Filed 1/3/19 Pryor v. Fitness International, LLC CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

VALERIE PRYOR, Individually and as Successor in Interest, etc., Plaintiff and Appellant, v. FITNESS INTERNATIONAL, LLC, Defendant and Respondent.	B287329 (Consolidated with B289429) (Los Angeles County Super. Ct. No. BC633381)

APPEAL from an order and judgment of the Superior Court of Los Angeles County, Stephen P. Pfahler, Judge. Affirmed.

The Cook Law Firm, Philip E. Cook; Scolinos, Sheldon & Nevell, and Daniel G. Sheldon for Plaintiff and Appellant.

Yoka & Smith, Christopher E. Faenza, Alice Chen Smith, Benjamin A. Davis; Greines, Martin, Stein & Richland, Robert A. Olson, and Gary Wax for Defendant and Respondent.

Plaintiff and appellant Valerie Pryor, both in her individual capacity and as a successor in interest to her late husband, Roderick T. Bennett (Pryor), appeals from a judgment sustaining a demurrer to her complaint against Fitness International LLC, dba LA Fitness (LA Fitness), and dismissing it without leave to amend. The complaint alleges that LA Fitness is vicariously liable for Bennett's death in a fatal car-on-bicycle collision with then-LA Fitness employee James Guidroz. The accident occurred shortly after the company had ordered Guidroz to prematurely end his shift selling health club memberships at an LA Fitness facility, because he appeared to be intoxicated. The complaint also alleges LA Fitness was directly negligent in failing to take safety precautions when it ordered Guidroz to leave the workplace in an impaired state on the day of the accident and, more generally, in failing to address Guidroz's suspected drug abuse.

Neither Pryor's complaint, nor any of the additional allegations she contends she would include in a further amended complaint, support a core element of any vicarious liability theory: a connection between the fatal accident and either LA Fitness's enterprise running a health club or Guidroz's job duties. With respect to her direct negligence claims, although Pryor plausibly alleges that workplace drug abuse is generally foreseeable, that is insufficient—in light of countervailing policy considerations—to impose on LA Fitness an unworkably broad and inefficient duty to try and prevent harm from Guidroz's actions after he concluded his shift, left the workplace, and chose to drive home while intoxicated. Thus, although the facts alleged involve a tragic accident and tremendous loss to Bennett, LA Fitness cannot be held legally responsible for that tragedy. The trial court did not err in sustaining the demurrer and denying leave to amend. Accordingly, we affirm.

FACTUAL AND PROCEDURAL SUMMARY

We summarize the facts as alleged in the first and second amended complaints,[1] accepting all factual allegations as true and construing all allegations in the light most favorable to Pryor. (See *Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 321–322.)

A. *Factual Background*

This action arises out of the untimely death of Roderick T. Bennett, appellant Pryor's late husband. Lucas James Guidroz struck and killed Bennett with his car while Bennett was riding his bicycle on a public street on the afternoon of May 25, 2016. As a result of the accident, Guidroz is currently serving a 10-year prison sentence for gross vehicular manslaughter while intoxicated, in violation of Penal Code section 191.5, subdivision (a).

Less than an hour before the accident, Guidroz had been working at an LA Fitness health club in Stevenson Ranch, where

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[1] In the second amended complaint, Pryor realleged vicarious liability claims the court had previously dismissed without leave to amend. (See Factual and Procedural Summary part B, *post*.) These realleged vicarious liability claims were thus "improperly pled" in the second amended complaint, and the trial court did not consider them. To the extent these improper allegations regarding vicarious liability in the second amended complaint differ from those in the first amended complaint, we do not consider them in reviewing the court's decision to sustain the demurrer on the vicarious liability claims. We do, however, take them into account in assessing whether Pryor has met her burden of identifying additional allegations she would include, if granted leave to amend those claims. For ease of reference, we refer generally to "the complaint" as encompassing the properly pleaded allegations contained in both the first and second amended complaints.

he was employed as a "membership counselor." The only duty the complaint alleges this position entailed was "interact[ing] with prospective customers using a 'script' provided by LA Fitness to help him sell gym memberships."[2] Guidroz's job thus did not require him to leave the facility.

According to Guidroz's manager, Esdras Mendoza, Guidroz appeared "fit to perform his job duties" when he started his shift approximately five and a half hours before the accident. Mendoza noticed changes in Guidroz's behavior as the day progressed, including that "[h]is attention span had shortened, he had begun to slur his words, he was sweating, and his short-term memory appeared impaired." Mendoza suggested Guidroz take his lunch break to see if his condition might improve. It did not. Instead, Mendoza observed additional behaviors, based on which "it was (or should have been) apparent that Guidroz was intoxicated, impaired, and/or under the influence of a chemical substance." For example, Guidroz's "eyes were dilated and glossy," he "was vacillating from a lethargic state to an urgent, excited state," and he "had trouble recalling the simple script"

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[2] The complaint alleges in passing that LA Fitness "had required Guidroz on occasion to use a personal automobile to perform his job duties." Pryor does not rely on or even mention this allegation in her briefing on appeal. It is also inconsistent with the more specific allegation that Guidroz's sole duty as a health club "membership counselor" was as noted above, and thus did not involve leaving the facility, let alone require driving. Nor can one reasonably infer that the duties of a "membership counselor" at a health club would involve use of an automobile. (See *City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865 ["We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context."].) Thus, we give no weight to the allegation that Guidroz was "on occasion" asked to use his personal automobile.

for interacting with prospective customers. Mendoza concluded that Guidroz had become incapable of performing his job duties, and ordered Guidroz to "leave work" around 4:00 p.m., although his shift was not scheduled to end until 8:00 p.m. There are no allegations that Mendoza or any other LA Fitness employee inquired into what Guidroz would do when he left the premises, or whether he would operate a vehicle. The second amended complaint does allege more generally, however, that "LA Fitness employees knew that, although the State of California had suspended Guidroz's driving privileges . . . Guidroz continued to drive to work in a personal automobile and did so on a regular, consistent and/or frequent basis."

Guidroz left the facility driving his girlfriend's car. At approximately 4:31 p.m., due to his impaired state, Guidroz struck and killed Bennett.

Pryor alleges that, even before the day in question, LA Fitness knew or should have known Guidroz had a drug problem, based on the fact that Guidroz often spent 20 to 30 minutes in the restroom, "or otherwise disappear[ed] from his work station with little or no explanation." The complaint further alleges that LA Fitness knew or should have known that Guidroz had a "habit of driving in an impaired state while under the influence of intoxicating substances" and that he did not have a driver license.

B. *Procedural History*

Pryor sued LA Fitness, Guidroz, and Guidroz's girlfriend for torts in connection with Bennett's death. Against LA Fitness, Pryor alleged negligence causes of action that relied on two primary theories. First, she alleged that the company was vicariously liable for Guidroz's negligence, because Guidroz was acting within the scope of his employment when he became

intoxicated, and/or when he struck Bennett. Second, she alleged that the company had itself been negligent in hiring, retaining, and supervising Guidroz, because it had a legal duty to investigate Guidroz's drug use, warn third parties of Guidroz's drug use, and "humanely, properly and safely address his condition, including his impairment on [the day of Bennett's death]." Pryor alleged that LA Fitness's failure to fulfill these duties proximately caused Bennett's death.

LA Fitness demurred to all causes of action in the first amended complaint, arguing that Guidroz was acting outside the scope of his employment both when he became intoxicated and when he collided with Bennett, and that there was no nexus between the accident and LA Fitness's actions with respect to Guidroz. The court agreed and sustained the demurrer. It granted leave to amend the direct negligence causes of action only, citing "the liberal policy of allowing leave to amend" and noting that "one of [LA Fitness's] managers intentionally took action to affirmatively send defendant Guidroz home, notwithstanding knowledge of his impaired condition."

Pryor filed a second amended complaint to which LA Fitness again demurred.[3] The court again sustained the

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[3] It appears that LA Fitness's filing captioned "notice of demurrer and demurrer to plaintiff's second amended complaint; memorandum of points and authorities; declaration of Benjamin A. Davis" (capitalization omitted) does not contain a separate demurrer pleading, but rather, the notice thereof, and memorandum and declaration in support thereof. In any case, the subject of our review on appeal is the trial court's "judgment of dismissal following sustaining of [LA Fitness's] demurrer to plaintiff's second amended complaint." (Capitalization omitted.) We therefore disagree with Pryor that the possible missing pleading below should affect our analysis on appeal.

demurrer, this time without leave to amend any cause of action, on the basis that "Guidroz's intoxication was personal in nature and deviated from his employment duties and employment relationship." The court noted that Pryor had again failed to allege any "facts supporting a finding that Guidroz's alleged intoxication was customary or incidental to his employment, or inherent in the working environment as a sales associate," any other connection between Guidroz's alleged intoxication and his employment at [LA Fitness], facts supporting that Guidroz's drug use was a "foreseeable consequence of his employment," or any benefit to LA Fitness from Guidroz's intoxication.

The trial court dismissed all causes of action, and Pryor timely appealed. Pryor later timely appealed an amended judgment that added a cost amount recoverable by LA Fitness, and this court consolidated those appeals pursuant to the parties' stipulation.

STANDARD OF REVIEW

In an appeal from a judgment of dismissal after a sustained demurrer, we review non-equitable claims in a complaint de novo to determine whether the complaint "alleges facts sufficient to state a cause of action under any legal theory." (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 595.) We must affirm if the demurrer would be properly sustained on any theory, even if not articulated by the trial court. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742.)

In reviewing a denial of leave to amend a complaint following a sustained demurrer, we review for an abuse of discretion. This occurs when a court denies leave although " 'there is a reasonable possibility the plaintiff could cure the defect with an amendment.' " (*Aguilera v. Heiman, supra,* 174 Cal.App.4th at p. 595.)

DISCUSSION

I. Vicarious Liability

Pryor argues that Guidroz was acting within the scope of his employment when he became intoxicated and collided with Bennett, and that LA Fitness is therefore vicariously liable, under the doctrine of respondeat superior, for Bennett's resulting death. To support a connection between the accident and the scope of Guidroz's employment, Pryor points to (1) the time and location of Guidroz's drug use—specifically, that "he became significantly impaired" while "working, during the course of a regularly scheduled shift, on LA Fitness premises," (2) LA Fitness's knowledge that Guidroz became impaired while on the job, (3) the closeness in time between the accident and LA Fitness ordering Guidroz to end his shift early and leave, and (4) that LA Fitness benefited from Guidroz no longer being in the facility in his impaired state. Because neither these allegations, nor anything else in the complaint, connect the accident with the nature of LA Fitness's business or Guidroz's job duties, Pryor has not alleged a legally cognizable basis for respondeat superior liability.

The doctrine of respondeat superior is " 'grounded upon "a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be *characteristic of its activities*." ' " (*Martinez v. Hagopian* (1986) 182 Cal.App.3d 1223, 1228, italics added.) Vicarious liability under this theory thus requires "a relationship between the nature of the work involved and the type of tort committed," such that the employment "predictably . . . create[s] the risk employees will commit . . . torts of the type for which liability is sought." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 298–299, 302 (*Lisa M.*).)

Indeed, " 'the modern justification for [an employer's] vicarious liability' "—that, " 'as a required cost of doing business,' " liability for torts " '*sure to occur in the conduct of the employer's enterprise*' " should be " 'placed upon that enterprise itself' "—derives from a connection between the employer's particular enterprise and the particular risks at issue. (*Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 959-960 (*Hinman*), italics added.)

The complaint does not allege facts supporting any such connection. Guidroz's drug use and intoxicated driving cannot be viewed as " 'typical of or broadly incidental to *the enterprise* [*LA Fitness*] *has undertaken'* "—i.e., operating a health club. (*Hinman*, *supra*, 2 Cal.3d at p. 960, italics added.) Nor can a car accident be considered an "outgrowth" of Guidroz's duties as an LA Fitness sales associate—a job that did not require car travel—such that risk of a car accident is " 'inherent in the working environment.' " (*Carr v. Wm. C. Crowell Co.* (1946) 28 Cal.2d 652, 656–657.) To the contrary, Guidroz was acting in a purely personal capacity when he became intoxicated and, later, when he collided with Bennett. (*Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1005 (*Farmers Ins.*) ["employer will not be held vicariously liable . . . if the employee *substantially* deviates from the employment duties for personal purposes"].) Although California courts broadly interpret the scope of employment for the purposes of respondeat superior liability, it does not reach conduct, with which the employee "substantially deviates from his duties for personal purposes." (*Alma W. v. Oakland Unified School Dist.* (1981) 123 Cal.App.3d 133, 139 (*Alma W.*).) Thus, the requisite connection between the accident and LA Fitness's business is lacking, and neither Guidroz's "mere presence" at the LA Fitness facility when he became intoxicated, nor his "attendance to occupational duties prior . . .

to the [accident]" can "give rise to a cause of action against [LA Fitness] under the doctrine of respondeat superior." (*Id.* at p. 140.)

Pryor's arguments that Guidroz was acting within the scope of his employment at the time of the accident do not dictate a different result. We address each of these arguments below.

A. *Foreseeability*

In order for an employer to be held vicariously liable, an employee's tortious conduct must be "reasonably foreseeable *in light of the employer's business* or *the employee's job responsibilities*." (CACI No. 3720; *Rodgers v. Kemper Constr. Co.* (1975) 50 Cal.App.3d 608, 618-619.) Thus, foreseeability in this context derives from the requisite connection, discussed above, between the employer's business and the harm or risk at issue.

Pryor argues that, because it is foreseeable as a general matter that some employees may become intoxicated while at work, employers should be held vicariously liable for the risks such intoxicated employees pose to society—including the risk that they may drive home while intoxicated and injure members of the public. Pryor acknowledges that her argument does not rely on any specific aspects of LA Fitness's business, and would, in fact, apply to "any other employer's[] business." The California Supreme Court has rejected such an approach to respondeat superior foreseeability, as it jettisons any requirement that the specific employer's business be connected with the tort. In *Farmers Ins.*, for example, plaintiff argued that because sexual harassment is a foreseeable occurrence in the workplace, an employee engaging in sexual harassment is acting within the scope of employment for the purposes of respondeat superior liability. (*Farmers Ins.*, *supra*, 11 Cal.4th at p. 1008.) The Court

rejected this argument as "stretch[ing] the respondeat superior foreseeability concept beyond its logical limits." (*Id.* at p. 1009.) While sexual harassment—like drug abuse—"is a pervasive problem and . . . many workers in many different fields of employment have experienced [it] . . . in determining whether a risk is 'unusual or startling' for respondeat superior purposes, ' "the inquiry should be whether the risk was one 'that may fairly be regarded as typical of or broadly incidental' *to the enterprise undertaken by the employer*." ' " (*Ibid.*, italics added.) Thus, "[t]he question is not one of statistical frequency, but of a relationship between the nature of the work involved and the type of tort committed." (*Lisa M., supra,* 12 Cal.4th at p. 302; see, e.g., *Harris v. Trojan Fireworks Co.* (1981) 120 Cal.App.3d 157, 165 (*Harris*) ["the pivotal consideration" in assessing employer's respondeat superior liability for employee car accident after work-related banquet was "whether there was a sufficient business relationship between the employment and the banquet at which the defendant became intoxicated to hold the employer liable for the employee's negligent driving"].)

The complaint's allegations regarding the general foreseeability of employee drug use and resulting harm are therefore insufficient to establish that Guidroz was acting within the scope of his employment when he collided with Bennett.

B. *The "Going and Coming" Rule and Exceptions*

Because commuting to or from one's place of employment typically has no connection with the specific nature of the business conducted there, courts have recognized a general "going and coming" rule, under which "an employee is not regarded as acting within the scope of his employment while going to or coming from his place of work." (*Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 722.) Guidroz's collision with Bennett occurred

during Guidroz's commute home after the conclusion of his shift, and thus falls within the scope of this rule. Pryor urges this does not preclude respondeat superior liability, citing three exceptions to the going and coming rule. None of these exceptions apply on the facts alleged.

1. *Dangerous instrumentality exception*

The going and coming rule does not apply "when an employee endangers others with a risk arising from or related to work." (*Bussard v. Minimed, Inc.* (2003) 105 Cal.App.4th 798, 804–805 (*Bussard*).) Pryor argues that Guidroz taking drugs and becoming intoxicated while at work constituted a "work-related event," such that LA Fitness is liable for injuries resulting from the danger Guidroz posed as a result, even during his commute home. But this "dangerous instrumentality" exception only applies where "activities *within [an employee's] scope of employment* . . . cause the employee to become an instrumentality of danger to others." (See *Childers v. Shasta Livestock Auction Yard, Inc.* (1987) 190 Cal.App.3d 792, 804–805, italics added.) For example, in *Bussard*, where pesticides were present at the workplace, employees could not perform their duties there without inhaling pesticide fumes, rendering such inhalation a "work-related event." (*Bussard, supra,* 105 Cal.App.4th at p. 806.) The employer thus could be held vicariously liable when the fumes intoxicated an employee, leading her to get into an accident driving home. (*Ibid.*) Another illustrative example is *Purton v. Marriott Internat., Inc.* (2013) 218 Cal.App.4th 499, in which the court concluded that, where drinking alcohol "was a customary incident to the employment relationship [and the employer] impliedly permitted employees to consume alcohol while on the job," an employee was

acting within the scope of his employment when he became an "instrument of danger" drinking on the job. (*Id.* at pp. 509-510.)

Unlike in these cases, Guidroz was not acting within the scope of his employment when he covertly ingested drugs in the restroom during his shift. His drug use was in no way connected with his employer's business or his job duties, nor was it "necessary to the comfort, convenience, health, and welfare of [Guidroz] while at work." (*Farmers Ins., supra,* 11 Cal.4th at p. 1004; see also Discussion *ante*, part A.) Accordingly, the dangerous instrumentality case line does not support Pryor's claims. If anything, this body of law reiterates that a connection between the employer's specific business or employee's specific duties and the tort at issue is a prerequisite to vicarious liability under any theory. (See *Bussard, supra,* 105 Cal.App.4th at pp. 804–805 [applying scope of employment foreseeability concept discussed in *Farmers Ins., supra*, 11 Cal.4th at pp. 1003-1004, to determine whether a danger instrumentality "arises from or is related to work"].)

2. *Special errand*

Under the "special errand" or "special missions" exception, when an employee "is coming from his home or returning to it on a special errand either as part of his regular duties or at a specific order or request of his employer, the employee is considered to be in the scope of his employment." (*Boynton v. McKales* (1956) 139 Cal.App.2d 777, 789.) The exception thus applies when a trip to or from the workplace benefits the employer in a way that is "not common to commute trips by ordinary members of the work force." (*Hinman, supra*, 2 Cal.3d at p. 962.)

Pryor argues that Guidroz was on a "special errand" for LA Fitness when he left work the day of the accident, because

(1) he concluded his shift early and left at his manager's request, and (2) it benefited LA Fitness that Guidroz left the facility, given his impaired state and potential for harming or annoying customers and other employees. Guidroz leaving the facility did not benefit LA Fitness in the manner required for the special errand exception to apply. An employee ending a shift early, even for safety reasons, does not benefit the employer, because "[a]ny benefit to the employer . . . stems only from the ability to stop the employees [from working] and the commute home does nothing to add to that benefit." (*Caldwell v. A.R.B., Inc.* (1986) 176 Cal.App.3d 1028, 1038 (*Caldwell*) [rejecting argument that "defendant's ability to send employees home under hazardous working conditions [was] a benefit to the employer" where it is thereby "able to avoid liability for workplace injuries"].) Accordingly, the special errand exception does not apply. (See *ibid.*; *General Ins. Co. v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 595, 601 (*General Ins.*) ["The special mission rule 'is ordinarily held inapplicable when the only special component is the fact that the employee began work earlier or quit work later than usual.' "].)

3. *Special risk exception*

Finally, Pryor cites the "special risk" exception, relying on "a series of workers' compensation cases [in which] the courts have recognized an exception to the going-and-coming rule where 'an employee suffers injury from a special risk causally related to employment.' " (*Depew v. Crocodile Enterprises*, Inc. (1998) 63 Cal.App.4th 480, 487 (*Depew*).) This exception "is a creation of the workers' compensation system" that no court has clearly confirmed applies "to third party claims against an employer based on respondeat superior." (*Ibid.*) In the workers' compensation context, "the exception will apply (1) if 'but

for' the employment the employee would not have been at the location where the injury occurred and (2) if 'the risk is distinctive in nature or quantitatively greater than risks common to the public.' " (*Santa Rosa Junior College v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 345, 354; see *Caldwell, supra,* 176 Cal.App.3d at p. 1036.) Even assuming the exception applies to respondeat superior cases, it requires a plaintiff "establish a causal nexus between his injury and the employee's job." (*Depew, supra,* 63 Cal.App.4th at p. 488; see *General Ins., supra*, 16 Cal.3d at p. 600 [requiring a "causal relationship between the accident and the employment" for exception to apply in workers' compensation context].) For example, in *Depew*, the court considered whether the exception applied to an accident related to a restaurant employee's extreme fatigue while driving home after two long shifts. (*Depew, supra*, at pp. 483-484.) Because "extreme fatigue is not ' " 'typical of or broadly incidental to the enterprise' " 'of operating a restaurant," and "neither the nature of [the employee's] job [at a restaurant,] nor the hours he worked made it predictable that he would fall asleep at the wheel and cause a fatal car accident"; "his condition was neither an 'outgrowth' of his employment nor ' " 'inherent in the working environment.' " ' " (*Id.* at p. 490.) As discussed above, Pryor's complaint fails to allege any such connection between LA Fitness's enterprise or the nature of Guidroz's job and the accident with Bennett. Thus, the special risk exception does not assist Pryor's claims.

For these reasons, the complaint fails to allege any basis on which LA Fitness may be held vicariously liable for Guidroz's actions.

II. Direct Negligence Causes of Actions

Pryor alleges LA Fitness was directly negligent in two respects. First, she alleges negligence in the way LA Fitness responded to Guidroz's impairment on the day of the accident, including specifically its failure to assure safe transportation for Guidroz after he was ordered to stop work and leave the premises while intoxicated. Second, she alleges the company was negligent in hiring and retaining Guidroz.

"The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion." (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397 (*Bily*).) As a general rule, each person has a duty to use ordinary care and "is liable for injuries caused by his failure to exercise reasonable care in the circumstances." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112 (*Rowland*); Civ. Code, § 1714.) " 'Courts, however, have invoked the concept of duty to limit . . . "the otherwise potentially infinite liability which would follow from every negligent act." ' " (*Bily*, *supra*, 3 Cal.4th at p. 397.) Thus, " 'duty' is not an immutable fact of nature ' "but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." ' " (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 572, fn. 6.)

Courts determine whether a duty exists based on the particular circumstances of a case, balancing several factors, namely: "[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk

involved." (See *Rowland*, *supra,* 69 Cal.2d at p. 113; *Bryant v. Glastetter* (1995) 32 Cal.App.4th 770, 778 (*Bryant*) [" 'Whether a duty of care exists "is a question of law to be determined on a case-by-case basis." ' "].) These "*Rowland* factors" are aimed at evaluating both public policy implications and the foreseeability that the type of injury the plaintiff alleges will result from the conduct at issue. (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1145 (*Kesner*).)

To assess Pryor's claims, we therefore consider whether, based on the *Rowland* factors, the law should impose a duty on LA Fitness to (1) take steps to assure that Guidroz did not operate a vehicle or otherwise endanger the public when, knowing he was intoxicated, the company ordered him to leave work on the day of the accident, and/or (2) more generally, take steps to address and prevent harm resulting from Guidroz's suspected drug abuse, after hiring and/or retaining him despite that suspected drug use.

A. *Negligent Supervision/General Negligence*

Under the *Rowland* factors, Pryor's negligence claim that LA Fitness failed to exercise reasonable care on the day of the accident fails for lack of a legally cognizable duty.

1. *Foreseeability*

We agree with Pryor that the foreseeability factor weighs in favor of imposing the duty Pryor seeks. That an inebriated man leaving his place of employment may attempt to drive home and, in the process, get into an accident, is " ' "likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct." ' " (*Laabs v. Southern California Edison Co.* (2009) 175 Cal.App.4th 1260, 1273.)

But " 'foreseeability alone is not sufficient to create an independent tort duty.' " (*Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077, 1086 (*Vasilenko*).) Only " '[i]n the absence of "overriding policy considerations" ' " is foreseeability of " ' "primary importance in establishing the element of duty." ' " (*Bryant, supra,* 32 Cal.App.4th at p. 778.) Here, based on our analysis of the remaining *Rowland* factors as outlined below, we conclude that such overriding public policy considerations weigh against imposing a duty on LA Fitness to try and prevent Guidroz's collision with Bennett.

2. *Closeness of the connection between the conduct and the harm*

Although the accident may have been a foreseeable result of Guidroz leaving the LA Fitness facility while intoxicated, that does not mean these two events are closely connected. Standing in between them in the causal chain are, at a minimum: Guidroz's decision to drive, rather than seek alternative transportation; his decision to drive the particular route he did; and Bennett's presence on the bike route at the moment Guidroz swerved into it. When "the occurrence of injury results from the confluence of" choices by multiple actors, and their making these choices at "a certain time and place and in a certain manner," "the closeness factor tips against finding a duty." (*Vasilenko*, *supra*, 3 Cal.5th at p. 1201.)

3. *Extent of the burden to the defendant and consequences to the community*

Pryor's negligence theory would impose on businesses a sweeping duty because it does not require any connection between the business and the employee behavior for which the business is held responsible. "Failing to require a connection between the employment and the injured party would result in the employer becoming an insurer of the safety of every person with whom its employees come into contact, regardless of their relationship to the employer." (See *Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1341 (*Mendoza*).) In essence, Pryor asks this court to make a policy decision that, once a business becomes aware of an intoxicated employee on its premises, the business should be required to try and prevent any harm the intoxicated individual may cause, even after leaving the premises. This is an inefficient and unfair allocation of responsibility.

Moreover, if the duty is not tethered to the employer's business or employee's job duties, there is no clear dividing line for determining how far a business must go to meet its legal obligations. This would create an amorphous and unworkable standard of care for employers. Pryor disputes this, arguing that "there were many simple, inexpensive actions LA Fitness could have undertaken" that "would have prevented . . . Bennett's death" such as "(i) allowing Guidroz to remain on company premises to finish his scheduled shift, or to otherwise permit him to recover or improve; (ii) offering or arranging medical assessment or treatment for Guidroz before sending him home; (iii) verifying use of safe transportation by Guidroz before sending him home; or (iv) arranging safe transportation for

Guidroz, such as a taxi cab or ride share service, when sending him home."

In considering Pryor's argument, the California Supreme Court's recent discussion of duty in *Vasilenko* is instructive. There, the Court noted that imposing a duty on a church to assure the safety of its patrons crossing a public street to reach the church's additional parking lot "could result in significant burdens," because landowners "would have to continuously monitor the dangerousness of the abutting street and . . . they may have to relocate their parking lots as conditions change." (*Vasilenko*, *supra,* 3 Cal.5th at p. 1090.) Plaintiff responded that "he [was] advocating only for a duty that could be satisfied by 'simple, inexpensive, and reasonable' precautions," such as warning patrons to be alert in crossing the street. (*Id.* at pp. 1090-1091.) The Court rejected this argument in part because the plaintiff's proposed precautions were "unlikely to be as straightforward or beneficial as [plaintiff] makes them out to be." (*Id.* at p. 1091.) So too here. The purportedly "simple, straightforward" precautions Pryor identifies only create additional difficulties. For example, if LA Fitness must keep Guidroz at the facility, what of the company's obligation to keep customers and other employees there safe? What of the fact that LA Fitness had no legal authority to order Guidroz to stay on the premises? The duty Pryor suggests, even limited to the few "simple" precautions she identifies, could also negatively affect the community by creating incentives for employers to engage in behavior that is problematic in other ways. For example, businesses would be incentivized to, in an abundance of caution, refuse to hire former drug addicts or alcoholics. And, like the measures the plaintiff proposed in *Vasilenko*, Pryor's proposed measures will not necessarily prevent harm: Placing Guidroz in a taxi does not prevent him from later operating a vehicle, or

starting a fight with the taxi driver, or causing any number of other harms attributable to his intoxicated state (all of which, under the logic of Pryor's theory, LA Fitness had a duty to prevent).

Finally, as noted, even if Pryor's suggested precautions were simple and minimally burdensome, it remains an illogical and unfair allocation of burden to require a company to shoulder the responsibility of preventing harm from a risk it had no part in creating.

4. *Moral culpability*

In applying the moral culpability factor, courts consider a " ' " 'defendant's culpability in terms of the defendant's state of mind and the inherently harmful nature of the defendant's acts.' " ' " (*Day v. Lupo Vine Street, L.P.* (2018) 22 Cal.App.5th 62, 75.) Thus, for this factor to weigh in favor of finding a duty, " ' " 'courts have required a higher degree of moral culpability such as where the defendant (1) intended or planned the harmful result [citation]; (2) had actual or constructive knowledge of the harmful consequences of their behavior [citation]; (3) acted in bad faith or with a reckless indifference to the results of their conduct [citations]; or (4) engaged in inherently harmful acts [citation].' " ' " (*Ibid.*) Nothing in the complaint supports that LA Fitness intended Bennett's death, acted in bad faith, or did anything "inherently harmful." To the extent the complaint alleges LA Fitness's general knowledge that an intoxicated individual may pose some sort of harm to the public, this is not sufficient, actual, or constructive knowledge of "harmful consequences of [its] behavior" to provide the heightened level of moral culpability " 'beyond that associated with ordinary negligence.' " This factor thus weighs against finding a duty. (See *ibid.* [landlord not morally culpable for failing to provide

an automatic external defibrillator and assure tenant health club operator maintained it, as statute required health club to do].)

Pryor urges us to rely on the discussion of this factor in *Kesner*, where the Court concluded an employer who had exposed its employees to asbestos was morally culpable, because the employees were "powerless or unsophisticated compared to the defendants" with respect to the risks at issue, and "[the employer] exercised greater control over" those risks. (*Kesner, supra*, 1 Cal.5th at p. 1151.) But key to the court's application of the factor in that case was that the defendant, as a "commercial user[] of asbestos," had "benefitted financially from [the] use of asbestos," and that "[n]egligence in [the] use of asbestos [was] morally blameworthy." (*Ibid*.) LA Fitness's conduct does not reflect such a heightened level of moral culpability, nor did LA Fitness profit or seek to profit financially from its actions with respect to Guidroz.

5. *Preventing future harm*

The policy of preventing future harm is ordinarily served by allocating costs to those responsible for and "best situated" to prevent it. (See *Kesner, supra*, 1 Cal.5th at p. 1153; *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 781-782 (*Cabral*).) While an employer may be "best suited" to prevent harms *resulting from the workplace environment*—for example, asbestos in the workplace (see *Kesner, supra*, 1 Cal.5th at p. 1153)—the same cannot be said for an employer's ability to control the actions of its intoxicated employees after hours. As discussed above, LA Fitness had only a limited ability to control Guidroz's actions, particularly after he concluded his shift and left the

facility.[4] And even if we were to conclude that an employer may be indirectly "responsible" for failing to so control its employees, "[t]he policy question" in applying this factor "is whether [the factor] is outweighed, for a category of negligent conduct . . . by the undesirable consequences of allowing potential liability." (C*abral, supra,* 51 Cal.4th at pp. 781-782.) As discussed above, the undesirable consequences of imposing such a duty far outweigh any possible ability LA Fitness may have to prevent future similar harm.

6. *Availability of insurance*

Pryor argues that employers like LA Fitness are generally better able to secure insurance than are individuals. This may be the case, but it is an insufficient and improper basis for imposing a duty on the facts alleged. While the tort system does, as Pryor notes, contemplate "spread[ing] the risk" associated with the cost of doing business, it does so based on a connection between that business and the risks the business creates. (See *Harris*, *supra*, 120 Cal.App.3d at p. 163.) By engaging in the business of running a health club, or employing an individual with a drug problem to sell gym memberships, LA Fitness did not create the risk that that such an employee would collide with and kill a member of the public. Thus, "spreading the risk" of such a tragic accident to LA Fitness based solely on the company's superior ability to secure insurance would be "merely a legal artifice

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[4] While an employer has " 'the right to control the manner and means of [an employee] accomplishing the result' " the employer hired the employee to achieve (*S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350), this does not translate into blanket control over an employee's actions unrelated to performing that work.

invoked to reach a deep pocket," which courts have rejected in the context of respondeat superior (*Alma W.*, *supra,* 123 Cal.App.3d at pp. 143–144), and we likewise reject here.

In sum, Pryor urges that LA Fitness may have been able to do something that may have made it less likely Guidroz, acting wholly outside the scope of his employment, might injure someone, and that LA Fitness should be required to take such steps because, as a company rather than an individual, it is better able to shoulder the financial burden. This argument relies on an interpretation of an employer's duty that far from guarantees a net public policy benefit. We decline to impose such a duty.

B. *Negligent Hiring and Retention Claims*

The tort of negligent hiring "has developed in California in factual settings where the plaintiff's injury occurred in the workplace, or the contact between the plaintiff and the employee was generated by the employment relationship." (*Mendoza, supra,* 66 Cal.App.4th at pp. 1339–1340.) As discussed above, neither is the case on the facts alleged in the complaint. It thus does not state a claim for negligent hiring.

Application of the *Rowland* factors quickly confirms this result. Although it may be foreseeable that an individual who abuses drugs will injure someone by driving intoxicated, such an accident is not a foreseeable—or even logical—consequence of *hiring* a drug addict to perform a job that does not involve driving. Nor are there any " ' "overriding policy considerations" ' " that make it appropriate or workable to impose liability on an employer for failing to ferret out and address substance abuse by its employees. (*Bryant*, *supra,* 32 Cal.App.4th at p. 778.) We therefore conclude that the "category of negligent conduct" at issue in the present case—

hiring and then failing to further investigate or address an employee's suspected, covert drug abuse—was not " ' "sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed." ' " (*Kesner*, *supra,* 1 Cal.5th at p. 1145.) The facts alleged do not support the legal duty required for Pryor's negligent hiring and firing claim, and the trial court correctly sustained the demurrer of this claim.

III. Denial of Leave to Amend

Pryor finally argues the trial court erred in denying leave to amend the complaint. On appeal, the plaintiff bears the burden of identifying specific additional factual allegations that would enable an otherwise deficient complaint to state a cause of action. (See *Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 342–343.) While Pryor has identified several sources of additional factual allegations, none of these correct the deficiencies, based on which the trial court properly sustained LA Fitness's demurrers and twice dismissed Pryor's complaint.

In briefing the demurrer issues before the trial court, Pryor offered a handful of additional materials not referenced or incorporated in the complaint. Specifically, Pryor filed a declaration of "human resources expert Timothy Trujillo" that purports to opine on the applicable standard of care for California employers regarding drug and alcohol use during work hours. Attached to this declaration are several secondary sources, such as articles, surveys, and guidance from public human resources organizations, regarding work place drug use and related human resources issues. Finally, in its memorandum of points and authorities opposing the demurrer, Pryor references a passage from LA Fitness's drug and alcohol policy, as set forth in the company's employee handbook. This passage provides:

> "The Company recognizes a responsibility to help provide a safe and productive work environment for all employees and to minimize the public safety risks of our operations. Toward this end, the Company has a particular concern about substance abuse, since it can affect an employee's productivity and efficiency; jeopardize the safety of the employee, coworkers, and the public; impair the reputation of the Company and its employees; and violate state and federal statutes."

Pryor argues that these materials support allegations she could add to the complaint, if granted leave to amend, regarding the foreseeability of employee drug use on the job and resulting threats to public safety, as well as the standard of care for employers in dealing with inebriated or otherwise impaired employees.

But such additional allegations only further support Pryor's theory of vicarious liability as it is already alleged in the complaint, a theory which fails as a matter of law. In reaching this conclusion regarding the complaint in our analysis above, we acknowledge that drug abuse by employees while at work is a generally foreseeable occurrence. We likewise acknowledge that it is generally foreseeable that an intoxicated individual may choose to operate a vehicle, creating a risk to the public. But we nevertheless conclude that the complaint fails to allege a viable vicarious liability theory, because such generally foreseeable chains of events do not support the requisite connection between LA Fitness's business or the job duties it imposed on Guidroz and Guidroz's negligence on the day in question. Thus, allegations supporting the general foreseeability of workplace drug use and impairment do not address the core deficiency in Pryor's claims. That LA Fitness's employee handbook acknowledges the general likelihood of employee drug abuse and the public safety risks resulting therefrom is likewise unhelpful to Pryor.

Second, opinions regarding the standard of care for California employers in dealing with employee drug abuse—from a purported human resources expert, a government website providing guidance to HR professionals, or an article—do not assist Pryor's direct negligence claims. As discussed above, whether the law imposes a duty is a question of policy and foreseeability that courts determine on a case-by-case basis. We have outlined above the policy concerns that animate our refusal to recognize such a duty on the facts currently alleged. Opinions on how employers can or should assist employees in dealing with drug abuse do not inform or change the outcome of that policy analysis.

Thus, the additional allegations Pryor identifies do not address the deficiencies in the complaint. The trial court did not abuse its discretion in denying Pryor leave to amend her claims.

DISPOSITION

The trial court's judgment sustaining the demurrer and dismissing the complaint without leave to amend is affirmed as to all causes of action. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

BENDIX, J.