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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

GILBERT TAPIA,

Plaintiff and Appellant,

v.

7-ELEVEN, INC., et al.,

Defendants and Respondents.

D058114

(Super. Ct. No. 37-2008-00090793-
CU-NP-CTL)

APPEALS from judgments of the Superior Court of San Diego County, Yuri P. Hoffman, Judge. Affirmed.

Gilbert Tapia was attacked in the parking lot of a 7-Eleven convenience store and suffered serious injuries. He sued 7-Eleven, Inc. (7-Eleven) and its franchisee, Jennifer Walker (collectively, defendants), for damages on theories of negligence and premises liability. On separate motions for summary judgment filed by defendants, the trial court ruled that 7-Eleven owed Tapia no duty and that neither 7-Eleven nor Walker caused his

injuries. Based on these rulings, the court granted the motions and entered judgments against Tapia.

Tapia appeals, contending there are triable issues of fact as to whether defendants breached their duty to take steps to make the premises safe and secure from the foreseeable criminal assault that led to his injuries. We affirm.

I

FACTUAL BACKGROUND

At approximately 12:45 a.m., Tapia and a friend, James Deeds, left a bar and walked across the street to a 7-Eleven store franchised to Walker. Soon after Tapia and Deeds entered the store, Antonio Ray Owsley also entered. A verbal exchange followed during which Deeds called Owsley a "nigger." The three men then exited the store.

A few minutes later, Joseph Todash, a store clerk, heard a commotion in the parking lot. He looked outside and saw Tapia, Deeds, Owsley and others fighting. Todash telephoned 911. By the time police arrived about five minutes later, the fight was over and the participants had gone.

According to Tapia's brief on appeal, which does not cite any supporting evidence in the record, during the fight his assailants "beat him mercilessly, causing severe and permanent injuries." Tapia contends the beating was so severe that he "has no recollection of the incident or events immediately thereafter."

II

PROCEDURAL BACKGROUND

Tapia sued defendants in separate causes of action labeled negligence and premises liability. In both causes of action, he alleged defendants breached their duty of care by failing to provide safe and secure premises and adjacent areas for patrons of the store, or by failing to warn those on the premises or the adjacent areas of the dangers that existed in those places due to inadequate security. Tapia further alleged that as a result of defendants' breaches of duty, he was attacked by several persons as he was leaving the store. The attack, in turn, rendered Tapia "sick, sore, lame, disabled and distressed both physically and mentally," and caused him to incur medical bills and loss of earnings.

Tapia requested a judgment awarding him general and special damages, as well as costs.¹

Defendants filed separate motions for summary judgment. 7-Eleven moved first and Walker followed.

In its motion, 7-Eleven contended, among other things, that as a mere franchisor that had no control over the day-to-day operations of Walker's store, it had no duty to prevent and did not cause the harm that befell Tapia. In support of these arguments, 7-Eleven submitted, among other documents, a copy of the applicable franchise agreement and related amendments, which contained provisions leasing the store to Walker and providing that she would operate the store as an independent contractor. 7-Eleven also

¹ Because the facts supporting the negligence and premises liability causes of action are the same and the liability of a defendant in possession and control of land for injuries sustained on the land is governed by general negligence principles (*Rowland v. Christian* (1968) 69 Cal.2d 108, 119), we treat them as one and the same cause of action.

submitted a declaration from Walker, who stated she "operated the Store as an independent contractor by controlling the means and manner of its operation."

In her motion for summary judgment, Walker similarly contended, among other things, that she had no legal duty to prevent the attack on Tapia because it was unforeseeable, and that there was no evidence Tapia's harm resulted from any act or omission for which Walker was responsible. In support of her motion, Walker relied on, among other documents, her own declaration in which she stated she had never witnessed or been advised of an incident similar to the assault on Tapia occurring at her store. She also relied on a declaration from Todash, the clerk on duty, who described the assault, the events leading up thereto and his telephone call to the police.

Tapia opposed the motions for summary judgment. The thrust of his opposition was that, based on the foreseeability of the assault in the store parking lot, defendants had a duty to take affirmative steps to prevent the assault, which they breached.

In opposition to both motions, Tapia relied heavily on logs of calls to the local sheriff's department for service at Walker's store and in the area within 0.2 miles of the store, which showed that in the year preceding the assault on Tapia, the sheriff had received 53 calls for disturbances, assaults and other misconduct at Walker's 7-Eleven store, and hundreds of calls for service in the surrounding area. Tapia also relied on a portion of the transcript of Walker's deposition, wherein Walker testified that she had instructed two employees not to let Owsley into the store because he had wielded a knife in front of her daughter. Tapia further relied on a portion of the Todash deposition transcript wherein Todash testified that prior to the assault Walker had not informed him

that "any particular person was not allowed in the store," but that if she had done so, he "would have taken her advice and told that person that he or she was not allowed [in the store]."

In opposition to Walker's motion, but not 7-Eleven's motion, Tapia submitted a declaration from a former police officer and security consultant, who identified three breaches of Walker's duty of care to provide safe and secure premises: (1) failure to inform all employees that Owsley had been banned from the store based on the incident involving a knife and Walker's daughter; (2) failure to train employees how to handle arguments between customers inside the store; and (3) failure to train employees or to have a policy to enforce prohibitions against loitering.

The trial court agreed with 7-Eleven's duty and causation arguments, granted its motion for summary judgment and entered judgment for 7-Eleven. The court also agreed with Walker's causation argument, granted her motion for summary judgment and entered judgment for Walker.

Tapia timely appealed both judgments.

III

DISCUSSION

Tapia argues the trial court erred in granting defendants' motions for summary judgment because the evidence he presented in opposition to the motions raised triable issues of material fact. Tapia contends the history of criminal activity at or near Walker's store imposed on defendants a duty to take affirmative steps to prevent the foreseeable criminal assault that caused his injuries. According to Tapia, Walker's failures (1) to tell

her employees not to let Owsley into the store, (2) to train her employees how to handle arguments between customers in the store, and (3) to train her employees on 7-Eleven's policy against loitering "led to [the] brutal beating" Tapia suffered in the parking lot of Walker's store. Tapia further contends 7-Eleven is liable as the owner/lessor and franchisor of Walker's store. After setting forth the applicable standard of review, we shall explain why we reject these contentions.

A. *Standard of Review*

A defendant may move for summary judgment on the ground "the action has no merit," i.e., as to each cause of action at issue, the plaintiff cannot establish an essential element or the defendant has a complete defense. (Code Civ. Proc., § 437c, subds. (a), (o)(1), (2).) To prevail on a motion for summary judgment, the defendant must show there are no triable issues of material fact, and under the applicable law the plaintiff cannot prevail on any asserted cause of action. (*Id.*, § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) On appeal from a summary judgment in favor of the defendant, we review de novo the record that was before the trial court when it ruled on the motion, resolving any doubts in the evidence in favor of the plaintiff. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768 (*Saelzler*).)

B. *Tapia Is Not Entitled to Reversal of the Summary Judgments*

1. *Tapia Forfeited His Challenge to the Trial Court's Rulings on Causation, Which Are Sufficient to Sustain the Summary Judgments*

As an initial matter, Tapia has not met his appellate burden to establish reversible error. Although a plaintiff suing for injuries sustained on a defendant's premises must

show the defendant owed a legal duty of care, the defendant breached that duty *and the breach was the proximate cause of the plaintiff's injury* (e.g., *Saelzler, supra*, 25 Cal.4th at p. 772), Tapia's appellate briefing contains only passing references to the causation element on which the trial court relied in granting defendants' motions for summary judgment. Under established principles of appellate procedure, this constitutes a forfeiture of Tapia's challenge to the summary judgments insofar as they were based on lack of causation.

It is settled that a "judgment or order of the lower court is *presumed correct*," and "error must be affirmatively shown." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) This rule applies fully to an appeal from a summary judgment. "Although our review of a summary judgment is *de novo*, it is limited to issues which have been adequately raised and supported in [the appellant's] brief." (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6 (*Reyes*)). "[D]e novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. 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." (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116 (*Lewis*)). To discharge this responsibility, an appellant must, among other things, submit a brief that states each issue under a separate heading or subheading and supports each issue by argument and citation to supporting facts and law. (Cal. Rules of Court, rule 8.204(a)(1)(B) & (C).) "[A]n issue merely raised by a party without any argument or authority is deemed to be without

foundation and requires no discussion.'" (*Roe v. McDonald's Corp.* (2005) 129 Cal.App.4th 1107, 1114 (*Roe*.) Thus, on appeal from a summary judgment, issues not adequately briefed are deemed forfeited or abandoned. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125 (*Christoff*); *Reyes*, at p. 466, fn. 6.)

Here, Tapia has not directly addressed in his briefs the causation issue on which the trial court granted defendants' summary judgment motions. He instead argued that defendants had a duty to prevent the foreseeable assault that led to his injuries — mentioning the incidence of prior crimes at Walker's store and in the surrounding neighborhood no fewer than 20 times. To be sure, at a few places within the discussion of the duty and breach elements of his claims, Tapia generally asserted that defendants' breaches "result[ed] in severe and permanent injuries to [Tapia]," were "a cause of [his] injuries" and "led to [his] brutal beating." And at one point, he asserted more specifically that if Walker had told Todash not to let Owsley into the store, "this incident would never have happened." But, Tapia never cited or discussed the evidence before the trial court as it related to causation, or any legal authorities pertinent to the sufficiency of that evidence to establish the causation element of his claims, as required by appellate procedural rules. (Cal. Rules of Court, rule 8.204(a)(1)(B) & (C); *Lewis, supra*, 93 Cal.App.4th at p. 116.) Even after Walker pointed out Tapia's omission in her answering brief, Tapia still refused squarely to address the essential causation element of his claim, or the authorities on

which defendants relied to show he could not establish that element.² Indeed, in his reply brief Tapia continued to insist that the judgment must be reversed because he "provided an exhaustive analysis of the issue of duty and all evidence submitted in the trial court established that, in fact, [defendants] owed [him] such a duty."³

Tapia's failure to discuss in his briefing the facts and the law relevant to the dispositive causation issue constitutes a failure to demonstrate that the trial court erred in granting defendants' motions for summary judgment. "Thus, the trial court's ruling of lack of causation disposes of the entire complaint and suffices to affirm the summary judgment[s] in favor of defendant[s]." (*Christoff, supra*, 134 Cal.App.4th at p. 126 [agreeing with defendant's contention that plaintiff's failure to discuss causation issue in opening brief forfeited issue on appeal]; see also *Lewis, supra*, 93 Cal.App.4th at p. 118 [plaintiff forfeited issue not adequately raised in opening brief]; *Reyes, supra*, 65

² The cases defendants cited included *Saelzler, supra*, 25 Cal.4th 763, *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472 (*Leslie G.*), *Nola M. v. University of Southern California* (1993) 16 Cal.App.4th 421 and *Lopez v. McDonald's Corp.* (1987) 193 Cal.App.3d 495.

³ Tapia took the same approach in the trial court. The papers he filed in opposition to defendants' motions for summary judgment discussed the duty and breach elements of his claims, but not the causation element. Further, at the hearing on Walker's motion, the trial court asked Tapia's counsel: "Do you want to talk to me about the causation issue?" Counsel responded, "Your Honor, you are looking at causation to say [Walker] was not the one responsible for the assault on Mr. Tapia, because obviously she was not the assailant. *And that we are not here to argue because that is the case. But the question becomes one of foreseeability and prevention as opposed to causation.*" (Italics added.) Counsel then went on to argue the history of criminal activity at Walker's store supported imposition of a duty on Walker to take precautions to prevent the assault on Tapia.

Cal.App.4th at p. 466, fn. 6 [plaintiffs abandoned claims of error not addressed in opening brief].)

Before we leave the forfeiture issue, we wish to correct a serious misapprehension that apparently led to Tapia's decisions in the trial court and in this court to refuse to confront the causation issue and to insist that defendants were not entitled to summary judgment because he raised triable issues of fact as to the issues of duty and breach. In this regard, Tapia contends defendants were not entitled to summary judgment because they "failed to sustain [their] burden *to negate each of the elements* of [his] causes of action." (Italics added.) Defendants, however, bore no such burden before they could prevail on their summary judgment motions.

A defendant moving for summary judgment on the ground that a cause of action has no merit may satisfy its burden by showing that "*one or more elements* of the cause of action, even if not separately pleaded, cannot be established." (Code Civ. Proc., § 437c, subd. (p)(2).) The law does not "require a defendant moving for summary judgment to conclusively negate an element of the plaintiff's cause of action"; "all that the defendant need do is to show that the plaintiff cannot establish *at least one element* of the cause of action." (*Aguilar, supra*, 25 Cal.4th at p. 853, italics added.) "When that is done, the burden shifts to the plaintiff to present evidence showing there is a triable issue of material fact. If the plaintiff is unable to meet [his] burden of proof regarding *an essential element* of [his] case, all other facts are rendered immaterial." (*Leslie G., supra*, 43 Cal.App.4th at p. 482, italics added; accord, *Saelzler, supra*, 25 Cal.4th at pp. 780-781.) Thus, insofar as defendants attacked the essential element of causation in their

motions for summary judgment (see, e.g., *Saelzler*, at p. 772), Tapia could not defeat the motions by showing there were triable issues of fact as to the elements of duty and breach, because those elements were "rendered immaterial" once he failed to respond to defendants' showings that he could not establish causation (*Leslie G.*, at p. 482; see also *Christoff, supra*, 134 Cal.App.4th at p. 126 ["If causation is lacking, the complaint cannot stand."]; *Romero v. American President Lines, Ltd.* (1995) 38 Cal.App.4th 1199, 1203 ["the opposing party may not defeat summary judgment by attempting to generate a factual dispute as to immaterial issues"]).

2. *The Trial Court Correctly Ruled Tapia Could Not Prove Defendants Caused His Injuries*

Even if Tapia had not forfeited his challenge to the summary judgments in favor of defendants by not adequately briefing the causation issue on which the trial court relied in granting defendants' summary judgment motions, he would lose on the merits. As we shall explain, the trial court correctly ruled Tapia did not present sufficient evidence from which a reasonable trier of fact could conclude that defendants proximately caused his injuries.

As we noted earlier, a plaintiff seeking to hold a defendant liable for injuries sustained on the defendant's premises by the criminal assault of a third party must show, among other elements, that the defendant's breach of a legal duty was a proximate or legal cause of the plaintiff's injury. (*Saelzler, supra*, 25 Cal.4th at p. 772.) To prove such causation, "the plaintiff must show that the defendant's act or omission was a 'substantial factor' in bringing about the injury." (*Id.* at p. 778.) If the plaintiff seeks to establish

causation by circumstantial evidence, he cannot defeat summary judgment "merely by showing that the inferences [he] draws from those circumstances are *consistent* with [his] theory. Instead, [he] must show that the inferences favorable to [him] are *more reasonable or probable* than those against [him]." (*Leslie G.*, *supra*, 43 Cal.App.4th at p. 483; accord, *Saelzler*, at pp. 775-776.) Thus, to defeat a defendant's motion for summary judgment, "the plaintiff must establish, *by nonspeculative evidence*, some actual causal link between the plaintiff's injury and the defendant's failure to provide adequate security measures." (*Saelzler*, at p. 774, italics added.)

"Here, by reason of the prior criminal assaults and [other] incidents on the premises, defendants *may* have owed a duty to provide a reasonable degree of security to persons entering them." (*Saelzler*, *supra*, 25 Cal.4th at p. 775, italics added.) In that event, Tapia contends that a reasonable degree of security required defendants: (1) to inform Todash that Owsley was not allowed inside Walker's store; (2) to train Walker's employees how to handle arguments between customers in the store; and (3) to train Walker's employees how to enforce 7-Eleven's policy against loitering. We assume without deciding that defendants owed such duties to Tapia and breached them. (See *Saelzler*, at p. 775.) Nevertheless, as we explain below, the evidence presented as part of defendants' motions for summary judgment would not allow a reasonable trier of fact to find that any such breach proximately caused Tapia's injuries.

In support of their attacks on the essential causation element of Tapia's claims, defendants submitted a surveillance tape and a declaration from Todash, the clerk on duty when Tapia was assaulted, showing that: (1) Todash telephoned the police two minutes

15 seconds after Owsley entered Walker's store; (2) Tapia's assailants fled the premises three minutes 25 seconds after Owsley entered the store and; and (3) the police arrived approximately five minutes after the assailants had fled. In his declaration, Todash also stated: (1) he did not see Tapia, Deeds or Owsley draw any weapons or make physical contact with one another; (2) he heard Deeds call Owsley a "nigger," but did not hear either Tapia or Deeds express any safety concerns; and (3) he did not anticipate any physical altercation among them while they were in the store. Defendants also submitted a portion of the transcript of Tapia's deposition, wherein Tapia admitted that neither he nor Deeds had gotten into a verbal altercation or argument with anyone in the store. Finally, defendants submitted a declaration from "an expert in public safety security measures, criminal investigation, and criminal activity," who stated: "It is my opinion that there was no act, omission, or security deficiency by [defendants] that had a direct causal relationship to the altercation and injuries involving [Tapia]." From this evidence, defendants argued that no act or omission on their part caused Tapia's injuries because the assault happened so quickly and unexpectedly that there was nothing they could have done to prevent it. (See, e.g., *Roe, supra*, 129 Cal.App.4th at pp. 1119-1120 [defendant's failure to undertake security measures could not be considered cause of plaintiff's assault by third party on defendant's premises when there was no evidence defendant had reason or opportunity to do so during short time assailant was on premises]; *Thompson v. Sacramento City Unified School Dist.* (2003) 107 Cal.App.4th 1352, 1372 [when "an injury occurs with such rapidity that supervisorial personnel could have no opportunity to

discover and respond to the situation, then claims of abstract negligence will not support recovery"].)

After defendants showed Tapia could not establish causation, the burden shifted to him to set forth "specific facts" showing that a triable issue of material fact existed as to whether defendants proximately caused his injuries. (Code Civ. Proc., § 437c, subd. (p)(2).) In opposition to 7-Eleven's motion, however, Tapia did not submit any declarations or other evidence supporting causation; did not refer to any such evidence in response to 7-Eleven's separate statement of undisputed facts; and did not argue the causation issue in his memorandum of points and authorities. Hence, Tapia did not sustain his burden of proof to defeat 7-Eleven's summary judgment motion, and the trial court correctly granted the motion. (See *Aguilar, supra*, 25 Cal.4th at pp. 849-851.)

After the trial court granted 7-Eleven's motion, Tapia submitted a declaration from an expert on the issue of causation in opposition to Walker's summary judgment motion.⁴ The expert, a retired police officer and security consultant, stated that Walker's failures to notify Todash that Owsley had been banned from the store, to train Todash how to deal with arguments between customers in the store, and to train Todash regarding enforcement of 7-Eleven's policy against loitering were "contributing factors that l[ed] to

⁴ Curiously, in opposition to Walker's motion for summary judgment, Tapia did not discuss the expert's declaration in either his response to Walker's separate statement of undisputed facts or his memorandum of points and authorities. Tapia's failure to cite the expert's declaration in his responsive separate statement "may constitute a sufficient ground, in the court's discretion, for granting the motion." (Code Civ. Proc., § 437c, subd. (b)(3); see *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1189-1192.)

the attack on Tapia, which could have been addressed prior to the incident" and which, if properly addressed, "more likely than not would have prevented the incident from having occurred." As we shall explain, however, this "opinion regarding causation is too tenuous to create a triable issue whether the lack of or inadequate [security measures] were an actual or legal cause of [Tapia's assault]." (*Rinehart v. Boys & Girls Club of Chula Vista* (2005) 133 Cal.App.4th 419, 435 (*Rinehart*).

First, the expert's opinion about the causal nexus between Tapia's injuries and Walker's failure to train Todash how to handle customer arguments has no factual basis. As previously noted, Tapia testified at his deposition that neither he nor Deeds argued with anyone while in the store; and Todash did not observe anything that suggested an assault would occur. Contrary to the expert's opinion, therefore, there was no argument between customers that Todash could have prevented from escalating into a physical assault. (See *Saelzler, supra*, 25 Cal.4th at p. 778 [to establish causation, "plaintiff must show some substantial link or nexus between omission and injury"].)

Second, the expert's opinion about the causal nexus between Tapia's injuries and Walker's failure to train Todash on enforcement of the no-loitering policy also has no factual basis. Although Todash testified at his deposition that before the assault on Tapia "there were some kids on the property," later identified as Tapia's assailants, there was no evidence the assailants were "loitering" because no testimony or other evidence established how long they had been on the premises or what they were doing there. Hence, defendants' failure to prevent loitering could not have been a cause of Tapia's injuries. (See *Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1222-1223 [failure to hire

security guards to discourage gang gatherings did not cause plaintiff's injury when there was no evidence the shooting that injured plaintiff arose out of gang gathering].)

Third and finally, the expert's opinion did not establish a sufficient factual basis to support a causal nexus between Tapia's injuries and Walker's failure to tell Todash that Owsley had been banned from the store. Todash did testify at his deposition that, prior to the assault on Tapia, Walker had not informed him "that any particular person was not allowed into the store"; and if she had done so, he "would have taken her advice and told that person that he or she was not allowed." But, Tapia's expert's opinion necessarily assumes that Todash would have recognized Owsley during the few minutes he was in the store; *and if* Todash had recognized Owsley, he would have been able to eject him from the store; *and if* Todash had ejected Owsley from the store, Deeds would not have directed a racial slur at Owsley; *and if* Deeds had not uttered the racial slur, Owsley *and the other assailants* would not have assaulted Tapia in the parking lot. Nothing in the record supports any of these assumptions, however. From all that appears, it is at least equally possible that Todash would not have recognized Owsley, that Owsley would not have complied with an order to leave the store, that Deeds would have uttered the racial epithet before Todash was able to eject Owsley, or that Owsley or the other assailants would have assaulted Tapia regardless of the racial epithet. Tapia's expert's factually unsupported opinion was thus insufficient to create a triable issue on causation. (See *Rinehart, supra*, 133 Cal.App.4th at p. 433 ["'an expert's speculative and conjectural conclusion that different [security] measures might have prevented an injury cannot be relied on to establish causation'"]; *Leslie G., supra*, 43 Cal.App.4th at p. 487 [expert

testimony insufficient to create triable issue on causation when it does not establish reasonably probable causal link between defendant's act or omission and plaintiff's injury].)

In short, the record contains insufficient evidence from which a reasonable trier of fact could conclude that it is more probable than not that had Walker told Todash not to let Owsley in the store, Tapia would not have been assaulted in the parking lot. Because "there is no factual basis for the expert's opinion or for [Tapia's] general assertion of causation, the conclusion is unavoidable that summary judgment was properly granted." (*Leslie G.*, *supra*, 43 Cal.App.4th at p. 488; accord, *Saelzler*, *supra*, 25 Cal.4th at p. 775.)

DISPOSITION

The judgments are affirmed.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.