4th Civil No. G059971

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

PAUL J. BEAUDREAU,

Plaintiff and Appellant,

v.

BURNHAM USA EQUITIES, INC., et al.

Defendants and Respondents.

Appeal from Orange County Superior Court
Case No. 30-2019-01102369-CU-PA-CJC
Honorable Deborah Servino

RESPONDENTS' BRIEF

DIEDERICH & ASSOCIATES
*Robert E. Henke (SBN 150736)
rhenke@travelers.com
21680 Gateway Center Drive
Suite 100
Diamond Bar, California 91765
(909) 612-3908 / Fax: (855) 260-0261

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson (SBN 109374)
rolson@gmsr.com
*Gary J. Wax (SBN 265490)
gwax@gmsr.com
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
(310) 859-7811 / Fax: (310) 276-5261

Attorneys for Defendants and Respondents Burnham Equities, Inc., Seal Beach Village SPE, Inc., and Seal Beach Village LP

Court of Appeal
State of California
Fourth Appellate District, Division Three

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case No: G059971

Case Name: *Beaudreau v. Burnham USA Equities, Inc. et al.*

Please check the applicable box:

■ There are no interested entities or parties to list in this Certificate per California Rules of Court, rule 8.208.

□ Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	
5.	

/s/ Gary J. Wax
Signature of Attorney/Party Submitting Form

Printed Name: Gary J. Wax
Address: Greines, Martin, Stein & Richland, LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
State Bar No. 265490

Party Represented: Defendants and Respondents Burnham Equities, Inc., Seal Beach Village SPE, Inc., and Seal Beach Village LP

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Constitution and Statutes

TABLE OF AUTHORITIES

INTRODUCTION

Twenty-seven years ago, this Court held in *Jefferson v. Qwik Korner Market, Inc.* (1994) 28 Cal.App.4th 990 (*Jefferson*)—a case with virtually the same set of facts as here—that a store owes *no* legal duty, as a matter of law, to erect additional barriers beyond a wheel stop and raised curb around its storefront perpendicular parking spaces. In so concluding, *Jefferson* weighed the legal foreseeability of the incident and public policy considerations including the expense and burden of taking prophylactic measures.

There is no reason to depart from the *Jefferson* precedent. Duty—as *Jefferson* holds and our Supreme Court has repeatedly emphasized—is a question of law. So, too, are the judgments about foreseeability and the weighing of burdens that accompany the duty analysis. Without a legal duty, there can be no negligence liability.

Plaintiff was hit by a parking car that jumped over both a concrete wheel-stop and raised curb in front of a pedestrian area where he was walking. He sued the strip-mall and its management company for failing to install additional barriers, to remove parking located anywhere close to where pedestrians might be walking, to remove a planter on one side of the walkway, or to provide unspecified warnings. The trial court, following *Jefferson*, granted summary judgment for the defendants on the basis that they did not owe the claimed legal duty.

And it was correct in doing so. As a matter of law, business owners in this circumstance have no affirmative duty to take further

measures to prevent a third party from driving onto the sidewalk in front of their businesses, or to warn their patrons regarding every conceivable freakish accident that can occur near their parking lots.

On appeal, plaintiff argues that the accident was "easily anticipated" based on his supposed expert's unvetted "statistics." Those proffered statistics are that among billions of times cars have parked, a nearly infinitesimal percentage of those cars in an unspecified variety of circumstances around the country have negligently driven onto sidewalks in front of other businesses.

If this accident was reasonably foreseeable, it is also reasonably foreseeable that cars will drive onto pedestrian walkways in every strip-mall parking lot—or, for that matter, every street-adjacent business—in California. Based on plaintiff's theory, every business with pedestrian walkways near a parking area owes a duty to fortify the parking/pedestrian boundary by erecting multiple protective barriers strong enough to withstand an out-of-control car, thereby interfering with access between parking and businesses. There is, and should be, no such common-law duty.

Defendants' evidence establishes that this particular strip-mall had no history of over-the-curb vehicle incursions. It was no more foreseeable that a car would drive onto the pedestrian walkway at this location, or that a pedestrian would be passing by at the precise moment that a car jumped the curb, than in any of the thousands of other similarly designed strip-malls with storefront parking in California. That showing met defendants' burden of production on the duty issue.

The question is not whether cars could *ever* conceivably drive onto pedestrian walkways. Nor is it whether a business could *ever* owe a duty to protect patrons against that possibility. Rather, the question is whether the potential for a car to drive onto pedestrian walkways at a particular location is enough to warrant imposing a duty of protection on similar businesses with parking *throughout California*—even if the particular location has no history of cars driving onto the walkways. The answer is no.

Nor is foreseeability the only duty touchstone. Duty is ultimately a policy determination for courts. Here, the public policy factors also compel rejecting the new duty that plaintiff advocates, including that all similarly situated strip-malls (and any other businesses with adjacent parking) would be required to either redesign their parking lots at huge aggregate expense and consumer inconvenience, or eliminate parking or sidewalk amenities that are an iconic part of California's landscape. Such barriers would interfere with access between parking and businesses, including by consumers who might be carrying packages.

There is no basis to depart from *Jefferson*—decided on virtually the same facts. The reality of parking has not changed over the last quarter century. The burden, expense, and inconvenience of fortifying thousands of miles of pedestrian walkways in front of California businesses have not lessened. Plaintiff offers no good reason to depart from precedent. He just disagrees with it. Courts across the country that include foreseeability in the legal duty determination—as California does—have consistently held, in runaway parking car cases, that businesses do *not* owe the duty that plaintiff posits.

The trial court properly followed *Jefferson* and correctly entered summary judgment because plaintiff failed to establish an essential element of his claim—i.e., that defendants owed him any legal duty.

The judgment should be affirmed.

STATEMENT OF FACTS

A. A driver pulling into a perpendicular parking spot at defendants' strip-mall mistakenly presses the accelerator instead of the brake, vaulting over a concrete wheel-stop and raised curb, injuring plaintiff who was walking on the pedestrian walkway.

Defendant Seal Beach Village, LP owns the commercial property commonly known as Seal Beach Village—a strip-mall that includes multiple retail stores, banks, restaurants, and above-ground parking. (1 Appellant's Appendix (AA) 109-110 ¶¶ 5-6.) Co-defendant Seal Beach Village SPE is the owner's managing member, and co-defendant Burnham USA Equities, Inc. is the property manager. (1AA 110-111 ¶¶ 6-8.)

When a driver was pulling into a designated Seal Beach Village parking space, perpendicular to a pedestrian walkway located in front of a restaurant, she accidentally pressed her foot on the accelerator instead of the brake and lost control of her car. (1AA 54, 109 ¶ 3, 251 ¶ 10, 325; see 1AA 73-74 ¶¶ 6-7; 1AA 80, 121, 130.)

The parking space that she was pulling into was separated from the strip-mall's pedestrian walkway by two barriers: (1) a concrete wheel-stop (also known as a parking block or curb stop), and (2) a raised curb. (1AA 73-74 ¶ 7; 1AA 76-78,

80, 130, 153 ¶ 21.)[1] When the driver accelerated forward, out-of-control, her car jumped both concrete barriers and entered the pedestrian walkway. (1AA 325.)

At the time, plaintiff Paul Beaudreau, was walking on the pedestrian walkway directly in front of the parking area. (1AA 54, 63, 109.) After the car jumped over the two barriers, it pinned Beaudreau against a planter located between the parking lot, another pedestrian walkway, and a restaurant, which caused severe injuries. (1AA 54, 63, 109, 152-153 ¶¶ 20-21; 1AA 251 ¶ 10.)

B. Plaintiff sues the strip-mall owner and affiliated parties for failing to protect him from the errant driver.

Beaudreau sued (1) the property owner, (2) the owner's managing member, and (3) the property manager (collectively, the "Seal Beach Village defendants") for negligence/premises liability. (1AA 15-18.)

Beaudreau alleged that defendants negligently owned and managed the premises "in a defective and dangerous condition, with no warning given." (1AA 16 ¶ 4.) In particular, he alleged that the defective and dangerous condition was "an unsafe parking lot that dangerously channeled pedestrians such as Plaintiff, into traffic, with the risk that they would be struck by a motor vehicle; unsafe design of the parking lot, without

[1] For the Court's convenience, a photograph of the parking space from the record (1AA 130) is attached to the end of this brief at page 71 (see Cal. Rules of Court, rule 8.204(d)).

reasonable stops barricades or warnings; an unsafe design of the unguarded and exposed adjacent pedestrian walkways." (1AA 16 ¶ 5.)

C. The trial court, following this Court's precedent in *Jefferson v. Qwik Korner Market*, grants summary judgment for the defense, finding no legal duty owed to plaintiff.

The Seal Beach Village defendants moved for summary judgment. (1AA 32-42.) Relying on *Jefferson*, they argued that they owed no duty to protect a plaintiff from a car that jumps both a concrete barrier and a raised curb because such an event is not reasonably foreseeable, and even if it is foreseeable, public policy dictates against imposing the claimed duty. (1AA 37-40; Reporter's Transcript (RT) 3-4.)

Defendants submitted undisputed evidence that the accident was caused by the driver attempting to park in a designated perpendicular space. (1AA 54, 63, 109 ¶ 3.) Instead of pressing the brake to stop, the driver pressed the accelerator, which caused the vehicle to vault over both a concrete wheel-stop and raised curb before proceeding onto the pedestrian walkway and pinning plaintiff against a planter, injuring him. (1AA 36, 54, 109-110.) Defendants also submitted undisputed evidence that they were unaware of any prior curb-jumping events. (1AA 69 ¶¶ 7-8; 1AA 74 ¶¶ 8-9, 112 ¶ 13.)

In opposition, plaintiff argued that a jury could find that the Seal Beach Village defendants had created an unreasonable risk of harm and that foreseeability was a fact question for the

jury. (1AA 95-105.) He submitted no evidence of any prior curb-jumping incidents at Seal Beach Village. He asserted that because cars have driven onto sidewalks elsewhere in the country and because a retirement community was located less than a half-mile away, and both plaintiff and the driver were over eighty-years old, the Seal Beach Village defendants should have foreseen the accident. (1AA 97, 100, 103.)

Plaintiff submitted two expert declarations purporting to show the national incidence of parking lot accidents and storefront crashes, and the costs of installing additional vehicle barriers. (1AA 155-159, 164-166, 253-255.)

Defendants replied and objected to plaintiff's inadmissible evidence. (1AA 264-293.) In particular, they objected to:

- Plaintiff's expert declaration to the extent the expert opined that the accident was foreseeable, because such testimony was an impermissible legal conclusion; and
- The paragraph in plaintiff's counsel declaration that attempted to provide foundation for the police report from the incident, based on lack of foundation and personal knowledge.

(1AA 281 [#18], 287 [#32], 289 [#36], 293 [#43].)

The trial court granted summary judgment for the Seal Beach Village defendants. (1AA 323, 326.)[2] "Based on this record," it concluded that defendants had no duty to install

[2] The trial court's order granting summary judgment is attached at pages 72-75, *post*. (See Cal. Rules of Court, rule 8.204(d).)

"bollards or concrete poles," and "had no duty to protect Plaintiff from the tragic accident that occurred." (1AA 325.) The trial court relied on the following undisputed facts to conclude that defendants owed plaintiff no duty:

- Plaintiff was walking in the strip-mall's pedestrian area at the time of the accident;
- The driver who caused the accident accelerated forward into a designated parking spot located perpendicular to the pedestrian area;
- There was no expectation that customers would stay at any fixed point along the walkway in the area;
- Defendants "provided some protection from vehicles by means of a cement parking stop that provided a barrier between the parking space and the sidewalk";
- The probability that someone would be struck by an out-of-control vehicle was "far lower because there was both a raised curb and cement parking stop"; and
- There was no evidence of any "prior incident at the premises in which a vehicle jumped a cement parking block and entered any walkway at the premises."

(*Ibid.*)

According to the trial court, "[i]t would be expected for a driver pulling into such a parking space to be traveling at a low speed, and would decelerate in the face of an obvious barrier, and would have his or her foot on the brake pedal." (*Ibid.*)

According to the trial court, plaintiff's statistics imposed no duty on defendants to protect plaintiff from curb-jumping vehicles because there was "no information as to whether the circumstances of these incidents were even similar to the instant case." (1AA 326.) Nor did plaintiff's expert evidence that a senior community was located approximately half a mile from the strip-mall create any duty, according to the court. (*Ibid*.) Indeed, plaintiff's expert opined that "'[p]arking lot accidents and storefront crashes can and do occur with *drivers of all ages* and experience levels.'" (*Ibid*., quoting 1AA 156 ¶ 28, italics added by trial court.)

The court sustained the Seal Beach Village defendants' foundation objection to the police report. (1AA 323; see 1AA 131-142 [police report], 281 [#18].)[3] Further, the Court expressly "did not consider" plaintiffs' experts' opinions to the extent that they opined regarding the existence of a duty and negligence, because such opinions were legal conclusions. (1AA 323.)

[3] The opening brief admits that when the trial court sustained defendants' objection to the declaration purporting to authenticate the police report, the court "likely excluded the report entirely." (AOB 77.) Nevertheless, plaintiff impermissibly relies on the police report throughout the opening brief without acknowledging its exclusion. (See AOB 14-17 & fn. 1, 28, fn. 4, 69.) As we show in section I.C., *post*, the trial court did not abuse its discretion in excluding it.

D. The trial court enters judgment; plaintiff appeals.

On December 16, 2020, the court entered judgment. (1AA 341-342.) Defendants served notice of entry of judgment on January 26, 2021. (1AA 344-358.) This appeal followed.

ARGUMENT

I. The Trial Court's Evidentiary Rulings Were Correct.

A. The trial court properly considered defendants' declarations.

Plaintiff argues that the declarations defendants submitted in support of summary judgment lack personal knowledge. (AOB 41-50.) But plaintiff failed to object in the trial court, waiving the argument on appeal. In any event, there was ample personal knowledge.

The law is explicit: Objections to evidence filed in support of summary judgment *must* be submitted in writing or made orally "at the hearing" or they are deemed waived. (See Code Civ. Proc., § 437c, subds. (b)(5) & (d); Cal. Rules of Court, rule 3.1352; *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 531-532 [to avoid waiving evidentiary objections, they must either be made in writing before the hearing or delivered orally at the hearing].) Plaintiff made no such objections. His arguments on appeal regarding defendants' evidence are thus forfeited.

In any event, the declarants established their personal knowledge. Both attested to "personal knowledge" and described their roles within the defendant companies demonstrating why it was reasonable that they would acquire such knowledge. (1AA 69 ¶ 1, 73 ¶ 1; see *Taylor v. Financial Casualty & Surety, Inc.* (2021) 67 Cal.App.5th 966, 983 [the declarant "stated he had personal knowledge of the facts stated in his declaration"; based on his job title and his access to books and records, the court concluded "his background and experience sufficiently

established his personal knowledge of the information provided"]; *Osmond v. EWAP, Inc.* (1984) 153 Cal.App.3d 842, 851 ["Certainly, by virtue of their positions and described duties, both [declarants] were competent to testify"].)

Declarant Therese Hotvedt stated that she obtained personal knowledge by being "the Vice-President of the General Partner of [defendant] Seal Beach Village LP," a position she has held "since the company was formed in November 2003." (1AA 69 ¶ 2.) That position, according to her declaration, allowed her to become "familiar with the business operations of Seal Beach Village, LP, in addition to its record keeping procedures and the various jobs and projects [the] company has been engaged in *since its formation*." (*Ibid*., italics added.) These statements are sufficient to establish her personal knowledge, not just beginning in 2003, but also back to the company's purchase of the property three years earlier. Plaintiff points to no evidence contradicting her personal knowledge regarding the facts she testified to.

A trial court does not abuse its discretion by accepting, at face value, a declarant's sworn statement that he or she has personal knowledge, especially when her title and access to documents is expressly stated and uncontradicted. (See *Lujan v. Minagar* (2004) 124 Cal.App.4th 1040, 1046 ["A court may not disregard or reject the uncontradicted and undisputed testimony of a witness unless that testimony is inherently improbable or other circumstances such as the witness's demeanor, bias, or motives, create a logical basis for doing so"].)

There was no additional requirement for Ms. Hotvedt to detail exactly which business records she reviewed or when she reviewed them. (See AOB 42.) Nor does it matter that she was not designated as the "person most knowledgeable." (AOB 33, fn. 8; see also AOB 44.) That's a discovery designation that has nothing to do with the summary judgment procedure or other declarants' personal knowledge.

Plaintiff also asserts that Deana Morgan's declaration doesn't establish her personal knowledge regarding the lack of prior incidents. (AOB 45-49.) But again, her declaration is more-than sufficient.

Ms. Morgan stated that beginning in 2006 she was property manager for Seal Beach Village on behalf of defendant Burnham Equities, Inc. (1AA 73 ¶ 1.) As the property manager for Seal Beach Village, her job duties "included, but were not limited to, the operation, management, inspections, repairs and maintenance for the Premises." (*Ibid.*) Based on her position as property manager for the property where the incident occurred, and her role as Vice-President for defendant Burnham Equities, Inc., she had "personal knowledge regarding the operation, management, repairs and maintenance of the Premises." (*Ibid.*)

None of plaintiff's laundry list of *additional* facts not found in her declaration make infirm the existing statements establishing her personal knowledge. (AOB 45-49.) Nor has plaintiff established any abuse of discretion in the court's admission and consideration of the declarations—especially considering plaintiff failed to preserve any objection.

B. Fact witnesses cannot permissibly opine on legal issues, such as duty and foreseeability.

Plaintiff next complains that the trial court struck his expert's legal opinions. A party opposing summary judgment must rely on *admissible* evidence. (Code Civ. Proc., § 437c, subd. (d); see *Hayman v. Block* (1986) 176 Cal.App.3d 629, 638.)

The trial court sustained defendants' objections the purported safety expert's foreseeability opinions as impermissible legal conclusions. (1AA 287 [#32], 289 [#36], 293 [#43]; 1AA 323 [sustaining legal opinions regarding "duty of care and negligence"].) Its summary judgment evidentiary rulings are reviewed for an abuse of discretion. (*Foroudi v. Aerospace Corporation* (2020) 57 Cal.App.5th 992, 1006.) "Under this standard, the trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*Thompson v. County of Los Angeles* (2006) 142 Cal.App.4th 154, 168.)

The trial court acted well within its discretion—indeed it was correct as a matter of law—in excluding the expert's impermissible legal opinions. Experts may not opine regarding legal questions. (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178-1184; *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 884 ["'[I]t is thoroughly established that experts may not give opinions on matters which are essentially within the province of the court to decide.'"].)

A corollary to this rule, as plaintiff acknowledges, is that "experts may not offer impermissible opinions on duty." (AOB 75; see *Vulk v. State Farm General Insurance Company* (2021) 69 Cal.App.5th 243, 259, fn. 6 [rejecting plaintiff's attempt to establish a triable issue of fact on duty of care issue based on expert opinions]; *Thompson v. Sacramento City Unified School Dist.* (2003) 107 Cal.App.4th 1352, 1373 ["[a] party cannot rely upon an expert's opinion to establish duty, which is a question of law for the court"]; *Asplund v. Selected Investments in Financial Equities, Inc.* (2000) 86 Cal.App.4th 26, 50 [trial court properly excluded expert declaration purporting to establish duty].)

That includes assessing whether the event was foreseeable in the legal sense, which is a question of law for duty purposes. (See § II.A., *post*; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 678, disapproved on another ground in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527, fn. 5; *Grotheer v. Escape Adventures, Inc.* (2017) 14 Cal.App.5th 1283, 1301.)

Plaintiff's expert's opinions that the accident here was foreseeable (AOB 68, citing AA 161 ¶ 37, 164 ¶ 41, 167 ¶ 48) are inadmissible. The court properly excluded them.

C. The court was well within its discretion in excluding the hearsay police report.

Plaintiff argues the trial court erred in excluding the police report of the driver-versus-pedestrian incident in this case. (AOB 77-78.) He suggests that, although it was obvious hearsay, it was somehow admissible. (AOB 78.) Certainly, it was unnecessary to establish what happened in this case as the facts

are undisputed. And there is no doubt that it is hearsay—it's an unsworn, out of court statement, repeating others' hearsay. (Evid. Code, § 1200.)

As the proponent of the evidence, plaintiff bore the burden to establish that the hearsay evidence fell within one of the exceptions. (*Furman v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 416, 421; see *Scott S. v. Superior Court* (2012) 204 Cal.App.4th 326, 342 [the hearsay proponent "has the burden of laying the proper foundation"].) The longstanding rule is that police reports are inadmissible. (E.g., *People v. Sanchez* (2016) 63 Cal.4th 665, 695 & fn. 1 [as police reports are not created to conduct the police entity's business, they are inadmissible]; *People v. McVey* (2018) 24 Cal.App.5th 405, 416 [police report inadmissible under business records exception absent affidavit from authenticating police agency witness]; *Behr v. Santa Cruz County* (1959) 172 Cal.App.2d 697, 705 [accident reports, especially those compiled by police at the scene of an accident—based on statements of participants, bystanders, measurements, deductions and conclusions of their own—"fail to qualify as admissible official records or business records"].)

Plaintiff doesn't even attempt to establish (rather than just to baldly assert) that the police report satisfies an exception; nor did he make any offer of proof in the trial court. He simply states ipse dixit that "at least portions" of the police report "are admissible for the truth of the matter under exceptions to the hearsay rule" (citing the business records and official records exceptions), and that the driver's statements are admissible

under the "declaration[s] against interest" exception to the hearsay rule. (AOB 78.)

Without demonstrating that the hearsay evidence satisfies any of these exceptions' requirements (he can't), plaintiff failed to establish that the court abused its discretion in sustaining the hearsay objections. (See *People v. Morrison* (2004) 34 Cal.4th 698, 724 [hearsay evidence is properly excluded "when the proponent fails to make an adequate offer of proof regarding the relevance or admissibility of the evidence"].)

Nor can he establish prejudice on appeal. (Cal. Const., art. VI, § 13; Evid. Code, § 354.) What happened—that the driver pressed the accelerator instead of the brake—is undisputed. As there's no other legitimate purpose for the hearsay police report, the evidence was properly excluded. Thus, it is not part of the record and plaintiff's reliance on it is improper.

II. Defendants Owe No Duty To Forecast And Prevent A Freak Accident: Where A Car Attempting To Park Vaults Over Both The Concrete Wheel-Stop And Curb And Drives Onto The Pedestrian Walkway.

Plaintiff's negligence claim required him to establish a legal duty. (*Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077, 1083.) The trial court held that defendants "had no duty to protect Plaintiff" from a car that that drove over two barriers, and onto the pedestrian walkway. (1AA 325.) On appeal, plaintiff contends that the defendants owed plaintiff a legal duty because the incident was conceivable. (AOB 56-70.) But none of the opening brief's arguments support the duty claim.

A. Duty and its foreseeability component are *legal* determinations for the court.

In California, whether a duty exists, and the scope of the duty, are legal questions for the court. (*Ann M.*, *supra*, 6 Cal.4th at p. 678; see 1AA 324-325 [court deciding duty as a legal question].) Because duty is a question of law, it "'is particularly amenable to resolution by summary judgment.'" (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1154; see *Verdugo v. Target Corp.* (2014) 59 Cal.4th 312, 340-341 [rejecting claimed duty based on complaint's allegations].)

A key factor in the duty inquiry is whether the harm at issue was reasonably foreseeable. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112-113; see 1AA 324; AOB 57.) Under California law, this, too, is a legal question for the court: "Foreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the court." (*Ann M., supra*, 6 Cal.4th at p. 678.)

In the duty context, the court's task "'is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed ….'" (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1145, original italics.) Courts, not juries, make this "normative inquiry." (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 476; *Ann M., supra*, 6 Cal.4th at p. 678.) That is because "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.'" (*O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 364, internal quotation marks omitted, original italics.)

Many of the cases that plaintiff relies on are from jurisdictions which do not include foreseeability in the legal analysis that a *court* must perform. (E.g., *State Farm Fire and Cas. Co. v. Bell* (D.Kan. 2014) 30 F.Supp.3d 1085, 1117-1118 (*Bell*) [Kansas]; *Rodriguez v. Del Sol Shopping Center Associates, L.P.* (N.M. 2014) 326 P.3d 465, 468 [New Mexico]; *Springtree Properties, Inc. v. Hammond* (Fla. 1997) 692 So.2d 164 [Florida]; *Oswald v. Costco Wholesale Corporation* (Idaho 2020) 473 P.3d 809, 825 [Idaho]; *Truax v. Roulhac* (Pa.Super.Ct. 2015) 126 A.3d 991, 1000 [Pennsylvania]; *Parish v. L.M. Daigle Oil Co., Inc.* (La.Ct.App. 1999) 742 So.2d 18 [Louisiana].) They are, thus, irrelevant to California law.

As we now discuss, the *legal* foreseeability inquiry refutes a general duty owed by businesses to protect against parking vehicles jumping two barriers and careening into the pedestrian walkway.

B. An injury is legally foreseeable only if its occurrence is *reasonably* likely.

"Reasonably foreseeable" in the duty context "does not mean simply imaginable or conceivable." (*Jefferson*, *supra*, 28 Cal.App.4th at p. 996.) Rather, defendants' conduct must have been "'*sufficiently likely* to result in the kind of harm

experienced that liability may appropriately be imposed.'" (*Id.* at p. 993, quoting *Ballard v. Uribe* (1986) 41 Cal.3d 564, 572-573, fn. 6, original italics; see also *Tucker v. CBS Radio Stations, Inc.* (2011) 194 Cal.App.4th 1246, 1253 ["[f]oreseeability supports a duty only to the extent it is reasonable, because rarely is anything completely unforeseeable"].)

Foreseeability is not measured in the abstract. Whether an event was sufficiently likely to warrant imposing a duty depends on what measures the plaintiff claims should have been taken. If the burden of providing the urged precautionary measure "is onerous rather than minimal," courts will not impose a common law duty to do so, "absent a showing of a 'heightened' or 'high degree' of foreseeability of the danger in question …." (*Verdugo*, *supra*, 59 Cal.4th at p. 338 [conceivable possibility of shoppers suffering heart attacks did not warrant duty for store to have an available automated external defibrillator].)

Here, the measures that plaintiff seeks—(1) removing *all* strip-mall storefront parking; (2) installing additional barriers; (3) redesigning the pedestrian walkway; or (4) providing unspecified ubiquitous warnings (AOB 20-23; 1AA 101-104, 164 ¶ 42)—are onerous. Plaintiff's expert declared that "the pedestrian-only sidewalk and building frontage could have been fully protected against an intrusion from a vehicle for less than $12,000." (1AA 167 ¶ 46.) But as plaintiff's foreseeability theory would apply equally to *all* businesses with sidewalk-adjacent parking, the cost would be multiplied many times over, throughout the State. Given this onerous burden, there must be a heightened likelihood of harm.

But even without heightened foreseeability, the "sufficiently likely" to occur standard means that the harm is not legally foreseeable merely because it is *imaginable*. (See *Ulwelling v. Crown Coach Corp.* (1962) 206 Cal.App.2d 96, 118 [one is not required to anticipate against remote possibilities].) There must be some additional factor making it likely that a patron of Seal Beach Village would be hit by an out-of-control car as to warrant imposing on defendants a duty to protect against that possibility.

As we now explain, there is no sufficient foreseeability here to trigger the duty plaintiff claims.

C. The remote possibility that a parking car would vault over two concrete barriers does not warrant imposing a duty to fortify pedestrian walkways.

1. *Jefferson v. Qwik Korner Market*—from this District and Division—is on all fours and establishes that the accident was not legally reasonably foreseeable.

As the trial court found, *Jefferson*, *supra*, 28 Cal.App.4th 990, from this District and Division "is directly on point." (1AA 325.) Indeed, the facts are virtually identical. In *Jefferson*, as here, an elderly driver attempting to park in a store's parking lot perpendicular to a pedestrian walkway accidentally pressed the accelerator instead of the brake, drove over both a concrete wheel-stop and a curb, then proceeded onto the sidewalk where he hit a customer who was standing outside of a store.

(28 Cal.App.4th at p. 992.) The injured customer sued the store, arguing that the accident was foreseeable and that the store should have installed metal posts (bollards) at the ends of the parking spaces to stop cars from reaching the sidewalk. (*Ibid.*)

This Court affirmed summary judgment for the store. (*Id.* at p. 997.) It concluded that it was insufficiently foreseeable that a car pulling into a perpendicular, head-in parking spot in front of a store would drive over a concrete wheel-stop and a raised curb and hit pedestrians standing in front of the store. (*Ibid.*) Imposing a duty on a store "to protect a customer from every imaginable incident is an unreasonable burden"; a car driving up onto the sidewalk and injuring a customer walking there was not sufficiently likely to occur such that it would require the store to erect additional barriers. (*Id.* at pp. 996-997; see *id.* at pp. 992-994 [noting that a parking lot space designed with a wheel-stop and curb is "typical of the vast majority of such businesses"].)

Jefferson recognized that cars sometimes leave the roadway and hit people, but held that the accident at issue was not "sufficiently likely" to warrant imposing a duty to protect against it. (*Id.* at pp. 993-996.) *Jefferson* adopted the rule in parking lot/negligence cases that "such accidents are insufficiently likely as a matter of law" to impose a duty on premises owners; and thus, strip-mall owners with perpendicular parking have "no duty to provide 'an impregnable barrier'" around the sidewalk. (*Id.* at pp. 992-993.) It rejected imposing a duty on a store "to protect a customer from every imaginable incident" because it would be "an unreasonable burden." (*Id.* at p. 996.) *Jefferson* stands for the proposition that pedestrian

injuries occurring on storefront pedestrian walkways caused by out-of-control drivers are *solely* the drivers' fault.

Jefferson's legal reasoning was based upon our Supreme Court's decision in *Ann M.*, *supra*, 6 Cal.4th 666. There, the Court stated: "We further conclude that the requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises. To hold otherwise would be to impose an unfair burden upon landlords and, in effect, would force landlords to become the insurers of public safety, contrary to well established policy in this state." (*Ann M.*, at p. 679; accord, *Jefferson*, at p. 996 [the law does not impose a duty on store owners to ensure customers' safety].)

The facts here are indistinguishable from *Jefferson*. The undisputed record shows:

- Seal Beach Village is a strip-mall filled with retail shops, banks, restaurants, and above-ground parking. (1AA 76, 80, 110 ¶¶ 5-6.)

- When a Seal Beach Village patron was pulling into a designated parking space located perpendicular to a pedestrian walkway in front of Seal Beach Village's shops and restaurants, she accidentally pressed the accelerator. (1AA 73-74 ¶¶ 4-7, 109-111 ¶¶ 2-3, 9-11, 152-153 ¶¶ 20-21, see 1AA 76-78, 121, 128, 130.)

- At the time, plaintiff was walking on the pedestrian walkway. (1AA 109 ¶ 3, 152 ¶ 20.)

- When the driver accelerated, she drove over a concrete wheel-stop, over a raised concrete curb, and onto the elevated

pedestrian walkway where her car hit plaintiff. (1AA 109 ¶ 3, 152-153 ¶¶ 20-21; see 160 ¶ 34.)[4]

- There is no evidence of *any* car driving onto the walkway in Seal Beach Village before this incident. (1AA 69 ¶¶ 7-8, 74 ¶¶ 8-9. 112 ¶ 13 [plaintiff's statement of material facts identifies no prior curb-jumping incident at Seal Beach Village].)[5]

Nothing in these facts indicates that Seal Beach Village is particularly susceptible to cars driving over both a concrete wheel-stop and an elevated curb before proceeding onto the pedestrian walkway. Plaintiff proffered no relevant contrary facts. (See 1AA 112-115.) Nothing in this record suggests facts materially different from those in *Jefferson*.

As in *Jefferson*, the duty that plaintiff seeks to impose, therefore, is one that would apply to *any* business offering parking spaces located perpendicular to a pedestrian walkway with wheel stops and a raised curb. This would require many strip-malls with restaurants to remove outdoor seating, or to

---

[4] Plaintiff did not dispute the existence of the concrete wheel-stop or the elevated curb, he just disputed that they were standard size. (1AA 112 ¶ 11; see also 1AA 152-153 ¶¶ 20-21.)

[5] Plaintiff argues that the evidence only establishes that these particular declarants were unaware of prior incidents, but that their lack of knowledge doesn't necessarily mean that *all* defendants lack knowledge. (AOB 33, fn. 8, 43-44, 49.) But he presents *no* evidence that there *have* been any prior curb-jumping incidents at this strip-mall. The declarations of individuals likely to know such information stated that they were unaware of any such incidents, which more-than sufficed to meet defendants' burden to show the absence of circumstances to support plaintiff's claimed duty.

erect protective barriers around it. Other businesses, too, would have to either eliminate sidewalk amenities or incur onerous expenses.

The accident was caused by a bizarre coincidence of simultaneously-occurring events: A car jumped the wheel-stop and curb at the precise moment that a pedestrian happened to be walking by. This coincidence was far from foreseeable. (See *Ulwelling*, *supra*, 206 Cal.App.2d at p. 114 [a business's duty to anticipate what usually happens and what is likely to happen does not require it to predict the unusual, unlikely, or remotely probable].) Defendants had the right to expect that the driver, pulling into the parking space, would *not* press the accelerator and would *not* vault into the pedestrian area where plaintiff was walking. (See *Tucker v. Lombardo* (1956) 47 Cal.2d 457, 467 [everybody has the "'right to presume that every other person will perform his duty and obey the law"'].)

Jefferson recognized three possible categories of exceptions, although any one feature, standing alone, might not suffice to create a duty: (1) businesses without *any* curbs or barriers; (2) businesses with a history of prior similar incidents; or (3) building designs that required customers to await service "adjacent to a parking lot or driveway." (28 Cal.App.4th at pp. 994-995.)[6] This case falls into *none* of those categories.

---

[6] *Jefferson* cited, for its third category, three cases involving restaurants where the patrons were forced to stand at a service window in a fixed position next to perpendicular parking. (28 Cal.App.4th at p. 995, citing *Chatmon v. Church's Fried Chicken* (Ga.Ct.App. 1974) 211 S.E.2d 2, 3 [location demanded that customers had to stand immediately in front of cars on a parking

(See 1AA 109 ¶ 3 [undisputed that plaintiff was *walking* in the pedestrian area].)

Per *Jefferson*, *no* case imposed liability where a curb separated cars from pedestrians, the parking lot design was typical, "there were no prior similar incidents[,] *and* nothing required customers to remain in a fixed location adjacent to the parking area." (28 Cal.App.4th 990 at pp. 995-996, italics added.)

2. Plaintiff's attempts to distinguish *Jefferson* fail.

Plaintiff argues that *Jefferson* does not apply here. (AOB 23, 35-50.) But none of plaintiff's bases for ignoring this settled authority withstand scrutiny.

First, plaintiff attempts to distinguish *Jefferson* on the basis that the expert there opined that "'the design and construction of the parking lot met or exceeded all city codes and regulations'"; whereas here, the Seal Beach Village defendants presented no such evidence. (AOB 36-37, 39-40; see also RT 7.) But *Jefferson* does *not* hold that a defendant moving for summary judgment in a mall-parking negligence case is required to establish that the mall's parking complied with codes or

---

island to make a purchase]; *Barker v. Wah Low* (1971) 19 Cal.App.3d 710, 711-712, 721 [parking spaces at drive-in restaurant were located "close to and facing the building"]; *Johnson v. Hatoum* (Fla.Dist.Ct.App. 1970) 239 So.2d 22, 24, 27 [vehicles at a drive-in restaurant "were permitted to drive onto the premises and park anywhere and at any angle and at such proximity to the buildings and other patrons as the operator wished"].)

regulations. Plaintiff does not allege that the Seal Beach Village defendants violated any code or regulation; nor does he allege negligence per se. (See 1AA 15-17; cf. Evid. Code, § 669, subd. (a)(1) [presuming a duty only if plaintiff establishes the defendant violated a statute, ordinance, or regulation].)

Defendants had no burden to *disprove* that a code or regulation not pleaded imposed a duty on defendants. Nor does plaintiff cite any evidence that the parking lot design and construction failed to comply with any code or regulation. His code and regulation references are irrelevant distractions.

Next, plaintiff points to differences in the way the Seal Beach Village parking lot was designed in comparison to the parking lot in *Jefferson*. (AOB 37-40.) These minor differences are irrelevant. (See *Jefferson*, *supra*, 28 Cal.App.4th at p. 993 [courts must determine whether a legal duty is owed based on whether the category of negligent conduct at issue is *sufficiently likely* to result].) *Jefferson* states that where businesses provide perpendicular parking with "both a curb and wheelstops," such a "parking lot design is typical of most businesses" and creates no additional duty to protect pedestrians. (*Id*. at pp. 995-996.) That is exactly the design here.

Third, Plaintiff attempts to distinguish *Jefferson*, by pointing to the concrete planter the driver's car pinned him against. (AOB 39, 48.) He claims the planter's position near the parking lot made the accident foreseeable, and thus, created a duty to either remove the planter, eliminate parking spaces close to it, or warn patrons about it. (AOB 20-26, 48.) But there

is no claim or allegation that the walkway between the planter and parking was somehow inadequate for pedestrians when cars properly parked.

The walkway's design would only be relevant if plaintiff alleged that it required him to stand in a fixed location. (See *Jefferson*, *supra*, 28 Cal.App.4th at pp. 995-996 [noting that some courts impose a duty on store owners where the building design requires customers to stand near a parking lot awaiting service].) There's no allegation or evidence that Seal Beach Village did anything to require, or even encourage, plaintiff to stand between the parking space and the curb. Indeed, the evidence is undisputed that plaintiff was walking past the planter at the time the driver drove over the concrete barriers. (See 1AA 73 ¶ 6, 109 ¶ 3, 152 ¶ 20.) Nor is there any evidence showing that the walkway here, even with the planter, was narrower than either a standard walkway or the walkway in *Jefferson*.

The walkway design is irrelevant if the defendant does not have to anticipate a vehicle jumping the wheel stop and curb. Defendants have no need to *disprove* that having a planter adjacent to the pedestrian walkway was atypical. (AOB 39-40.) It is unforeseeable that a car would drive over concrete barriers onto the pedestrian walkway, period, regardless of where the planter was located in the first place.

Finally, plaintiff claims that defendants should have been aware that a community of people over the age of 50 lived about 1/2 mile from Seal Beach Village. (AOB 14, 16, 67; see 1AA 159 ¶ 32.) He vaguely implies that this coincidence in location made

the accident more foreseeable to the Seal Beach Village defendants because both the driver who caused the accident and plaintiff were in their 80s. (*Ibid*.) The trial court properly rejected this argument as plaintiff's own expert also acknowledged "'[p]arking lot accidents and storefront crashes can and do occur with *drivers of all ages* and experience levels.'" (1AA 335, quoting 1AA 156 ¶ 28, italics added by court.)

In any event, businesses have no duty to survey the surrounding communities to determine whether they have a high percentage of senior drivers (as if drivers would be confined to one particular area in densely-populated Southern California). (See AOB 67; RT 9-10.) Business owners are entitled to assume that licensed drivers visiting their parking lots, regardless of their age, are competent to drive. (See *Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 950 (conc. opn. of Mosk, J.) ["as a licensed driver, [the driver whose car hit the plaintiff pedestrian] was presumptively competent to drive," citing Veh. Code, § 12805, subd. (c)]; *Papelian v. State of California* (1976) 65 Cal.App.3d 958, 963 [it is "to be presumed" that the Department of Motor Vehicles does not issue licenses to those who are unfit to drive].) Our Supreme Court has repeatedly rejected such a community-danger approach. (See *Ann M.*, *supra*, 6 Cal.4th at p. 680 [prior similar incidents on premises not established by surrounding area crime statistics]; accord, *Sharon P. v. Arman, Ltd*. (1999) 21 Cal.4th 1181, 1191, disapproved on other grounds in A*guilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826 and *Reid v. Google, Inc.* (2010) 50 Cal.4th 512.)

Jefferson is indistinguishable.

3. No authority imposes a legal duty on defendants contrary to *Jefferson*'s no-duty holding.

No California case imposes a duty on stores to protect its walking patrons from out-of-control parking vehicles by installing impenetrable barriers. Nor has any court demanded a walkway wider than any particular width at shopping centers. In fact, the opening brief cites no published California case in which a store owner was found liable for a pedestrian's injury that he incurred while walking on a pedestrian walkway. The cases that he does cite (AOB 64-65) involve different layouts—and, in one case, a prior similar accident.

Bigbee v. Pacific Tel. & Tel. Co. (1983) 34 Cal.3d 49, involved a phonebooth "in a parking lot 15 feet from the side of a major thoroughfare and near a driveway"—nothing like the parking lot circumstances here. (*Id.* at p. 58.) *Bigbee* held that it was a triable fact question as to whether it was foreseeable that a car would hit the phonebooth, particularly given that this was *at least the second time* that it had happened "at this same location …." (*Ibid.*) Later decisions establish that *Bigbee*'s duty analysis was wrong: In the duty context, foreseeability is a legal question for the court, not a fact question for the jury. (*Ann M., supra*, 6 Cal.4th at p. 678 [disapproving *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, which, in turn, cited *Bigbee* for the proposition that "foreseeability is ordinarily a question of fact"]; *Vasilenko*, *supra*, 3 Cal.5th 1077, 1083 ["[t]he existence of a duty is a question of law"].)

Nor is *Bigbee* factually on-point: Unlike in *Bigbee*, a phone booth *in* the parking lot and adjacent to a major roadway is not at issue.

Robison v. Six Flags Theme Parks Inc. (1998) 64 Cal.App.4th 1294, 1302 (see AOB 58, 61), is even further afield. As the trial court found, *Robison* is inapposite for two reasons: it does not involve a car pulling into a parking space, and the defendant there "provided no protective measures at all." (1AA 335.) The defendant, a theme park, put picnic tables in its parking lot and aimed 25-mile-per-hour traffic lanes directly at the tables. (*Robison*, at pp. 1296-1297.) There was no physical barrier between the traffic lanes and the tables, and the only way for cars to avoid hitting the tables was to make a sharp 90-degree turn just before hitting them. (*Ibid.*) *Robison* held that this specific configuration made it reasonably foreseeable that a car would miss the 90-degree turn and hit a table. (*Id.* at p. 1305.)

In contrast to *Robison*, defendants here did not seat patrons in the middle of a parking lot; rather, they simply created a pedestrian walkway close to the parking lot that was separated from the parking by two physical barriers—a concrete wheel-stop and a raised street curb. *Robison* does not indicate that it is legally foreseeable that patrons will be hit by a car in that situation.

If anything, *Robison* supports that the accident here was *not* foreseeable. *Robison* noted that the risks of a collision are lower when a car is pulling into a perpendicular parking space bounded by a concrete wheel-stop than when it is traveling in

a traffic lane. "A driver pulling into such a parking space will expectably be traveling at low speed, will expectably be decelerating in the face of an obvious barrier, and will expectably have his or her foot on the brake pedal. All these factors are relevant to the degree of foreseeability of an accident." (*Id.* at p. 1302; see also 1AA 334 [trial court distinguishing *Robison* on the same basis].) The combination of those factors here makes the degree of foreseeability low. (See 1AA 334.)

4. *Jefferson* remains good law.

Plaintiff asserts that *Jefferson* has lost its vitality at 27-years old, so he asks this Court to overrule it. (AOB 50-65.) Not so.

To begin with, under stare decisis, this Court will not "overrule a decision rendered by another panel of this court except for compelling reasons." (*People v. Bolden* (1990) 217 Cal.App.3d 1591, 1598; see *Golden Gateway Center v. Golden Gateway Tenants Assn.* (2001) 26 Cal.4th 1013, 1022 [""[E]ven in constitutional cases, the doctrine [of stare decisis] carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification"""]; *ibid.* [following a prior decision that had "been the law in California for over 20 years," and stating that whether or not a later court would reach same conclusion addressing the issue for the first time, the Court was "obliged to follow it under principles of stare decisis"]; *Imperial Irrigation Dist. v. State Wat. Resources Control Bd.* (1990) 225 Cal.App.3d 548, 556 [prior published opinions "should be followed unless, by reason of passage of time or new

enlightenment of some sort, they are found clearly erroneous"]; *The MEGA Life & Health Ins. Co. v. Superior Court* (2009) 172 Cal.App.4th 1522, 1529 [the Court of Appeal generally follows Court of Appeal precedent unless given "good reason to disagree"]; *Fire Ins. Exchange v. Abbott* (1988) 204 Cal.App.3d 1012, 1023 [same].)

There are no such reasons here. No published decision conflicts or disagrees with *Jefferson*—to the contrary it has been repeatedly followed. And plaintiff has offered no good reason for this Court to overrule or refuse to follow it. Plaintiff points to no change in the law. The realities of parking at businesses around the state have not changed.

Rather, plaintiff argues that 29 cases citing *Jefferson* involve cars have negligently driven onto business sidewalks. (AOB 50-51.) He claims that the simple existence of these cases (whether the courts found a duty or not) means that such accidents are now foreseeable to business owners. (*Ibid*.)

The vast majority of California cases citing *Jefferson* are unpublished. Presumably, that is because they followed it. If they disagreed with it, or criticized it, or reached a contrary result, such cases would be published. (See Cal. Rules of Court, rule 8.1105(c).)

One of the three published California cases that cited *Jefferson* followed it. (See *Wawanesa Mut. Ins. Co. v. Matlock* (1997) 60 Cal.App.4th 583, 588.) The second published case didn't even involve parking. (*Robison*, *supra*, 64 Cal.App.4th at p. 1303.) As discussed above, it involved a very different

circumstance: a moving traffic lane pointed directly at a picnic table area with *no* barrier whatsoever. (*Ibid*; pp. 44-45, *ante*.) The third initially published case distinguished *Jefferson*, but it was depublished when the Supreme Court reversed it. (*Wiener v. Southcoast Childcare Centers, Inc.* (2003) 107 Cal.App.4th 1429, rev. granted and revd. (2004) 32 Cal.4th 1138.) *Jefferson* is hardly an outlier or even a controversial decision.

Indeed, courts around the country continue to follow it. One of the more recent out-of-state cases citing *Jefferson* rejects the exact argument that plaintiff makes here—i.e., "that Defendants should have installed bollards at the end of the nose-in parking spaces because this would have prevented the injury Plaintiff sustained." (*O'Bryant v. Walgreen Co.* (S.D.Miss. 2019) 387 F.Supp.3d 693, 702, affd. (5th Cir. 2020) 802 Fed.Appx. 826; see AOB 59-60 [asserting that defendants should have installed bollards or concrete poles].)

The facts in *O'Bryant* are virtually identical to this case, except that in *O'Bryant* the plaintiff was standing still. There, the driver was pulling his truck into a perpendicular parking space located in front of a sidewalk next to a Walgreens store where a store patron was standing engaged in a conversation. (387 F.Supp.3d at p. 694.) The driver's foot accidentally slipped off the brake pedal and onto the accelerator. (*Ibid*.) This caused his truck to drive over the curb, and onto the sidewalk. (*Ibid*.) The truck pinned the store patron against the brick building, causing him to suffer serious injuries. (*Ibid*.; see 1AA 154-155 ¶¶ 23-24 [the driver's car in this case pinned plaintiff against a planter].)

The federal district court followed Mississippi law, which follows the same negligence liability principles as California, including that in negligence/premises liability cases, courts can decide whether defendants owe plaintiff a legal duty as a matter of law. (*O'Bryant*, *supra*, 387 F.Supp.3d at pp. 695-702.)

The district court granted summary judgment for the same reason the trial court here granted defendants' motion: because it concluded, as a matter of law, that the defendant had no duty to erect protective bollards, or to otherwise ensure the safety of patrons on the sidewalk. (*Id.* at p. 702.) It concluded that the declaration of plaintiff's "self-designated expert in 'storefront safety'"—*the same safety expert that submitted a declaration in support of plaintiff's motion in this case* (see 1AA 145-248)—was "insufficient to establish that Walgreen Co. created circumstances making vehicle-caused injury to a patron reasonably foreseeable" (*O'Bryant*, p. 702, see *id.* at p. 701).

The Fifth Circuit Court of Appeals *affirmed*, agreeing that the store had no duty to erect physical barriers to prevent injuries caused by a third-party's errant driving, because defendants "had no prior indication that such an incident would happen." (*O'Bryant v. Walgreen Company* (5th Cir. 2020) 802 Fed.Appx. 826, 832; see *id.* at p. 835.)

O'Bryant is factually and legally on point. The only differences between that case and this case are immaterial. If anything, *O'Bryant* presents an even closer case on legal duty simply because the injured patron there was standing in a stationary position; whereas here, it is undisputed that plaintiff

was walking on the pedestrian walkway at the time of the accident. *O'Bryant* demonstrates that *Jefferson* remains vital today, so much so that courts in other jurisdictions still rely on it as establishing that store owners owe no tort duty in storefront curb-jumping cases absent special circumstances.

O'Bryant and *Jefferson* represent the majority national rule: When a motorist—while parking her car in front of a store—inadvertently accelerates, forcing her car onto the sidewalk, the store owes plaintiff no duty as a matter of law. (See Annot., Liability of owner or operator of parking lot for personal injuries caused by movement of vehicles (1971) 38 A.L.R.3d 138 (cumulative supp.) § III.8[b] [collecting cases].)

Plaintiff's cherry-picked cases mostly from outside of California (AOB 61-63), do not undermine *Jefferson*'s no-duty principles. They are all easily distinguishable:

- *Kerrigan v. Lowe's Home Centers, LLC* (C.D.Cal., Sept. 15, 2015, No. EDCV 15-00088-VAP (KKx)) 2015 WL 12669869. *Kerrigan* involved a pedestrian who exited a store and walked into traffic obscured by obstructions (trees for sale) that the store had placed in the way. (*Id.* at p. *1.) It had nothing to do with parking. And, it relied on the rule that property owners cannot affirmatively create a condition on their property that in normal or expected use is dangerous. (*Id.* at p. *5.)

- *Martinez v. Costco Wholesale Corp.* (C.D.Cal., Sept. 19, 2019, No. SACV 18-1296 JVS (KESx)) 2019 WL 6655272. The deceased in *Martinez* was hit by a car while he was walking in a crosswalk near a Costco front entrance. (*Id.* at p. *2.)

In denying summary judgment, *Martinez* distinguished *Jefferson* because it involved a car entering an area (the sidewalk) "where cars [we]re not supposed to be"; whereas, in *Martinez*, the driver "hit the deceased in a space both cars and pedestrians [we]re supposed to be—the driveway and crosswalk alongside the store." (*Id*. at p. *9.) Here, it is undisputed that defendants did not create a space where both car and pedestrians were supposed to be.

- *Springtree Properties, Inc. v. Hammond* (Fla. 1997) 692 So.2d 164. In *Springtree Properties*, the Florida Supreme Court decided that foreseeability was "relevant to proximate cause rather than duty." (*Id*. at p. 167.) As such, it is at odds with controlling California duty law.

- *Parish v. L.M. Daigle Oil Co., Inc.* (La.Ct.App. 1999) 742 So.2d 18. *Parish*, decided under Louisiana law, followed the Florida Supreme Court's decision in *Springtree Properties*, *supra*, in declining to evaluate foreseeability as an element of legal duty. (*Id*. at pp. 22-25.) It concluded that under Louisiana law, the scope of duty is ordinarily left for the trier of fact to resolve. (*Id*. at p. 25.) That legal rule is contrary to California law, which requires the *court* to decide both the existence and scope of duty as a matter of law. (See *Ann M.*, *supra*, 6 Cal.4th at p. 678 ["Foreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the court"].)

- *Marshall v. Burger King Corp.* (Ill. 2006) 856 N.E.2d 1048, 1060. The Illinois Supreme Court declined to create an exemption to the per se duty of care imposed by Illinois law,

which is based on the special relationship between a business invitor and invitee. (*Id.* at pp. 1057-1062; see *Rowland, supra*, 69 Cal.2d 108 [rejecting special business invitee categorization].) The dissenting opinion cites *Jefferson*, noting that "the majority opinion is at odds with the clear weight of authority with respect to legal foreseeability." (856 N.E.2d at p. 1072 [dis. opn. of McMorrow, J.].)

The rest of plaintiff's cases are likewise inapposite because they were decided in jurisdictions, unlike California, where foreseeability is a fact issue for the jury to decide. (See *State Farm Fire and Cas. Co. v. Bell*, *supra*, 30 F.Supp.3d at p. 1118 [Kansas]; *Rodriguez v. Del Sol Shopping Center Associates, L.P.* (N.M. 2014) 326 P.3d 465, 468 [New Mexico]; *Truax v. Roulhac* (Pa.Super.Ct. 2015) 126 A.3d 991, 1000 [Pennsylvania]; *Oswald v. Costco Wholesale Corporation* (Idaho 2020) 473 P.3d 809, 825 [Idaho].) These cases have no bearing on California courts' *legal* determination in negligence cases as to whether a duty owed.

None of plaintiff's authorities lead to the conclusion that *Jefferson* should be reconsidered as a matter of California law.

5. Plaintiff's vague national statistics and anecdotes neither impose a duty nor undermine *Jefferson*'s no-duty holding.

Finally, plaintiff asserts that "[t]he sheer volume of incidents and of the literature now available shows that the phenomenon is not only 'foreseeable,' but, indeed, is easily anticipated in scenarios exactly like the one presented here." (AOB 52; see also 1AA 160, 240-241.) This anecdote argument

lacks any merit. As the trial court found, "[n]one of these statistics support a conclusion that the category of negligent conduct at issue is *sufficiently likely* to result in the kind of harm experienced that liability may appropriately be imposed." (1AA 326, original italics.)

National statistics do not make this accident foreseeable at any particular location among the hundreds of thousands or millions of parking locations across the country. And statistics about even thousands of injuries amongst more than 330 million people in the United States (see https://www.census.gov/popclock) do not suggest a likely event. (By contrast there were more than 36,000 deaths and 2.74 million injuries [just under 1% of the population] from motor vehicle accidents in 2019. [U.S. Department of Transportation, Bureau of Transportation Statistics, Motor Vehicle Safety Data <https://www.bts.gov/content/motor-vehicle-safety-data> (as of Dec. 6, 2021)].)

Further, plaintiff's statistics are not tied to particular circumstances. To have any bearing on foreseeability, plaintiff would need to establish that the events and statistics discussed in the literature involved substantially the same circumstances, including that the physical parking and walkway layouts were reasonably similar. (See *Benson v. Honda Motor Co.* (1994) 26 Cal.App.4th 1337, 1345 [adequate foundation in a negligence case for admitting "prior similar incident" evidence requires proffering testimony establishing substantial similarity].) Plaintiff suggests no such showing. He does not say how many of his statistics involve, as here and in *Jefferson*, parking spaces with wheel stops

and a raised curb. Not surprisingly, the trial court found plaintiff's failure to include any "information as to whether the circumstances of these incidents were even similar to the instance case" made the statistics irrelevant. (1AA 335.) On appeal, plaintiff, once again, fails to show any similarity.

Plaintiff relies on a declaration from the same "self-designated" safety expert that the injured patron relied on in *O'Bryant*, *supra*, 387 F.Supp.3d at p. 701, which was rejected there as a basis for establishing a legal duty. (AOB 51-52, citing 1AA 148-152, 155-164, 177-178, 240-241, 243-245.)[7] Based on the expert's proffered supposed data, he argues that this Court should revisit and overrule *Jefferson*. (AOB 51-52.) But the existence of a legal duty cannot be determined by a single self-designated expert—relying on anecdotal data that has not been peer reviewed and may well be inaccurate—who campaigns to change the law. (This same expert pops up here, in *O'Bryant* and in *Bell*.)

---

[7] Plaintiff infers that a Kansas district court's limited admission of the same expert's testimony somehow makes a strip-mall parking lot accident foreseeable at Seal Beach Village. (See AOB 51 & fn. 11.) But the court simply decided that the opinion was not "*so* unreliable that the jury should not hear it." (*State Farm Fire and Cas. Co. v. Bell*, *supra*, 30 F.Supp.3d at p. 1102, italics added.) It did so under Kansas law that allows a jury, not a court, to decide the duty question. At the same time, the Kansas district court "agree[d] that [the expert's] heavy reliance on media reports to reach his estimate that pedal error accounts for 41% of vehicle incursion accidents" rendered that particular opinion unreliable. (*Id*. at pp. 1102-1103.)

The "expert's" declaration fails to include any information about what percentage of the accidents included in the study resembled the one here—i.e., where there was both a concrete wheel-stop and a raised curb—as opposed to other configurations. It is imprecise as to the cause of accidents, asserting merely that "many" involve pedal errors. It is imprecise as to locales. It also fails to indicate how many millions of vehicles drive by or park in front of businesses each year, so it contains no indication as to likelihood.[8] The statistics, thus, shed no light on how foreseeable it was that a car would drive onto the strip-mall's pedestrian walkway at Seal Beach Village. Rather, the proffered statistics are national, for all property configurations.

Nor is the expert's claim that four other accidents occurred in the same city that "involved a vehicle-into-storefront crash" relevant. Only two of the claimed incidents occurred *before* July 31, 2018, the date of plaintiff's accident. (1AA 230.) Later events are irrelevant as a matter of law as to foreseeability at the relevant time. (See *Lindstrom v. Hertz Corp.* (2000) 81

---

[8] In 2019, there were approximately 276 million registered vehicles in the United States. (U.S. Department of Transportation, Federal Highway Administration, Policy and Governmental Affairs, Office of Highway Policy Information, Table DV-1C – Highway Statistics 2019 <https://www.fhwa.dot.gov/policyinformation/statistics/2019/dv1c.cfm> (as of Dec. 6, 2021).) If a vehicle parks at or drives by a business every 10 days (a conservatively low number), that is almost 10 billion events per year (36 times 276 million). Even the expert's claim of 4,000 injuries per year represents a mere 0.00004% (a 4 in 10 *million* chance) of such an event and 0.0012% of the 330 million United States population.

Cal.App.4th 644, 649 ["The facts known to Hertz *at the time it rented the vehicle* to France determine whether reasonable foreseeability existed," italics added].)

As for the two incidents pre-dating the accident, plaintiff has not explained how either made curb-jumping reasonably foreseeable at this particular strip-mall (Seal Beach Village), which had no prior similar incidents or why the defendants here should even have been aware of those incidents. (See *Ann M.*, *supra*, 6 Cal.4th at p. 680 [prior similar incidents on premises not established by surrounding area crime statistics].) Without including any details in the earlier cases about the parking configurations or safety barriers or whether the accidents were caused by drunk drivers, etc., those cases do not shed light on the issue. (1AA 158-159 ¶ 31; see 1AA 230.)

Businesses with parking have no duty to erect impenetrable barriers based on anecdotes about incidents around the country that may or may not involve similar circumstances.

There is no rule of duty by anecdote or unverified "expert" statistics. Plaintiff's undefined national statistics imposed no duty on defendants.

D. Public policy factors also compel rejecting plaintiff's proffered novel, burdensome duty.

Nor is reasonable-foreseeability conclusive on the duty issue. As our Supreme Court has explained and the trial court here echoed, "'there are clear judicial days on which a court can foresee forever,'" but the "mere presence of a foreseeable risk of injury" is insufficient to impose liability for negligence. (*Bily v.*

Arthur Young & Co. (1992) 3 Cal.4th 370, 399; accord, *Jefferson*, *supra*, 28 Cap.App.4th at p. 996; 1AA 326.) Rather, "policy considerations may dictate a cause of action should not be sanctioned no matter how foreseeable the risk," because "the consequences of a negligent act must be limited in order to avoid an intolerable burden on society." (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 274.)

Reasonable foreseeability is not enough; other public policy factors may dictate rejecting the claimed duty. Plaintiff agrees that "policy issues" must weigh in his favor to create a duty. (AOB 56.) Those other factors include "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." (*Rowland, supra*, 69 Cal.2d at p. 113.)

The first two factors on this list go to foreseeability; the others "take into account public policy concerns that might support excluding certain kinds of plaintiffs or injuries from relief." (*Kesner*, *supra*, 1 Cal.5th at p. 1145.)

Here, plaintiff fails to address most of these factors. When the policy factors are properly considered they weigh strongly in defendants' favor, thus, compelling rejection of the claimed duty.

- *Burden on the defendant and the community*. The extent of the burden to the defendant is a crucial consideration of the duty determination. (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213.) *Jefferson* addressed this directly: "Imposing a duty on a convenience store to protect a customer from every imaginable incident is an unreasonable burden: a motorcycle can pass between metal posts and a large truck can break through a cement wall. Only an impregnable barrier would suffice, in essence holding the store owner as the insurer of its customers' safety." (28 Cal.App.4th at p. 996.) In holding that "[t]he law does not impose such a burden," *Jefferson* relied on *Ann M.*, *supra*, 6 Cal.4th at p. 679, which refused to impose a duty on landlords to act "as insurers of public safety" because it "would be 'contrary to well-established policy,'" and the Restatement Second of Torts, section 344, comment d, which instructs that an "owner of land open to public is not insurer of visitors' safety against acts of third persons." (28 Cal.App.4th at p. 996.)

Where, as here, there is a complete lack of evidence of prior similar incidents, imposing a duty on landowners to foresee a risk of harm to pedestrians from out-of-control vehicles being driven by incompetent drivers who do not know the difference between the accelerator and the brake, is the equivalent of imposing strict liability on landowners. Plaintiff's rationale would apply to every business with walkway-adjacent parking. If these businesses owed a duty to protect their customers from the possibility that an errant driver will drive over concrete barriers and onto the pedestrian walkways, they would have two choices: erect expensive protective barriers or remove the parking altogether.

Many businesses would likely choose the latter option to avoid the type of liability that plaintiff seeks to impose here. The result would be a sharp reduction in strip-mall and other business parking. And although plaintiff's expert asserted that the Seal Beach Village defendants could have protected plaintiff for $12,000 (1AA 167 ¶ 46), the aggregate costs mount quickly when multiplied across all the businesses that would owe the duty on his theory into the millions or billions of dollars.

Moreover, the duty plaintiff advocates would not stop at businesses with adjacent parking. The statistics that plaintiff says create foreseeability also include cars driving *"into storefronts*," and "*buildings*," i.e., including from adjacent public roads. (1AA 156 ¶ 27, 158 ¶ 31, 253 ¶ 17, italics added; AOB 52.) Do businesses and commercial buildings now have to protect against errant roadway drivers or persons parking on adjacent public streets? Is walkway-adjacent parking *entirely* impermissible, forcing vehicle-exiting drivers and passengers to cross dangerous parking lots? *Jefferson* held that imposing a duty on stores with adjacent parking would create an unreasonable burden, and that "[i]f the law imposed a duty to protect against every *conceivable* harm, nothing could function." (*Jefferson*, *supra*, 28 Cal.App.4th at p. 996, original italics.) The trial court echoed this finding. (1AA 326.)

And the burden is not just monetary. Creating barriers to vehicles necessarily interferes with the ability of consumers to access store-adjacent walkways, especially if they are carrying packages, using strollers, or helping elderly with walkers.

The comparison of the unlikeliness of the event and the society-wide burden that would be imposed on businesses and those accessing them, affords no basis for the novel duty plaintiff is promoting.

- *Connection between defendants' conduct and the injury.* The defendants' role here is at most indirect. The direct cause of plaintiff's injury was the negligent driver. Plaintiff has not alleged that defendants had any relationship to the driver or any role in causing her to drive onto the sidewalk. (Compare *Kesner, supra*, 1 Cal.5th at pp. 1148-1149 [in take-home asbestos case, intervening action of defendant's employees carrying asbestos home was "derivative of defendants' allegedly negligent conduct," i.e., not removing asbestos from employees' clothing].) The "close connection" factor is not met when an injury is caused by a third person's intervening act and there is no evidence that the defendant was on notice of the same type of conduct previously occurring that caused the injury. (*Sakai v. Massco Investments, LLC* (2018) 20 Cal.App.5th 1178, 1185 [parking lot owner owed no duty to prevent accident caused by driver backing out of crowded parking lot and ensuing injury caused by driver of second vehicle].)

Plaintiff's excerpt from *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 770 about causation (see AOB 56) adds nothing to this analysis. *Cole* involved a driver returning to her car in an unprotected parking area adjacent to a roadway—both owned by the defendant city. There was no question as to duty. The issue was whether the driver's misconduct was a superseding cause. But that question is not even reached here unless there is

a duty. (See *Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 209 [duty factors only come into play once plaintiff establishes a special relationship between the parties].)

Accordingly, the connection factor weighs against imposing a duty.

- *Moral blame.* The opening brief does not address this factor. The moral blame here lies with the driver. Further, defendants did not direct plaintiff him to walk between the driver's car while she was attempting to park rather than on the portion of the walkway that was on the other side of the concrete planter, nowhere near the parking cars. (See 1AA 80, 125.) Plaintiff was in as good a position as defendants to anticipate and assess the risk of a car driving onto the sidewalk—there being no history of incidents at this location. Plaintiff's foreseeability theory is essentially that concrete wheel-stop and curb-jumping are so prevalent that everyone in the country must have been aware of the risk, including presumably plaintiff himself. Defendants did not control the driver who hit plaintiff. They simply provided parking for their patrons. Their conduct was not morally blameworthy.

- *Policy of preventing future harm.* "The policy of preventing future harm is ordinarily served by allocating costs to those responsible for the injury and thus best suited to prevent it." (*Vasilenko*, *supra*, 3 Cal.5th at p. 1087.) The policy is not served where "the injury was not reasonably foreseeable"—for instance, where a parking lot visitor makes "inexplicable decisions to drive dangerously." (*Sakai*, *supra*, 20 Cal.App.5th at p. 1188, fn. 1.) Here, the policy is best served by imposing costs on the errant

driver, and errant drivers in general—not the strip-mall and other business owners. "[I]n light of the possibility that imposing a duty will discourage the landowner from designating options for parking," and defendants' limited options "to reduce the risk to its invitees, especially when compared to the ability of invitees and drivers to prevent injury," the policy of preventing future harm favors *not* imposing a duty on defendants here. (*Vasilenko*, *supra*, 3 Cal.5th at p. 1092.)

The opening brief's discussion of *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607 (*Regents*) (AOB 55) doesn't pertain to same type of future harm. *Regents* involved a criminal assault on a student at a public college campus by another student whose mental health issues were known to the college. (4 Cal.5th at pp. 613-617.) The college had a heightened duty to protect its students. And colleges had been "alert[ed] to the possibility that students, particularly those with mental health issues, may lash out violently against those around them." (*Id.* at p. 630.) Without a duty being imposed, schools would have "a marginal incentive to suspend or expel students who display a potential for violence," or it "might make schools reluctant to admit certain students, or to offer mental health treatment." (*Id.* at p. 632.) There is no such comparable policy problem here. Defendants had no knowledge of the driver's propensity to miss the brake pedal; nor did they have any ability to suspend her right to drive or to expel her.

- *Availability of insurance.* There's no evidence that the relevant parties—plaintiff, defendants, or the driver—are, or are not, insured. But creating the categorical duty that plaintiff

proposes will predictably and inevitably lead to increased insurance costs for all businesses.

The bottom line: The various policy factors, especially the widespread, substantial burden that would be imposed, dictate against imposing a duty on landowners to protect raised pedestrian walkways in front of businesses from errant drivers.

E. Plaintiff's additional facts are immaterial.

Nor do any of plaintiff's seven additional facts (see AOB 67-68) create a fact dispute. Two of those "facts" (property owners' duties in California and the role of prior similar incidents) are just legal argument. Two others are just his expert's generic, undifferentiated, and unverified national statistics addressed in section II.C.5., above. Two talk about the age of the plaintiff and the driver and the nearby Leisure World age 50+ community. But the ages of the plaintiff and the driver are irrelevant. Plaintiff's own expert declared that the age of the driver does not matter. And that there are a number of adults over 50 in the area cannot dictate a duty, especially in a location adjacent to Long Beach, a city of over 450,000. (World Population Review <https://worldpopulationreview.com/us-cities/long-beach-ca-population> (as of Dec. 6, 2021).) The final "fact" was that the planter narrowed the broad walking plaza. But there is, and can be, no claim that there was insufficient room for pedestrians if a vehicle stopped at the wheel stop or even the raised curb.

Facts only warrant denying summary judgment if they are *material*—i.e., they can make a difference to the motion's disposition. (Code Civ. Proc., § 437c, subds. (b)(3) & (p)(2);

Cal. Rules of Court, rule 3.1350(a)(2) & (f)(3); *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162-163 ["in order to avert summary judgment the plaintiff must produce substantial responsive evidence sufficient to establish a triable issue of *material* fact on the merits of the defendant's showing," italics added].)

None of plaintiff's facts are material to the legal duty determination, so none meet the standard to successfully oppose summary judgment.

***

The duty that plaintiff advocates would impose significant consequences on businesses throughout California and would sharply curtail parking and parking access without providing any benefit worth that level of imposition. There is no reason to depart from *Jefferson*.

This Court should affirm the trial court's holding no such legal duty exists.

III. Plaintiff's "Other" Claims Are Just The Same Duty Under Other Guises.

As a final attempt to dodge *Jefferson*, plaintiff suggests that the Seal Beach Village defendants should have removed planters or warned about the unexpected danger of parking cars going over wheel stops and jumping curbs. That does not change the duty calculus. The Seal Beach Village defendants' motion was premised on and granted as to no legal duty to anticipate or protect from the unlikely event of a parking car jumping two concrete impediments. (1AA 33, 37-40; see 1AA 325 ["Based on

this record, Defendants had no duty to protect Plaintiff from the tragic accident that occurred"].)

Plaintiff's novel suggestions do not make the accident here any more legally foreseeable. Nor do they propose any plausible solutions. Plaintiff does not suggest what sort of warning should have been posted by defendants or the scores of thousands of other businesses with similar parking. Do there have to be signs lining walkway perimeters saying "Careful, in exceedingly rare instances a car might hurdle the wheel stops and jump the curb"? And what would a reasonable pedestrian do in response to such a warning about such a highly unlikely event? That cars were parking was open and obvious.

Nor did the Seal Beach Village defendants have any duty to warn plaintiff about a planter in the pedestrian walkway or about its proximity to the parking lot (see AOB 26-28): The planter was indisputably open and obvious, as was its distance from the parking lot. (See 1AA 124, 153 ¶ 21, 154 ¶ 23.) Landowners owe no duty to warn of open and obvious dangers on their property because such dangers serve as warnings themselves. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 126; *Edwards v. California Sports, Inc.* (1988) 206 Cal.App.3d 1284, 1288 [a property owner "'is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care'"].)

Likewise, plaintiff does not contend that the several feet wide walkway between the parking and the planter was unduly narrow if vehicles were being properly parked. If that is so, then

the presence or absence of the planter, a building wall, or some other obstruction should make no difference. If plaintiff is proposing that there has to be a minimum safety zone or setback between parking and businesses, then again, he is suggesting reconfiguring thousands of businesses across the state, a huge burden and undertaking.

Plaintiff also claims that photographs "show that [the concrete planter] is exactly the height that would entice a patron to use it for such seating." (AOB 48.) That is beside the point. It is undisputed that plaintiff was walking at the time of the accident. Plaintiff's speculative interrogatory response that the planter "apparently was designed for seating" (1AA 54) does not create a fact dispute on foreseeability of this incident. Other than plaintiff's hypothesis, there is no evidence that the planter was designed for seating.

In fact, plaintiff's suggestions are not separate legal duties, they are simply different ways in which plaintiff claims that the defendants should have complied with (but rather supposedly breached) an overarching (but nonexistent) duty to protect against a random and exceedingly rare event—a parking car jumping multiple impediments to go onto the sidewalk. But if there is not the overarching duty, then methods of breach are irrelevant. "[I]f the defendant's showing negates an essential element of the plaintiff's case then no amount of factual conflict upon other aspects of the case will preclude summary judgment." (*Andrews v. Wells* (1988) 204 Cal.App.3d 533, 538.) Duty is only imposed on a premises owner if there was an unreasonably

dangerous condition that could foreseeably cause harm. (See *Vasilenko*, *supra*, 3 Cal.5th at pp. 1088-1090.)

Plaintiff's reliance on *Vasilenko v. Grace Family Church*, *supra*, 3 Cal.5th 1077, a case finding no duty, is misplaced. *Vasilenko* did not create a duty exception where the defendant obscures or magnifies the risk of harm. (See *Gonzalez v. Mathis* (2021) 12 Cal.5th 29, 45 [cases are not authority for propositions not considered].) But even if it did, there is no claim, nor can there be, that defendants here obscured or magnified a risk of harm. The cases that *Vasilenko* cited are not contrary:

- In *Annocki v. Peterson Enterprises, LLC* (2014) 232 Cal.App.4th 32, 38, the restaurant operator allowed its patrons to leave the premises in a manner that was unsafe to themselves and others.
- In *Barnes v. Black* (1999) 71 Cal.App.4th 1473, 1480, the issue was whether a landowner owed a child tenant a duty to protect the child from riding out into the street "at a point where resident young children were known to ride wheeled toys." The defendants here did not know that parking cars were likely to jump two concrete barriers at this particular point.
- *Johnston v. De La Guerra Properties* (1946) 28 Cal.2d 394, 400, doesn't involve cars at all. It involves the duty of a restaurant to provide a lit walkway at night.

Vasilenko, and the cases it relies on—like *Jefferson*—compel a legal conclusion of no duty here.

Finally, plaintiff's complaints about the Seal Beach Village defendants' separate statement are of no moment. (AOB 29-35.) There are no relevant *fact* issues here. The question is a purely legal one: duty. The factual context in which that question is to be determined is undisputed—a driver hit the gas pedal instead of the brake while parking and, in a freak accident, jumped *both* a concrete wheel-stop *and* the raised concrete curb. Where there is no material fact dispute "and the sole remaining issue is one of law, it is the duty of the trial court to determine the issue of law." (*Coca-Cola Bottling Co. v. Lucky Stores, Inc.* (1992) 11 Cal.App.4th 1372, 1377.)

CONCLUSION

Plaintiff's theory of the case is that because a tiny percentage of cars across the country (something like 0.0012% according to plaintiff's expert's unverified "statistics") drive onto sidewalks each year, in all sorts of varying circumstances, it was reasonably foreseeable that a car attempting to park at Seal Beach Village would jump both a concrete wheel-stop and raised curb and plow into a strip-mall patron who was walking on the sidewalk.

Based on that theory, plaintiff seeks to throw out longstanding and well accepted precedent and to require businesses to install barriers beyond concrete wheel-stops and curbs to protect customers from the remote possibility of an errant driver. His rationale would impose an undue burden on businesses and consumers throughout the state. There is no

precedent for a legal duty of such sweeping proportions and implications.

The accident here was not reasonably foreseeable as a matter of law, and even if it was, public policy dictates against imposing the duty that plaintiff urges. There is no reason to depart from this Court's on-point *Jefferson* precedent.

The judgment should be affirmed.

December 13, 2021

DIEDERICH & ASSOCIATES
Robert E. Henke

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson
Gary J. Wax

By */s/ Gary J. Wax*
Gary J. Wax

Attorneys for Defendants and Respondents Burnham Equities, Inc., Seal Beach Village SPE, Inc., and Seal Beach Village LP

CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **RESPONDENTS' BRIEF** contains **13,487** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: December 13, 2021 */s/ Gary J. Wax*

Gary J. Wax

ATTACHMENTS PURSUANT TO
CALIFORNIA RULES OF COURT, RULE 8.204(D)

Pages included from the record:

1AA 130 & 323-326

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MINUTE ORDER

DATE: 12/14/2020 **TIME: 07:59:00 AM** **DEPT: C21**

JUDICIAL OFFICER PRESIDING: Deborah Servino
CLERK: Schallie Valencia
REPORTER/ERM: None
BAILIFF/COURT ATTENDANT: None

CASE NO: 30-2019-01102369-CU-PA-CJC **CASE INIT.DATE: 10/03/2019**
CASE TITLE: Beaudreau vs. Seal Beach Village LP
CASE CATEGORY: Civil - Unlimited **CASE TYPE: PI/PD/WD - Auto**

EVENT ID/DOCUMENT ID: 73425201

EVENT TYPE: Chambers Work

APPEARANCES

There are no appearances by any party.

The Court, having taken the above-entitled matters under submission on November 20, 2020, and having fully considered the arguments of all parties, both written and oral, and the evidence submitted in this case, now rules as follows:

NOTICE OF RULING:

Defendants/Cross-Complainants Burnham USA Equities, Inc., Seal Beach Village APE, Inc., and Seal Beach Village LP's motion for summary judgment on Plaintiff Paul J. Beaudreau's Complaint is granted.

Evidentiary Objections

Defendants' evidentiary objection nos. 1 through 9, 12-17, 19-43 are overruled. Defendants' evidentiary objections nos. 10, 11, 18, are sustained. In addition, to the extent the declarations contain opinions regarding duty of care and negligence, the Court did not consider them because they are improper opinion testimony about legal conclusions.

Applicable Law

"[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at p. 851.) A defendant moving for summary judgment satisfies his or her initial burden by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).) The scope of this burden is determined by the allegations of the plaintiff's complaint. (*FPI Development v. Nakashima* (1991) 231 Cal.App.3d 367, 381-382 [pleadings serve as the outer measure of materiality in a summary judgment motion]; *580 Folsom Associates v. Prometheus Development Co.* (1990) 223 Cal.App.3d 1, 18-19 [defendant only required to defeat allegations

reasonably contained in the complaint].)

A cause of action cannot be established if the undisputed facts presented by the defendant prove the contrary of the plaintiff's allegations as a matter of law. (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1597.) Alternatively, a moving defendant can show that a cause of action cannot be established by submitting evidence, such as discovery admissions and responses, that plaintiff does not have and cannot reasonably obtain evidence to establish an essential element of his cause of action. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at pp. 854-855; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 590 [finding moving defendant may show plaintiff's lack of evidence by factually devoid discovery responses after plaintiff has had adequate opportunity for discovery]; see *Scheiding v. Dinwiddie Constr. Co.* (1999) 69 Cal.App.4th 64, 80-81 [finding *Union Bank* rule only applies where discovery requests are broad enough to elicit all such information].) Once a defendant meets its prima facie showing, the burden shifts to the plaintiff to show by reference to specific facts the existence of a triable issue as to that affirmative defense or cause of action. (*Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 850.)

Merits

Plaintiff alleged one cause of action for premises liability and negligence against all Defendants. The elements of negligence are (1) the legal duty to use due care; (2) a breach of such legal duty; (3) causation; and (4) resulting damages. (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917.) Premises liability is a form of negligence. The elements of premises liability are (1) the defendant owned, leased, occupied, or controlled the property; (2) the defendant was negligent in the use or maintenance of the property; (3) the plaintiff was harmed; and (4) the defendant's negligence was a substantial factor in causing the plaintiff's harm. (CACI no. 1000.)

The determination of duty is a question of law. (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 770.) The Civil Code codifies the general duty of care. "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself." (Civ. Code, § 1714, subd. (a).) 'This general rule requires a property owner to exercise ordinary care in the management of his or her premises in order to avoid exposing persons to an unreasonable risk of harm." (*Jefferson v. Qwik Korner Market, Inc.* (1994) 28 Cal.App.4th 990, 993 [quoting *Scott v. Chevron U.S.A.* (1992) 5 Cal.App.4th 510, 515].) However, the duty to take steps to prevent the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated. (*Ibid.*)

California courts balance the following factors: "the 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." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112-113.) Duty "is an allocation of risk determined by balancing the foreseeability of harm, in light of all the circumstances, against the burden to be imposed." (*White v. Southern Cal. Edison Co.* (1994) 25 Cal.App.4th 442, 447.)

An important feature of the duty analysis is that the *Rowland* factors are "evaluated at a relatively broad level of factual generality. Thus, as to foreseeability, [our high court has] explained that the court's task in determining duty 'is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed.'" (*Cabral v. Ralphs Grocery Co., supra*, 51 Cal.4th at p. 772.) For purposes of

duty analysis, ' " 'foreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct.' ... [I]t is settled that what is required to be foreseeable is the general character of the event or harm—e.g., being struck by a car while standing in a phone booth—not its precise nature or manner of occurrence." ' (*Kesner v. Superior Court*, *supra*, 1 Cal.5th at p. 1145 [quoting *Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 57-58]; see *Robison v. Six Flags Theme Parks Inc.* (1998) 64 Cal.App.4th 1294, 1297.) Foreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the court. (*Ann M. v. Pacific Plaza Shopping* Center (1993) 6 Cal.4th, 679.) "The court must ascertain whether 'the category of negligent conduct at issue is *sufficiently likely* to result in the kind of harm experienced that liability may appropriately be imposed.'" *(Jefferson v. Qwik Korner Market, Inc., supra*, 28 Cal.App.4th at p. 993 [emphasis in original, and quoting *Bullard v. Uribe* (1986) 41 Cal.3d 564, 572-573.)

The case of *Jefferson v. Qwik Korner Market, Inc., supra*, 28 Cal.App.4th 990 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. There were benches and tables to the side of the storefront. The plaintiff brough 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 those posts. 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. The trial court granted the motion. (*Id.* at p. 992.)

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 pp. 993-994.) It acknowledged that courts in a minority of cases 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. 994-995.) There still remains very little California case law regarding cars negligently coming onto the sidewalks of businesses.

The facts of the instant case are very similar to those in *Jefferson v. Qwik Korner, Market, Inc*. Here, it is undisputed that Plaintiff was walking in the pedestrian areas of the premises when a car driven by Diane Elaine Booth-Colin accelerated forward in a designated parking spot and struck Plaintiff, pinning him against a concrete planter. (Separate Statement of Undisputed Fact 3.) The parking space was perpendicular to the walkway. (Morgan Decl., at ¶ 6.) It would be expected for a driver pulling into such a parking space to be traveling at a low speed, and would decelerate in the face of an obvious barrier, and would have his or her foot on the brake pedal. (See *Robison v. Six Flags Theme Parks Inc., supra,* 64 Cal.App.4th at p. 1302.) Defendants provided some protection from vehicles by means of a cement parking stop that provided a barrier between the parking space and the sidewalk. The probability that someone will be struck by an out-of-control vehicle are far lower because there was both a raised curb and cement parking stop. (See Morgan Decl., at ¶ 7.) And, there was no expectation that customers would be at a fixed point along the walkway in the area. (Morgan Decl., at ¶ 6.) In addition, there had been no prior incident at the premises in which a vehicle jumped a cement parking block and entered any walkway at the premises. (Hotvedt Decl., at ¶ 7; Morgan Decl., at ¶¶ 8-9.) While the probability would have been even lower it there are bollards or concrete poles, the law does not impose such a duty. *(Jefferson v. Qwik Korner Market, Inc., supra,* 28 Cal.App.4th at p. 997.) Based on this record, Defendants had no duty to protect Plaintiff from the tragic accident that occurred.

Plaintiff points to some statistics in arguing that a pedestrian at the premises was sufficiently likely to be injured by a negligently driven vehicle in the parking lot. First, he relies on a statistic by his expert Warren

Vander Helm that a curb-jumping incident in which a vehicle strikes a pedestrian causing serious injury occurs every 2 1/2 hours, and actually kills a pedestrian every 18 hours. (Opp., at p. 7; Vander Helm Decl., at ¶ 17.) But, this statistic does not assist Plaintiff because there is no information as to whether the circumstances of these incidents were even similar to the instant case. Plaintiff also suggests that because 41% of drivers involved in storefront crashes are over the age of 60, and because the senior community Leisure World was approximately half a mile from the premises, it was sufficiently likely that sufficiently likely that an elderly person would drive onto the sidewalk of the premises. (Opp., at p. 8; Reiter Decl., at ¶¶ 28, 32.) But, Reiter also stated, "Parking lot accidents and storefront crashes can and do occur with *drivers of all ages* and experience levels." (Reiter Decl., at ¶ 28, emphasis added.) None of these statistics support a conclusion that the category of negligent conduct at issue is *sufficiently likely* to result in the kind of harm experienced that liability may appropriately be imposed. "Given enough imagination *everything* is foreseeable. To paraphrase Justice Eagleson, with apologies to Bernard Witkin, on a clear judicial day, you can fore see forever. [Citation.] If the law imposed a duty to protect against every *conceivable* harm, nothing could function." (*Jefferson v. Qwik Korner Market, Inc.*, *supra*, 28 Cal.App.4th at p. 996, emphasis in original.)

The case that Plaintiff relies upon, *Robison v. Six Flags Theme Parks Inc.*, *supra,* 64 Cal.App.4th 1294, is inapposite. *Robison* did not involve a parking space. Rather, it involved a lane of traffic with a twenty-five mile per hour speed limit aimed directly at the picnic table where the plaintiffs were seated, "necessitating a ninety degree left turn to avoid an accident, and with no barriers or obstructions of any kind separating the picnic table from the traffic lanes." (*Id.* at p. 1302.) The defendant in *Robison* provided no protective measures at all. (*Ibid.*) The instant case is more similar to *Jefferson v. Qwik Korner Market, Inc.* than *Robison v. Six Flags Theme Parks Inc.*

Accordingly, Defendants' motion for summary judgment is granted. Defendants shall electronically submit a proposed judgment for the Court's signature.

The Clerk is ordered to give notice of this ruling.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On December 13, 2021, I served the foregoing document described as: **RESPONDENTS' BRIEF** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

(X) By Mail: By placing a true copy thereof enclosed in sealed envelopes addressed as indicated below and delivering such envelopes by mail. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

(X) I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

Executed on December 13, 2021, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/ Leslie Y. Barela
Leslie Barela

SERVICE LIST

Via Truefiling:

Delores A. Yarnall
The Yarnall Firm, APLC
24968 Newhall Ave.
Santa Clarita, CA 91321
Email: dyarnall@yarnalllaw.com

DeWitt Algorri & Algorri
Mark S. Algorri (SBN 88859)
Patrick S Nolan (SBN 268061)
25 East Union St. Pasadena CA 91103
Email: mark@daalaw.com
Email: patrick@daalaw.com

Sweet James, LLP
James M. Bergener
4220 Von Karman Avenue, Suite 200 Newport Beach, CA 92660
Email: james@sweetjames.com

Attorneys for Plaintiff and Appellant, Paul J. Beaudreau

Clerk
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Via U. S. Mail:

The Hon. Deborah Servino
Orange County Superior Court
Central Justice Center
700 Civic Ctr Drive West (Department C21)
Santa Ana, CA 92701-2014