S235412

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ALEKSANDR VASILENKO, et al.,

Plaintiffs and Appellants,

v.

GRACE FAMILY CHURCH,

Defendant and Respondent.

Court of Appeal
No. C074801

Sacramento County
No. 34201100097580

ANSWER BRIEF ON THE MERITS

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Plaintiffs Aleksandr and Larisa Vasilenko respectfully request this Court to affirm the judgment of the Court of Appeal.

ISSUE PRESENTED

Does one who owns, possesses, or controls premises abutting a public street have a duty to an invitee to provide safe passage across that public street if that entity directs its invitees to park in its overflow parking lot across the street?

SUMMARY OF PLAINTIFFS' ANSWER

The answer to the above question, under the specific facts of this case, is "yes." A duty of care flows from defendant Grace Family Church (GFC) to plaintiffs from two independent sources: (1) the duty of care established by Civil Code section 1714, subdivision (a); and (2) the duty of care voluntarily assumed by GFC.

A. Section 1714(a) and *Rowland v. Christian*

Section 1714, subdivision (a) enunciates the civil law duty of care: "Everyone is responsible . . . 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. . . ." This is a "fundamental principle" for which, absent a statutory immunity, "no such exception should be made unless clearly supported by public policy." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112.) Section 1714(a) applies when a defendant creates or increases a risk of harm, i.e., commits misfeasance.

GFC owned its church and main parking lot (the main lot); operated by permission an overflow parking lot situated at a swim center directly across the street from the church on Marconi Avenue, a busy and dangerous five-lane thoroughfare (the pool lot); and also used a second overflow parking lot at a business plaza across a much safer side-street, Root Avenue (the plaza lot).

GFC created and increased a foreseeable risk of harm when it directed Mr. Vasilenko to park only in the pool lot. GFC knew that would both (1) require him to make a dangerous pedestrian crossing of Marconi to return to the church *and* (2) induce him to take the shortest and most direct route to the church by crossing Marconi midblock at the most dangerous possible location. While Mr. Vasilenko attempted the legal midblock crossing of Marconi, he was hit by a car and badly injured.

Under the facts of this case the essential issue is whether *Rowland's* multifactor approach still applies when a land possessor's misfeasance injures a business invitee while he is off the premises, or, instead, whether the *sole fact* he was off the premises negates the fundamental principle. Plaintiffs will show that section 1714(a) and *Rowland* apply here as in other misfeasance cases, and that neither a balancing of the *Rowland* factors nor supposed premises liability rules urged by GFC can override the fundamental principle on this record.

B. The Duty Voluntarily Assumed by GFC

Regardless of whether a duty arose under section 1714(a), GFC voluntarily assumed a common law duty to protect Mr. Vasilenko. GFC, knowing there was no reasonably safe way to cross Marconi Avenue without assistance, implemented measures to help invitees directed to park at the pool lot make a safer crossing of Marconi. GFC's assumption of duty induced Mr. Vasilenko's reliance and increased the foreseeable risk of harm to him.

C. The Scope of the Duty

Under each theory, GFC had a duty to exercise ordinary care in making available to invitees a means of reasonably safe passage to its church as they returned from its overflow parking lots by: (1) not directing invitees to use the dangerous pool lot, when it could just as easily direct them to unlimited parking at the safer plaza lot; or (2) if it insisted on having invitees use the pool lot, warning them *not* to cross Marconi midblock (the lawful and most direct route to the church, yet the most dangerous), but to cross at the intersection where attendants were stationed to help them make a safer crossing of Marconi; or (3) ceasing its use of the pool lot permanently, or, at the least, refraining from using it when darkness and bad weather made crossing Marconi more perilous than usual.

FACTUAL BACKGROUND

GFC's main premises and its pool lot straddle a part of Marconi Avenue consisting of five lanes: two eastbound, two westbound, and a center universal left-turn lane. (I CT 231, II CT 495.) Root Avenue intersects Marconi east of the premises. (Fig. 1, *post.*) There is no traffic signal or marked crosswalk at Root and Marconi. (II CT 508, 583) Traffic on Marconi typically travels 50 to 55 miles per hour. (I CT 254)

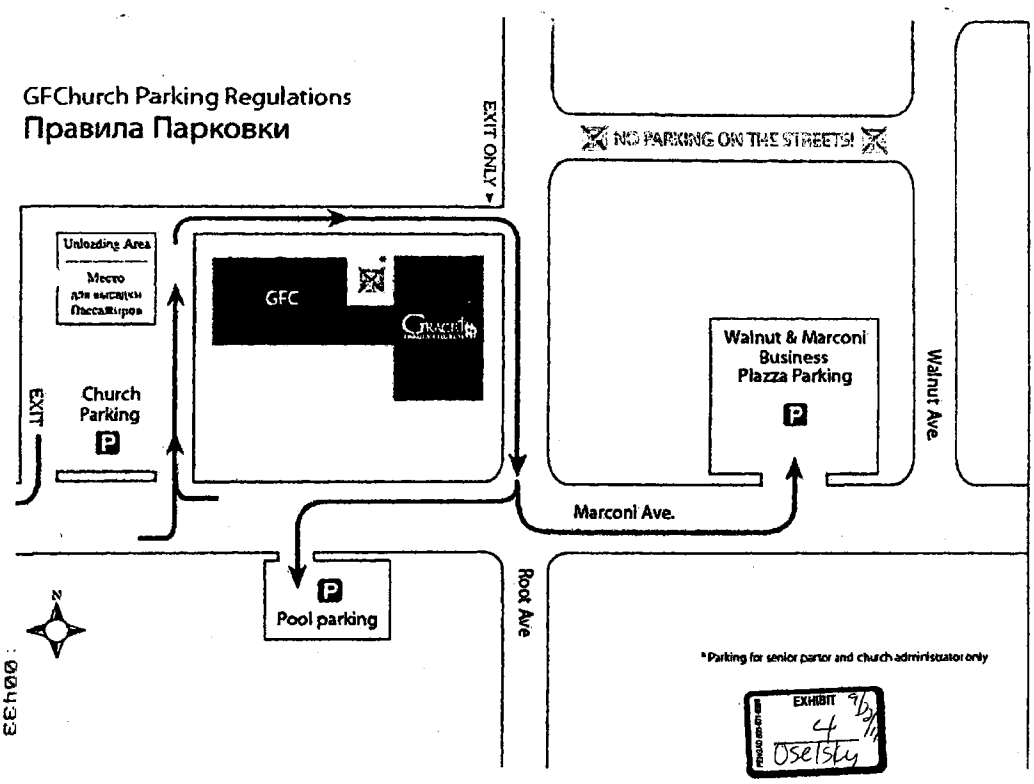

FIGURE 1

Figure 1 above, entitled "GFChurch Parking Regulations" and known as the "map," was prepared by authority of GFC Pastor John Oselsky. (I CT 264, II CT 433, 530)

A. GFC Undertook to Operate An Overflow Lot In A Dangerous Location Across Marconi Avenue

In 2006 GFC had Arthur Popov approach the Debbie Meyer Swim Center and obtain permission for GFC to use the swim center's parking lot as a GFC overflow lot on Sundays. (I CT 213) Prior to the subject incident, Pastor Oselsky made an additional agreement to use the pool lot at other times when GFC's main lot filled up. (I CT 232-233, II CT 476, 504)

The key for the pool lot gate was stored in a realtor-style lockbox mounted on the swim center fence, and GFC was permitted to access the key. (I CT 214) GFC's parking attendants unlocked the gate to admit cars to the pool lot, prevented cars from entering once it was full, opened it to let cars exit, and ensured there was no damage or vandalism to parked cars. (I CT 202, 235-236)

B. GFC Knew It Was Dangerous for Pedestrians to Cross Marconi at the Intersection, and More Dangerous to Cross Straight Over to the Church

Given the speed and volume of traffic on Marconi Avenue, GFC knew there was no reasonably safe way to cross Marconi unassisted in the vicinity of its premises because of: (1) the extreme danger to pedestrians crossing Marconi at the corner of Root Avenue, where there was neither a marked crosswalk nor a traffic signal; and (2) the even greater risk to pedestrians crossing Marconi midblock straight from the pool lot to the church.

Prior to the incident, GFC asked the Sacramento County Department of Transportation (DOT) to install a marked crosswalk or traffic light at the intersection of Marconi and Root. (II CT 518, 557-559) Pastor Oselsky testified a marked crosswalk or a traffic signal would "[a]bsolutely" facilitate crossing. (II CT 517) A parking attendant testified traffic controls were requested for safety reasons. (I CT 235, 236)

DOT installed a meter to count cars passing through the intersection. (II CT 518) Based on that count, DOT declined to install a signal for reasons related to the "balancing of traffic going on Root versus Marconi," i.e., the "difference in traffic between Root and Marconi. Root . . . doesn't have as high traffic as Marconi." (I CT 235, II CT 518)

Despite its knowledge of the ongoing danger of crossing Marconi Avenue, GFC continued to direct people to park at the pool lot. During church services, GFC's leaders "periodically" informed church members about "how to cross the street." (I CT 266) Members were advised to cross "at the intersection of Root Avenue and Marconi Avenue" because it was "safest." (II 539-540, 546) Mr. Vasilenko was not a church member and was struck by a car while on his way to GFC for the first time, so he never heard any of the warnings issued from the pulpit. (II CT 528)

C. GFC Appointed Attendants to Instruct Pedestrians Coming From the Pool Lot When, Where, and How to Cross Marconi Avenue

Prior to the incident, the pastor asked Sergey Amelin to serve as a volunteer parking attendant. (I CT 194-196) Amelin then recruited other GFC members to volunteer as attendants and was put in charge of them. (I CT 197-198, 261, II CT 544) There is no evidence he was qualified for the job.

GFC issued its attendants reflective vests, walkie-talkies, and flashlights. (I CT 198-199, 223, II CT 533) The attendants' duties included, among other things, "[d]irect[ing]" people where to park when the main lot was full, and notifying Amelin when an overflow lot was full so that no more cars would be sent there. (I CT 193, 200)

Amelin knew it was "common" for pedestrians, including families, to cross Marconi by the shortest route straight from the pool lot to the church. (II CT 400) Popov also saw families and children crossing midblock. (II CT 551-552) Attendant Vyacheslad Klimov, who heard it was dangerous to cross Marconi, estimated 25% of GFC pedestrians crossed midblock. (II CT 375, 378-379)

It was legal to cross midblock directly from the pool lot to the church. (Sac. County Code, tit. 10, ch. 10.20.040.) Nevertheless, due to the heightened danger of crossing midblock, attendants were assigned to instruct pedestrians who parked in the pool lot: (1) *not* to cross

Marconi straight from the pool lot to the church; but instead (2) to go to the right as they exited the pool lot, walk to the intersection with Root, and only there cross Marconi. (I CT 201, 266, II CT 381)

More attendants stood "at the corners of the intersection . . . to assist people in crossing Marconi." (I CT 271 [No. 13].) They told pedestrians to "cross safely," "make sure there are no cars," "make sure it's safe and cross the street then," and "how to get across the street from the swim center to the church. . . ." (I CT 212, 266, II CT 539)

Attendants in the main lot distributed the map when GFC held large events it knew would attract non-members. (II CT 407, Fig. 1, *ante*.) The map was "use[d] to explain to the people how to use the church parking." (II CT 475, 510) The map identified three parking lots – the main lot and two overflow lots – each of which GFC labeled with a white capital "P" on a dark square (the universally recognized parking lot symbol). (Fig. 1, *ante*.)

The pool lot was immediately across Marconi Avenue from the church. (I CT 222, Fig. 1, *ante*.) The plaza lot on the *same side of Marconi* as the church was a "large" lot at the Walnut & Marconi Business Plaza. (II CT 476, 512, Fig. 1, *ante*.) GFC used the plaza lot as an overflow lot, and labeled it as such on the map, though it had no arrangement with the plaza lot's owner. (CT 476)

GFC invitees directed to the plaza lot would *not* have needed to cross Marconi Avenue, but only Root Avenue. (Fig. 1, *ante*.) The following raise a reasonable inference that Root was much safer to cross than Marconi: (1) DOT measured significantly less traffic on Root than on Marconi (I CT 235); (2) there is no evidence GFC expressed any concerns for the safety of invitees crossing Root; and (3) though GFC assigned attendants to help invitees cross Marconi, there is no evidence it told its attendants to help invitees cross Root.

D. The Night of the Incident

At least *seven* attendants were on duty when Mr. Vasilenko was injured. (I CT 209, 260-261) One was at the front gate to the church; one was at the curve at the back of the church; a few were deployed at the intersection of Marconi and Root; and two were in the pool lot. (I CT 209-210, 246)

Since it was a Friday, traffic on Marconi Avenue was heavier than it was on Sundays. (II CT 552) Even on Sundays, however, some persons crossing Marconi on their way from the pool lot had to stand in the middle of the Root Avenue intersection for up to two minutes. (II CT 567) Amelin and Klimov witnessed pedestrians making these two-stage or "two-leg" crossings. (II CT 379, 400, 567)

Aleksandr Ivantsov was an attendant assigned to the main lot on the night of the incident. (I CT 260-261) The main lot was full when

Mr. Vasilenko arrived. (I CT 264, II CT 592) Ivantsov spoke with plaintiff, "gave him a map and told him that he can go and park his car across the street and he can – he can go back to the church." (II CT 592) Ivantsov testified he told plaintiff specifically:

" 'Parking lot is full. Unfortunately, *you need to* go and park your car across the street at the swimming pool' " and " '*you need to follow direction* [*sic*] and here is map [*sic*] and just park your car across the street in the swimming pool area.' " (II CT 593, 595, italics added.)[1]

Previously, when Ivantsov worked in the pool lot, he told people to cross Marconi at the Root Avenue intersection, but he did not say that to plaintiff. (II CT 595, 596) Ivantsov did not see plaintiff struck by the car, but said he "was supposed to park across the street, and that's why it's happened." (II CT 594)

Another invitee, Sergey Skachkov, with his girlfriend, Faythe, drove into the main parking lot about the same time as Mr. Vasilenko.[2] (I CT 253) Skachkov noticed there were no spaces there. (I CT 244) An unidentified attendant directed Skachkov, who was at the west side of the property, to turn right at Root, right on Marconi, and then left into

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1 GFC misapplies the standard of review (see p. 17, *post*) by omitting both of Ivantsov's statements that he told plaintiff "you need to" park at the pool lot. (II CT 593, 595)

2 As explained *post*, Mr. Vasilenko moved in synchrony with the couple as they crossed Marconi Avenue from the pool lot to the church (I CT 250-251), so it is reasonable to infer the couple and Mr. Vasilenko had arrived at the main parking lot at about the same time.

the pool lot. (I CT 244, 245, Fig. 1, *ante*) There is no evidence the attendant told Skachkov he could park at the plaza lot or elsewhere.

The entrance to the pool lot was closed when Skachkov arrived there. (I CT 246) Gesturing with their hands and flashlights, the attendants waved him in and showed him where to park. (I CT 246, 247) They did not speak to Skachkov and did not tell him how or where to cross Marconi. (II CT 500) GFC also admits attendants failed to assist or instruct Mr. Vasilenko in crossing Marconi. (OBM 4)

Instead of crossing Marconi at the Root Avenue intersection, Skachkov and Faythe crossed midblock by the shortest route to the church because they were late and the rain was "pretty heavy." (I CT 248, 250) Skachkov also testified he saw no advantage in crossing at the intersection because there was no marked crosswalk or traffic light there. (I CT 250) It was legal to cross straight over midblock. (Sac. County Code, tit. 10, ch. 10.20.040.)

While on the sidewalk, Skachkov "[v]ery diligently" looked left and right for traffic. (I CT 248-249) Cars were coming "moderately in waves." (I CT 249, 250-251) Once eastbound traffic from their left cleared, the couple was able to reach the center lane. (I CT 252) While crossing the first two lanes, Skachkov saw Mr. Vasilenko 15 feet to his right and "walking almost in sync with us across the street. . . ." (I CT 251)

The couple had to wait in the center lane for up to one minute for westbound traffic from their right to clear. (I CT 252) Plaintiff stopped with them. (I CT 251) The three invitees then strove to make the second leg of the crossing. (I CT 252) Skachkov looked to his right and did not see any traffic. (I CT 252) After walking halfway across the last two lanes, Skachkov suddenly saw the headlights of an oncoming car about 20 feet from Mr. Vasilenko, and all three pedestrians started running. (I CT 250, 253, 254)

Skachkov was able reach the sidewalk, and Faythe made it as far as the curb, but Mr. Vasilenko was hit by a car traveling 50 to 55 miles an hour. (I CT 253, 254) Plaintiff had sprinted four to six feet before being struck. (II CT 499) Visibility was poor at the time due to darkness and heavy rain. (II CT 495, 500, 503, 549-550)

E. GFC Directed Mr. Vasilenko to Use the Pool Lot When It Knew Its Safer Plaza Lot Had Unlimited Parking

In the trial court, GFC made the judicial admission "unlimited" parking was available to Mr. Vasilenko at the plaza lot designated on its map. (II CT 479, 483) In its moving papers, GFC asserted it did not control where its invitees parked. (I CT 270 [No. 8].) Plaintiffs properly disputed that fact (II CT 446 [No. 8]) and also noted unlimited parking was available at GFC's plaza lot on the same side of Marconi as the church (II CT 328).

GFC's reply again insisted it did not control where invitees parked (II CT 479), and stated: "Plaintiff asserts 'there is unlimited parking in the adjacent shopping center [no evidence that this lot was 'adjacent'] parking lot on the same side of the street as the church.' *Exactly so*, and there is no evidence that plaintiff was in any way precluded from parking in that lot or at any other place he deemed more suitable." (II CT 483, bracketed text by GFC, italics added here.)

A necessary implication of GFC's reply argument was that it was safer to cross Root Avenue than to cross Marconi Avenue. GFC presented no evidence, however, that its agent advised Mr. Vasilenko: (1) there was unlimited parking at the plaza lot; or (2) he could park wherever he wanted.[3]

F. GFC's Attendants Were Not Adequately Qualified, Trained, or Supervised

Based on the nature of the duties assigned to attendants, GFC knew or should have known attendants were not adequately qualified, trained, or supervised to perform their duties, and that this risked the lives of its invitees. GFC placed those attendants on duty anyway.

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[3] There was testimony people sometimes parked on Root Avenue *on the same side of Marconi as the church* if the main lot was full (I CT 231-232, 234), but (1) Root Avenue is *not* labeled as a parking area on GFC's map (Fig. 1, *ante*), and (2) there no evidence that parking was available on Root on the night in question or that the attendant told Mr. Vasilenko he could park on Root.

GFC's process for selecting attendants consisted of settling for anyone who was willing to volunteer on a given day. (I CT 197, 261, II CT 520) GFC's attendants received no training, even as of ten months after Mr. Vasilenko was hit by a car, but the pastor admitted it "would be a good idea. . . ." (II CT 502, 521, 524-525) They learned "[j]ust by doing the job." (II CT 404)

TRIAL COURT PROCEEDINGS

The third cause of action of plaintiffs' first amended complaint asserted a claim for "General Negligence" against GFC. (I CT 67) It alleged, among other things, GFC knew or should have known it "create[d]" an unreasonable risk of harm by using and controlling the pool lot across Marconi Avenue from the church; requiring Mr. Vasilenko and other invitees to park in that lot and then cross Marconi Avenue on foot; and failing to have GFC's attendants provide those pedestrians with assistance GFC knew was required for safe access to the church from that location. (I CT 67) It alleged GFC's negligence caused Mr. Vasilenko, while crossing Marconi, to be hit by a car driven by Joshua Drury.[4] (I CT 67)

Plaintiffs' fourth cause of action, also for "General Negligence" (I CT 68), alleged GFC knew or should have known its attendants and

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[4] Mr. Drury was named as a defendant in the first cause of action for negligent operation of a motor vehicle. (I CT 65) The first cause of action is not at issue here.

their supervisors were not adequately qualified, trained, or supervised; this presented an unreasonable risk of harm to Mr. Vasilenko and others who relied on attendants to direct them to a safe area to park and assist them in safely crossing Marconi Avenue; and as a result, Mr. Vasilenko was hit by a car while crossing Marconi. (I CT 68)

Also relevant here is the second cause of action, alleged by Mrs. Vasilenko for the loss of consortium she suffered due to the injuries to her spouse, a claim which is derivative of the third and/or fourth causes of action. (I CT 67)

GFC moved for summary judgment or summary adjudication on the second, third, and fourth causes of action. (I CT 178-300) Following a hearing (RT 14-31), the trial court granted summary judgment in favor of GFC. (III CT 623-630). The gist of its ruling was that GFC owed no duty to Mr. Vasilenko because he was injured while on property not controlled by GFC. (III CT 624)

COURT OF APPEAL DECISION

The Third District Court of Appeal, in a majority opinion by Justice Blease, with Justice Butz, concurring, reversed the judgment of dismissal entered in favor of GFC. (*Vasilenko v. Grace Family Church* (2016) 248 Cal.App.4th 146, 149, 159 [rev. granted Sep. 21, 2016].)

The majority recognized GFC "maintained and operated a parking lot in a location that required its invitees to cross a busy

thoroughfare *and* directed its invitees to that lot when its main lot was full." (*Vasilenko, supra,* 248 Cal.App.4th at p. 157, original italics.) It observed "the salient fact is not that GFC did not control the public street where Vasilenko was injured, but that it *did* control the location and operation of its overflow parking lot, which Vasilenko alleges caused or at least contributed to his injury." (*Id.* at p. 154, original italics.)

The majority also rejected both alternative grounds GFC had raised in its summary judgment motion, causation and negligent failure to train attendants (though neither was relied on by the trial court or argued by GFC on appeal), because triable issues of fact existed as to each. (*Vasilenko, supra,* 248 Cal.App.4th at pp. 158-159.)

Presiding Justice Raye dissented. (*Vasilenko, supra,* 248 Cal.App.4th at pp. 159-163 [dis. opn. of Raye, P.J.].) Respectfully, the dissenting opinion misapprehended a crucial fact when it asserted GFC "simply made its parishioners aware of nearby parking and provided attendants to facilitate the position of their cars within the facility." (*Id.*, p. 163, fn. omitted [dis. opn. of Raye, P.J.].) As the majority discerned, GFC affirmatively "directed" Mr. Vasilenko and others to park at the pool lot. (*Id.* at p. 157.)

STANDARD OF REVIEW

This Court performs de novo review and "considers all the evidence set forth in the moving and opposition papers. . . ." (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 334.) It views the evidence in the light most favorable to plaintiffs as the losing party in the trial court, and resolves any evidentiary doubts or ambiguities in plaintiffs' favor. (*Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 107.)

The Court determines, as to each cause of action, whether defendant has *conclusively* negated a necessary element of plaintiffs' case, or proven that *under no hypothesis* is there a material issue of fact that requires the process of trial. (*Johnson v. Prasad* (2014) 224 Cal.App.4th 74, 79.)

Generally, the existence and scope of a duty of care is a legal question for the court, but that "does not eliminate the role of the trier of fact. 'In an action for negligence the plaintiff has the burden of proving [¶] (a) facts which give rise to a legal duty on the part of the defendant. . . .' [Citations].) Where a triable issue of fact exists, it is the function of the jury to determine the facts. [Citation.]" (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1162, fn. 4.)

Whether defendant's conduct caused an injury is ordinarily a fact question for the jury. (*Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1021.) Causation is resolved as a matter of law only if the facts

are such that the only reasonable conclusion is a lack of causation. (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 353; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 785 [dis. opn. of Werdegar, J.].)

ARGUMENT

I.

THERE IS NO PUBLIC POLICY BASIS FOR EXEMPTING A POSSESSOR OF LAND FROM THE DUTY TO USE ORDINARY CARE WHEN ITS CONDUCT CREATES A RISK OF HARM TO INVITEES OFF PREMISES

The section 1714(a) duty of care applies whenever a defendant creates or increases a risk of harm (i.e., commits misfeasance), subject only to limitations compelled under *Rowland*'s multifactor analysis. Misfeasance cases require a full *Rowland* analysis no matter whether the injury to the invitee occurs *on or off* the land possessed by the invitor. GFC cannot satisfy its burden to nullify the duty of care under our facts because it relies mainly on cases involving nonfeasance.

A. Misfeasance Triggers the Duty Analysis Under Section 1714(a) and *Rowland v. Christian*

As the Court of Appeal majority noted, the crux of this case is that GFC's conduct created a greater risk of harm to Mr. Vasilenko by directing him to park in a lot that required him to cross Marconi Avenue (i.e., misfeasance, although the majority did not explicitly use the term). (*Vasilenko, supra,* 248 Cal.App.4th at pp. 156, 157.)

1. Good Samaritan Rule vs. Creating the Risk

The ordinary rule that there is no duty to act as a "good Samaritan" (absent a special relationship) does not apply if the complaint, "as here, is grounded upon an affirmative act of defendant which created an undue risk of harm." (*Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40, 48-49.)

"Misfeasance exists when the defendant is responsible for making the plaintiff's position worse, i.e., defendant has created a risk. Conversely, nonfeasance is found when the defendant has failed to aid plaintiff through beneficial intervention. . . . If . . . the act complained of is one of misfeasance, the question of duty is governed by the standards of ordinary care discussed above." (*Weirum, supra,* 15 Cal.3d at p. 49.) Here, liability is not predicated on GFC's failure to intervene for the benefit of Mr. Vasilenko, but rather upon its creation of an unreasonable risk of harm to him.

Lugtu v. California Highway Patrol (2001) 26 Cal.4th 703 also addressed the misfeasance/nonfeasance distinction. It held a CHP officer making a traffic stop had a duty not to direct the driver of the car to stop in a more dangerous location (the center divider) as opposed to an available safer location (the right shoulder). (*Id.* at pp. 707-708.) While in that more dangerous place, the car was hit by a truck, injuring the passengers. (*Id.* at p. 709.) *Lugtu* explained:

"In this case, unlike the cases relied upon by defendants, plaintiffs' cause of action does not rest upon an assertion that defendants should be held liable for failing to come to plaintiffs' aid, but rather is based upon the claim that Hedgecock's affirmative conduct itself, in directing Michael Lugtu to stop the Camry in the center median of the freeway, placed plaintiffs in a dangerous position and created a serious risk of harm to which they otherwise would not have been exposed. Thus, plaintiffs' action against Hedgecock is based upon a claim of misfeasance, not nonfeasance." (*Lugtu, supra,* 26 Cal.4th at pp. 716-717.)

As in *Lugtu*, GFC's affirmative acts unreasonably placed Mr. Vasilenko in a more dangerous position when a safer alternative existed, creating a greater risk of harm.

2. The Restatement Third of Torts

Section 7 of the Restatement Third of Torts echoes the principles stated in section 1714(a) and *Rowland v. Christian.* Under section 7(a), "[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." Comment *o* to section 7 explains: "An actor's conduct *creates a risk* when the actor's conduct or course of conduct *results in greater risk* to another than the other would have faced absent the conduct. . . . Conduct may also create risk by exposing another to the improper conduct of third parties. See § 19;

see also § 37, Comment *c* [misfeasance occurs when 'actor's entire conduct created a risk of harm,' even if the specific act breaching the duty of care was itself an omission].)"[5]

GFC relies on section 54 of the Restatement Third of Torts (OBM 18-19), but it supports plaintiffs' position because it provides a "possessor of land has a duty of reasonable care for . . . *conduct on the land* that poses a risk of physical harm to persons or property *not on the land*." (Rest.3d Torts, § 54(a), italics added.) Further, "an actor on private property is obliged to take precautions for the safety of those off the land." (Rest.3d Torts, § 54, com. *b*.)

Nor does section 54(c) aid GFC. It provides "a possessor of land adjacent to a public walkway [or, under comment *d*, adjacent public highways and streets] has no duty under this Chapter with regard to a risk posed by the condition of the walkway to pedestrians or others *if the land possessor did not create the risk*." (Rest.3d Torts, § 54(c), italics added.) But GFC *did* create a risk under the facts of this case.

GFC relies heavily on comment *d* to section 54, but that reliance is also misplaced: "*d. Public walkways.* Subsection (c) is a specific application of § 37, which provides that ordinarily there is no duty to rescue or protect another from risks that the actor had no role in

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[5] Since either creating a risk in the first instance or increasing the risk from a preexisting hazard constitutes "creation" of a risk (Rest.3d Torts, § 7, cmt. *o*), plaintiffs' subsequent references to GFC's creating a risk imply both means of creating a risk.

creating. Subsection (c) also applies to adjacent public highways and streets, which are omitted only because no one would think that a land possessor did have a duty of care to others for conditions not caused by the possessor on public highways and streets adjacent to the possessor's land. The relationship between Subsection (c) and Subsection (a) reveals that when a land possessor's activities or conditions on the land *do* pose a risk to those on public walkways (or highways), the possessor owes a duty of reasonable care for those risks." (Rest.3d Torts, § 54, com. *d*, original italics [noting " 'creating risk' clause in Subsection (c)" is explained in, inter alia, § 7, com. *l*, and § 37, com. *c*].) Thus, when section 54 is properly harmonized with sections 7 and 37, the Restatement supports plaintiffs' position.

B. The Correct Analytical Pathway for Misfeasance

Section 1714 "states a civil law and not a common law principle." (*Rowland, supra,* 69 Cal.2d at p. 112.) There are no exceptions to section 1714(a) except as clearly supported by public policy after a balancing of a number of factors, including eight listed in *Rowland.*

C. This Case Is Not Within the Category of GFC Seeks to "Carve Out" From the General Duty Rule

The *Rowland* factors are "evaluated at a relatively broad level of factual generality." (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 772.) The question is "not whether they support an exception to the general duty . . . on the facts of the particular case before us, but

whether carving out an entire category of cases from that general duty rule is justified by clear considerations of policy. . . ." (*Ibid.*)

In seeking an exception here, GFC asserts the "category of negligent conduct at issue is GFC's alleged failure to instruct invitees on how to cross a public street, or assist invitees in crossing a public street." (OBM 31) GFC seeks to file this case under a category akin to nonfeasance, but this case is *not* about GFC merely inviting a person to its premises and then failing to protect him from a traffic hazard he happened to encounter off premises as he was coming or going. Rather, GFC *created* a risk of harm to its invitees.

A no-duty rule is also inappropriate here because, all within the span of a few minutes: (1) Mr. Vasilenko was actually present on *two different* GFC premises, and then injured as he was about to re-enter GFC's premises for a *third* time; (2) his movements while *off* premises were under the direction and control of GFC; and (3) GFC's control of his movements while he was *off* premises exposed him to a risk of harm *greater* than that which otherwise existed.

D. GFC Cannot Carry Its Heavy Burden to Negate the Fundamental Duty Under These Facts

To promote efficient analysis, this Court splits the *Rowland* factors into two functional groups: "*Foreseeability and Related Factors*" and "*Considerations of Public Policy.*" (*Cabral, supra,* 51 Cal.4th at pp. 774, 781.) The foreseeability of the risk (in the first group) and the

extent of burden to the defendant (in the second group) are "ordinarily the crucial considerations. . . ." (*Casteneda v. Olsher* (2007) 41 Cal.4th 1205, 1213; *McDaniel v. Sunset Manor Co.* (1990) 220 Cal.App.3d 1, 7, 8 ["the chief element and of prime concern," the "pivotal question," is foreseeability].)

1. Foreseeability and Related Factors (Nos. 1, 2, 3)

The first three considerations are " '[1] the foreseeability of harm to the plaintiff, [2] the degree of certainty that the plaintiff suffered injury, [and] [3] the closeness of the connection between the defendant's conduct and the injury suffered. . . .' " (*Cabral, supra,* 51 Cal.4th at p. 774.)

GFC's argument as to **Factor 1**, foreseeability, must fail. It is highly foreseeable that a person directed to park his car in a place that would require him to make a perilous crossing of a busy thoroughfare *and* also induce him to cross at the most dangerous possible location, at night, during a rain storm, could be hit by a car.

Foreseeability includes " 'whatever is likely enough' " in modern life that a reasonable person would take account of it in guiding practical conduct. (*Bigbee v. Pacific Telephone & Telegraph* (1983) 34 Cal.3d 49, 57.) "One may be held accountable for creating even ' "the risk of a slight possibility of injury if a reasonably prudent person would not do so." ' [Citation.]" (*Ibid.*) What happened here is exactly

what GFC knew was likely enough to happen, and it was not "categorically" unforeseeable.

As to **Factor 2**, GFC concedes Mr. Vasilenko suffered injury (OBM 33), and so also implicitly admits Mrs. Vasilenko has suffered injury.

GFC's analysis of **Factor 3** must fail because it is contrary to the record. GFC contends there is no close connection between its use of the pool lot and the injury because parking there was "merely an option" it made available to Mr. Vasilenko, he was "not required" to park there, and "[t]here were other options for parking, including the Walnut & Marconi Business Plaza and the street." (OBM 33)

Mr. Vasilenko did what any reasonable person would do in the circumstances and it is wrong for GFC to suggest he should have rejected the attendant's directive about where he "need[ed]" to park. Plaintiff was entitled reasonably to: (1) presume he was required to submit to the apparent authority of the attendant donned in the official-looking clothing and equipment issued by GFC; and (2) rely that the attendant, with his superior knowledge of the situation, would not send him to a dangerous parking lot if a safer one was available. There was no reason for him to defy the attendant's dictate.[6]

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[6] If this Court were to determine the duty question turns on whether there is a difference between being "directed" and "required" to use the pool lot, reasonable minds could differ as to how a person in

This is not a case where the connection between defendant's conduct and the injury suffered is "too attenuated" and "only distant[ ] and indirect[ ]. . . ." (*Cabral, supra,* 51 Cal.4th at p. 779.) In any event, this Court has held that courts should hesitate to negate a duty based on Factor 3. (*Ibid.*)

2. Public Policy Considerations (Nos. 4 through 8)

"We ask next whether the public policy factors identified in *Rowland* – '[4] the moral blame attached to the defendant's conduct, [5] the policy of preventing future harm, [6] the extent of the burden to the defendant and [7] consequences to the community of imposing a duty to exercise care with resulting liability for breach, and [8] the availability, cost, and prevalence of insurance for the risk involved' (*Rowland, supra*, 69 Cal.2d at p. 113) – justify creating a duty exception immunizing [GFC] from potential liability. . . ." (*Cabral, supra,* 51 Cal.4th at p. 781.)

GFC's entire analysis as to **Factor 4** is that "there is no moral blame on GFC for this injury. . . ." (OBM 33) That is not true. GFC's conduct was blameworthy because, despite its full awareness of the grave risk to invitees crossing Marconi from its pool lot, it failed to

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Mr. Vasilenko's position, under the circumstances, would construe the attendant's statement that he "need[ed]" to park there. This would preclude summary judgment because it would constitute a triable issue of fact for the jury to resolve before a court could factor it into the *Rowland* analysis. (*Alcaraz v. Vece, supra,* 14 Cal.4th at p. 1162, fn. 4.)

employ any one of several simple precautions to mitigate it. "[W]here a sufficient likelihood of harm to another attends a failure to perform an undertaking, sloth or timidity can be characterized as immoral." (*FNS Mortgage Services Corp. v. Pacific General Group, Inc.* (1994) 24 Cal.App.4th 1564, 1575.)

Further, GFC's conduct is not entitled to any "special legal protection." (*Cabral, supra*, 51 Cal.4th at p. 782.) Rather, the special legal protection was owed by GFC to Mr. Vasilenko under its "special relationship" with business invitees, which includes an affirmative duty to "undertak[e] reasonable, relatively simple, and minimally burdensome measures" to protect invitees from foreseeable harm by third parties. (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 245.) GFC could easily have satisfied its duty by, e.g., sending him to the safer plaza lot.

As to **Factor 5**, the policy of preventing future harm is "served, in tort law, by imposing the costs of negligent conduct upon those responsible." (*Cabral, supra*, 51 Cal.4th at pp. 781-782.) GFC errs in arguing a duty "would not prevent future harm as the harm will exist regardless." (OBM 32) Although traffic hazards will continue to exist, recognizing a duty will motivate land possessors to avoid creating an even greater risk of harm to invitees from those traffic hazards, thus reducing future harm.

Next are **Factors 6 and 7**, which intertwine. As to **Factor 6,** "burden to the defendant," GFC posits land possessors will be unduly burdened to "prevent all future harm to its invitees" because they "do not have the ability to provide sufficient parking on their premises for all invitees and invitees must park elsewhere and cross public streets." (OBM 32)

First, a duty of care does not obligate anyone to "guarantee" safety, but only to exercise "ordinary care. . . ." (§ 1714(a).) Second, plaintiffs do *not* argue a land possessor should be liable for failing to provide sufficient parking on its premises (or for merely operating an overflow lot across a street, or informing invitees about parking available from others across a street, or validating parking provided by others) since those, without more, do not create a greater risk of harm.

Rather, GFC's duty arises from the accumulation of the large number of unique facts existing in this case. **Factor 6** shields a defendant from liability where it can prove it would have been too costly or impractical for it to have done something that was less likely to injure the plaintiff, but GFC cannot make that showing on this record. In the category of cases like the one at bar, where a defendant has already decided to direct its invitees *where* to park, and can just as easily direct them to safer parking instead of dangerous parking, a duty of ordinary care imposes no burden. In any event, imposition of a

reasonable burden would be justified to avoid serious risk to human life.

GFC protests that a duty might "require landowners to employ persons to direct and inform invitees as to where the invitee should cross, i.e., an intersection or marked crosswalk," with the costs passed along to consumers or invitees. (OBM 32) But GFC had already determined to do those very things of its own accord; the only thing that would change if a duty is recognized here is that GFC and its attendants would need to perform them *with ordinary care.*

In addressing **factors 6 and 7**, one must start from the correct premise: The question is not whether a new duty should be created, but whether an *exception* to the fundamental duty should be created. (*Cabral, supra,* 51 Cal.4th at p. 783.) It is for the jury to decide "what reasonable prudence dictates under . . . particular circumstances" (*id.* at p. 774), and those who refrain from over-the-top misfeasance like GFC's need have no concern that recognizing a duty on these facts would result in liability.

It is instructive, as to **Factors 6 and 7**, to recall what happened (and, more importantly, what did not happen) following the decision in *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139. The California Transit Association (CTA) sponsored Assembly Bill

No. 2737, "intended to overturn the recent decision in *Bonanno*. . . ."[7] Bill supporters argued *Bonanno* would "impose an incredibly onerous burden on public agencies to make the means of ingress and egress across adjacent properties safe" and "potentially threaten[ ] all public agencies."[8] What really happened was that the bill died in committee and the sky did not fall.[9]

Factor 8 (insurance), the remaining *Rowland* factor, also cannot overcome the duty rule. GFC has liability insurance. (II CT 527) As for land possessors generally, commercial general liability policies provide coverage for bodily injury off premises. (*Miller's Standard Insurance Policies Annotated* (6th ed. 2013) *Policies: General Liability,* Forms CG 00 01 07 98; CG 00 01 12 04, pp. 1, 7; CG 00 01 04 13.)

It is unrealistic to assume premiums would become prohibitive if a duty is recognized here. Insurance company underwriters determine

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7 Assembly Bill No. 2737 (2003-2004 Reg. Sess.). (*Text* at <http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=200320040AB2737> [as of Nov. 7, 2016]).

Assembly Committee on Judiciary, Analysis of Assembly Bill No. 2737 (2003-2004 Reg. Sess.) May 4, 2004, pp. 1, 4. (*Bill Analysis* at <http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200320040AB2737> [as of Nov. 7, 2016]).

8 *Id.*, *Bill Analysis*, at pp. 1, 4, 8.

9 Assembly Bill No. 2737 (2003-2004 Reg. Sess.). (*History* at <http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=200320040AB2737> [as of Nov. 7, 2016]).

the potential liability exposure and set a premium commensurate with the risk. Higher premiums, if any, would fall on those who create risks to invitees off the premises and reflect their responsibility for potential harm, an entirely just result. By contrast, GFC seeks a form of "no cost" insurance, i.e., a judicially-created immunity, that would permit tortfeasors to avoid responsibility for their carelessness and result in more injuries, even as the compensation pool available to injured persons shrinks.

The *Rowland* factors all weigh against creating a categorical exception to the rule that *everyone* is obligated to exercise ordinary care to prevent harm to others. (§ 1714(a).)

E. Cases Involving the Premises' Relationship to Adjacent Hazards Support A Duty To Invitees Off Premises

A land possessor is liable for off-premises injuries resulting from the manner in which a characteristic of its land (in some cases, its location) interrelates with adjacent land in a way that unreasonably exposes invitees to hazards on the adjacent land.

In *Barnes v. Black* (1999) 71 Cal.App.4th 1473, the premises included a private sidewalk leading to children's play area and, adjacent to the sidewalk, a steep driveway leading down to a busy street. (*Id.* at p. 1476.) Plaintiffs' decedent, a boy who lived on the premises with his family, lost control of his tricycle, went down the driveway, and rolled into the street, where he was hit by a car. (*Ibid.*)

The trial court ruled there was no duty based on the sole fact the injury occurred in the public street. (*Barnes, supra,* 71 Cal.App.4th at pp. 1476-1477.) When plaintiffs appealed, defendant argued, like GFC here, that "as a matter of law it owes no duty of care to protect . . . from an unreasonable risk of injury off the premises on a public street over which [it] has no control." (*Ibid.*)

The Court of Appeal reversed the judgment, applying *Rowland v. Christian* and explaining "the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury off-site. (*McDaniel v. Sunset Manor Co.* (1990) 220 Cal.App.3d 1, 7-8; *Swanberg v. O'Mectin* (1984) 157 Cal.App.3d 325, 330.) The *Rowland* factors determine the scope of a duty of care whether the risk of harm is situated on site or off site." (*Barnes, supra,* 71 Cal.App.4th at pp. 1478-1479.)

Barnes rejected defendant's claim, based on *Brooks v. Eugene Burger Management Corp.* (1989) 215 Cal.App.3d 1611, 1624, that a landowner owes no duty to erect a fence to protect children from dangers off-site. (*Barnes, supra,* 71 Cal.App.4th at p. 1479.) *Barnes* distinguished the case because it involved a child who walked into the street in front of an apartment building and plaintiff "did not allege the configuration of the defendant's property ejected the child into the

street against his will *or otherwise affirmatively caused the child to enter the street*, as here." (*Ibid.*, italics added.)

Barnes also distinguished "cases involving the failure to take affirmative action to protect persons from dangerous conditions on adjacent property" because they did not involve an allegation that "the injury was a result of his child being ejected from [defendant's] premises by its dangerous configuration at a point where resident young children were known to ride wheeled toys. [Citation.]" (*Barnes, supra,* 71 Cal.App.4th at pp. 1479-1480, citing, inter alia, *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 739, *Steinmetz v. City of Stockton Chamber of Commerce* (1985) 169 Cal.App.3d 1142, and *Nevarez v. Thriftimart, Inc.* (1970) 7 Cal.App.3d 799.)

Although Mr. Vasilenko was not "ejected" onto Marconi Avenue, *Barnes*'s use of that terminology in distinguishing its facts from those in other cases does not mean *Barnes* set a person's being "ejected or forced" (OBM 1) into the street as a minimum threshold for finding the creation of a risk of harm. As in *Barnes,* it is enough that GFC "affirmatively caused [Mr. Vasilenko] to enter the street. . . ." (*Barnes, supra,* 71 Cal.App.4th at p. 1479.)

Annocki v. Peterson Enterprises, LLC (2014) 232 Cal.App.4th 32, which relied in part on *Barnes,* also shows a duty does not depend on a person being "ejected or forced" into the street. (OBM 1) Plaintiffs'

decedent was riding his motorcycle on the Pacific Coast Highway in Malibu when he collided with a car driven by a patron (defendant's invitee) exiting defendant's restaurant parking lot driveway. (*Annocki, supra,* 232 Cal.App.4th at p. 34.)

Patrons exiting the driveway could not turn left onto the highway because of a temporary median divider. The patron became confused, however, and turned left anyway; upon encountering the divider, he tried to back up to turn his car in the correct direction but instead collided with decedent. (*Annocki, supra,* 232 Cal.App.4th at p. 35.) As here, the *Annocki* patron was not "ejected or forced" into road, but misfeasance did affirmatively cause him to enter it in a manner that created a risk to both himself and the decedent.

The Court of Appeal agreed defendant did not have a duty to control the highway, but the "analysis does not end there. This case is analogous to *Barnes* . . . the property configuration here allowed restaurant patrons to leave [defendant's] premises in a manner that was unsafe to themselves and others. . . . [N]o signs were posted in [defendant's] lot indicating to patrons that only a right turn could be made, nor did the valet on duty inform [the patron] that he could only make a right turn." (*Annocki, supra,* 232 Cal.App.4th at p. 38.)

Annocki also explained that moral blame attached to defendant's "failure to take [those] minimal, inexpensive steps to avert harm to its

patrons and persons in the roadway." (*Annocki, supra,* 232 Cal.App.3d at pp. 38-39.) It reversed the dismissal, holding that defendant had a duty to warn patrons to turn right when exiting. (*Id.* at p. 39.) Since the *Annocki* defendant's duty flowed not only to its invitee (the patron) but also to the decedent who was a passerby on the highway, a duty must flow to invitee Mr. Vasilenko under our facts.

F. The Location of Defendant's Parking Lot Is a Dangerous Condition When An Invitee Must Make A Dangerous Street Crossing to Reach the Other Premises

Barnes and *Annocki* mesh neatly with *Bonanno v. Central Contra Costa Transit Authority, supra,* 30 Cal.4th 139, because all three cases involved a configuration of defendant's land that created a greater risk to invitees from a preexisting traffic hazard on adjacent public streets.

Bonanno held "the location of a bus stop may constitute a 'dangerous condition' of public property . . . where, in order to reach the stop, bus patrons must cross a busy thoroughfare at an uncontrolled intersection," affirming a jury verdict for the plaintiff. (*Bonanno, supra,* 30 Cal.4th at p. 144, fn. omitted.) *Bonanno* found "the location of the bus stop created a dangerous condition in that it 'beckoned pedestrian bus patrons to cross' " at a dangerous crosswalk. (*Id.* at pp. 144, 146.)

"Most obviously, a dangerous condition exists when public property is physically damaged, deteriorated, or defective in such a way as to foreseeably endanger those using the property itself. [Citations.] But [it] has also been considered to be in a dangerous condition 'because of the . . . location of the improvement. . . .' [Citation.] [¶] [T]he location of a public improvement or, more broadly, its relationship to its surroundings, may create dangers to users. . . ." (*Bonanno, supra,* 30 Cal.4th at pp. 148-149.) Property can be deemed dangerous when its *location* "necessarily exposed" users of the property to "hazards on adjoining property. . . ." (*Id.* at p. 149.)

Bonanno "reject[ed] CCCTA's contention that it cannot be liable for an injury occurring on property (the street) it neither owned nor controlled. CCCTA *owned and controlled its own bus stop*, and a condition of *that property, its physical situation*, caused users of the bus stop to be at risk from the immediately adjacent property. . . ." (*Bonanno, supra,* 30 Cal.4th at p. 151, italics added.) By the same token, it is irrelevant that GFC did not control Marconi Avenue, for it did control the physical situation of its overflow parking lot.

Bonanno is authoritative even though the defendant there was a public entity. Many cases note the large overlap between public and private liability for negligence. (E.g., *Lugtu v. CHP, supra,* 26 Cal.4th at pp. 716, 722; *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th

1121, 1136; *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1127-1128; *Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 264 [in a public entity case, if a legal duty is not created by statute, the question of whether a duty exists is analyzed under general principles of tort law].)

Bonanno itself relied on a private defendant case, *Schwartz v. Helms Bakery, Ltd.* (1967) 67 Cal.2d 232, for a crucial point. CCCTA cited *Seaber v. Hotel Del Coronado* (1991) 1 Cal.App.4th 481 in arguing it had had no duty as to hazards on adjacent land not under its control. (*Bonanno, supra,* 30 Cal.4th at p. 152.) *Bonanno* explained why *Seaber* did not apply:

> *[T]he feasibility of moving or removing a bus stop* – an option not available to the hotel owners in *Seaber* – distinguishes the present case from *Seaber.*
>
> In this sense, . . . , *the case at bar is closer to those involving mobile places of business*, such as *Schwartz v. Helms Bakery Limited* (1967) 67 Cal.2d 232 (bakery truck), than it is to *Seaber*: " ' "While the street vendor cannot control traffic on the street around him he can, to a degree, control his own movements, the places where he will do business and, thus, the avenues of approach to it." ' [Citations.]" (*Seaber, supra,* at p. 490.)
>
> Similarly, the existence of the bus stop and sign attracted patrons, beckoning them to cross. . . . And, while CCCTA could not control traffic, it did control the location of the bus stop. . . . *The solution was to move or eliminate the bus stop, a remedy that imposed no undue burden on CCCTA.*

(*Bonanno, supra,* 30 Cal.4th at p. 152, italics added; and quoted text, appearing originally in a single paragraph, separated into multiple paragraphs for clarity.)

Here, as in *Bonanno*, it was feasible for GFC to move, remove, or eliminate the dangerous location. GFC could not literally rip up the terra firma of the *pool* parking lot and haul that chunk of land to a safer place (OBM 28) but, as a *functional* matter, it could very easily "move" its *overflow* lot to a safer location by directing invitees instead to the unlimited parking at the plaza lot (the second overflow lot identified on GFC's own map); or "remove" or "eliminate" the pool lot by closing it (permanently, or at least on dark and rainy nights when crossing Marconi was even more dangerous).

Since GFC controlled *where* and *when* it would operate its parking lot, the facts of the instant case are much closer to those in *Bonanno* than to those in *Seaber*. On this record, the dissent's view that GFC "was not a property manager" of the pool lot is inexplicable. (*Vasilenko, supra,* 248 Cal.App.4th at p. 162 [dis. opn. Raye, P.J.].)

As in *Bonanno*, GFC's maintaining and "managing" the pool lot in a dangerous location "beckoned" Mr. Vasilenko to cross by the shortest and most dangerous route to the church. The inducement to cross midblock *owed its very existence to the pool lot's location*; GFC's invitees would have had no reason to cross there otherwise. Even if

GFC did not control Marconi Avenue, it *did* control the *location* of the lot and thus plaintiff's "avenue of approach" to its church. (*Bonanno, supra,* 30 Cal.4th at 152.)

In addition, long before *Bonanno*, this Court held a *private* defendant – the owner of a telephone booth – had a duty to protect invitees from harm by not *locating* the booth in a place where it might foreseeably be crashed into by motorists veering off a public street. (*Bigbee, supra,* 34 Cal.3d. at pp. 52, 53, 55-56 & fn. 8.)

G. *Schwartz* Establishes a Duty Beyond the Boundaries of the Land Under the "Special Relationship" Doctrine

Schwartz v. Helms Bakery held a duty of care may exist even if defendant does not control the street where the injury to its invitee occurred. A duty exists if "the dangerous *circumstances* which caused the injury" were either: (1) "created by defendants"; or (2) "within the range of defendant's supervision and control. . . ." (*Schwartz,* 67 Cal.2d at p. 243, fn. 10, italics added.)

In *Schwartz*, a child was hit by a car while crossing the street to buy a doughnut from defendant's mobile retail truck. (*Schwartz, supra,* 67 Cal.2d at p. 240.) This Court found two bases for the duty of care: (1) the duty owed to business invitees; and (2) the duty created when defendant voluntarily undertook to direct plaintiff's movements. (*Id.* at

p. 236 and fn. 2.)[10] The relationship with invitees may extend a duty to them even when they are not on land controlled by defendant:

> The courts have long held that one who invites another to do business with him owes to the invitee the duty to exercise reasonable care to prevent his being injured on "the premises." The physical area encompassed by the term "the premises" does not, however, coincide with the area to which the invitor possesses a title or a lease. The "premises" may be less or greater than the invitor's property. The premises may include such means of *ingress* and *egress* as a customer may reasonably be expected to use. *The crucial element is control.* (*Johnston v. De La Guerra Prop., Inc.* [(1946)] 28 Cal.2d 394, 401.) An invitor bears a duty to warn an invitee of a dangerous condition existing on a public street or sidewalk adjoining his business which, because of the invitor's special benefit, convenience, or use of the public way, creates a danger.

(*Schwartz, supra,* 67 Cal.2d at pp. 239-240, italics added, fns. omitted.)

Mr. Vasilenko was required to use a route of ingress and egress well-known to GFC when it directed him to park at the pool lot. It knew he would leave that lot on foot and then cross Marconi Avenue (likely midblock) to reach the church. GFC's claim that it "did not direct egress from the swim school lot" is unsupportable. (OBM 38)

Unlike some Court of Appeal decisions (see Part I.H, *post*) this Court has not limited *Schwartz* to cases involving either immature plaintiffs or mobile defendants. (*Bonanno, supra,* 30 Cal.4th at p. 152 [adult plaintiff and stationary bus stop]; *Alcaraz, supra,* 14 Cal.4th at p. 1158 [adult plaintiff and stationary land defect]; *Lugtu, supra,* 26

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[10] The voluntary assumption of a duty is addressed Part II, *post.*

Cal.4th at p. 716 [*Schwartz* supports duty not to place adults and others where they are exposed to unreasonable risk of harm from third parties].)

After all, *Schwartz*'s "ingress and egress" principle originated in *Johnston v. De La Guerra Properties, supra,* 28 Cal.2d 394, involving an adult business invitee and stationary premises. In attempting to distinguish *Johnston,* GFC claims the defendant "landlord there was liable because he was in control of the adjoining property that was used as a parking lot and had graded it so that it sloped down to the private walk. (*Id.* at p. 397.)" (OBM 35) GFC misapprehends a crucial fact in two respects, but both errors are understandable because of the confusing way in which *Johnston* stated the facts.

GFC's errs first in implying the hazard existed on the adjoining parking lot. In fact, the hazard was in how the landlord's property and adjoining property interrelated at their common border where plaintiff was injured, 10 feet removed from the parking lot proper. (*Johnston, supra,* 28 Cal.2d at pp. 397, 398.) GFC errs next in implying the parking lot was controlled by the landlord at the time of plaintiff's injury. The actual facts are these:

Years before plaintiff's injury, the defendant landlord graded an **adjoining parking lot** so that it sloped down to the northern edge of landlord's property, where it abutted landlord's **private walk** used as

an approach to landlord's building. (*Johnston, supra,* 28 Cal.2d at p. 397.) *Prior to plaintiff's injury, however,* an oil company acquired the adjoining property (containing a gasoline station *and the parking lot* north of landlord's private walk). (*Id.* at pp. 397-398.)

The oil company built a low **concrete wall** on the southern edge of its property, abutting the entire length of landlord's private walk. (*Johnston, supra,* 28 Cal.2d at p. 397.) The wall varied from six inches above the private walk at the eastern end to two feet above it at the western end. A ten-foot wide unpaved **parkway** existed on the oil company property between its parking lot and its wall. A three-foot wide concrete **ramp** on the oil company property led from the parking lot, through the parkway, to landlord's private walk at a point near a side entrance to tenant's restaurant. (*Ibid.*)

At the time of plaintiff's injury, there was no arrangement between the oil company and the landlord for the latter's invitees to use the parking lot, but the landlord knew invitees continued to park on the oil company property and approach landlord's property from that direction. (*Johnston, supra,* 28 Cal.2d at p. 397.)

About 8:00 p.m. on the night of the incident, the plaintiff and her companions parked their car in the oil company's lot, intending to have dinner at tenant's restaurant. (*Johnston, supra,* 28 Cal.2d at p. 397.) On plaintiff's one prior visit, the car was parked toward the east

end of the lot; on that occasion, she had walked across the parkway (not using the ramp) and stepped down from the wall at a point where it was only six inches higher than the private walk. (*Id.* at p. 398.)

On the night of the incident, however, the car was parked at the parking lot's west end, from which she approached landlord's property. (*Johnston, supra,* 28 Cal.2d at p. 398.) It was a dark night and the area was poorly lit. Plaintiff walked across the parkway (again without using the ramp). Based on her prior experience, she assumed the walk at the west end was also only six inches lower than the wall, but it was actually 18 inches lower; as a result, she stepped off "into space," fell, and broke her hip. (*Ibid.*)

The Court found "[t]he condition of the [landlord's] premises *in relation to the adjoining property* was thus an important factor in causing the accident." (*Johnston, supra,* 28 Cal.2d at p. 398, italics added.) Thus, *Johnston* – like *Barnes, Annocki,* and *Bonanno* – involved a configuration of defendant's land that created a risk of harm. Under these circumstances *Johnston* explained:

> where the invitee has been intentionally or negligently misled into the reasonable belief that a particular passageway . . . is an appropriate means of reaching the business area, he is entitled to the protection of a visitor while using such passageway. . . . [Citations.] In other words, the invitation, and consequently the duty, of the invitor are sufficiently extensive to protect the business visitor in his use of such means of ingress and egress as by allurement or inducement, express or implied, he has been led to employ. [Citations.]

(*Johnston, supra,* 28 Cal.2d at p. 399.) "Under these circumstances, it cannot be said as a matter of law that defendant owner was not negligent in failing . . . to protect or warn business invitees against the danger inherent in this particular approach." (*Johnston, supra,* 28 Cal.2d at pp. 400-401.)[11]

That *Johnston* involved adjacent private land makes it no less applicable here. The Restatement Third of Torts explains that no distinction should be drawn, for purposes of the duty inquiry, between risks on adjacent *public* streets and risks on adjacent *private* land. (Rest.3d Torts, § 54, com. *e.*)

Bonanno, Schwartz, Johnston, Bigbee, Barnes, and *Annocki* all suggest that no exemption from the fundamental duty rule should be made for GFC under the facts of this case.

H. GFC's Main Cases Are Distinguishable

Seaber v. Hotel Del Coronado, supra, 1 Cal.App.4th 481 does not compel a no-duty finding. In *Seaber*, the decedent was struck by a car while crossing the highway from defendant's hotel to his car parked in the parking lot of a *different hotel,* the Glorietta Bay Inn. (*Seaber*, at pp. 484-485.) It is very significant that *Seaber* factually distinguished

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[11] In separately analyzing the liability of the tenant, *Johnston* noted he was liable because he erected a neon sign that invited people to use the side entrance to his restaurant and illuminated the general area of the walk, such that tenant had exercised a limited right of control of the walkway. (*Johnston, supra,* 28 Cal.2d at p. 401.)

Warrington v. Bird (1985) 204 N.J.Super. 611 [499 A.2d 1026], whose facts are closer to those of the instant case:

> The facts here are different than those considered in *Warrington v. Bird* . . . , where the appellate court recognized that liability may rest upon a restaurant for injuries suffered by patrons who were struck by a motor vehicle while crossing a county road which passed between the restaurant and *its* parking lot. The court there declared: "We agree that the critical element should not be the question of the proprietor's control over the area to be traversed but rather the expectation of the invitee that safe passage will be afforded from the parking facility to the establishment to which they are invited. Commercial entrepreneurs know *in providing the parking facility* that their customers will travel a definite route to reach their premises. The benefitting proprietor should not be permitted to cause or ignore an unsafe condition in that route which it might reasonably remedy, *whether the path leads along a sidewalk or across a roadway*." [¶] . . .
>
> Here, the Hotel neither *owned* the Glorietta Bay Inn parking lot *nor provided it as a parking facility for its patrons.*

(*Seaber, supra,* 1 Cal.App.4th at p. 493, fn. 9, italics added.) *Seaber* even conceded "an abutting landowner has always had an obligation to refrain from affirmative conduct which results in a dangerous condition upon public streets or sidewalks." (*Id.* at p. 488.)

Seaber also differs from our case because even if it were feasible for the hotel to warn guests and other persons on *its* side of the street, it was not feasible for it "to warn pedestrians approaching the Hotel from the other side of the street." (*Seaber, supra,* 1 Cal.App.4th at p. 492.) Here, GFC controlled its main premises *and* the pool lot on the

other side of the street, *and* assigned attendants to warn pedestrians approaching from the other side of Marconi. Further, although the hotel's guests and invitees "frequently used" the third party lot across the street (*id.* at p. 485), there was no evidence the hotel ever directed or encouraged them to park there.

In *Steinmetz, supra,* 169 Cal.App.3d 1142 the decedent attended a business mixer sponsored by defendant; parked her car one block from defendant's premises; and was killed by an unknown assailant when she later returned to her car. (*Id.* at p. 1144.) Several hundred people attended the mixer, but defendant's premises had parking for only 20 to 25 cars. The plaintiffs alleged defendant had a duty to "provide a safe place to park" for its business invitee, but the Court of Appeal held no such duty existed. (*Ibid.*)

The Court of Appeal then applied the rule that there is no duty to take "affirmative action to protect" persons upon the land unless a defendant possesses that land. (*Steinmetz, supra,* 169 Cal.App.3d at p. 1146.) Under that rule, there could be no duty because defendant did not possess the premises where the killing occurred. (*Id.* at p. 1147.)

Donnell v. California Western School of Law (1988) 200 Cal.App.3d 715 is another case where a defendant did *not* provide parking (*id.* at p. 718) and "took no action to influence or affect the condition of . . . adjoining property" (*id.* at p. 720). It distinguished

situations, like the one herein, where land possessors "actively put[ ] others in peril elsewhere" (*id.* at p. 726) or "voluntarily assume[ ] a duty" to protect an invitee off the premises (*id.* at p. 719).[12]

In *Nevarez v. Thriftimart, supra,* 7 Cal.App.3d 799, the three-year-old plaintiff was hit by a car while running from his house to defendant's market on the other side of the street, attracted by the free ice cream, candy, popcorn, and carnival rides that were part of the market's grand opening festivities. (*Id.* at p. 802.)

Each of the cases discussed above (*Steinmetz, Donnell,* and *Nevarez*) involved nonfeasance because mere proximity was the only connection between the defendant's land and the hazard. Plaintiffs do not contend those cases were wrongly decided. Finding a duty here would not conflict with those cases or with *Seaber*. Those cases and *Seaber* provide land possessors with all the protection against liability needed under typical circumstances. Our case is very different, however, because GFC specifically controlled where its invitee would park and required him to traverse a definite route that GFC knew was highly dangerous.

Owens v. Kings Supermarket, supra, 198 Cal.App.3d 379 is of dubious value to GFC. It held a "defendant supermarket did not, as a matter of law, owe a duty to a customer who was injured by the

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12 The voluntary assumption of a duty is discussed in Part II, *post.*

negligence of a third party on an adjacent public street" (*id.* at p. 388), despite express allegations, in a second amended complaint, that he was on defendants' premises when he was injured (*id.* at p. 383).

The original and first amended complaints alleged plaintiff was injured while on a public street adjacent to defendant's premises, and that defendant encouraged its customers to use the street as a parking lot. (*Owens, supra,* 198 Cal.App.3d at pp. 382, 383.) Demurrers were sustained to both of those complaints, so in an attempt to avoid the sustaining of another demurrer, plaintiff's second amended complaint omitted the fact that the injury occurred on a public street; the trial court sustained a demurrer nonetheless. (*Id.* at p. 384.)

The Court of Appeal affirmed the dismissal, explaining that a party who pleads facts inconsistent with those in prior pleadings must explain the inconsistency; since plaintiff could not, the appellate court enforced against him the "policy against sham pleading." (*Ibid.*)

As to the merits of *Owens*'s duty analysis, plaintiffs here respectfully submit that *Owens* erred in essentially deciding, as a matter of law, that a possessor of stationary premises could never create a greater risk of harm by encouraging invitees to double-park in a traffic lane to buy newspapers, liquor, and groceries, as plaintiff there had alleged. (*Owens, supra,* 198 Cal.App.3d at p. 382)

It is also worth noting that in *Alcaraz v. Vece, supra,* 14 Cal.4th 1149, the three different dissenting opinions all conceded that a defendant should owe a duty of care to an invitee on adjacent land if it created or aggravated the risk on that land. (*Id.* at pp. 1174, 1179, 1183 [dis. opn. of Kennard, J.], 1187 [dis. opn. of Baxter, J.], 1192, 1198 [dis. opn. of Brown, J.].)

I. Persuasive Out-of-State Decisions Support A Duty Here

Well-reasoned decisions of appellate courts in sister states have held defendants owe a duty to invitees who are injured while crossing streets to and from the defendant's land under facts similar to ours. *Donavan v. Jones* (La. Ct. App. 1995) 658 So.2d 755 involved facts remarkably similar those in our record. Already mentioned was *Warrington, supra,* 204 N.J.Super. 611. (See Part I.H, *ante.*)

J. Mr. Vasilenko's Responsibility Is An Issue of Comparative Fault and Cannot Negate GFC's Duty

Also meritless is GFC's claim that it should owe no duty of care to an adult invitee who, it asserts, must bear sole responsibility for his own safety when crossing the street. (OBM 30) GFC apparently wishes to replace comparative fault with the contributory negligence doctrine that bars all recovery to a plaintiff whose own negligence contributed in any way to causing his harm. (*Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804 [holding the opposite].) Comparative fault is a factual issue for the jury at trial, not a duty factor for the Court.

Similar considerations defeat GFC's attempt to depict Mr. Vasilenko as a "jaywalker," a pejorative used to imply he should not be entitled to any damages. (OBM 3, fn. 1.) The reasoning fails, but in any event **Mr. Vasilenko did *not* jaywalk**. GFC claims he violated Sacramento *City* Code, Title 10, Chapter 10.20.020, but the incident occurred in an "unincorporated area of the County of Sacramento," a different legal jurisdiction with a different ordinance. (I CT 65 [First Am. Complaint]; I CT 269 [No. 1, citing the same], II CT 445 [No. 1].)

The Sacramento *County* Code shows Mr. Vasilenko made a *perfectly legal* midblock crossing of Marconi: "No pedestrian shall cross a roadway at any place other than by a route at a right angle to the curb or by the shortest route to the opposite curb except in a marked crosswalk." (Sac. County Code, tit. 10, ch. 10.20.040.) The evidence he crossed directly from the pool lot toward the church means he must have crossed at a right angle to the curb *and* by the shortest route to the opposite curb.

Vehicle Code section 21954, subdivision (a) does not prohibit crossing at other than a marked or unmarked crosswalk, and Vehicle Code section 21955 does not apply because there was no signal device or police officer at the adjacent intersection of Root Avenue.

GFC cites *Lucas v. George T.R. Murai Farms, Inc.* (1993) 15 Cal.App.4th 1578 to argue it has no duty because the danger on

Marconi was so obvious. (OBM 30) That point was only a tiny part of *Lucas*'s analysis, and its no-duty ruling resulted from other factors it found determinative. Besides, the evidence indicates Mr. Vasilenko and the other adults with him were diligent in looking out for cars while crossing, but darkness and rain might have prevented them from appreciating the full extent of the danger. On the other hand, GFC was fully aware of the danger at all times.

II.

GFC VOLUNTARILY ASSUMED A DUTY TO PROTECT MR. VASILENKO FROM THE DANGER INHERENT IN AN UNASSISTED CROSSING OF MARCONI

The Court of Appeal's judgment can also be affirmed on the independent ground that, regardless whether GFC owed Mr. Vasilenko a duty of care as a matter of civil law under section 1714(a), it voluntarily assumed a duty of care toward him under common law. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 18-19 [judgment may be affirmed on any theory supported by the record].)

In *Schwartz*, two "concomitant legal relationship[s]" triggered defendant's duty to use ordinary care to protect plaintiff from harm on the street: (1) its "special relationship" with its business invitee; and (2) the relationship arising when defendant voluntarily undertook to "direct" plaintiff's conduct and movements on the street. (*Schwartz*,

supra, 67 Cal.2d at p. 236 and fn. 2.) On the duty created by a "voluntary undertaking," *Schwartz* explained:

> Firmly rooted in the common law lies the concept that although one individual need do nothing to rescue another from peril not of that individual's own making, nevertheless, "(h)e who undertakes to do an act must do it with reasonable care." [Citations.] . . . "If the conduct of the actor has brought him into a human relationship with another, of such character that sound social policy requires some affirmative action or some precaution on his part to avoid harm, the duty to act or take the precaution is imposed by law. . . . Where a person is under the special protection of another, the latter is bound to exercise reasonable care to prevent harm to him, and this duty may include protection from the dangerous conduct of third persons." [Citations.]

(*Schwartz, supra,* 67 Cal.2d at pp. 238-239, fn. omitted.)

When a defendant voluntarily acts to protect a plaintiff from harm in a nonemergency situation, a duty will exist if either: (1) defendant's failure to use reasonable care added to the risk of harm; or (2) defendant's conduct caused plaintiff to reasonably rely on defendant's protection. (CACI No. 450A, Good Samaritan – Nonemergency (2016), p. 304.)

The foregoing is consistent with California case law. (*Williams v. State of California* (1983) 34 Cal.3d 18, 23; *Artiglio v. Corning, Inc.* (1998) 18 Cal.4th 604, 613 ["[i]t is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to a duty of acting carefully, if he acts at all' "; " '[i]f the defendant enters upon an affirmative course of conduct affecting the interests of

another, he is regarded as assuming a duty to act, and will thereafter be liable for negligent acts and omissions' "].)

GFC voluntarily assumed a duty to protect Mr. Vasilenko and other invitees while they crossed Marconi Avenue by embarking on a comprehensive plan to guide and assist them as they walked from the pool lot to the church. Among other things, GFC undertook to:

(1) Prepare a map to instruct invitees how to drive to GFC's two overflow parking lots, label those lots on the map, and distribute that map to non-members of the church in particular;

(2) Authorize attendants in the main lot to direct invitees where to park, which *caused invitees reasonably to rely* that an attendant was sending them to a safe parking area, but which also simultaneously *increased their risk of harm* because (unbeknownst to them) the pool lot to which they were directed was not reasonably safe;

(3) Deploy attendants on public street corners to help pedestrian invitees returning from the pool lot to cross Marconi Avenue safely, including by advising them when, where, and how to cross Marconi; and,

(4) Instruct attendants at the pool lot to tell invitees parked there not to cross Marconi Avenue midblock (where there were no attendants to provide help), but instead to cross Marconi only at the

intersection with Root Avenue (where additional attendants were stationed to help them cross Marconi).

This voluntary assumption of a duty shows why GFC's reliance on *Brooks v. Eugene Burger, supra,* 215 Cal.App.3d 1611 is misplaced (OBM 26), as illustrated by comparing it to *McDaniel v. Sunset Manor, supra,* 220 Cal.App.3d 1, a case decided only six months later and involving superficially similar but crucially different facts. (*Id.* at pp. 6, 9, 10 [*McDaniel* defendant had no *initial* duty to erect a fence, as established in *Brooks*, but by building a fence it *voluntarily assumed* a duty to maintain the fence in a safe manner].) Similar to the *McDaniel* defendant, GFC voluntary assumed a duty to protect its invitees while they crossed Marconi Avenue, regardless of whether it initially had a duty to do so.

Whether a defendant's voluntary actions trigger an actionable duty of care is normally a legal question for the court. (*Artiglio, supra,* 18 Cal.4th at p. 615.) It should be resolved in favor of plaintiffs on this record; at the least, triable issues of fact exist that preclude summary judgment in favor of GFC on this issue. (*Ibid.*)

Both parties briefed voluntary assumption of a duty in the Court of Appeal (AOB 47-50, RB 16-17, ARB 7-11) but that court did not reach the issue because it found a duty under section 1714(a). If this Court affirms on the basis of section 1714(a), there would appear to be

no need for it to reach the alternate theory. If it does not affirm on the section 1714(a) theory, this Court may address the alternate theory and need not remand to the Court of Appeal for an initial determination. (*O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 364.)

III.

GFC DOES NOT DENY THAT ITS ATTENDANTS WERE NOT ADEQUATELY QUALIFIED, TRAINED, AND SUPERVISED

GFC does not address the specific merits (legal or factual) of plaintiffs' fourth cause of action (OBM 34), impliedly conceding the Court of Appeal correctly decided GFC's showing on that ground in the trial court was inadequate. (*Vasilenko, supra*, 248 Cal.App.4th at pp. 158-159.) Instead, GFC argues that if it did not owe a duty of care under the third cause of action, then it could not have owed a duty under the fourth cause of action. (OBM 34) But since GFC's argument must fail as to the third cause of action for reasons stated in Parts I and II, *ante*, it must also fail as to the fourth cause of action.

IV.

GFC CANNOT SHOW, AS A MATTER OF LAW, THAT ITS CONDUCT WAS NOT A "SUBSTANTIAL FACTOR" IN CAUSING THE HARM TO PLAINTIFFS

California has adopted the "substantial factor" test for cause-in-fact determinations. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 968.) Under that standard, "a cause in fact is something

that is a substantial factor in bringing about the injury. [Citations.] . . . The substantial factor standard . . . subsumes the 'but for' test while reaching beyond it to satisfactorily address other situations, such as those involving independent or concurrent causes in fact. [Citations.]" (*Id.* at p. 968.)

"The term 'substantial factor' has not been judicially defined with specificity, and indeed it has been observed that it is 'neither possible nor desirable to reduce it to any lower terms.' [Citation.]" (*Rutherford, supra,* 16 Cal.4th at p. 968.) "The . . . standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical." (*Id.* at p. 978.)

"A substantial factor . . . is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm. [¶] [Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.]" (CACI No. 430 (2016), p. 285.)

As stated in *Rutherford*: "Undue emphasis should not be placed on the term 'substantial.' For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the 'but for' test, has been invoked by defendants whose conduct is clearly a 'but for' cause of plaintiff's injury but is nevertheless urged as an

insubstantial contribution to the injury. [Citation.] Misused in this way, the substantial factor test 'undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby.' [Citation.]" (*Rutherford, supra,* 16 Cal.4th at p. 968.)

The evidence shows plaintiffs can reasonably expect to establish a "prima facie" case of causation at trial, such that the question cannot be resolved as a matter of law. (*Saelzer, supra,* 25 Cal.4th at p. 768.) The evidence is adequate to prove GFC's conduct was a substantial factor in bringing about plaintiffs' injuries, and does not prove the same harm would have occurred absent defendant's conduct.

When Mr. Vasilenko drove into the main lot, the attendant gave him a map showing *two* overflow parking lots marked with the "P" symbol: (1) the pool lot and (2) the plaza lot. GFC, but not Mr. Vasilenko, knew there was unlimited parking available at the plaza lot. There is no evidence it would have been just as risky for Mr. Vasilenko to cross Root from the plaza lot as it was for him to cross Marconi from the pool lot; in fact, the evidence shows it would have been *much safer* for him to cross Root.

Nevertheless, GFC's attendant told Mr. Vasilenko he "need[ed]" to park at the pool lot. Since that lot was under lock and key, Mr. Vasilenko could not have used it unless directed to do so by GFC. Then

other attendants failed to carry out their assigned duties to assist Mr. Vasilenko and other invitees make safe passage across Marconi. It is reasonable to conclude that the above acts and omissions contributed to his being struck by a car while trying to cross Marconi midblock. GFC's claims that it "did nothing more than make available an alternative area for Mr. Vasilenko to park his car" and "mere[ly] operat[e]" the pool lot are contrary to the record.

CONCLUSION

The plaintiffs respectfully request this Court to affirm the judgment of the Court of Appeal in full, on an any theory supported by the record, and to grant such other and further relief as the Court may deem appropriate.

Respectfully Submitted,

Dated: November 18, 2016

Frank J. Torrano
State Bar No. 166558

CERTIFICATION OF WORD COUNT

Appellate counsel certifies that this brief contains 13,980 words. Counsel relies on the word count of the computer program used to prepare the brief. (Cal. Rules of Court, rule 8.204(c).)

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

Dated: November 18, 2016

Frank J. Torrano

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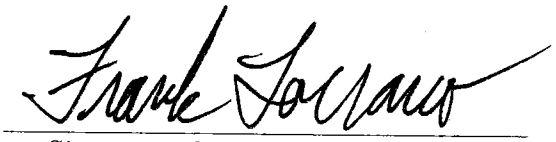

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