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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ANETTE ESMAILI, Individually and as Administrator, et al., Plaintiffs and Appellants, v. STATE OF CALIFORNIA et al., Defendants and Respondents.	B246247 (Los Angeles County Super. Ct. No. BC462291)

APPEAL from an order of the Superior Court of Los Angeles County, Barbara M. Scheper, Judge. Affirmed.

Eisenberg & Associates, Mark S. Eisenberg; Leib Law Corporation and Daniel C. Leib for Plaintiffs and Appellants.

Kamala D. Harris, Attorney General, Kristin G. Houge, Senior Assistant Attorney General, Richard J. Rojo, Supervising Deputy Attorney General, and Sandra I. Barrientos, Deputy Attorney General, for Defendants and Respondents.

The facts of this case are undeniably tragic. After leaving a party at which she apparently consumed alcohol or drugs, plaintiffs' 17-year-old daughter, Sophia Salazar (Sophia), walked onto State Route 60 (SR 60) and was hit by a car and killed. Prior to her death, Sophia allegedly had approached two California Highway Patrol (CHP) officers and asked for their assistance; they procured a cab for her, but when she was unwilling to enter it, the officers did not detain her.

Sophia's parents sued the officers and the State of California, alleging causes of action under 42 U.S.C. section 1983 (section 1983) and for negligence. The trial court sustained with prejudice defendants' demurrer to both causes of action, concluding that the facts alleged did not state a claim under either theory.

We affirm. Under applicable federal and state law, the officers and the State could be liable only if they took some affirmative action to place Sophia in danger or to heighten her vulnerability to existing danger. Because plaintiffs did not allege any such affirmative action, the trial court correctly sustained defendants' demurrer.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Underlying Facts*[1]

Anette Esmaili and Rodolfo Salazar (plaintiffs) are the parents of Sophia, who was struck by a car and killed on May 30, 2010. Plaintiffs allege that on May 29, 2010, Sophia, then 17 years old, attended a party at the home of defendants Mary Genovia Rodriguez, Asia Genovia, and Kody Genovia (Genovias). During the evening, drugs and/or alcohol were furnished to guests, and Sophia became "intoxicated, disoriented, inebriated and confused." At approximately midnight, Sophia left the party without her cell phone and attempted to walk home.

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[1] Because the present appeal is from an order sustaining a demurrer to plaintiffs' second amended complaint, in our statement of the facts we "assume the truth of the complaint's properly pleaded or implied factual allegations." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Shoemaker v. Harris* (2013) 214 Cal.App.4th 1210, 1213, fn. 2.)

At about 12:30 a.m., Sophia approached two on-duty CHP officers, defendants Bradley Sadek and Martin Gonzalez, in the parking lot of a 7-Eleven convenience store. Sophia was "visibly distraught, shaken, disoriented, and intoxicated, ill and in need of medical care, lost, visibly underage, alone and out on public streets past curfew." Sophia asked the officers for help returning home, but "instead of adequately rendering assistance themselves, [the officers] undertook to aid Sophia by attempting to foist her off on a nearby cab driver." Sophia declined to get into the cab, and the officers "allowed Sophia to leave their presence in the well-lit area of the 7-Eleven parking lot on foot, in the dark. They stood and watched as Sophia headed in a direction *opposite* from the home address she had provided to the defendants. The defendant officers stood and watched with reckless disregard for the dangers to Sophia as she stumbled deeper into a high-crime area in the wrong direction." Shortly after leaving the officers, Sophia walked onto SR-60 and was hit and killed by a passing motorist.

2. *The Present Action*

Plaintiffs filed the present action on May 25, 2011,[2] and filed the operative second amended complaint against Officers Sadek and Gonzalez, the State of California, and the Genovias on August 10, 2012.[3] The complaint alleges four causes of action: (1) negligence (against the Genovias) (first cause of action); (2) violation of civil rights pursuant to section 1983 (against Officers Sadek and Gonzalez) (second cause of action); (2) negligence (against the State of California and Officers Sadek and Gonzalez) (third cause of action); and (4) survival (against all defendants) (fourth cause of action).

The State and Officers Sadek and Gonzalez demurred. They asserted (1) the second cause of action for violation of civil rights was barred as a matter of law because

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[2] The complaint alleged that pursuant to Government Code sections 910-913.2, plaintiffs filed a government claim on November 22, 2011; the claim was denied either in writing or by operation of law.

[3] The trial court sustained demurrers with leave to amend to the original and first amended complaints.

the federal due process clause does not create a duty for public employees to protect an individual from private harm and, in any event, the officers were entitled to qualified immunity; (2) the third cause of action for negligence was barred because there was no "special relationship" between Sophia and the state defendants; and (3) the fourth cause of action failed because there were no underlying claims on which to proceed.[4]

The trial court sustained the demurrer without leave to amend and dismissed the State and Officers Sadek and Gonzales on November 16, 2012. Plaintiffs timely appealed.

STANDARD OF REVIEW

"In determining whether plaintiffs properly stated a claim for relief, our standard of review is clear: ' "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see also *McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415 [noting that our review is de novo].)" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

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[4] On appeal, plaintiffs assert error as to only the second and third causes of action. Because any assertion of error as to the fourth cause of action therefore is forfeited, we do not consider it. (E.g., *Neighbors For Fair Planning v. City & County of San Francisco* (2013) 217 Cal.App.4th 540, 554.)

DISCUSSION

I. *Section 1983/Violation of Right to Bodily Security*

Plaintiffs' second cause of action asserts a claim under section 1983 for violation of Sophia's federal due process rights. It alleges that because Sophia was a minor, visibly intoxicated, out after curfew, and in need of psychiatric or medical care, the officers had a duty to place her in protective custody, transport her to the CHP station, or take her home. The officers' failure to do so is alleged to constitute a violation of the Fourteenth Amendment to the U.S. Constitution and to give rise to a cause of action under section 1983.

The trial court concluded that the second cause of action did not state a claim under section 1983 because the officers did not create the danger that led to Sophia's death. Plaintiffs respond that under *DeShaney v. Winnebago Cty. Soc. Servs. Dept.* (1989) 489 U.S. 189 (*DeShaney*), a public entity or employee may be liable for harm to a plaintiff inflicted by a private third party if the public employee took some action that made the plaintiff more vulnerable to private harm. Plaintiffs urge that doctrine applies to the present case because the officers "undert[ook] to assist [Sophia], but then [left] her to fend for herself in a high crime area knowing she [was] lost, intoxicated and disoriented."

For the reasons that follow, we conclude that plaintiffs' second cause of action fails to state a state a claim for a violation of Sophia's federal due process rights under *DeShaney* and its progeny. The trial court therefore correctly sustained the demurrer to this cause of action.

A. *Section 1983*

Section 1983 states, in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 1983 does not, by its own terms, create substantive rights; it provides only remedies for deprivations of rights established elsewhere in the Constitution or federal laws. (*McAllister v. Los Angeles Unified School District* (2013) 216 Cal.App.4th 1198, 1207; *Baker v. McCollan* (1979) 443 U.S. 137, 144, fn. 3.) Thus, " '[t]o state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law.' (*West v. Atkins* (1988) 487 U.S. 42, 48.) ' "State courts look to federal law to determine what conduct will support an action under section 1983. [Citation.]" ' (*Weaver v. State of California* (1998) 63 Cal.App.4th 188, 203.) 'The threshold inquiry [in analyzing a section 1983 claim] is whether the evidence establishes that appellants have been deprived of a constitutional right.' (*Duchesne v. Sugarman* (2d Cir.1977) 566 F.2d 817, 824 (*Duchesne)*.)" (*Arce v. Childrens Hospital Los Angeles* (2012) 211 Cal.App.4th 1455, 1472-1473 (*Arce*).)[5]

B. *DeShaney v. Winnebago Cty. Soc. Servs. Dept.*

Plaintiffs contend that defendants violated Sophia's right to federal substantive due process as defined in *DeShaney* and its progeny. The *DeShaney* plaintiff, Joshua DeShaney, was a four-year-old boy who was so severely beaten by his father that he suffered permanent brain damage; the defendants were social workers and other local officials who had received complaints that Joshua's father was abusing him but did not remove him from his father's custody. (*Id*. at p. 191.) Joshua alleged that defendants'

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[5] If a court concludes plaintiffs have been deprived of a constitutional right, it then considers whether the defendant is entitled to qualified immunity. "Under section 1983, government officials are generally entitled to 'qualified immunity' which 'shields [them] from liability for civil damages if (1) the law governing the official's conduct was clearly established; and (2) under that law, the official objectively could have believed that her conduct was lawful.' (*Mabe v. San Bernardino County, Dept. of Public Social Services* (9th Cir. 2001) 237 F.3d 1101, 1106 (*Mabe*).)" (*Arce*, *supra*, 211 Cal.App.4th at p. 1473, fn. 10.) Because we conclude below that plaintiffs have not alleged a constitutional violation, we do not reach the issue of qualified immunity.

failure to protect him from his father's violence deprived him of his liberty without due process of law in violation of the Fourteenth Amendment. (*Id*. at p. 193.)

The Supreme Court affirmed the district court's grant of summary judgment for the defendants, holding that the state had no constitutional duty to protect Joshua from his father's violence. It distinguished Joshua's case from others involving individuals in state penal or psychiatric custody, noting that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs— *e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. [Citations.] The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. [Citations.] In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means." (*Id*. at pp. 199-200.)

This principle did not extend to the case before it, the court said, because Joshua was harmed in the custody of his father, not of the state. (*Id*. at p. 201.) It explained: "While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not

become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua." (*Id*. at p. 201.)

C. *The State-Created-Danger Doctrine*

Subsequent federal decisions, noting *DeShaney*'s distinction between privately-created and state-created dangers, have held that state-created dangers may give rise to a constitutional claim under section 1983 even if the injured person was not in state custody. *Kneipp v. Tedder* (3d Cir. 1996) 95 F.3d 1199 (*Kneipp*) is one such case. There, the plaintiff and her husband were walking home from a bar when they were stopped by police officers for causing a public disturbance. Plaintiff was visibly intoxicated and was unable to stand without assistance. (*Id.* at p. 1201.) Plaintiff's husband asked if he could go home to his young children, and the officers allowed him to do so. (*Id.* at p. 1202.) Sometime later, the officers sent plaintiff home alone. (*Id.* at p. 1202.) She never reached her home and was found the next day at the bottom of an embankment. As a result of her exposure to the cold, she suffered permanent brain damage. (*Id.* at p. 1203.)

Plaintiff's guardians brought a civil rights action under section 1983 against the City and several police officers, alleging that defendants affirmatively created a danger and increased the risk that plaintiff would be injured when they permitted plaintiff's husband to leave and then abandoned plaintiff. (*Id.* at p. 1203.) The district court granted the defendants' motion for summary judgment, but the Third Circuit reversed, holding that plaintiff's complaint stated a claim under the state-created danger theory. It explained: "In previous cases, we have considered the possible viability of the state-created danger theory as a mechanism for establishing a constitutional claim pursuant to 42 U.S.C. § 1983. [Citation.] Until now, we have not, however, been presented with the appropriate factual background to support a finding that state actors created a danger which deprived an individual of her Fourteenth Amendment right to substantive due process. Samantha Kneipp's case presents the right set of facts which,

if believed, would trigger the application of the state-created danger theory. . . . (*Id.* at p. 1205.)

"Here it is alleged that Officer Tedder, exercising his powers as a police officer, placed Samantha in danger of foreseeable injury when he sent her home unescorted in a visibly intoxicated state in cold weather. . . . [¶] Finally, there is sufficient evidence in the summary judgment record to show that Officer Tedder and the other police officers used their authority as police officers to create a dangerous situation or to make Samantha more vulnerable to danger had they not intervened. The conduct of the police, in allowing Joseph to go home alone and in detaining Samantha, and then sending her home unescorted in a seriously intoxicated state in cold weather, made Samantha more vulnerable to harm. It is conceivable that, but for the intervention of the police, Joseph would have continued to escort his wife back to their apartment where she would have been safe. A jury could find that Samantha was in a worse position after the police intervened than she would have been if they had not done so. As a result of the affirmative acts of the police officers, the danger or risk of injury to Samantha was greatly increased." (*Id.* at p. 1209.)

Thus, the court concluded: "Under the particular circumstances of this case, we hold that the state-created danger theory is a viable mechanism for establishing a constitutional claim under 42 U.S.C. § 1983. When viewed in the light most favorable to the legal guardians, the evidence submitted was sufficient to raise a triable issue of fact as to whether the police officers affirmatively placed Samantha in a position of danger. The district court erred, therefore, in granting summary judgment for the defendant police officers based on its finding that a constitutional violation had not occurred." (*Id.* at p. 1211.)

The Ninth Circuit reached a similar conclusion in *Munger v. City of Glasgow Police Dept.* (9th Cir. 2000) 227 F.3d 1082 (*Munger*). There, the plaintiffs' adult son (Munger) became intoxicated and belligerent at a local bar. The bartender called the police, and a police officer walked Munger out the front door of the bar. When Munger was ejected, the outside temperatures were minus 20 degrees and Munger was visibly

drunk and wearing only jeans and a t-shirt. Officers told Munger not to drive or reenter the bar, and he walked away from the bar towards an abandoned railroad yard. He was found the next morning in an alleyway, dead from hypothermia. (*Id.* at pp. 1084-1085.)

The Ninth Circuit concluded that defendants were not entitled to summary adjudication of plaintiff's section 1983 claim. The court explained: "Although the general rule is that the state is not liable for its omissions, *see DeShaney*, [*supra*,] 489 U.S. [at p. 195], there are several exceptions to this rule. Relevant here is the 'danger creation' exception to the rule of non-liability. [Citation.] This exception exists where there is 'affirmative conduct on the part of the state in placing the plaintiff in danger.' [Citation.] . . . [¶] . . . [¶]

"To determine whether the officers in this case acted reasonably, we must determine whether they did in fact affirmatively place Munger in danger. In examining whether an officer affirmatively places an individual in danger, we do not look solely to the agency of the individual, nor do we rest our opinion on what options may or may not have been available to the individual. Instead, we examine whether the officers left the person in a situation that was more dangerous than the one in which they found him. . . . [¶] . . . [¶]

"Viewing the evidence in the light most favorable to the Mungers, we hold that the district court erred in concluding that the officers did not affirmatively place Munger in a position of danger. The officers affirmatively ejected Munger from a bar late at night when the outside temperatures were subfreezing. They knew that Munger was wearing only a t-shirt and jeans, was intoxicated, was prevented by the officers from driving his truck or reentering Stan's Bar, and was walking away from the nearby open establishments. Furthermore, the fact that the officers went looking for Munger (or so claim), demonstrates that they were aware of the danger that he was in. It would seem indisputable, under this version of the facts, that the officers placed Munger 'in a more dangerous position than the one in which they found him.' [Citation.] The district court therefore erred in granting the officers qualified immunity as a matter of law." (*Munger*, *supra*, 227 F.3d at pp. 1086-1087; see also *Kennedy v. City of Ridgefield*

(9th Cir. 2006) 439 F.3d 1055, 1063 (*Kennedy*) [in informing neighbor of plaintiff's allegations of child molestation without first warning plaintiff, officers created "an actual, particularized danger [plaintiff] would not otherwise have faced"]; *Davis v. Brady* (6th Cir. 1998) 143 F.3d 1021 (*Davis*) [defendant officers were not entitled to summary judgment in a section 1983 action where they arrested plaintiff for intoxication and then released him outside city limits in a 55-mile-per-hour speed limit area with no sidewalks, where he was hit by a car and permanently injured].)

D. *Analysis*

Plaintiffs contend that the present case is analogous to *Kneipp*, *Munger*, *Kennedy*, and *Davis*, urging that "police cannot abandon an unescorted and intoxicated minor who is entitled to their protection, after undertaking to assist her, but then leaving her to fend for herself in a high crime area knowing she is lost, intoxicated and disoriented; and aware of the fact that the minor is walking away in the wrong direction. In that regard the CHP acted very much like the police in *Davis*, who watched with humor as the obviously drunk plaintiff stumbled off in traffic, into an unfamiliar neighborhood; or *Munger*, *supra*, where the police watched plaintiff stumble off into an abandoned railyard wearing only a T-shirt and jeans in sub-freezing weather."

We do not agree. The cases discussed above establish that a public entity may be liable for harm to an individual inflicted by a private third party only if the public employees "affirmatively place[d]" the individual in danger or "left the person in a situation that was more dangerous than the one in which they found him." (*Munger*, *supra*, 227 F.3d at pp. 1086-1087.) Here, no such affirmative conduct is alleged. When Sophia approached the officers at the 7-Eleven, she was already "distraught, shaken, disoriented, and intoxicated." Her physical condition and location were unchanged when she walked away from the officers a short time later; unlike the cited cases, the officers neither moved her to different location nor deprived her of the assistance of family or friends. In short, while the officers did not improve Sophia's circumstances, neither did they make them worse. Under the authority discussed above, therefore, the

officers' actions did not give rise to a Fourteenth Amendment substantive due process claim.

Plaintiffs appear to suggest that affirmative conduct by a public employee may not be necessary if the employees acted with deliberate indifference to a known or obvious danger, but we do not agree. Indeed, the Supreme Court in *DeShaney* specifically rejected such a contention in concluding that the state was not liable for failing to remove the four-year-old plaintiff from the care of his abusive father. It explained: "[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. . . . [¶] If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them. [Footnote omitted.] As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." (*DeShaney*, *supra*, 489 U.S. at pp. 195-197.)

The cases plaintiffs cite do not suggest otherwise. While these cases discuss deliberate indifference, they do so in the context of a state-created danger, considering whether a state actor was acting "deliberately and indifferently *to the danger he was creating*." (*Kennedy v. City of Ridgefield*, *supra*, 439 F.3d at p. 1065, italics added; see also *Wood v. Ostrander* (9th Cir. 1989) 879 F.2d 583, 589-590 ["Wood has raised a triable issue of fact as to whether [Officer] Ostrander's conduct 'affirmatively placed the plaintiff in a position of danger.' [Citations.] The fact that Ostrander arrested [plaintiff's boyfriend], impounded his car, and apparently stranded [plaintiff] in

a high-crime area at 2:30 a.m. distinguishes [plaintiff] from the general public and triggers a duty of the police to afford her some measure of peace and safety."].)

Plaintiffs also suggest that a higher standard applies to the officers' conduct in the present case because Sophia was a minor and, therefore, entitled to greater state protection. Again, we do not agree. While plaintiffs cite significant authority for the proposition that a state may exercise more control over minors than it may over adults, *none* of this authority suggests that the state's failure to exercise control may give rise to an actionable violation of the Fourteenth Amendment. Moreover, *DeShaney* suggests otherwise, arising, as it did, in the context of a devastating injury to a very young child over whom the state could have exercised both legal and physical custody.

The Supreme Court made clear in *DeShaney* that "the Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation." (*DeShaney*, *supra*, 489 U.S. at p. 202.) To paraphrase that case, because Officers Sadek and Gonzales did not have a constitutional duty to protect Sophia from the consequences of her intoxication and poor judgment, their failure to protect her does not constitute a violation of her due process rights.

2. *Negligence*

The third cause of action alleges negligence pursuant to Government Code sections 815.2 and 820, subdivision (a).[6] As relevant here, the negligence cause of action alleges:

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[6] Section 815.2 provides: "(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative. [¶] (b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability."

Section 820 provides: "(a) Except as otherwise provided by statute (including Section 820.2), a public employee is liable for injury caused by his act or omission to the same extent as a private person. [¶] (b) The liability of a public employee

"55. [Gonzales and Sadek] affirmatively assumed the mandatory duty to protect/take custody of Sophia once they undertook to assist her in obtaining a ride home from the cab driver.

"56. [Gonzales and Sadek], by their utter failure to exercise even a modicum of professional judgment and determine that Sophia was a minor, which determination in turn would have required the officers to take Sophia into custody, violated Sophia's right to be taken into the safe custody of the police until such time as she could be returned to her parent's custody. By undertaking to assist her, but by failing to follow through, a special relationship was formed with the minor Sophia, thus bringing Sophia out of the general population and requiring that [Gonzales and Sadek] render reasonable aid and protection to her.

"57. When [Gonzales and Sadek] found Sophia, it was well past curfew; the area near the 7-Eleven was well lit; she asked uniformed, on-duty police officers to help her get home safely; the officers refused to take her the few blocks home, made a half-hearted effort to enlist a cab driver to take her, despite her lack of funds, and just let her, a lost, disoriented, obviously distressed and possibly ill minor, run off into the night in a dark high-crime area. In doing so, [Gonzales and Sadek] affirmatively created a danger to Sophia that she otherwise would not have faced, i.e., that she would be turned away from an area she reasonably believed to be a safe haven into a high crime area at night."

Although the second amended complaint alleges negligence generally, the sole negligence theory plaintiffs pursue on appeal is negligence per se.[7] Specifically,

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established by this part (commencing with Section 814) is subject to any defenses that would be available to the public employee if he were a private person."

[7] Because the appellants' opening brief addresses only negligence per se, any other negligence theory is forfeited. (E.g., *Neighbors For Fair Planning v. City & County of San Francisco* (2013) 217 Cal.App.4th 540, 554.) However, we observe that a wealth of case law supports our conclusion that defendants did not owe Sophia a duty to return her home safely. (See, e.g., *Williams v. State of California* (1983) 34 Cal.3d 18, 24-25 ["In spite of the fact that our tax dollars support police functions, it is settled that the

plaintiffs urge that the officers and State are liable for negligence per se because they violated Penal Code section 647, subdivision (g), which provides:

"When a person has violated subdivision (f),[8] a peace officer, if he or she is reasonably able to do so, shall place the person, or cause him or her to be placed, in civil protective custody. The person shall be taken to a facility, designated pursuant to Section 5170 of the Welfare and Institutions Code, for the 72-hour treatment and evaluation of inebriates."

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rules concerning the duty—or lack thereof—to come to the aid of another are applicable to law enforcement personnel in carrying out routine traffic investigations. Thus, the state highway patrol has the right, but not the duty, to investigate accidents [citations] or to come to the aid of stranded motorists [citations]. [¶] . . . [¶] Recovery has been denied . . . for injuries caused by the failure of police personnel to respond to requests for assistance, the failure to investigate properly, or the failure to investigate at all, where the police had not induced reliance on a promise, express or implied, that they would provide protection."]; *Greyhound Lines, Inc. v. Department of California Highway Patrol* (2013) 213 Cal.App.4th 1129, 1137 ["Greyhound argues that a special relationship was created between CHP and the bus passengers when the CHP operators assured the 911 callers that emergency assistance was on the way and then failed to properly input the dispatch codes. . . . [¶] Greyhound's argument fails for several reasons. First, Greyhound's theory expands the special relationship exception whereas California courts have made it plain that the special relationship rule is not expansive but, rather, is narrow and is reserved for a very limited class of unusual cases. [Citation.] [¶] More importantly, CHP did not either induce the bus passengers to rely on CHP to their detriment or increase their risk of harm. The nonfeasance of the CHP 911 operators, i.e., their failure to include the lane blockage information in the dispatch, left the bus passengers in exactly the same position they already occupied. Without detrimental reliance by, or an increase in the risk of harm to, the bus passengers, there is no special relationship."]; *Minch v. California Highway Patrol* (2006) 140 Cal.App.4th 895, 898 [CHP did not owe a duty of care to tow truck operator because they did not "create or increase the risk of harm that led to plaintiff's injuries, and the circumstances did not establish a special relationship between the officers and plaintiff such that the officers would have had a duty to protect him."].)

[8] A person violates subdivision (f) if he or she, among other things, "is found in any public place under the influence of intoxicating liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor, drug, controlled substance, or toluene, in a condition that he or she is unable to exercise care for his or her own safety or the safety of others."

Like the trial court, we reject plaintiffs' contention that the facts alleged in the second amended complaint give rise to a cause of action for negligence per se. The court considered an analogous claim in *Stout v. City of Porterville* (1983) 148 Cal.App.3d 937. There, plaintiff Stout was stopped by a police officer while walking on a main thoroughfare at 1:30 a.m. The officer asked Stout why he was in the area and about his sobriety, and then allowed him to leave. Stout alleged that when he was questioned by the officer, he was intoxicated and unable to care for himself. He subsequently was struck by a vehicle driven by a third party and injured. (*Id*. at p. 940.)

Stout sued the city of Porterville, alleging that the city and officer were liable for his injuries because the officer failed to arrest him or take him to a facility described by Penal Code section 647, subdivision (ff) [now, subdivision (g)]. The city demurred, and the trial court sustained the demurrer without leave to amend. (*Id*. at pp. 940-941.) The Court of Appeal affirmed. It explained that subdivision (ff) did not require the police to take a "public inebriate" into custody; instead, it simply gave officers the option to offer treatment to *an arrestee*, rather than to prosecute him. Moreover, if section 647 created a mandatory duty of some kind, that duty was solely "to . . . make a reasonable decision concerning the appropriate disposition of a lawfully arrested drunk." (*Id*. at p. 947.) The court explained: "Appellants suggest that the 'mandate' refers to taking the inebriate into custody and transporting him to a treatment facility. To adopt this suggestion would lead to absurd results. For example, in those counties with no treatment facility the police could leave the drunk on the street with no cause of action, while in other counties with such facilities a similarly situated drunk would have a cause of action. One could expect the purpose of subdivision (ff) would be quickly thwarted by a rush of counties withdrawing from participation in this therapeutic model." (*Ibid.*) The court concluded: "The purpose of Penal Code section 647, subdivision (ff), is not to create a new cause of action in the inebriate." (*Ibid*.)

Courts have similarly concluded in other cases, holding that police officers do not have a duty, on which a negligence action may be premised, to take an inebriated person into civil or criminal custody. (E.g., *City of Sunnyvale v. Superior Court* (1988)

203 Cal.App.3d 839, 844-845 [officers stopped vehicle in which the plaintiff, a minor, was a passenger, cited the driver for driving at an unsafe speed and with open containers of alcohol in the vehicle, and then released the driver, who subsequently crashed the vehicle; *held*: "[T]he police had no duty to take charge of the situation, although fraught with danger, and to persuade the minor passengers to make other transportation arrangements. . . . Their failure to advise [plaintiff] to leave the vehicle is not a breach of any affirmative duty which they owed her."]; *Jackson v. Clements* (1983) 146 Cal.App.3d 983, 987 [officers investigated a party where alcoholic beverages were being served to minors, but failed to stop the consumption of alcohol or to stop the minors from driving under the influence; *held*: officers' actions did not breach a duty to the persons in the vehicle with which the minors' vehicle collided; "plaintiffs cite no authority, nor has any been found, to support their claim that a police officer's observation of a citizen's conduct which might foreseeably create a risk of harm to others, or the officer's temporary detention of the citizen, creates a special relationship which imposes on the officer a duty to control the citizen's subsequent behavior."].)

The present case is indistinguishable from *Stout*, *City of Sunnyvale*, and *Jackson*. As in *Stout*, plaintiffs do not plead that the officers were "reasonably able" to place Sophia in protective custody in an alcohol treatment facility; indeed, the complaint is completely silent as to the availability of such facilities. Plaintiffs do not allege, for example, that such facilities existed within a reasonable distance from the area where Sophia approached them, that such facilities accepted minors, or that there were available beds the night of Sophia's death. And, as in *City of Sunnyvale* and *Jackson*, although the officers allegedly were aware of the plaintiff's intoxication, they "did not create the peril to [plaintiff], they did not voluntarily assume a duty to protect her, they made no promise or statement to induce her reliance, nor did they alter the risk to her that would have otherwise existed." (*Jackson*, *supra*, 146 Cal.App.3d at p. 988.) Under these circumstances, they had no special relationship with Sophia that would create a duty of affirmative action or, under present circumstances, liability for her death.

Plaintiffs suggest that the present case is distinguishable from those discussed above because Sophia was a minor and thus was "deemed by the State to be incapable of self-care." We do not agree. Although the state assumes heightened responsibilities to minors in some circumstances, *City of Sunnyvale* and *Jackson* stand for the proposition that minors have no greater right than adults to sue public officials for failing to protect them from the consequences of their own intoxication. (See *City of Sunnyvale*, *supra*, 203 Cal.App.3d 839; *Jackson*, *supra*, 146 Cal.App.3d 983.)[9]

For the reasons discussed above, therefore, plaintiffs failed to properly plead a cause of action for negligence, and the trial court did not err in sustaining defendants' demurrer to the third cause of action. Because plaintiffs have not demonstrated that they could cure the defects in the second amended complaint if given an opportunity to do so, the trial court did not abuse its discretion in denying leave to amend.

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[9] Having so concluded, we need not consider the issue of statutory immunity. "In *Davidson v. City of Westminster* . . . , the Supreme Court stated that 'the question of the applicability of a statutory immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity. . . . [¶] "Absence of duty [rather than statutory immunity] is a particularly useful and conceptually more satisfactory rationale where, absent any 'special relationship' between the officers and the plaintiff, the alleged tort consists merely in police nonfeasance." ' (32 Cal.3d 197, 202; accord, *Williams v. State of California* (1983) 34 Cal.3d 18, 22-23.)" (*Jackson v. Clements*, *supra*, 146 Cal.App.3d at p. 986.)

DISPOSITION

The order sustaining defendants' demurrer and dismissing Sadek, Gonzalez, and the State of California is affirmed. Defendants shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, J.*

I CONCUR:

ALDRICH, J.

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

KLEIN, P.J.

I concur. Given the present state of the law, the decedent's parents cannot state a cause of action in tort against the two California Highway Patrol (CHP) officers and the State of California. Nonetheless, this court's affirmance should not be construed as condoning the conduct of the CHP officers in this fact situation. A modicum of common sense could have prevented this tragedy. Taking as true the allegations of the complaint, reasonable law enforcement officers would have detained this obviously intoxicated juvenile, placed her in the back seat of their vehicle, and taken her into civil protective custody. Instead, they did nothing. As a result, a young life met a tragic ending and a family is devastated.

Hopefully, one day the Legislature will see fit to heighten the duty of law enforcement in such circumstances. Until then, one can only rely on the conscience of individual officers as they perform their duties.

KLEIN, P.J.