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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THOMAS V. GIRARDI, et al.,

Plaintiffs and Appellants,

v.

SAN RAFAEL HOMEOWNERS  
ASSOCIATION, et al.,

Defendants and Respondents.

B231197

(Los Angeles County  
Super. Ct. No. GC042147)

APPEAL from a judgment of the Superior Court for Los Angeles County,  
Jan A. Plum, Judge. Affirmed.

Girardi and Keese, Thomas V. Girardi, Neyleen S. Beljajev and Robert  
Finnerty for Plaintiffs and Appellants.

Manning & Kass, Ellrod, Ramirez, Trester, Anthony J. Ellrod and Kevin H.  
Louth for Defendants and Respondents.

Plaintiffs Thomas V. Girardi and Erika Girardi (collectively, the Girardis) appeal from a summary judgment entered in favor of defendants Alta San Rafael Association (erroneously sued and served as San Rafael Homeowners Association), and Board of Directors of Alta San Rafael Association (erroneously sued and served as Board of Directors of San Rafael Homeowners Association) (collectively, the Association). The Girardis sued the Association for negligence after their home was burglarized twice. They alleged that the Association, which manages and maintains a common interest development in the Alta San Rafael neighborhood of Pasadena in which the Girardis own a house, owed the development's homeowners a duty to keep the premises reasonably safe, and breached that duty by failing to hire a security guard, have monitored gates, and maintain street lights. The trial court granted the Association's motion for summary judgment on the grounds that, as a matter of law, the Association owed no duty to protect homeowners' property from theft, and even if there were such a duty, there was no causation in this case. We affirm the judgment on the ground that the Girardis failed to show a triable issue regarding causation.

## **BACKGROUND**

The Girardis own and live in a home in the Alta San Rafael common interest development (the development). The houses in the development are located along a three to four mile hilly roadway. There are several streetlights along the roadway, but most of them were not operational at the time of the events here. There are gates at the access points to the roadway. There were neither guards nor cameras at the gates at the times relevant to this lawsuit. The gates, which are manual, are always open. Although the Board of Directors of the Association approved funding to repair, upgrade, and possibly motorize the gates in early 2007, the Board subsequently was informed by representatives from the City of Pasadena

that construction of motorized gates would violate its zoning codes, and that it was unlikely that the City would grant a variance. The Board was also informed that several members of the Association, a neighboring homeowners' association, and the Pasadena police and fire departments opposed the construction of motorized gates.

The Girardis' 15,000 square-foot house sits on five acres of property within the development. The property is surrounded by a fence. The fence is approximately 10 feet high in the front, with 15 foot high gates, and is approximately four feet high in the back, with three six foot tall locked access gates. The exterior lighting on the Girardis' property, which is mostly in the garden area, is programmed to operate from dusk to dawn. There is an alarm system in the house, although the Girardis do not activate it themselves; their housekeepers (who work from 7:00 a.m. to 3:00 p.m. during the week and from 9:00 a.m. to 12:00 p.m. on Saturdays) activate the alarm only when the Girardis are away.

On December 28, 2007, Erica Girardi left the house at around 6:00 p.m. to meet Thomas for dinner. When they returned to the house at around 9:00 p.m., they discovered that someone had broken in and stolen several pieces of jewelry, including a pair of earrings valued at \$1 million.<sup>1</sup> It appeared that the thief or thieves gained entry to the house by breaking a pane of glass in a door leading from the rear patio into the living room.

Shortly after the burglary, Erika Girardi attended an informal meeting with most of the neighborhood to discuss the burglary. She brought with her Ernie Garcia, who owned a private security company and gave a talk about possible

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<sup>1</sup> Although there was a safe in the house, the earrings were taken from a glass jar that was on the bathroom counter.

security upgrades to make the neighborhood safer. No improvements were made in the year following that meeting.

On November 28, 2008, the Girardis, who were away in Aspen, Colorado, were notified that their home had again been burglarized. The burglary had occurred sometime between the evening of November 26, when the Girardis left for Aspen, and noon on November 28, when one of the housekeepers arrived for work (neither of the housekeepers worked on November 27, which was Thanksgiving Day). The point of entry appeared to be the same as the first burglary. The thief or thieves took various items from some of the bedrooms and/or closets, but left several of those items behind at the point of entry. One of the items that remained missing was a Cartier watch.

The following month, on Christmas Eve 2008, the Girardis' personal trainer left a gift outside the front gate. The Girardis saw the gift as they were leaving at one point, but did not pick it up. When they returned later, the gift was gone. They did not tell the personal trainer about the theft and do not know what the gift was.

In January 2009, the Girardis filed the complaint in the instant action, alleging a single cause of action for negligence based upon the Association's failure to hire a security guard, install a security gate and cameras, and replace broken street lights.<sup>2</sup> The Girardis alleged that as a result of the Association's negligence they were damaged in the amount of \$1.2 million due to the burglaries.<sup>3</sup>

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<sup>2</sup> The original complaint named as defendants only the San Rafael Homeowners Association. The Girardis subsequently amended their complaint to add as defendants the Board of Directors of the San Rafael Homeowners Association, Alta San Rafael Association, and the Board of Directors of Alta San Rafael Association.

<sup>3</sup> The complaint (and amended complaint) also alleged that as a result of the Association's negligence the Girardis were damaged in the diminution of the value of their real estate. When asked about that allegation at his deposition, however, Thomas

The Association moved for summary judgment on two grounds: (1) as a matter of law, the Association owed the Girardis no duty to protect their property from criminal acts of a third party (citing our decision in *Royal Neckwear Co. v. Century City, Inc.* (1988) 205 Cal.App.3d 1146 (*Royal Neckwear*)); and (2) the Girardis had no evidence as to the identity of the thief or thieves or whether the thief or thieves were authorized to enter the development, and therefore they could not establish that the Association’s failure to provide security guards, motorized gates, security cameras, or street lighting was a cause of their property losses (citing *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763 (*Saelzler*)). The Girardis opposed the motion, arguing that *Royal Neckwear* did not apply because it involved commercial rather than residential property, and that the Association did not establish that the Girardis had no evidence to show causation; they asserted they could produce witnesses and/or expert testimony to show that none of their employees caused the burglaries, and they provided the declaration of a security expert who opined that the burglaries were the result of the Association’s failure to implement adequate security measures.

The trial court granted the motion, finding, under *Royal Neckwear*, that the Association did not owe the Girardis a duty to protect their property from theft, and that even if the Association did owe such a duty, the Girardis could not establish

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Girardi testified: “You know what? I’m not seeking – I mean, we’ve alleged it in the complaint; but I think if all these people realize this has an impact on their houses, just not mine, maybe it would be smart to clean up this mess. . . . [¶] You know, I mean, that’s the focus of it. It isn’t ‘I want money from the insurance policy for the depreciation of the value of my house.’ I don’t want that.” When asked whether his response meant that the claim was waived, he responded, “Well, the claim is there. No, I want the claim to be there for the purposes of --” Counsel then asked, “Okay. How about the damages associated with that claim?” Girardi responded: “Okay, good. I’ll go along with that, yeah. The whole purpose of this is to try and change the stupid situation – you know what I mean? -- with this group of people.”

causation. Before the court entered judgment, the Girardis filed a motion for reconsideration. They argued that the Association undertook a duty to protect their property through the Covenants, Conditions, and Restrictions for the development (the CC&Rs), which they had been unable to obtain before the summary judgment motion. Before the motion for reconsideration was heard, however, the trial court entered judgment.

At the hearing on the reconsideration motion, the court indicated that it was unaware of the motion when it entered judgment, and that had it known of the motion it probably would not have entered judgment when it did. The court concluded, however, that entry of judgment removed its jurisdiction. The court noted that in any event the motion would have been denied because the CC&Rs were a public record that could have been obtained by the Girardis before the summary judgment motion was heard. Following the denial of their motion for reconsideration, the Girardis timely filed a notice of appeal from the judgment.

## **DISCUSSION**

The Girardis contend on appeal that (1) the trial court erred in relying on *Royal Neckwear, supra*, 205 Cal.App.3d 1146 when it found the Association did not owe a duty to protect the Girardis' personal property, because that case involved a commercial landlord-tenant relationship rather than a relationship between a homeowner and a homeowners association; (2) the trial court erred in finding the Girardis could not prove causation, because the Girardis raised a triable issue regarding causation through the declaration of their expert witness on security issues; and (3) the trial court improperly entered judgment while the Girardis' motion for reconsideration was pending.

We need not address the first issue because, as discussed below, we find the Girardis failed to raise a triable issue regarding causation. Before we address that

issue and the motion for reconsideration, we note that the appellants' appendix filed with the appellants' opening brief failed to include most of the documents necessary to review the summary judgment. For example, the appendix did not include the Association's separate statement of material facts, the Girardis' responsive separate statement, or the Association's response. Most importantly, the appendix did not include any of the evidence -- other than the declaration of its security expert -- filed in support of or opposition to the Association's summary judgment motion. Because of this, the Girardis failed to cite to evidence in support of their factual assertions in their opening brief, instead citing to the briefs filed in the trial court. In short, the record filed with the opening brief and the opening brief itself violated the Rules of Court. (Cal. Rules of Court, rule 8.124(b)(1)(B) [an appellant's appendix must contain all items "necessary for proper consideration of the issues, including, for an appellant's appendix, any item that the appellant should reasonably assume the respondent will rely on"]; Cal. Rules of Court, rule 8.204(a) [an appellant's brief must provide a summary of the significant facts and support any reference to a matter in the record by a citation to the volume and page number where that matter appears].)

We could affirm the judgment based upon the Girardis' failure to adequately raise any reviewable issue. (See, e.g., *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116 ["As with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed".]) Nevertheless, because all of the necessary items for review ultimately were provided -- through the respondents' appendix, which provided the evidence and separate statements filed by respondents, and the appellants' reply appendix, which provided the Girardis' evidence -- we will

address the merits of the summary judgment and denial of the Girardis' motion for reconsideration.

A. *Grant of Summary Judgment*

As noted, in granting the Association's motion for summary judgment, the trial court found that under *Royal Neckwear, supra*, 205 Cal.App.3d 1146, the Association owed no duty to the Girardis to protect their personal property from theft, and that even if there was a duty, there was no causation here. Although the Girardis challenge both findings, we address only the latter, because the summary judgment may be affirmed on either ground.

1. *Standard of Review*

Summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment has the burden of showing that "one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) If the defendant does so, the burden then shifts to the plaintiff to show by admissible evidence that a triable issue of material fact exists. (*Ibid.*) "Following a grant of summary judgment, we review the record de novo for the existence of triable issues." (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1176.)

2. *Causation*

The Girardis contend the trial court erred in finding they could not establish causation because causation is a question of fact for the jury to decide, and they

had raised a triable issue through the declaration of their security expert, Ernie Garcia.<sup>4</sup> We disagree that the Garcia declaration raised a triable issue regarding causation.

To prevail in a case in which the plaintiff seeks to recover damages under a negligence theory, “the plaintiff must show that the defendant owed her a legal duty of care, the defendant breached that duty, *and the breach was a proximate or legal cause of her injury.*” (*Saelzler, supra*, 25 Cal.4th at p. 772.) In *Saelzler*, the Supreme Court addressed the issue of causation in a case in which the plaintiff sued the owner of an apartment complex after she was attacked by unknown assailants at the complex. The trial court in that case granted summary judgment to the defendants based on the plaintiff’s failure to demonstrate that the defendants’ negligent failure to provide adequate security measures was an actual, legal cause of her injuries. (*Id.* at p. 766.) The plaintiff had submitted a declaration from a security expert, who opined that the attack on the plaintiff would not have occurred had the defendants provided certain security measures, but she offered no evidence showing the identity of the assailants, whether they had trespassed on the defendants’ property, or whether they were tenants and thus were permitted to pass through the security gates surrounding the complex. (*Id.* at pp. 769, 771.) The Supreme Court held that, because the plaintiff could not prove the identity or background of her assailants and thus could not show that they were unauthorized to enter the complex, her expert’s speculative opinion was insufficient to show that the defendant’s failure to provide increased security at the

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<sup>4</sup> The Girardis also argue in their reply brief that the Association failed to meet its burden of production on the causation issue in the motion for summary judgment. We deem this issue to be forfeited, however, because they failed to raise it in their opening brief. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764-765 [appellate court may consider issues waived when appellant could have raised them in opening brief but does not raise them until reply brief].)

entrance gates and/or functioning locked gates was a substantial factor in causing her injuries. (*Id.* at p. 776.)

In reaching this conclusion, the Supreme Court cited with approval several other cases in which appellate courts held that a security expert's opinion that the landowner failed to provide adequate security was insufficient to establish that that failure caused the plaintiff's injuries. One of those cases was *Nola M. v. University of Southern California* (1993) 16 Cal.App.4th 421. The Supreme Court agreed with the appellate court's conclusion that "the plaintiff must do more than simply criticize, through the speculative testimony of supposed security 'experts,' the extent and worth of the defendant's security measures, and instead must show the injury was actually caused by the failure to provide greater measures." (*Saelzler, supra*, 25 Cal.4th at p. 774, citing *Nola M., supra*, 16 Cal.App.4th at p. 435.)

The Supreme Court also agreed with the appellate court's analysis in *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, in which the plaintiff, who was raped in the parking garage of her apartment complex and sued her landlord for failing to repair a security gate, argued that her expert's opinion testimony that the nonfunctioning gate allowed the assailant to enter and assault the plaintiff was sufficient to raise a triable issue regarding causation. (*Saelzler, supra*, 25 Cal.4th at pp. 774-775.) As the Supreme Court explained: "The court [in *Leslie G.*] concluded that 'a tenant's negligence action against her landlord for injuries resulting from the criminal assault of a third person must be supported by evidence establishing that it was *more probable than not* that, but for the landlord's negligence, the assault would not have occurred. Where, as here, there is evidence that the assault could have occurred even in the absence of the landlord's negligence, proof of causation cannot be based on mere speculation, conjecture and inferences drawn from other inferences to reach a conclusion unsupported by any real evidence, or on an expert's opinion based on inferences, speculation and

conjecture. [¶] In this case, where there is no factual basis for the expert’s opinion or for [the plaintiff’s] general assertion of causation, the conclusion is unavoidable that summary judgment was properly granted.” (Saelzler, supra, 25 Cal.4th at pp. 775, quoting Leslie G., supra, 43 Cal.App.4th at p. 488.)

In the present case, the Girardis’ security expert offered no factual basis for his conclusion that the Association’s failure to repair street lights, motorize and secure the gates at the access points of the development, hire security guards, or install surveillance cameras caused and/or contributed to the burglaries of the Girardis’ house. In fact, the evidence before the trial court significantly undermined Garcia’s speculative opinion. For example, as in Saelzler, the Girardis admitted that they cannot prove the identity of the burglars, and thus they cannot show that the burglars were not authorized to enter the development, either as homeowners, employees of homeowners, or delivery personnel. Since the purpose of motorizing and securing the gates is to prevent only *unauthorized* people from entering the development, it would be mere speculation to conclude that the absence of those security measures contributed to the Girardis’ loss. (See Saelzler, supra, 25 Cal.4th at p. 776.) Similarly, the Girardis admitted they do not know the time at which the second burglary took place, and thus they cannot show that it did not occur during daylight hours. Moreover, the Girardis themselves presented evidence that nearby homes were burglarized during daylight hours. In light of this evidence, they cannot show that but for the Association’s failure to repair the street lights, the burglaries would not have occurred. Finally, the Girardis also presented evidence that their home was burglarized twice more after the complaint was filed, *after* cameras were installed at the gates. Given these subsequent

burglaries, they cannot show that the absence of cameras contributed to the earlier burglaries.<sup>5</sup>

In short, the Girardis failed to present evidence sufficient to raise a triable issue regarding whether the Association's alleged failure to provide adequate security was an actual, legal cause of their loss. Therefore, the trial court did not err in granting summary judgment in favor of the Association.

B. *Denial of Motion for Reconsideration*

The Girardis contend that the trial court's entry of judgment while their motion for reconsideration was pending was improper, resulting in a miscarriage of justice. Even if the trial court's premature entry of judgment was improper (see *APRI Ins. Co. v. Superior Court* (1999) 76 Cal.App.4th 176, 182 [noting that trial court should not have signed dismissal order while motion for reconsideration was pending, but holding that once the judgment was entered, the trial court had no jurisdiction to reconsider its ruling]), there was no miscarriage of justice here.

First, as noted by the trial court at the hearing on the motion for reconsideration, the purportedly "new" facts upon which the reconsideration motion was based were public records available to the Girardis at the time of summary judgment, and the Girardis failed to provide a satisfactory explanation for their failure to present the evidence before summary judgment was granted. Therefore, the Girardis' motion failed to satisfy the requirements for a motion for reconsideration. (Code Civ. Proc., § 1008; *New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 211.)

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<sup>5</sup> The fact that the cameras apparently did not work at the time of those subsequent burglaries is irrelevant to the causation issue, since the issue is whether having cameras at the gates would prevent burglaries, not whether they would assist in solving burglaries that occurred.

Second, the Girardis' motion addressed only the issue of the Association's duty. Therefore, even if the motion had satisfied the requirements of Code of Civil Procedure section 1008 and been considered before the trial court entered judgment, the result would be the same, because the Girardis failed to raise a triable issue regarding causation. Thus, the motion could not have prevented entry of a summary judgment in favor of the Association.

### **DISPOSITION**

The judgment is affirmed. Respondents shall recover their costs on appeal.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.