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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

AAMES-WARNER CORPORATION, et al., Defendants and Appellants, v. JUDITH FLOWERS, Plaintiff and Respondent.	B266962 (Los Angeles County Super. Ct. No. BC505274)

APPEAL from an order of the Superior Court of Los Angeles County. Ralph Dau, Judge. Affirmed.

Belofsky & Hanker and David Belofsky for Defendants and Appellants.

Driskell & Gordon and Robert L. Driskell for Plaintiff and Respondent.

Judith Flowers, a disabled individual, was staying at the Azul Inn West Los Angeles when she fell from a step and injured herself. She sued the Azul Inn and its management company, Aames-Warner Corporation, for premises liability and violation of the Unruh Civil Rights Act (the Unruh Act, Civil Code, § 51) and the American with Disabilities Act (ADA, 42 U.S.C. § 12101 et seq.). The jury returned a verdict for the defendants; however, the trial court entered judgment notwithstanding the verdict (JNOV). It ordered a new trial on the issue of damages and the defense of comparative negligence.

Defendants appeal, arguing the trial court erred in granting JNOV because (1) the ADA and Unruh Act do not require "the removal of any and all architectural barriers from places of public accommodation," and (2) there was substantial evidence supporting the verdict as to the lack of causation. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On the night of April 21, 2011, Flowers fell from a step while staying at the Azul Inn. In April 2013, she filed an action against appellants for premises liability and violation of the Unruh Act and the ADA based on allegations the step was too high, lacked a handrail, and poorly lighted. The prayer of the complaint sought compensatory damages.

At trial, Flowers testified that she suffers from multiple sclerosis and, when she is not using a wheelchair, "gets around" with the assistance of a quad cane. She regularly participates in "a study for a medication for multiple sclerosis" run by the Veterans Administration (V.A.). The V.A. has a contract with the Azul Inn to provide rooms for patients at a favorable rate.

On April 21, 2011, Flowers checked in to the Azul Inn. The Azul Inn had two rooms that met all requirements under the ADA for disabled persons using wheelchairs. Flowers had previously stayed in these rooms when she was using a wheelchair, however, she did not request this type of room that night because she only was using a cane.

Flowers accessed her room by an outdoor walkway that ended just beyond her room. Along the walkway was a nine-inch high step—a "monster step up"—which Flowers navigated with difficulty by lifting up her "trunk" and cane onto the step and "then using those two things to balance."

President Obama's motorcade was scheduled to pass by the Azul Inn that evening. At approximately 10:00 p.m., Flowers saw red and blue lights flashing outside her window and "headed out the door as quickly as [she] could to try to get to the sidewalk to see the motorcade . . . ." She was not wearing her contact lenses and was barefoot at the time. She could not remember "for sure" whether she took her cane with her.

After she exited her door, she took a few steps and then her "last step hit nothing" and she fell after missing the step she had climbed earlier that day. "It was very dark" and she did not see the step when she fell. She was "watching where [she] was going ahead of [her] toward the sidewalk" and did not "look[] down and see[] where the step was." Flowers's expert testified that the step was an "unsafe condition"—it was too high and difficult to see.

One of the owners of the Azul Inn testified for the defense that several lights illuminated the area where Flowers fell. The front desk clerk also testified that the location where Flowers fell was "well lit." Appellants' expert also testified that the step was

illuminated by several nearby lights. He further testified that the local building code did not require a handrail to be installed for a single step, and did not recommend any particular height for the step.

The jury rendered a verdict for appellants, finding the Azul Inn was not negligent in maintaining the property and did not deny full and equal accommodations to Flowers. Judgment was entered for appellants on June 5, 2015. On June 16, 2015, Flowers moved for JNOV, arguing that appellants were liable for negligence per se and disability discrimination based on their failure to remove an "architectural barrier" under state and federal law.

The trial court granted JNOV as to liability and ordered a new trial as to damages and the defense of comparative negligence only.[1] The court held as follows: "[A]rchitectural barriers must be removed in existing facilities 'where such removal is readily achievable.' . . . Evidence at trial showed that the step could have been replaced with a ramp and handrail for around $3,000. The removal of that architectural barrier was, thus, readily achievable. . . . [¶] Had the jury properly applied [the jury instructions] it would have found defendant negligent. On this point the evidence is not in dispute. . . . [E]vidence that the 9-inch step was a substantial factor in causing plaintiff's injuries

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[1] Following a defense verdict, the trial court may grant JNOV in the plaintiff's favor on the issue of liability and order a new trial on the issue of damages. (See *Gordon v. Strawther Enterprises, Inc.* (1969) 273 Cal.App.2d 504 [holding that JNOV should have been granted for the plaintiff because the defendant was clearly negligent and there was no conflicting evidence as to whether its negligence caused the accident; the action was remanded for the jury to determine damages].)

was undisputed. Defendant contended at the hearing that plaintiff was comparatively negligent, but it conceded that this is a defense that might reduce plaintiff's damages but would not bar a finding that defendant was negligent. . . . [¶] The same evidence that required a finding that defendant was negligent required a finding that defendant denied full and equal accommodations to plaintiff." Appellants timely appealed.

DISCUSSION

A. JNOV and Standard of Review

"It is settled that a motion for judgment notwithstanding the verdict should be granted only if a motion for directed verdict should have been granted [citation] and that the cardinal requirement for the granting of either motion is the absence of any substantial conflict in the evidence. [Citation.] Stated differently, a directed verdict or judgment notwithstanding the verdict may be sustained only when it can be said as a matter of law that no other reasonable conclusion is legally deducible from the evidence and that any other holding would be so lacking in evidentiary support that the reviewing court would be compelled to reverse it or the trial court would be required to set it aside as a matter of law. [Citation.] The court is not authorized to determine the weight of the evidence or the credibility of witnesses. [Citation.]" (*Spillman v. San Francisco* (1967) 252 Cal.App.2d 782, 786.)

A trial court order granting JNOV is not appealable; the right to appeal lies from the subsequent judgment. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285.) However, where, as here, the trial court grants a partial JNOV and a partial new trial as to the question of damages, the partial JNOV may be reviewed on appeal from the order granting a par-

tial new trial. (*Beavers v. Allstate Ins. Co.* (1990) 225 Cal.App.3d 310, 330.)

On appeal from a JNOV, we review the evidence in the light most favorable to the verdict. (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 769.) We reverse only if substantial evidence supported the jury verdict. (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 546, overruled on another ground in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580 ["In other words, we apply the substantial evidence test to the jury verdict, ignoring the judgment."].) However, we review de novo any issues on appeal that deal solely with statutory interpretation. (*Trujillo*, *supra*, 63 Cal.App.4th at p. 284.)

B. The ADA Requires the Removal of All Architectural Barriers Where Such Removal is Readily Achievable

Title III of the ADA "states a 'general rule' of nondiscrimination in public accommodations: 'No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.' (42 U.S.C. § 12182(a).) Supplementing this general rule are specific prohibitions. [Citations.] Among its specific prohibitions, 'Title III of the ADA prohibits discrimination on the basis of disability . . . both with respect to the accessibility of their physical facilities and with respect to their policies and practices.' [Citation.]

"Congress adopted two distinct standards for regulating building accessibility: one to apply to facilities existing before January 26, 1993, and the other to apply to facilities newly constructed or altered on or after January 26, 1993. [Citations.] . . .

"Under the ADA, 'existing facilities' must remove architectural barriers 'where such removal is readily achievable,' meaning 'easily accomplishable and able to be carried out without much difficulty or expense.' (42 U.S.C. §§ 12182(b)(2)(A)(iv), 12181(9).)

¶ . . . ¶

"A violation of the ADA also constitutes a violation of [] the [Unruh] Act . . . . 'Thus, a plaintiff whose rights are violated under the ADA may now seek damages under the California statutes[,]' and is not limited to injunctive relief as plaintiffs are under federal law. [Citation.] The expansion of California law to include ADA violations had other effects. For example, title 24 [of the California regulatory code] does not require facilities that predate its enactment to comply with its regulations unless and until the facility is altered.[2] [Citation.] In contrast, '[t]he ADA requires existing facilities to remove barriers to access so long as removal is readily achievable, regardless of whether the facility has been altered.' [Citation.] By amending the Civil Code to provide that a violation of the ADA is also a violation of the [Unruh] Act . . . the Legislature authorized the filing of civil actions under state law to enforce the federal requirement that architectural barriers be removed where it is readily achievable to do so, and that alternative means of access be provided where physical access is not readily achievable." (*Californians for Disability Rights*

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2 Title 24 of the California regulatory code sets forth the standards governing the physical accessibility of public accommodations. (*Moeller v. Taco Bell Corp.* (N.D. Cal. 2004) 220 F.R.D. 604, 607.)

v. Mervyn's LLC (2008) 165 Cal.App.4th 571, 583–586 (*Mervyn's*).)

Here, appellants contend the trial court erred in concluding the ADA (and by extension the Unruh Act) requires public accommodations to remove architectural barriers when readily achievable. They argue that the ADA only requires public accommodations to ensure that certain areas be "handicap-accessible." Based on this interpretation, they contend the Azul Inn was in compliance with the ADA because it had two rooms that were handicap-accessible.

Appellants do not cite to any case law in support of their interpretation of the ADA.[3] Rather, they support their interpretation by generally arguing that the ADA's removal of architectural barriers requirement should be "read and interpreted together" with the requirement that public accommodations ensure "full and equal access and enjoyment" of their facilities to the disabled.

It is unclear to us how the ADA's general mandate that public accommodations provide full and equal access to the disabled (42 U.S.C. § 12182(a)) limits the requirement that architectural barriers be removed when readily achievable (42 U.S.C. § 12182(b)(2)(A)(iv)). Under well-established principles of statutory interpretation, the more specific provision within a statute takes precedence over the more general one. (*Salazar v. Eastin*

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[3] Appellants do argue that the trial court "misapplied" *Smith v. Wal-Mart Stores, Inc.* (6th Cir. 1999) 167 F.3d 286 (*Smith*) which they claim did *not* hold that the entire facility at issue had to be in compliance with the ADA. Appellants do not argue that the *Smith* court affirmatively held that architectural barriers only had to be removed from certain areas of the store, and we conclude that the *Smith* court did not address this point.

(1995) 9 Cal.4th 836, 857.) Here, 42 U.S.C. section 12182 sets forth the general mandate that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the [] services . . . of any place of public accommodation," and then specifically defines discrimination as, *inter alia*, "a failure to remove architectural barriers . . . where such removal is readily achievable." (42 U.S.C. § 12182(a), (b)(2)(A)(iv).) Accordingly, the specific rule defining discrimination as involving architectural barriers takes precedence over the general rule of nondiscrimination in public accommodations. Moreover, these two provisions are simply not in conflict, nor does the ADA's general statement of purpose contain any language that could be interpreted as particularly limiting the architectural barriers provision.

In line with this reasoning, the U.S. Supreme Court has stated that the ADA requires "barrier removal if it is 'readily achievable' " without restriction to certain areas within public accommodations. (*Spector v. Norwegian Cruise Line Ltd.* (2005) 545 U.S. 119, 135; see also *Jankey v. Lee* (2012) 55 Cal.4th 1038, 1044 ["[b]usinesses must ' "remove architectural barriers . . . in existing facilities . . . where such removal is readily achievable." ' [Citation.]"]; *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 691 ["the ADA prohibits, among other things, the 'failure to remove architectural barriers . . . in existing facilities . . . where such removal is readily achievable' [citation]"]; *Madden v. Del Taco, Inc.* (2007) 150 Cal.App.4th 294, 302.)

On these grounds, we decline to hold that the ADA limits the removal of architectural barriers to only certain areas within public accommodations.

C. Appellants Have Not Shown the Trial Court Erred in Granting JNOV on the Issue of Causation

Appellants contend the trial court abused its discretion by depriving them of their right to a jury trial on the issue of whether their negligence or denial of full and equal accommodation were substantial factors in causing harm to Flowers. Specifically, appellants argue that Flowers presented no evidence "a ramp in front of her room would have prevented the fall." Furthermore, given Flowers's failure to wear her contacts, use her cane, put on shoes, and look where she was walking, hurried exit from her room, "she would have fallen no matter the condition of the premises."[4]

The trial court found the evidence was undisputed that the excessive height of the step and the lack of a handrail constituted an architectural barrier the removal of which was readily achievable. Appellants do not challenge that ruling. The issue before us is whether, viewing the evidence in the light most favorable to the jury's verdict, there is substantial evidence supporting the verdict as to a finding of no causation — that appellants' failure to remove the architectural barrier did not cause Flowers's injury.

" 'A defendant's negligent conduct may combine with another factor to cause harm; if a defendant's negligence was a sub-

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[4] Appellants characterize the evidence as showing that Flowers did not use her cane. Flowers testified that she always used her cane outdoors but she could not remember "for sure" whether she was using her cane when she fell. We do not agree with appellants' conclusion that the evidence, viewed in the light most favorable to the verdict, shows that Flowers was not using her cane when she fell. However, we accept this characterization of the evidence for purposes of our analysis.

stantial factor in causing the plaintiff's harm, then the defendant is responsible for the harm; a defendant cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing the plaintiff's harm; but conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.' [Citation.]" (*Huang v. The Bicycle Casino, Inc.* (2016) 4 Cal.App.5th 329, 348 (*Huang*).) "[A] force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 968-969.)

It is appellants' burden on appeal to affirmatively demonstrate error. (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58.) Thus, an appellant challenging a JNOV bears the burden of setting forth the material evidence establishing trial court error. (See *In re Marriage of Fink* (1979) 25 Cal.3d 877, 888 ["It is neither practical nor appropriate for us to comb the record on [the appellant's] behalf."].)

Here, appellants have not met their burden of showing the trial court erred in granting JNOV on the issue of causation. They first argue there was a "complete lack of causal evidence" because Flowers's expert did not testify "that a ramp in front of her room would have prevented the fall." This misstates the issue somewhat which is, whether appellants' failure to remediate the lack of a handrail and excessive height of the step caused Flowers's injury. Appellants do not address any of the undisputed evidence in the record suggesting that the dangerous condition posed by the step was a substantial factor in causing Flowers's injury, for example, that she had difficulty navigating the step

due to its excessive height, and had to lean on both her cane and another object in order to maintain her balance while doing so.

Appellants do point to portions of the record showing that Flowers failed to act with due care when she exited her room the night of the accident — she did not use her cane, she exited hurriedly, she did not look where she was walking, and she was not wearing her contacts. However, as stated above, "a defendant cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing the plaintiff's harm." (*Huang*, *supra*, 4 Cal.App.5th at p. 348.) Thus, that Flowers's own negligence may have been a substantial factor in causing her fall does not establish there were no other substantial factors causing her injury. Whether Flowers is guilty of contributory negligence is not before us now, but, as the trial court ordered, will be an issue for the next phase of the trial.

On these grounds, we conclude appellants have not met their burden of affirmatively demonstrating the trial court erred in granting JNOV as to causation.

DISPOSITION

The order is affirmed. Respondent shall recover her costs on appeal.

RUBIN, J.

I CONCUR:

FLIER, J.

BIGELOW, P.J. Dissenting:

I respectfully dissent in part.

I read the trial court's judgment notwithstanding the verdict (JNOV) order as having three main aspects. First, the evidence "required" the jury to find that the Azul Inn (the Inn) denied "full and equal accommodations" to Flowers within the meaning of the American Disability Act (ADA, 42 U.S.C. § 12101 et seq.). Specifically, that the Inn failed to remove an architectural barrier when "readily achievable." Second, because the Inn violated the ADA, the jury was "required" to find it was negligent. Finally, the evidence could not, as a matter of law, support a jury finding that there was no causation as between the Inn's denial of accommodations or its negligence and Flowers's injury. Based on these rulings, the court ordered a new trial limited to the issues of damages and the defense of comparative negligence. My colleagues affirm the court's order in its entirety. I would not.

I would not affirm the trial court's JNOV ruling that the evidence required the jury to find that the Inn denied Flowers full and equal accommodations to its facilities within the meaning of the ADA. Here, I accept the majority's interpretive conclusion that the ADA requires public accommodations to remove architectural barriers "when readily achievable,"[1] but do not take the next step and find that this required the jury to rule in favor of Flowers on her ADA claim. Flowers, of course, had the burden

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[1] The instructions told the jury: "The term 'readily achievable' means easily accomplishable and able to be carried out without much difficulty or expense."

of proof to persuade the jury to find that the Inn violated the ADA by failing to remove an architectural barrier, the nine-inch step, when removal was readily achievable. In my view, a reasonable jury could have found Flowers' evidence wanting.

Flowers presented an expert on the ADA, David Brotman, who testified about the requirements of the law. During his testimony, Brotman explained that the ADA required a public accommodation to remove architectural barriers when readily achievable. Further, I acknowledge that Brotman offered a general opinion that the nine-inch step could have been removed and replaced with a ramp for "somewhere around $3,000." But this is his full testimony:

> "I'm not sure that it was physically possible to create an accessible ramp at that location . . . . [¶] Sometimes we do ramps that are switch backs, in other words, the ramp instead of coming straight out you get to the top of the ramp, you make a right turn and you come down a little bit and then you make a U-turn and then come back down because you need the length to make up that height.
>
> "And so, it would have been possible, maybe, to do that but it would have involved a lot of demolition. I don't know, it could have --- you know, it would have cost far in excess of what we are talking about in the front area.
>
> "I'm not a contractor, although I get involved in pricing and in challenging pricing, but I'm not sure I'm the best one to give you the actual numbers involved other than order of magnitude this was proba-

> bly two to three times as much as a ramp in the front."

After giving the testimony noted above, Brotman offered his opinion that changing out the step in the Inn was "readily achievable."

I would not find that Brotman's testimony required the jury to find as a matter of fact that the Inn failed to remove the nine-inch step "when removal was readily achievable." If the jury had ruled in favor of Flowers, I would view Brotman's testimony as sufficiently substantial to support such a finding. But, given a jury ruling in favor of the Inn, I would not find the ruling was "required" to be different. Brotman's testimony was sufficiently evasive and without foundation to allow a reasonable jury to reject it.

Finally, assuming the court correctly granted JNOV as to the issue of whether the Inn violated the ADA, I would nevertheless depart from the majority opinion on the causation issue for a number of reasons. First, I am not persuaded that the trial court should have addressed the issue of causation in the context of Flowers' JNOV because there simply *was no jury verdict* on the issue of causation. The jury did not reach the question of causation on the special verdict form as to Flowers' negligence claim because the jury found the Inn had not been negligent. Similarly, the jury did not reach the issue of causation on the special verdict form as to Flower's ADA claim because the jury found that the Inn did not deny Flowers full and equal accommodation. I have reviewed Flowers' JNOV motion, and do not see that it sought judgment as to the issue of causation. On the whole, I am puzzled as to how the trial court ruled in favor of Flowers on the is-

sue of causation "notwithstanding" the jury's verdict, when there never was such a verdict.

Second, even assuming causation is properly addressed in the JNOV context presented, I know of no law that would have precluded the jury from finding there was no causation between any act and or omission on the Inn's part on the one hand, and Flowers' injury on the other hand. Stated another way, I know of no law that would have precluded the jury from finding that Flowers' conduct was the "sole proximate cause" of her injury. (See *Elder v. Pacific Tel. & Tel. Co.* (1977) 66 Cal.App.3d 650, 657 [the rule of comparative negligence does not mean a plaintiff is relieved from his or her burden to prove that a defendant's acts caused plaintiff's injuries].) If I may offer an extreme example: suppose the Inn violated the ADA by maintaining a nine-inch step in its lobby, but Flowers fell in a completely different part of the premises. It would follow that a jury could find that there was no causal relationship between the Inn's "wrong," and Flowers' fall. Likewise, here, I would not foreclose the reasonableness of a jury's finding that there was no causation based on a jury's predicate finding that Flowers would have fallen on her own, no matter how the Inn's pathway was configured.

BIGELOW, P.J.