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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MAGDALENA LUNA et al., Plaintiffs and Appellants, v. CRAVEN THIS, INC., Defendant and Respondent.	B237106 (Los Angeles County Super. Ct. No. GC045579)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jan Pluim, Judge. Reversed and remanded.

Law Offices of Robert J. Scuderi and Robert J. Scuderi for Plaintiffs and Appellants Magdalena Luna and Jaime Luna.

Manning & Kass, Ellrod, Ramirez, Trester and Eugene J. Egan and David J. Wilson for Defendant and Respondent.

Magdalena Luna and her husband, Jaime Luna, appeal from the judgment entered after the trial court granted summary judgment in favor of Craven This, Inc. (Craven), doing business as Brown's Jewelry & Loan, in this premises liability action. The Lunas contend triable issues of material fact exist as to whether Magdalena's[1] slip-and-fall accident was caused by an unreasonably dangerous condition, a defective floor mat, at Craven's pawn shop. We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Magdalena's Accident*

On May 18, 2009 Jaime and Magdalena went to a pawn shop owned by Craven. As her husband held the front door to the premises open for her to walk inside, Magdalena took four or five steps into the shop, tripped and fell, sustaining injuries. Jaime, who was still holding the door for his wife, rushed to her aid.

2. *The Lunas' Lawsuit and Craven's Summary Judgment Motion*

Magdalena sued Craven for negligence in a form complaint alleging only that she had tripped and fallen while on Craven's premises. In the same action Jaime asserted claims for loss of consortium and negligent infliction of emotional distress.

Craven moved for summary judgment, arguing the Lunas could not establish causation. In support of its motion Craven cited the Lunas' deposition testimony in which both Jaime and Magdalena testified they did not know what had caused Magdalena to stumble and fall.[2] In addition, because in interrogatory responses Magdalena asserted she had tripped on one of two rubber-backed carpeted floor mats placed at the entrance to the store, Craven also supplied several declarations directed to the quality of those mats:

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[1] Because the Lunas share a surname, we refer to them individually by their first names for convenience and clarity. (See *Jones v. Conoco Phillips Co.* (2011) 198 Cal.App.4th 1187, 1191, fn. 1; *Cruz v. Superior Court* (2004) 120 Cal.App.4th 175, 188, fn. 13.)

[2] Magdalena testified at her deposition she "did not know how" she fell and, apart from walking into the store and falling, did not remember anything else. Jaime testified he did not see anything wrong with the floor mats placed at the entrance of the store that could have caused his wife's fall and did not know what had caused her fall.

- Lorraine Wild, a sales clerk at the store, testified both floor mats placed at the entrance of the store were in good condition the day of the accident. Wild explained she cleaned the floor mats every week and would have noticed if they had been worn or posed a safety hazard.
- Kenneth Staehling, a store clerk, similarly testified the mats, purchased in 2007 after the store was remodeled, were in good condition on the day of the incident. He also testified the mats at issue were less than one-fourth inch thick and did not create any significant change in elevation that could have been dangerous to pedestrians.
- Store clerk Joe Ortega, who was facing Magdalena when she entered the store, testified Magdalena stumbled and fell just after she crossed the threshold and before she had even stepped on the mat. Ortega also testified there had been no other, similar accidents at the store involving floor mats.

Craven also argued any defect in the mats themselves was nonactionable as a matter of law under the trivial-defect doctrine; and, in any event, it had had no notice of any dangerous condition because no prior similar accidents had occurred on the premises.

3. *The Lunas' Opposition to Craven's Summary Judgment Motion*

The Lunas opposed the summary judgment motion. They argued the floor mats were thin and worn, creating a hazardous condition, and the question whether the mats had caused her injury was a factual determination for the jury to make. The Lunas included with their opposition papers photographs taken the day of the accident. The photographs depict Magdalena lying sideways on the mat as paramedics attend to her; the far left corner of the mat (the corner farthest from the front door) was flipped up, revealing the mat's rubber backing.

Charles E. Turnbow, a board certified forensic safety engineer specializing in accident prevention and the author of a book on slip-and-fall accidents, testified the floor mats presented a "significant tripping hazard." Turnbow explained his opinion was based on his examination of the photographs of the mats taken the day of the incident. The part of the mat that was flipped up in the photograph revealed the mats were likely residential

grade rather than commercial grade and not suited for use in a commercial building. In addition, the mats, approximately two years old, were worn from use as evidenced by frayed edges; and, because they were not commercial grade, the mats were not self-leveling or anti-buckling. Turnbow also opined the defects he described in the mats caused Magdalena's fall.

Craven objected to Turnbow's declaration primarily on grounds it lacked foundation and personal knowledge: Regardless of his expertise as a safety engineer, Turnbow did not specify he had had any expertise in floor mats; in any event, Turnbow had not examined the mats themselves but only photographs of them. The trial court sustained these objections and excluded the declaration.

4. *The Trial Court's Order*

The trial court granted Craven's summary judgment motion, concluding the Lunas lacked any evidence the floor mats had caused Magdalena's fall and thus the Lunas could not prove causation. The court also ruled any defect in the mats was "trivial as a matter of law."

DISCUSSION

1. *Standard of Review*

A motion for summary judgment is properly granted only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.)

When a defendant moves for summary judgment directed to one of the elements of the plaintiff's cause of action, the defendant may, but need not, present evidence that conclusively negates the element. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 853.) Alternatively, the defendant may present evidence to "show[] that one or more elements of the cause of action . . . cannot be established" by the plaintiff. (Code of Civ. Proc., § 437c, subd. (p)(2); see *Aguilar*, at p. 853.) A defendant "has shown that the

plaintiff cannot establish at least one element of the cause of action by showing that the plaintiff does not possess, and cannot reasonably obtain, needed evidence: The defendant must show that the plaintiff *does not possess* needed evidence, because otherwise the plaintiff might be able to establish the elements of the cause of action; the defendant must also show that the plaintiff *cannot reasonably obtain* needed evidence, because the plaintiff must be allowed a reasonable opportunity to oppose the motion." (*Aguilar*, at p. 854; see *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1002-1003 ["[w]hen the defendant moves for summary judgment in those circumstances in which the plaintiff would have the burden of proof by a preponderance of the evidence, the defendant must present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true [citation], or the defendant must establish that an element of the claim cannot be established, by presenting evidence that the plaintiff 'does not possess and cannot reasonably obtain, needed evidence'"].)

Only after the defendant's initial burden has been met does the burden shift to the plaintiff to demonstrate, by reference to specific facts not just allegations in the pleadings, there is a triable issue of material fact as to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 849.)

On review of an order granting summary judgment, we view the evidence in the light most favorable to the opposing party, liberally construing the opposing party's evidence and strictly scrutinizing the moving party's. (*O'Riordan v. Federal Kemper Life Assurance Co.* (2005) 36 Cal.4th 281, 284.)

2. *Summary Judgment Was Improper*

a. *The trial court erred in excluding Turnbow's declaration, which raised a triable issue of material fact as to causation*

"It is well established in California that although a store owner is not an insurer of the safety of its patrons, the owner does owe them a duty to exercise reasonable care in keeping the premises reasonably safe. [Citation.] In order to establish liability on a negligence theory, a plaintiff must prove duty, breach, causation and damages. (*Ortega*

v. Kmart Corp. (2001) 26 Cal.4th 1200, 1205 (*Ortega*).) "A plaintiff meets the causation element by showing that (1) the defendant's breach of its duty to exercise ordinary care was a substantial factor in bringing about plaintiff's harm, and (2) there is no rule of law relieving the defendant of liability." (*Ibid.*)

Here, Craven satisfied its initial burden on summary judgment by showing the Lunas did not know what had caused Magdalena to fall and did not have any evidence she had tripped on the floor mat rather than on something else, including her own body. In response, the Lunas submitted Turnbow's declaration concerning the hazardous nature of the floor mats and his opinion that the condition of the mats had caused her fall. Had the declaration been considered by the trial court, there is no question it created a triable issue of material fact as to causation. However, the trial court sustained Craven's objections and excluded the declaration on the ground Turnbow lacked personal knowledge and his opinion lacked foundation. This was error.

Turnbow established his expertise in building safety, in general, and in slip-and-fall accidents, in particular. His reliance on photographs of the floor mats, rather than the floor mats themselves, was neither impermissible nor unreasonable. (See Evid. Code, § 801, subd. (b) [expert may testify on matters perceived by or personally known to him or made known to him before the hearing, whether or not admissible, if it is of a type "that reasonably may be relied upon by an expert in forming an opinion on the subject to which his testimony relates"]; see also *Nelson v. County of Los Angeles* (2003) 113 Cal.App.4th 783, 792 [expert could properly use photographs of autopsy to opine as to cause of death].)[3] Because the photographs were taken immediately after the accident and depict the floor mats at issue and the conditions of the accident, they are not too speculative to provide an adequate basis for Turnbow's opinion. (Cf. *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1524 ["[w]hether a matter used by an expert

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[3] Craven's store clerks testified in declarations supporting summary judgment that one of the two mats that had been on the floor the day of the accident was later thrown away after a customer vomited on it. Thus, it is not at all clear the mat at issue was available for examination.

consists largely of conjecture or speculation is another important consideration" in determining whether the proffered opinion satisfies the requirements of Evid. Code, § 801].) Any concerns about the extent of Turnbow's expertise or his examination of the photographs to formulate his opinion go to the weight of his testimony, not its admissibility. (See *People v. Jones* (2012) 54 Cal.4th 1, 59; *People v. Bolin* (1998) 18 Cal.4th 297, 322; see also *Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1319 ["degree of expertise goes to the weight of the expert's testimony, not its admissibility"].)

In sum, the Lunas satisfied their burden, through Turnbow's admissible declaration, of raising triable issues of material fact as to whether Craven's use of defective floor mats breached its duty of care and caused Magdalena's fall and injuries.

b. *The trivial defect doctrine does not apply in this case*

Craven alternatively contends Turnbow's declaration is irrelevant because, as the trial court found, the alleged defects in the floor mats were "trivial as a matter of law." The trivial defect doctrine, which shields property owners from liability for damages caused by minor, trivial or insignificant defects in property (see *Whiting v. National City* (1937) 9 Cal.2d 163, 165), originated to shield public entities from liability for conditions on public property that create a risk "of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used." (Gov. Code, § 830.2.) The doctrine, which also applies to actions asserted against private entities (*Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, 927) (*Caloroso*)), "permits a court to determine 'triviality' as a matter of law rather than always submitting the issue to a jury . . . ." (*Ursino v. Big Boy Restaurants* (1987) 192 Cal.App.3d 394, 399 (*Ursino*).) In this way, the doctrine "provides a check valve for the elimination from the court system of unwarranted litigation [that] attempts to impose upon a property owner what amounts to absolute liability for injury to persons who come upon the property." (*Ibid.;* accord, *Caloroso,* at pp. 926-927.)

Craven insists Turnbow's opinion is immaterial to the question whether a defect in property is trivial as matter of law. (See *Caloroso, supra,* 122 Cal.App.4th at p. 928 ["[T]he trial court did not abuse its discretion in finding . . . no expert was needed to decide whether the size or irregular shape of the [walkway] crack rendered it dangerous. The photographs of the crack submitted by both sides demonstrate that the crack is minor and any irregularity in its shape is minimal."]; *Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 732 ["there is no need for expert opinion; [i]t is well within the common knowledge of lay judges and jurors just what type of a defect in a sidewalk is dangerous"]; cf. *Davis v. City of Pasadena* (1996) 42 Cal.App.4th 701, 705 ["fact that a witness can be found to opine that such a condition constitutes a significant risk and a dangerous condition does not eliminate this court's statutory task, pursuant to section 830.2, of independently evaluating the circumstances" to determine whether the risk created by the condition was trivial or insignificant as a matter of law].)

Whatever merit Craven's argument might have in a proper trivial defect case, the doctrine does not apply here because the alleged dangerous condition (the nature and misuse of a residential floor mat in a commercial setting) is not a natural "defect" as that term is used in the trivial defect doctrine; that is, it is not a crack in the sidewalk, difference in elevation between concrete slabs or other natural imperfection arising out of the passage of time. (See *Caloroso, supra,* 122 Cal.App.4th at p. 925 [crack in walkway]; *Ursino, supra,* 192 Cal.App.3d at p. 398 ["In summary, persons who maintain walkways, whether public or private, are not required to maintain them in an absolutely perfect condition. The duty of care imposed on a property owner, even one with actual notice, does not require the repair of minor defects."].) Moreover, the unsafe condition identified by Turnbow was not simply a difference in elevation between the mat and the floor, as Craven contends, but the use of a residential-grade mat in an allegedly dangerous stage of disrepair in an area of commercial traffic. Those matters are not included within the trivial defect doctrine no matter how broadly it may be applied. (See *Kasparian v. AvalonBay Communities* (2007) 156 Cal.App.4th 11, 27 [summary judgment based on trivial defect doctrine was error; trial court improperly focused

exclusively on trivial nature of the depth of the recessed drain and disregarded relevant expert testimony from which a reasonable jury could find the defendant's construction of drain was unreasonably dangerous and failed to comport with industry standards].)

DISPOSITION

The judgment is reversed, and the matter remanded for further proceedings not inconsistent with this opinion. The Lunas are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.