice of water in the stairway on the day of the accident. We disagree and affirm the judgment.

II. BACKGROUND

A. The Pleadings

On September 2, 2008, plaintiff filed a complaint alleging negligence and premises liability against defendants. Plaintiff alleged she sustained injuries because defendants "negligently and carelessly owned, operated, maintained, repaired and supervised" the premises. On April 22, 2009, Ms. Vargas answered the complaint asserting affirmative defenses of contract breach, failure to notify and negligence by plaintiff. On December 14, 2009, Mr. Smith and Mr. Carrera answered the complaint asserting the same affirmative defenses as Ms. Vargas.

B. Testimony

In September 1998, plaintiff moved with daughters, Yesenia and Christian Gonzales, and sons, Guillermo and Benedicto Gonzales,[1] into apartment A of a 16-unit complex owned by Mr. Smith in Maywood, California. The apartment is a two-bedroom, two-story unit with a stairway that connects the first and second floors. Plaintiff's daughter, Yesenia, signed a one-year lease agreement that commenced on September 1,

[1] For clarity's sake and not out of disrespect we refer to the plaintiff's children by their surnames.

1998, and terminated on September 1, 1999. The lease agreement contains the following maintenance provision: "Tenant shall properly use and operate all furniture, furnishings and appliances, electrical, gas and plumbing fixtures and [keep] them as clean and sanitary as their condition permits. Excluding ordinary wear and tear, Tenant shall notify Landlord and pay for all repairs and replacements caused by Tenant(s) or Tenant[s]' invitees' negligence or misuse. . . . " The lease agreement also contains a hold-over provision: "Any holding over at the expiration of this lease shall create a month to month tenancy at a monthly rent of $700.00 payable in advance. All other terms and conditions herein shall remain in full force and effect." Ms. Gonzalez also signed a move-in sheet which specifies, "[T]enant will keep unit in good repair."

Mr. Carrera and Ms. Vargas have managed Mr. Smith's properties, including the apartment complex, for the past 15 years. Mr. Carrera and Ms. Vargas do not live at the Maywood apartment complex. They manage 75 apartment units for Mr. Smith. Mr. Carrera and Ms. Vargas collect the rents and take care of repairs. They communicate with Mr. Smith mostly by telephone. And Mr. Carrera and Ms. Vargas are paid for their management services by commission, based on a percentage of the rents they collect.

At trial, Yesenia testified that within months of moving into the apartment, her upstairs bedroom ceiling leaked water when it rained. Yesenia's bedroom is three to four feet away from the stairs. Plaintiff's son, Benedicto, testified water leaked extensively in: the bedrooms; parts of the bathrooms; and parts of the stairs. The family put containers on the floor to hold the water because it would flow down the stairs. In September 1998, Yesenia notified Mr. Carrera about the water leakage problem when he came over to collect the rent. This occurred four or five months after the family moved into the apartment. When Mr. Carrera failed to check on the problem, she telephoned him a week later. A few days later, Mr. Carrera visited the apartment and went up the building roof with some tools. But the leaking problem continued whenever it rained. Yesenia testified she spoke with Mr. Carrera about the leaking problem at least twice yearly. Also, Benedicto had at least a dozen conversations with Mr. Carerra about the leaking

problem. Yesenia wrote notes to Ms. Vargas about the problems in the apartment. Yesenia included these notes with her rent check.

Yesenia stated Ms. Vargas later told the family Mr. Smith wanted them to send him a letter before he approved the repairs. On February 14, 2005, Benedicto wrote a letter to Mr. Smith identifying leaking problems in a second floor closet. Benedicto enclosed pictures he took with a disposable camera. Yesenia testified one of the pictures showed water stains on the ceiling and wall of her bedroom. The letter was signed by all five family members. Yesenia stated they did not give copies of the letter to Mr. Carrera or Ms. Vargas. However, Yesenia testified Ms. Vargas was aware of the family's letter to Mr. Smith. On one occasion, Ms. Vargas mentioned she received their letter from Mr. Smith when she came to collect the rent. Yesenia understood from Mr. Smith's response that Mr. Carrera and Ms. Vargas would fix the problems. That was the reason their letter to Mr. Smith ended up in Ms. Vargas' hands.

A few weeks after Mr. Smith's response to the family's February 14, 2005 letter, Mr. Carrera visited the apartment. Mr. Carrerra checked the upstairs ceiling in Yesenia's bedroom and the stairs. Later, Mr. Carrera told Yesenia he would fix the leaking problem. Yesenia saw Mr. Carrera carrying packets of tar-like materials up a ladder to the roof. Benedicto confirmed seeing Mr. Carrera on the roof. This observation was made after Benedicto wrote the February 2005 letter. Mr. Carrerra carried roofing supplies including tools and tar. A few days after the roof repair, Yesenia again complained to Mr. Carrera about the leaking roof when it began raining again. Both Yesenia and Benedicto testified Mr. Carrera's roofing repair did not stop the leaking problem.

On March 29, 2007, plaintiff was upstairs in her room when she decided to go downstairs for a drink of water. Plaintiff testified she slipped on some water on the first step of the staircase and fell down the stairs to the first floor. Plaintiff stated it had rained heavily early on the morning of the accident. Yesenia confirmed it had rained a few hours before the accident. Plaintiff saw the wet floor but had already started walking down the stairs when she slipped. Plaintiff testified she "tried to hold on to the handrail,

but it was loose" and later explained, "[I]t was not the moment yet to hold onto it." Benedicto testified he was downstairs in the living room when he saw plaintiff tumble and fall, landing on the last set of stairs. Benedicto ran towards plaintiff. Yesenia and Guillermo, also ran towards plaintiff. Plaintiff was unconscious but woke up after several seconds. Benedicto observed blood on plaintiff's elbows. Yesenia did not see plaintiff fall. But Yesenia heard plaintiff screaming. Yesenia heard plaintiff rolling and falling down the stairs. Plaintiff was taken to the hospital.

Dr. Hooshang Tabibian, plaintiff's doctor, testified on her behalf. Dr. Tabibian treated plaintiff after an orthopedist prescribed physical therapy. Dr. Tabibian conducted a physical examination of plaintiff and found she had back pain and atrophy in her wrist and hand. Robert Hall, a general building contractor testified for defendants. Mr. Hall inspected plaintiff's apartment in January 2010, 34 months after her accident. Mr. Hall testified he did not see any water penetration when he observed: the stairs; walls near the upstairs bedroom; and bedroom walls and floor. He also testified the stair handrails were firmly attached and the roof appeared to be in good shape. When cross-examined, Mr. Hall testified the upstairs bedroom ceiling had been repaired and painted in a rush by Mr. Carrera at some point in time. Besides testimony, the trial court judicially noticed precipitation data recorded during March 2007 at Long Beach Daugherty Field, which is over 10 miles from Maywood.

C. Trial Court's Statement Of Decision And Judgment

On September 20, 2010, the trial court issued its proposed statement of decision. The trial court thoroughly summarized the witnesses' testimony and the applicable law. The trial court found plaintiff carried her burden of proving that defendants' negligent maintenance and repair was a substantial factor in causing her harm. The trial court also found plaintiff was negligent.

On October 1, 2010, defendants filed objections and made proposals for a new statement of decision. Defendants repeatedly questioned plaintiff's credibility.

Defendants requested the trial court specify whether: plaintiff's failure to clean the wet floor as required by the tenant move-in sheet and lease was a legal cause of her accident; plaintiff failed to give notice of the wet floor; plaintiff's failure to produce letters complaining about the roof after December 5, 2005, undermined her credibility; the Long Beach climate data made it more probable than not that it did not rain in Maywood on the date of the accident thereby impeaching plaintiff's testimony; and it took Ms. Vargas and Mr. Carrera's testimony into consideration.

On January 31, 2011, the trial court issued its final statement of decision. It was substantially the same as its proposed statement of decision. In addition, the final statement of decision discussed defendants' objections. The trial court noted several clarification requests relating to plaintiff's testimony were not supported by her actual testimony. As to the precipitation evidence, the trial court ruled no opinion testimony from a properly qualified witness supported defendants' position.

On February 16, 2011, judgment was entered in plaintiff's favor. Plaintiff was awarded her attorney fees and $22,700 in total damages. On April 15, 2011, defendants timely filed their notice of appeal.

III DISCUSSION

A. Standard of Review

On appeal from a judgment entered after a court trial, we review factual determinations for substantial evidence. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053; *People ex rel. Monterey Mushrooms, Inc. v. Thompson* (2006) 136 Cal.App.4th 24, 36 fn. 11.) Our Supreme Court has stated: "Where findings of fact are challenged on a civil appeal . . . 'the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every

reasonable inference and resolving all conflicts in its favor. . . . " (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660 citing *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.) However, the applicability of a statutory standard to undisputed facts and questions of statutory interpretation are questions of law that are reviewed de novo. (*International Engine Parts, Inc. v. Feddersen & Co.* (1995) 9 Cal.4th 606, 611; *Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 765.) Likewise, we apply a de novo standard of review when the meaning of a contract may be determined without the aid of extrinsic evidence. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866; *Tin Tin Corp. v. Pacific Rim Park, LLC* (2009) 170 Cal.App.4th 1220, 1225.) In addition, whether a defendant owes a plaintiff a duty of care is a question of law for the court, which is review de novo by us. (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 770-771 (*Cabral)*; *Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213.)

B. Defendants' Duty Of Care

Civil Code section 1714, subdivision (a) states, "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself. . . ." Our Supreme Court has stated: "In other words, 'each person has a duty to use ordinary care and "is liable for injuries caused by his failure to exercise reasonable care in the circumstances."'" (*Cabral, supra,* 51 Cal.4th at p. 771; *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472 quoting *Rowland v. Christian* (1968) 69 Cal.2d 108, 112 (*Rowland*).)

In *Cabral*, the Supreme Court summarized the *Rowland* factors in determining duty of care: "In the *Rowland* decision, this court identified several considerations that, when balanced together, may justify a departure from the fundamental principle embodied in Civil Code section 1714: 'the foreeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection

between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.'" (*Cabral, supra,* 51 Cal.4th at p. 771 quoting *Rowland, supra,* 69 Cal.2d at p. 113; accord *Castaneda v. Olsher, supra,* 41 Cal.4th at p. 1213.) Although foreseeability and the extent of the burden to the defendant are ordinarily the crucial considerations, one or more of the *Rowland* factors may be determinative of the duty analysis in a given case. (*Id.* at p. 1213; *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 237 fn. 15.)

In *Cabral,* our Supreme Court stressed, "[I]n the absence of a statutory provision establishing an exception to the general rule of Civil Code section 1714, courts should create one only when 'clearly supported by public policy.'" (*Cabral, supra,* 51 Cal.4th at p. 771 quoting *Rowland, supra,* 69 Cal.2d at p. 112.) The Supreme Court explained, "By making exceptions to Civil Code section 1714's general duty of ordinary care only when foreseeability and policy considerations justify a categorical no-duty rule, we preserve the crucial distinction between a determination that the defendant owed the plaintiff no duty of ordinary care, which is for the *court* to make, and a determination that the defendant did not breach the duty of ordinary care, which in a jury trial is for the *jury* to make." (*Cabral, supra,* 51 Cal.4th at p. 772.)

Defendants assert they owed no duty of care because the lease agreement and tenant move-in sheet required plaintiff to clean and maintain the apartment. First, defendants improperly rely on a May 26, 2001 letter that Mr. Carrera sent to all tenants. We do not consider that letter because it was excluded by the trial court and thus is not part of the trial evidence. No argument has been raised on direct appeal concerning the propriety of the trial court's evidentiary ruling in this regard.

Second, they contend at common law, once a lessor transfers possession of the premises to the tenant, the duty of care shifts. Under defendant's theory, the tenant becomes liable for injuries caused by a condition of the premises. They argue the trial

court improperly applied the *Rowland* test to determine defendants' duty of care. They contend the trial court should have applied the duty of care set forth in the lease agreement and improperly shifted the contractual responsibilities from the tenant to the landlord. Defendants' arguments are meritless.

As noted, the lease agreement provides: "Tenant shall properly use and operate all furniture, furnishings and appliances, electrical, gas and plumbing fixtures and [keep] them as clean and sanitary as their condition permits. Excluding ordinary wear and tear, Tenant shall notify Landlord and pay for all repairs and replacements caused by Tenant(s) or Tenant[s]' invitees' negligence or misuse. . . ." Although the lease agreement expired September 1, 1999, we consider the lease agreement because of the following holdover provision in the agreement: "Any holding over at the expiration of this lease shall create a month to month tenancy at a monthly rent of $700.00 payable in advance. All other terms and conditions herein shall remain in full force and effect." Yesenia also signed a move-in sheet which specifies that tenant was to keep the unit in good repair. By its own terms, neither the lease agreement nor the tenant move-in sheet contractually limits defendants' duty of care. More importantly, there is no public policy justification for categorically excluding lessors and their agents from the Civil Code section 1714, subdivision (a) general duty of care. In *Brennan v. Cockrell Investments, Inc.* (1973) 35 Cal.App.3d 796, 800-801, the Court of Appeal reached this same conclusion in a landlord-tenant case. The Court of Appeal explained: "Possession and degree of control over the premises are significant factors to be weighed in determining whether or not the landlord failed to meet the statutory standard of care. Indeed, these considerations go to the very essence of the negligence issue. But it is impossible to perceive any legitimate public interest that would be promoted by the creation of a landlord immunity exception to the code provision." (*Brennan v. Cockrell Investments, Inc., supra,* 35 Cal.App.3d at p. 800; accord *Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 917; *Golden v. Conway* (1976) 55 Cal.App.3d 948, 955-956, 959.)

Defendants argue they cannot fulfill their duty of care to prevent plaintiff's accident because public policy favors limiting a lessor's right to entry in order to provide

the tenant with peaceful possession of the property. They also suggest imposition of a duty of care on lessors to prevent accidents would give rise to strict liability. Contrary to defendants' assertion, imposing on a lessor a duty of care would neither create strict liability nor infringe on a tenant's right to peaceful possession of the property. Here, there is substantial evidence defendants were notified of the leaking problem by plaintiff and her family on several occasions. Ms. Vargas and Mr. Carrera were invited by the family into the apartment to make repairs to fix the leaking problem. Moreover, it is undisputed that defendants have control over the building roof and its repair. There is substantial evidence: plaintiff slipped on water that came from a leaky roof; defendants were given notice of the leaky roof; and defendants attempted to repair the roof but were unsuccessful. Thus, there is no merit to defendants' argument that they owed no duty to plaintiff because public policy prevented them from intruding on her right to peaceful possession of the apartment unit. (*Evans v. Thomason* (1977) 72 Cal.App.3d 978, 985.)

Defendants also argue they owe no duty of care to plaintiff because: the accident was unforeseeable; they exercised no control over the premises; and they were not given notice of the dangerous condition. Defendants argue there is no duty of care because it was unforeseeable that plaintiff would breach her duty of cleaning the apartment and they had no control over the premises. Defendants rely on *Leakes v. Shamoun* (1986) 187 Cal.App.3d 772, 777-778. Defendants' reliance on *Leakes* is meritless.

In *Leakes*, the Court of Appeal held the property owner owed no duty to a third party who was shot in the head by the tenant's security guard. The victim was standing outside the door of an arcade located in a high crime area. (*Leakes v. Shamoun, supra*, 187 Cal.App.3d at pp. 774, 777-778.) The Court of Appeal held the property owner did not have direct control over the tenant's security guard. Rather the property owner's only control over the security guard was by way of an eviction proceeding against the tenant. (*Id.* at p. 776.) Here, there is substantial evidence defendants had notice of the leaking problem. They also had direct control over the building roof and access to the apartment to make repairs to prevent the leaking problem. It was foreseeable that defendants' failure to make the necessary repairs to fix the leaking problem was a legal cause of

plaintiff's accident and subsequent injury. Defendants' duty arguments are meritless. (*Stoiber v. Honeychuck, supra*, 101 Cal.App.4th at p. 917; *Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 510; *Brennan v. Cockrell Investments, Inc., supra*, 35 Cal.App.3d at p. 800.)

C. Comparative Negligence

Defendants argue plaintiff assumed the duty of the tenant to clean the apartment. Thus, they reason plaintiff's primary assumption of risk bars recovery because they owed no duty to prevent the harm that resulted from her conduct. They contend the trial court erred in applying the comparative negligence principles set forth in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 808, 824-825. Defendants assert the primary assumption of risk doctrine discussed in Chief Justice Ronald M. George's lead opinion in *Knight v. Jewett* (1992) 3 Cal.4th 296, 308-310 is the controlling rule of law. Defendants' arguments are meritless.

In *Knight*, Chief Justice George explained the assumption of risk doctrine and its relationship to the comparative fault principles adopted in *Li*: "In cases involving 'primary assumption of risk' – where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury— the doctrine continues to operate as a complete bar to the plaintiff's recovery. In cases involving 'secondary assumption of risk' – where the defendant does owe a duty of care to plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty— the doctrine is merged into the comparative fault scheme, and the trier of fact, in apportioning the loss resulting from the injury, may consider the relative responsibility of the parties." (*Knight v. Jewett, supra*, 3 Cal.4th at pp. 314-315.) This distinction between primary (with its application primarily in the field of sporting competition) and secondary assumption of the risk is firmly established. (*Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1068; *Parsons v. Crown Disposal Co., supra*, 15 Cal.4th at p. 480;

Patterson v. Sacramento City Unified School Dist. (2007) 155 Cal.App.4th 821, 842; *Childs v. County of Santa Barbara* (2004) 115 Cal.App.4th 64, 69; *Gordon v. Havasu Palms, Inc*. (2001) 93 Cal.App.4th 244, 250.)

Defendants contend this case involves the primary assumption of risk relying on: *Knight v. Jewett, supra,* 3 Cal.4th at page 320 [defendant who participated in touch football game owed no legal duty of care to other participants in the absence of intentional injury or conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport]; *Beninati v. Black Rock City, LLC* (2009) 175 Cal.App.4th 650, 658-659 [festival promoter did not owe participant a duty of care when the plaintiff approached the remnants of the Burning Man sculpture under doctrine of primary assumption of risk]; *Hodges v. Yarian* (1997) 53 Cal.App.4th 973, 976-977, 982-984 [firefighter rule barred recovery of damages for personal injuries suffered by off-duty sheriff deputy]; and *Stimson v. Carlson* (1992) 11 Cal.App.4th 1201, 1205-1206 [boat owner owed no legal duty to eliminate or protect crew member against swinging boom, which is a risk inherent in the sport of sailing]. None of the cases relied upon by defendants is factually similar to this case. As we discussed above, defendants owe a duty of care to plaintiffs to fix the leaking roof. In addition, our Supreme Court in *Cabral* has rejected the very argument asserted by defendants. In *Cabral* our Supreme Court held, "In urging us to hold it owed [plaintiff] no duty because [plaintiff] was injured only as a result of his own negligence, [defendant] asks us to do under the duty rubric what we would not do in the name of causation in [*Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 725-726], an invitation we should again decline." (51 Cal.4th at p. 781; see *Levy-Zentner v. Southern Pac. Transportation Co*. (1977) 74 Cal.App.3d 762, 793.) Accordingly, the trial court properly applied the comparative negligence doctrine articulated by the Supreme Court in *Li*.

IV. DISPOSITION

The judgment is affirmed. Plaintiff, Salud Leon-Guerrero, is to recover her appeal costs from defendants, Ronald Smith, Carpoforo Carrera and Maria Vargas.

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TURNER, P. J.

We concur:

ARMSTRONG, J.

MOSK, J.