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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CLIFF HIBBITTS et al., Plaintiffs and Appellants, v. LOS GATOS MUSICH, LLC, Defendant and Respondent.	H043688 (Santa Clara County Super. Ct. No. CV265728)

Plaintiff Cliff Hibbitts (Hibbitts) was seriously injured when a vehicle was driven into a walkway at a shopping center and hit him. Hibbitts and plaintiffs Stephanie Hibbitts, Cliff Hibbitts, Jr., Lyle Hibbitts, and Clay Hibbitts brought a negligence action against defendant Los Gatos Musich, LLC, the owner of the shopping center. The trial court granted defendant's motion for summary judgment and entered judgment in favor of defendant. Plaintiffs contend that the trial court erred when it denied discovery of incidents at other properties and granted the summary judgment motion. We affirm.

I. **Factual and Procedural Background**

A. **The Complaint**

Plaintiffs filed their complaint against defendant and Joe Findley for motor vehicle negligence, general negligence, and loss of consortium. They alleged defendant "negligently failed to protect customers and tenants from a reasonably foreseeable dangerous condition on their property which allowed vehicles to encroach into walkways and other areas designed and known to be frequently used by pedestrians and people using benches and areas for breaks and/or waiting for services. As a result, a car entered such area and seriously injured Cliff Hibbitts in the presence of his children.

B. **Motions to Compel**

Plaintiffs filed a motion to compel amended and further responses to their request for production of documents. Plaintiffs sought documents related to "vehicle vs. pedestrian collisions" and "vehicle vs. building collisions" at "any commercial properties owned by" Burlingame Musich 1 LLC, Burlingame Musich 2 LLC, Crystal Springs Musich LP, and Third Avenue Musich LLC. Defendant's position was that the documents were not relevant and would not lead to admissible evidence. Plaintiffs subsequently filed a declaration by their counsel in which he provided copies of: a traffic collision report; a photograph of a collision at the Burlingame Plaza Shopping Center in 2007 in which a car crossed through a walkway and into a store when the driver accidentally hit the accelerator while attempting to park; and a California Secretary of State printout showing Steve Musich as the agent for service of process for Burlingame Musich 1, LLC and Burlingame Musich 2, LLC.

Following a hearing, the trial court issued an order denying the motion. The trial court stated that the evidence submitted most recently did not change the outcome of the motion, since the photos showed "a visibly different physical layout . . . ." The court also noted: "Plaintiffs still have not cited to any authority or provided any evidence—and the Court's research cannot find any authority—suggesting that the knowledge of a prior accident of a distinct and separate legal entity regarding a completely different property can be imputed to [defendant] with regards to the subject property." The trial court concluded that plaintiffs had failed to show good cause for the requests by a fact-specific showing of relevance.

Plaintiffs subsequently filed a motion to compel amended and further responses to special interrogatories. In special interrogatories Nos. 2 through 9 and 16, plaintiffs sought information regarding incidents in which a vehicle collided into a person or caused damage at any shopping center owned by defendant and "any employees, officers, directors, agents, subsidiaries and all others acting or purporting to act on behalf of the same." Defendant's opposition to the motion argued that the same issue arose when the trial court heard plaintiffs' motion to produce documents. Following a hearing, the trial court denied the motion in part on the ground that the discovery was not calculated to lead to the discovery of relevant information and in part because defendant had provided substantive responses to some of the interrogatories.

C. **Motion for Summary Judgment**

Defendant brought a motion for summary judgment in which it argued that plaintiffs could not establish one of the elements of negligence, that is, that it had a duty to guard against a vehicle jumping a concrete wheel stop and striking a pedestrian on an adjacent walkway. Defendant submitted the declarations of Steve Musich, W. Charles Perry, and its counsel as well as Findley's and Hibbitts' responses to defendant's special interrogatories to support the following facts. Defendant owns and manages El Gato Shopping Center and Steve Musich is defendant's managing member. There is a walkway perpendicular to the parking lot that allows people to walk between stores in the shopping center. There are newspaper stands, bike racks, and benches along the walkway, but there is no fixed point along the walkway which would require a patron to stand in order to receive services from a tenant of the shopping center. According to Musich, who has managed defendant's property for 31 years, there has never been an incident in which a vehicle jumped a concrete parking block and entered any walkway at El Gato Shopping Center until the accident in the present case. He had never been told that such an incident occurred before he began managing the property in 1981.

On May 27, 2012, Hibbitts was at El Gato Shopping Center with his three sons. They were using the walkway to walk from the Nob Hill Store toward the Los Gatos Barber Shop. At the same time, Findley was attempting to park his car in a parking space, which fronted the walkway, when he mistakenly depressed the accelerator and brake at the same time. Findley drove his car over the parking block and into the walkway. Findley's car hit Hibbitts and knocked him to the ground. A part of his car remained on the parking block.

Perry, an engineer, visited El Gato Shopping Center and examined the concrete parking block at issue. The parking spaces fronting the walkway next to the grocery store are protected from the walkway by "concrete wheel stops measuring approximately 34 inches long by 6 inches wide by 5 inches high." Based on his review of records at the Los Gatos Building Department and discussions of the property with a building official, Perry opined: the building was constructed during or before 1960; the concrete wheel stops complied with the 1960 Uniform Building Code; and there had been "no change to the parking lot since the original construction that would have required the construction of a continuous curb, installing bollards, or lowering the parking lot to create a raised sidewalk and curb."

D. Summary Judgment Opposition

Plaintiffs filed opposition to the motion for summary judgment. They argued that the type of collision in the present case was common and "defendant should have and, in fact, admittedly did foresee, this type of collision happening at the El Gato property before Cliff Hibbitts was hit." Plaintiffs submitted the declarations of their counsel, Hibbitts, Stan Mitchell, and Robert Reiter.

Plaintiffs also attempted to introduce evidence of: storefront collisions at other properties previously owned by defendant's managing member, but not defendant; the declaration of their experts, Mitchell and Reiter, regarding the appropriateness of bollards, rather than parking blocks, to protect pedestrians from errant vehicles; storefront collisions at El Gato Shopping Center after the incident in the present case; the placement of benches, newspaper stands, and mail boxes, which were adjacent to where Hibbitts was hit; and statistical evidence of storefront collisions involving injury or death.

According to Hibbitts' declaration, cars commonly parked at El Gato Shopping Center with their wheels straddling the parking blocks. They also bumped into the posts supporting the roof of the walkway. According to Joseph Musich, he and his father Steve Musich were aware of and discussed the risks of storefront collisions before Hibbitts was hit. They concluded that it was not a "pervasive problem."

E. Reply

Defendant filed a reply to plaintiffs' opposition to the motion. Defendant pointed out that plaintiffs relied on events at physical locations other than where the accident occurred, at premises not owned by defendant, and events that occurred subsequent to the date of the accident. Defendant argued: there was no evidence of any similar event at El Gato Shopping Center; the parking block complied with the 1960 Uniform Building Code; and Hibbitts was not in a fixed location but walking at the time of accident. Defendant also made several objections to plaintiffs' evidence.

F. The Trial Court's Ruling

The trial court found that defendant met its initial burden to show that it did not have a duty to provide a barrier around the walkway. The trial court rejected plaintiffs' argument that there was a triable issue of material fact as to whether defendant owed them a duty, because defendant's managing agents were aware of prior similar incidents at other locations owned by other entities and the managing agents had discussed media reports of prior similar incidents at other locations. The trial court reiterated its prior ruling that knowledge of a prior accident at a different property owned by a separate legal entity could not be imputed to defendant. The trial court also noted that "the other properties did not appear to be sufficiently similar to the instant property . . . ."

The trial court discussed the evidence submitted by plaintiffs. It noted that the deposition testimony of Steve Musich, Joseph Musich, and Anthony Musich did not demonstrate that defendant ' "had knowledge of prior similar incidents' at El Gato Shopping Center such that accidents could be deemed foreseeable." The trial court summarized Mitchell's declaration, which stated that defendant should have installed bollards to protect pedestrians. The declaration also discussed incidents at other locations and incidents that occurred at El Gato Shopping Center after the subject incident and incidents for which Mitchell lacked personal knowledge, and attempted to state legal conclusions that were based on irrelevant facts. The trial court sustained defendant's "objections to the Mitchell declaration (numbered 45) . . . ."

The trial court next referred to Reiter's declaration, which included: statements regarding the appropriateness of bollards; and noted that Findley's car "struck a bike rack, newspaper stands, brickwork and planter boxes before finally coming to rest in the pedestrian breezeway." Reiter also stated that the car struck the corner of the store prior to hitting Hibbitts. The trial court concluded: "This statement regarding other objects obstructing a vehicle from entering the breezeway further evidences the lack of foreseeability of the subject accident."

Regarding the declaration of plaintiffs' counsel who submitted several photographs and other exhibits, the trial court sustained defendant's objections Nos. 4 through 19. The trial court reasoned that "evidence regarding incidents at El Gato Shopping Center after the subject incident, and incidents at other properties [was] not relevant."

The trial court next referred to Hibbitts' declaration in which he discussed the placement of benches, newspaper stands, and mail boxes. The trial court concluded that these statements were not relevant since he was not using any of these items and was walking on the walkway. The trial court also considered the photographs submitted by Hibbitts. The trial court stated that these photographs indicated that "Findley not only hit the corner of a store, a bike rack, newspaper stands, brickwork and planter boxes, but also changed the direction of his vehicle because the parking space does not orient itself directly onto the portion of walkway where Hibbitts was hit. Either Findley turned his vehicle to the right to drive down that walkway where Hibbitts was hit, or was deflected by the parking block that obstructed the vehicle, or after the vehicle rolled over that part from his vehicle that came off as a result of the impact with the concrete parking block, the vehicle itself was turned. In either case, such photos further evidence the lack of foreseeability of the subject accident."

The trial court sustained defendant's objections Nos. 21, 23 through 39, and 41 through 44 on the ground that "expert statements making legal conclusions or assumptions on those irrelevant facts and other irrelevant facts—such as accidents at other locations, or after the subject incident or on a nationwide scale—are also not relevant."

The trial court sustained defendant's objection No. 40 on the ground that an article by one California assemblyman discussing his intent does not indicate the intent by the remainder of the Assembly.
The trial court concluded that plaintiffs failed to demonstrate a trial issue of material fact as to whether defendant owed them a duty and granted defendant's motion for summary judgment.

II. **Discussion**

A. **Motions to Compel**

Plaintiffs contend that the trial court erred when it denied their motions to compel amended and further discovery requests regarding collisions at other properties. Though they do not make separate challenges to the trial court's orders, it appears that they are arguing that both motions sought responses that were relevant and would lead to discoverable evidence.
Plaintiffs sought to compel the production of documents relating to storefront collisions causing property damage or injuries at commercial properties, which were not owned by defendant. In some of their special interrogatories, plaintiffs also sought information regarding incidents in which a vehicle collided into a person or caused damage at any shopping center owned by defendant. "Defendant" was defined in both the request for documents and interrogatories as "any employees, officers, directors, agents, subsidiaries and all others acting or purporting to act on behalf of the same." Defendant objected to both the request for documents and the interrogatories as overly broad and not calculated to lead to the discovery of information relevant to the subject matter of the action nor to the discovery of admissible evidence. In its objections, defendant stated that these other properties had a different physical layout from El Gato Shopping Center and were not owned by defendant. Plaintiffs argue that since Steve Musich was "principally responsible for the operations and safety at each of the properties," the information was relevant to defendant's knowledge of these types of collisions.
Code of Civil Procedure section 2017.010 provides in relevant part that "any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action."
We review discovery rulings under the abuse of discretion standard. (*Union Bank of California v. Superior Court* (2005) 130 Cal.App.4th 378, 388.) "The trial judge's application of discretion in discovery matters is presumed correct, and the complaining party must show how and why the court's action constitutes an abuse of discretion in light of the particular circumstances involved. [Citations.]" (*Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 432.) "The trial court's determination will be set aside only when it has been demonstrated that there was 'no legal justification' for the order granting or denying the discovery in question. [Citations.]" (*Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599, 1612.)
"Moreover, when a plaintiff does not seek writ review of the trial court's discovery rulings and instead appeals from the judgment, he or she must 'show not only that the trial court erred, but also that the error was prejudicial'; i.e., the plaintiff must show that it is reasonably probable the ultimate outcome would have been more favorable to the plaintiff had the trial court not erred in

the discovery rulings. [Citations.]" (*MacQuiddy v. Mercedes-Benz USA, LLC* (2015) 233 Cal.App.4th 1036, 1045 (*MacQuiddy*).)

Here, plaintiffs submitted evidence of an incident at another property that occurred four and a half years prior to the accident in the present case, the trial court properly concluded that it was not relevant because this incident involved "a visibly different physical layout." Plaintiffs have also failed to provide any authority or reasoned analysis that knowledge of a prior accident at a different property, which was not owned by defendant, could be imputed to defendant. Even assuming that the trial court abused its discretion in denying the discovery orders, plaintiffs failed to seek writ review to challenge the trial court's ruling. Thus, they are required on appeal to establish prejudice. (*MacQuiddy*, *supra*, 233 Cal.App.4th at p. 1045.) "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citations.]" (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 (*Badie*).) Since they have not argued in their opening brief that it is reasonably probable that the trial court's ruling on the summary judgment motion would have been more favorable to them if the trial court had granted their motion to compel, the issue of prejudice has been waived. Based on this record, plaintiffs' contention fails.

B. **Trial Court's Evidentiary Rulings**

In the section of their opening brief entitled "The Errors in a Nutshell," plaintiffs contend that the trial court erred when it excluded: "evidence of the frequency of storefront collisions and of prior or similar incidents at properties owned and operated by the same people who owned and operated the Los Gatos property;" and "evidence relating to design and barriers which were available and commonly used by the defendant to protect its property but not the people who used its properties."

An appellate brief must "[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority." (Cal. Rules of Court, rule 8.204(a)(1)(B).) The brief must also include appropriate citations to the facts in the record. (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655 (*Keyes*).) As previously noted, when an appellant fails to support a contention with "reasoned argument and citations to authority," their contention is waived. (*Badie*, *supra*, 67 Cal.App.4th at pp. 784-785.) "Appellants may not attempt to rectify their omissions and oversights for the first time in their reply briefs because this deprives the opposing party of an opportunity to respond. [Citations.]" (*Keyes*, *supra*, at p. 656.)

Roe v. McDonald's Corp. (2005) 129 Cal.App.4th 1107 (*Roe*) is instructive. In that case, the trial court granted the defendants' motions for summary judgment after sustaining the defendants' objections to a declaration by the plaintiff's expert. (*Id.* at p. 1110.) Though the plaintiff asserted on appeal that the trial court had erred in excluding this evidence, she continued to rely on the declaration to demonstrate that there were triable issues of fact. (*Id.* at p. 1113.) The Court of Appeal stated that in conducting its de novo review of the order granting summary judgment, it would consider ' "all the evidence set forth in the moving and opposition papers *except that to which objections were made and sustained*.' " (*Ibid.*, quoting *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65-66.) The court further stated that it was the plaintiff's "burden on appeal to affirmatively challenge the trial court's evidentiary ruling, and demonstrate the court's error. She failed to do so. Her brief on appeal fails to identify the court's evidentiary ruling as a

distinct assignment of error, and there is no separate argument heading or analysis of the issue. That alone is grounds to deem the argument waived. [Citations.]" (*Roe*, at p. 1114.) Similarly, here, plaintiffs' brief incorporated the excluded evidence throughout their brief. Plaintiffs' brief does not contain a separate argument on this issue, does not cite to the record on appeal, does not discuss the standard of review, and does not even attempt to analyze the issue. Since they failed to adequately challenge the trial court's evidentiary rulings, we deem the argument waived. (*Roe*, *supra*, 129 Cal.App.4th at p. 1114.)

C. **Motion for Summary Judgment**

1. **Standard of Review**

" ' "Appellate review of a ruling on a summary judgment . . . is de novo. " ' "(*Food Pro Internat., Inc. v. Farmers Ins. Exchange* (2008) 169 Cal.App.4th 976, 993.) "In performing our independent review of a defendant's summary judgment motion 'we identify the issues framed by the pleadings since it is these allegations to which the motion must respond . . . .' " (*Jones v. Wachovia Bank* (2014) 230 Cal.App.4th 935, 945.) "[T]he party moving for summary judgment bears the burden of persuasion that there are no triable issues of material fact and that [the moving party] is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) The moving party "bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Ibid.*) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.*) A triable issue of fact can only be created by conflicting evidence, not speculation or conjecture. (*Horn v. Cushman & Wakefield Western* (1999) 72 Cal.App.4th 798, 807.)

2. **Analysis**

Here, each of the causes of action is premised on a theory of negligence. ' "Actionable negligence involves a legal duty to use due care, a breach of such legal duty, and the breach as the proximate or legal cause of the resulting injury.' [Citation.]" (*Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP* (2014) 59 Cal.4th 568, 573.) The first element, duty, "may be imposed by law, be assumed by the defendant, or exist by virtue of a special relationship." (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 985.) Everyone has a duty to use ordinary care to avoid injuring another. (Civ. Code, § 1714, subd. (a).) Whether a duty exists is a question of law. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 57-58.)

The case of *Jefferson v. Qwik Korner Market, Inc.* (1994) 28 Cal.App.4th 990 (*Qwik Korner*) is directly on point. In that case, when a driver depressed the accelerator rather than the brake as he attempted to park in front of a convenience store, the car jumped over a concrete parking block and a curb, entered the sidewalk, and injured the plaintiff. (*Id.* at p. 992.) There were benches and tables to the side of the storefront. (*Ibid.*) The plaintiff brought a negligence and premises liability action against the store. The complaint alleged that the accident was foreseeable and claimed that since metal posts at the end of the parking space would have prevented the accident, the defendant was negligent for failing to install these posts. (*Ibid.*) The defendant brought a

motion for summary judgment and asserted it had no duty to protect the plaintiff from unforeseeable negligence. The defendant submitted evidence that there was a raised curb and a wheel stop at the end of each parking space, the design of the parking lot met city codes and regulations, and there had been no prior similar incidents. (*Ibid.*) The trial court granted the motion. (*Ibid.*)

At issue on appeal was whether the accident was "sufficiently likely to occur to require the landowner to take more extensive measures than it did." (*Qwik Korner*, *supra*, 28 Cal.App.4th at p. 993.) The appellate court noted that the majority of courts in other states had found no liability under similar circumstances as a matter of law. (*Id.* at p. 994.) It also acknowledged that courts in a minority of cases had found that liability was a question of fact under the following circumstances: the defendant provided no curb or other barrier from encroaching vehicles; the defendant had notice of prior similar incidents; and the design of the building required customers to wait for service by standing next to the parking lot or driveway. (*Id.* at pp. 993-994.) The *Qwik Korner* court concluded that "the accident was not sufficiently likely, and therefore not reasonably foreseeable," and thus affirmed the judgment. (*Id.* at p. 997.)

The facts of the present case are almost identical to those in *Qwik Korner*. First, defendant provided some protection to encroaching vehicles by means of a concrete wheel stop, which met building code requirements and provided a barrier between the parking space and the sidewalk. Second, there had not been any previous incidents at El Gato Shopping Center in which vehicles in the parking lot had entered the walkway where Hibbitts was hit prior to Hibbitts' accident. Plaintiffs' contention that accidents at other properties, which were not owned by defendant, support a finding of foreseeability is unavailing. The trial court found that these other properties were not sufficiently similar to El Gato Shopping Center and sustained objections to this evidence. Thus, this court does not consider this evidence. (*Roe*, *supra*, 129 Cal.App.4th at p. 1113.) Third, there was nothing in the design of the building that required customers to wait for service by standing next to the parking lot or driveway where Hibbitts was hit. As noted by the trial court, Findley was attempting to park in a space that was not oriented to where Hibbitts was hit. Hibbitts was walking when he was hit by Findley's car and the benches, newspaper stands, and mail boxes were adjacent to the location of the accident. Based on this record, defendant had no duty to protect Hibbitts from the accident that occurred. Thus, the trial court did not err when it granted defendant's motion for summary judgment.

III. **Disposition**

The judgment is affirmed. Plaintiffs to bear costs on appeal.

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Mihara, J.

WE CONCUR:

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Elia, Acting P. J.

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Bamattre-Manoukian, J.