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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RICKY HASTEN-GOLSTON et al.,

Plaintiffs and Appellants,

v.

CITY OF SAN DIEGO et al.,

Defendants and Respondents.

D066846

(Super. Ct. No. 37-2013-00038675-
CU-PO-CTL)

APPEAL from judgments of the Superior Court of San Diego County, Ronald S. Prager, Judge. Affirmed.

diDonato Law Center, Peter R. diDonato and Lesli M. Hogan for Plaintiffs and Appellants.

Jan I. Goldsmith, City Attorney, and Carmen A. Brock, Deputy City Attorney, for Defendant and Respondent City of San Diego.

Horton, Oberrecht, Kirkpatrick & Martha and Kimberly S. Oberrecht for Defendants and Respondents LB One, LLC and Loc Nguyen Corp.

While sitting atop a concrete platform in Swan Canyon in the City Heights neighborhood of San Diego, plaintiffs Ricky Hasten-Golston (Hasten) and Bryant Byrd, Jr., (Byrd) (together Plaintiffs) were shot and injured by an unidentified male assailant. Plaintiffs asserted premises liability claims against defendant City of San Diego (City) for a dangerous condition of public property and against defendants LB One, LLC (LLC) and Loc Nguyen Corp., dba Payless Property Management (Payless) (together LB One) for negligence. Plaintiffs appeal from summary judgments in favor of the City and LB One (together Defendants).

On appeal, the parties present various arguments on numerous issues associated with the claims raised in the summary judgment motions. The trial court correctly ruled that Plaintiffs did not meet their burden of establishing a triable issue of material fact as to causation, and resolution of that issue is dispositive of the appeal. We will affirm the judgments in favor of Defendants.

I.

STATEMENT OF FACTS¹

" 'Because this case comes before us after the trial court granted a motion for summary judgment, we take the facts from the record that was before the trial court when

¹ We base our recitation of the facts on what the parties presented with accurate record references *to evidence*, disregarding other contentions of fact. (*Falcon v. Long Beach Genetics, Inc.* (2014) 224 Cal.App.4th 1263, 1267; see Cal. Rules of Court, rule 8.204(a)(1)(C).) In particular, we have not considered the numerous factual assertions in LB One's brief that are supported merely by reference to the parties' separate statements, because separate statements are not evidence of anything; they are "mere assertion[s]." (*Stockinger v. Feather River Community College* (2003) 111 Cal.App.4th 1014, 1024.)

it ruled on that motion.' " (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 716-717.) We consider all the evidence in the moving and opposing papers, except evidence to which objections were made and sustained, liberally construing and reasonably deducing inferences from Plaintiffs' evidence, and resolving any doubts in the evidence in Plaintiffs' favor. (*Id.* at p. 717; Code Civ. Proc., § 437c, subd. (c).)²

Swan Canyon consists of 26 acres of public open space, rights of way and private property in the City Heights neighborhood of San Diego. Late at night on June 28, 2012, an unknown assailant shot both Plaintiffs as they sat on a concrete platform on top of an embankment in Swan Canyon. The concrete platform is located in the far north end of the canyon — which is south of Thorn Street, between Highland Avenue and 44th Street. Highland Avenue and 44th Street run north-south, are one block apart (44th St. is to the west, and Highland Ave. is to the east), and the 44th Street alley (Alley) is in between (running north-south). From Thorn Street facing south, 44th Street continues well past the area in the canyon where the shooting occurred (with the canyon to the east); the Alley dead ends into the northern rim of the canyon a few lots south of Thorn Street; and

² We deny the City's request that we take judicial notice of the City of San Diego Mid-City Community Plan approved on August 4, 1998. The City did not request that the trial court take judicial notice of the document, the document is not necessary to our resolution of the appeal, and the City presents no unusual circumstance that would support taking judicial notice of the document. (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 379, fn. 2 ["'Reviewing courts generally do not take judicial notice of evidence not presented to the trial court' absent unusual circumstances."].) Accordingly, we also disregard any factual statements in the City's brief based on the document attached to the request. (*Kendall v. Barker* (1988) 197 Cal.App.3d 619, 625 ["'Statements of alleged fact in the briefs on appeal which are not contained in the record and were never called to the attention of the trial court will be disregarded by this court on appeal.' "].)

Highland Avenue dead ends into the canyon, parallel to the Alley, a few lots further south than where the Alley dead ends (with the portion of the canyon where the shooting occurred to the west).

Swan Canyon is not fully enclosed. While it is bounded in parts by public roadways, alleys, private residences and a public school, it has unfenced entrances open to the public at Highland Avenue (one lot south of where the Alley dead ends into the canyon), Redwood Street, Quince Street, Olive Street on the east and Olive Street on the west. In addition, some if not all of the properties circling the canyon, including the public school, also have direct access to the canyon.

Around 11:00 p.m. on June 28, Plaintiffs entered the far north end of Swan Canyon at the south (dead) end of the Alley through a gap in a chain-link fence. They proceeded to a concrete platform nearby — a location where they had "h[un]g out" together previously. Plaintiffs sat down on the platform, facing into the canyon with their feet hanging over the edge, as they shot bee-bees from an Airsoft gun, drank beer and smoked cigarettes. Approximately 15-20 minutes after they entered Swan Canyon, Plaintiffs noticed three men approaching from the south — i.e., from the bottom of the canyon on a dirt path about 50 feet away. Neither Hasten nor Byrd knew how the men entered Swan Canyon, although Hasten and Byrd acknowledge the other men could have entered the canyon at any of more than seven public access points, including two entrances less than 100 yards from the concrete platform. Within a minute, as the three men passed Plaintiffs to their left (east), one of the men said, "What's up?"; Hasten and Byrd each replied, "What's up?"; and seconds later, by which time the three men had just

passed the concrete platform, one of the men shot Hasten and Byrd multiple times from close (but more than five feet away) range. Hasten felt the impact of being struck, saw Byrd fall off the platform to the ground below, and then jumped down after him. The three men ran south, back into Swan Canyon, laughing. Meanwhile, Hasten helped Byrd, and the two of them managed to get out of the canyon and back to the Alley, where they screamed for help and collapsed before being rescued.

II.

STATEMENT OF THE CASE

In March 2013 Plaintiffs filed suit against the City, and in November 2013 Plaintiffs filed a first amended complaint against the City and LB One.³ As relevant to this appeal, in the operative complaint, Plaintiffs asserted the following claims: Hasten and an unnamed plaintiff (presumably Byrd) each alleged a separate cause of action against the City for premises liability based on a dangerous condition of public property; and Hasten and Byrd each alleged a separate cause of action against LB One for premises liability based on negligence.

In the dangerous condition of public property causes of action against the City, Plaintiffs alleged as follows: prior to 2000, the City built a fence at the boundary of Swan Canyon and the Alley; at all times, the City has had possession, dominion and

³ In both complaints, Plaintiffs also named other defendants, none of which is a party to the appeal.

Plaintiffs tell us that LLC owns and Payless manages certain apartment properties on Highland Avenue, however the evidence Plaintiffs cite establishes only that LLC owns certain Highland Avenue apartments. In their appellate briefing, neither Plaintiffs nor LB One differentiates between LLC and Payless; thus, we shall not either.

control over the fence; the City knew that Swan Canyon was an area of violence and criminal activity; by 2008, the fence was in a state of disrepair, and a portion of the fence had been removed by the City; the City failed to repair or replace the fence; the City knew that, because of the gap in the fence, a path was created from Swan Canyon to the Alley; the City knew that the "dilapidated fence constituted a dangerous condition to members of the public for unreasonable exposure to criminal activity"; on June 28, 2012, Plaintiffs entered Swan Canyon through the gap in the fence and sat on a concrete platform in the canyon to the south of the Alley; an individual walking through the canyon toward the gap in the fence shot Plaintiffs; if the fence had not been in a state of disrepair between 2008 and 2012, then (1) Plaintiffs would not have had access to Swan Canyon just south of the Alley, (2) a path from Swan Canyon to the Alley would not have been created, and (3) without the path to the Alley, "the perpetrator who shot [P]laintiffs would not have been at the location . . . and would not have shot [P]laintiffs"; as a result of creating the dangerous condition and not maintaining the fence, "the access to Swan Canyon was open and available" for the three men to accost and injure Plaintiffs; and the City's failure to maintain the fence created a dangerous condition in violation of Government Code section 835.⁴

⁴ "Except as provided by statute, a public entity is liable for injury *caused by a dangerous condition of its property* if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that *the injury was proximately caused by the dangerous condition*, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either: [¶] (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or [¶] (b) The public entity had actual or

In the negligence causes of action against LB One, Plaintiffs alleged as follows: prior to 2000, LB One or another named defendant or their predecessors built a fence at their property line and Swan Canyon at the end of the Alley;⁵ LB One knew that Swan Canyon was an area of gang violence and criminal activity; by 2008, the fence was in a state of disrepair, and a portion of the fence had been removed; the "dilapidated fence constituted a dangerous condition to members of the public for unreasonable exposure to criminal activity"; on June 28, 2012, Plaintiffs entered Swan Canyon through the gap in the fence and sat on a concrete platform in the canyon to the south of the Alley; an individual walking through the canyon toward the gap in the fence shot Plaintiffs; and if LB One had not allowed the fence to be in a state of disrepair between 2008 and 2012, then (1) Plaintiffs would not have had access to Swan Canyon just south of the Alley, (2) a path from Swan Canyon to the Alley would not have been created, and (3) without the path to the Alley, "the perpetrator who shot [P]laintiffs would not have been at that location and would not have shot [P]laintiffs."

The City and LB One filed and briefed separate motions for summary judgment. The court heard and decided them together.

As relevant to the dispositive issue on appeal, the City argued that, for purposes of Government Code section 835, the state of disrepair of the fence was not a "dangerous

constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." (Gov. Code, § 835, italics added.) Plaintiffs here alleged that subdivisions (a) and (b) both applied.

⁵ Plaintiffs inconsistently alleged that the City built the fence.

condition" for which a public entity may be held liable, because the condition of the fence did not *cause* (or contribute to or amplify) Plaintiffs' injuries. In opposition, Plaintiffs argued that the City's failure to maintain the fence between Swan Canyon and the Alley was "a direct cause of intensifying the risk of criminal behavior" at the location where Plaintiffs were injured, thereby contributing to Plaintiffs' injuries. In support of their position, Plaintiffs attempted to distinguish the legal authorities cited by the City and to establish a material issue of fact as to causation. In this latter regard, Plaintiffs argued that the condition of the fence *caused* Plaintiffs to be where they were at the time they were shot and *caused* the three men to be walking through the canyon toward the Alley. In reply, the City emphasized the speculative nature of Plaintiffs' argument — which relied on the motivations and intentions of the assailant, the identity of whom was unknown.

As relevant to the dispositive issue on appeal, LB One argued that its conduct related to the fence (which it did not own) was not a substantial factor in causing Plaintiffs' injuries. In opposition, Plaintiffs attempted to distinguish the legal authority relied on by LB One, arguing that LB One's failure to maintain the fence (on property it owned or controlled) was a legal cause of Plaintiffs' injuries: "Had the fence been maintained by [LB One], either the Plaintiffs would not have been in a position to be harmed, or the shooters would not have been going up that path to gain access to the [A]lley." In support of their position, Plaintiffs relied on the on the declaration testimony from their security expert, James Chaffee, which we will describe in greater detail at part III.A., *post*. In reply, LB One argued that Plaintiffs' injuries were caused by an

assailant who pulled the trigger on a gun, not by a gap in the fence between Swan Canyon and the Alley (which was not on LB One's property); LB One emphasized the speculative nature of Plaintiffs' arguments regarding the effect of the condition of the fence on the location of Plaintiffs or the assailant.

The court heard oral argument, took the matter under submission and ultimately issued a lengthy written ruling in September 2014 granting both motions for summary judgment. As relevant to the dispositive issue on appeal (causation), the court sustained the evidentiary objections to Chaffee's declaration and ruled as follows: with regard to the City, because Plaintiffs had no information about the assailant's intentions or his entry into Swan Canyon, Plaintiffs did not meet their burden of establishing how the failure to repair the gap in the fence was a substantial factor in causing their injuries; with regard to LB One, Plaintiffs failed to raise a triable issue of material fact as to causation, since they relied on Chaffee's expert testimony which the court had excluded.⁶

The court entered separate judgments in favor of the City and LB One, and Plaintiffs timely appealed from both.

⁶ The court's minute order, which is four and one-half single-spaced pages, also contains numerous rulings directed to other issues — including but not limited to duty, foreseeability, recreational trail immunity (as to the City), and admissibility of evidence. The parties have briefed these issues on appeal, but since we are able to affirm the judgments after reviewing the rulings related to Chaffee's declaration and causation, we need not discuss the other issues raised in the parties' appellate briefs.

III.

DISCUSSION

Plaintiffs argue on appeal that the failure to maintain the fence was a legal cause of Hasten's and Byrd's injuries, because had the fence been repaired, (1) Hasten and Byrd would not have been on the concrete platform in the canyon, and (2) the assailant (and his two friends) would not have been walking through the canyon toward the concrete platform on the north end. As we explain, because the condition of the fence was not a substantial factor in either group of men being where they were at the time of the shooting, Plaintiffs did not meet their burden of establishing that the City, LLC or Payless caused (or contributed to or amplified) Plaintiffs' injuries. To the extent Plaintiffs contend that the trial court erroneously sustained the evidentiary objections to Chaffee's declaration which contained evidence to the contrary, Plaintiffs did not meet their burden of establishing reversible error in excluding Chaffee's testimony.

A. *Plaintiffs Did Not Meet Their Burden of Establishing Reversible Error in the Exclusion of Chaffee's Testimony*

With regard to the admission of expert testimony, " 'California law permits a person with "special knowledge, skill, experience, training, or education" in a particular field to qualify as an expert witness . . . and to give testimony in the form of an opinion ' " (*People v. Vang* (2011) 52 Cal.4th 1038, 1044, citation omitted; see Evid. Code, §§ 720, 801.) We review the trial court's ruling on the admissibility of expert testimony for abuse of discretion. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773 (*Sargon*)). A ruling that constitutes an abuse of

discretion is one that is " 'so irrational or arbitrary that no reasonable person could agree with it.' " (*Ibid.*)

The trial court sustained Defendants' objections to the Chaffee declaration "pursuant to *Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, 928[,] and *Westbrooks v. State of California* (1985) 173 Cal.App.3d 1203, 1209-1210." From these citations, we understand the court's ruling to be that the declaration would be excluded on the basis it did not contain testimony related to " 'a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' " (*Caloroso*, at p. 929, quoting from Evid. Code, § 801, subd. (a); *Westbrooks*, at pp. 1209-1210, quoting from Evid. Code, § 801, subd. (a).) In their opening brief on appeal, Plaintiffs argue that Chaffee's expert opinions are "relevant to the issue[] of . . . causation," though they never really say how or why. Instead, Plaintiffs present argument only as to how they contend Chaffee's opinions are beyond common experience and thus how they would assist the trier of fact.

For example, although Plaintiffs contend that "[w]hether there is a causal connection between the open and unrepaired fence and the injuries sustained by Hasten and Byrd" is not a matter of common knowledge, Plaintiffs do not attempt to explain how or why there is a causal connection between the gap in the fence and Plaintiffs' injuries. In addition, we are left to guess as to what portion of Chaffee's declaration Plaintiffs rely on, which we are not required to do; "it is counsel's duty to point out portions of the record that support the position taken on appeal." (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768; see Cal. Rules of Court, rule 8.204(a)(1)(C).) This is especially

true here, where in opposition to the two motions Plaintiffs submitted two different declarations from Chaffee that contain different testimony related to causation; and on appeal, Plaintiffs do not differentiate between the two declarations. While Plaintiffs' failure to direct us to the specific testimony on which they rely allows us to deem Plaintiffs to have forfeited their argument, because neither declaration is lengthy we exercise our discretion to consider the argument. (*Del Real*, at p. 768.)

In both of Chaffee's declarations, he concludes by offering five opinions — only two of which potentially speak to causation:

"C. Criminal activity from spreading out of Swan Canyon would have been inhibited or prevented by fixing the dilapidated fence near the alley between 44th Street and Highland Avenue;

"D. . . . [I]f the subject chain-link fence had been repaired and closed, it is most likely that Plaintiffs Ricky Hasten-Golston and Bryant Byrd would not have been shot or injured by the assailants."

In addition, in the declaration in opposition to LB One's motion, Chaffee also offered the following opinions that arguably relate to causation:

"7. On June 28, 2012, the dilapidated and open condition of the chain-link fence created a dangerous condition and allowed three criminal assailants elements to encounter and shoot [P]laintiffs from a distance of approximately ten (10) feet. The lack of a complete fence *directly contributed to* the aggravated assault with a firearm used to harm [P]laintiffs, who, at the time of the shooting, were sitting on a concrete platform within Swan Canyon without any means of escape.

"8. Two separate and distinct contributing actions occurred *as a direct result of* the dilapidated condition of the fence with sections removed or rolled back. First, the missing portion of the chain[-]link fence allowed the two young victims (i.e., Hasten-Golston and Byrd) to enter from the [A]lley into Swan Canyon where they sat on a concrete platform. Second, the missing fence enticed the three criminal elements to traverse through Swan Canyon toward the opening in the fence which had been [in] a state of

disrepair for many years. Had the fence been repaired and not open, Plaintiffs would not have been sitting on the concrete platform without a means of escape at the time they encountered the assailants." (Italics added.)⁷

The scope of opinion testimony is not unlimited. In addition to the specific basis on which the trial court excluded the expert's opinions here — namely, the requirement that the proffered evidence be "sufficiently beyond common experience" such that "the opinion of an expert would assist the trier of fact" (Evid. Code, § 801, subd. (a)) — " 'an inherent corollary to the foundational predicate' " that the expert's testimony will assist the trier of fact is that *the proffered opinion evidence not be speculative*. (Sargon, *supra*, 55 Cal.4th at p. 770 ["under Evidence Code section 801, the trial court acts as a gatekeeper to exclude speculative . . . expert opinion"].) As explained in *Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396:

"There can be many possible 'causes,' indeed, an infinite number of circumstances which can produce an injury A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. *This is the outer limit of inference upon which an issue may be submitted to the jury.* . . . [¶] . . . [¶] The fact that a determination of causation is difficult to establish cannot, however, provide a plaintiff with an excuse to dispense with the introduction of some reasonably reliable evidence proving this essential element of his case. . . . *Such [evidence, which Plaintiffs here presented by expert] testimony, however, can enable a plaintiff's action to go to the jury only if it establishes a reasonably probable causal connection between an act and a present injury.*" (163 Cal.App.3d at p. 403, citations omitted, italics added; see *Leslie G. v. Perry*

⁷ Without a record reference, Plaintiffs also tell us that Chaffee "discusses that a reasonable and likely reason the three males were present within Swan Canyon was because they were aware of the missing fence allowing ingress and egress over the LB One property and into the 44th Street Alley."

& Associates (1996) 43 Cal.App.4th 472, 487 (*Leslie G.*), which we discuss at length at pt. III.B., *post.*)

In *Thai v. Stang* (1989) 214 Cal.App.3d 1264 (*Thai*), for instance, the defendant business owner was sued by the plaintiff patron who was injured as a result of a drive-by shooting outside the business. (*Id.* at p. 1268.) In opposition to the defendant's motion for summary judgment based on lack of causation, the plaintiff submitted a declaration from a security expert who testified, in part, that the lack of security guards contributed to the drive-by shooting.⁸ (*Thai*, at p. 1274.) The trial court ruled, and we affirmed on appeal, that given that the plaintiff's actual physical injuries resulted from a crime committed by an unknown perpetrator, the expert's declaration regarding causation was " 'pure speculation.' " (*Id.* at p. 1276.)⁹

Here, all four of the above-quoted opinions from Chaffee are speculative. First, Chaffee's testimony that the gap in the fence "*allowed*" Plaintiffs to enter Swan Canyon from the Alley is speculative as to whether the gap *caused* Plaintiffs to be on the concrete platform (or, more appropriately focused, *caused* the assailant to pull the trigger of a gun). Second, Chaffee's testimony regarding how the gap in the fence may have

⁸ Similar to Chaffee's testimony here, the security expert in *Thai* testified that the " 'presence of professional uniformed security officers is a known deterrent to criminal activity' "; and if " 'there [had] been a professional uniformed security officer assigned to the exterior of the [business] on the date in question, in my judgment, the shooting probably would not have occurred.' " (*Thai, supra*, 214 Cal.App.3d at p. 1276.)

⁹ *Plaintiffs* cite *Thai* in support of their argument that security experts are utilized "[i]n nearly every reported case involving allegations of inadequate protection from criminal conduct" without acknowledging that the expert's testimony in *Thai* was excluded as " 'pure speculation' " (*Thai, supra*, 214 Cal.App.3d at p. 1264).

contributed to the shooting here is speculative, since there is no evidence in the record to suggest that the (unknown) assailant knew about the gap in the fence.¹⁰ Thus, irrespective of the bases of Chaffee's opinions,¹¹ the opinions themselves are speculative as to (1) what caused Plaintiffs to enter the canyon, (2) what the assailant knew about Swan Canyon generally and the gap in the fence specifically and, therefore, (3) whether the gap in the fence caused or in any way contributed to the shooting.

We will affirm the trial court's exclusion of evidence if proper on any basis, regardless whether it was a ground that the trial court gave for its ruling or one that was identified in Defendants' objections.¹² (*Philip Chang & Sons Associates v. La Casa*

¹⁰ Multiple times during oral argument, Plaintiffs' counsel told the trial court that the assailant and his accomplices exited the canyon through the gap in the fence to the Alley and returned to the canyon through the gap and headed south past Plaintiffs after the shooting. However, Plaintiffs have not directed us to any evidence in the record that supports the statement that anyone other than Plaintiffs entered or exited the canyon through the gap in the fence. Indeed, no one knows how the three unidentified men *entered the canyon*; one of the three men shot Plaintiffs from *within the canyon*, and after the shooting the men *exited south through the canyon*, not through the gap in the fence.

¹¹ We express no opinion as to whether the trial court properly sustained Defendants' evidentiary objections to two exhibits (one containing crime statistics in the City Heights neighborhood and another photographs from the crime scene) on which Chaffee based his opinions. We nonetheless accept, for purposes of this issue, that Chaffee relied on these exhibits in forming his opinions. (See Evid. Code, § 801, subd. (b) [expert testimony may be based on matter "*whether or not admissible*," so long as it is "of a type that reasonably may be relied upon" by experts in forming opinions on the subject (italics added)]; *People v. Loy* (2011) 52 Cal.4th 46, 68.)

¹² Here, based on speculation, LB One objected to three out of four of the above-quoted paragraphs of testimony from Chaffee's declaration submitted in opposition to its motion, and the City objected to both paragraphs submitted in opposition to its motion. At oral argument in the trial court, during a discussion whether Chaffee's testimony related to a subject beyond common experience that would assist the trier of fact, more

Novato (1986) 177 Cal.App.3d 159, 173 ["If evidence is excluded on an improper objection but the evidence excluded is subject to objection on a different ground, *it does not matter that the reason advanced by counsel or relied upon by the court was wrong.* [Citations.] If the exclusion is proper upon any theory of law applicable to the instant case, the exclusion must be sustained regardless of the particular considerations which may have motivated the trial court to its decision." (Italics added.); *People v. Geier* (2007) 41 Cal.4th 555, 582 [affirming evidentiary ruling because it was correct under Evid. Code, § 352, even though the trial court did not cite that provision].) The quotations from *Philip Chang* are an evidence-specific application of the well-known principle that "a correct ruling will not be reversed simply because it may have been based on an incorrect reason." (*Ceja v. Department of Transportation* (2011) 201 Cal.App.4th 1475, 1483.)

Thus, Plaintiffs did not meet their burden of establishing reversible error in the exclusion of Chaffee's testimony regarding causation.

B. *The Trial Court Properly Granted Summary Judgment*

We review de novo whether the trial court erred in granting the motions for summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*)). A defendant is entitled to a summary judgment on the basis that the "action has no merit" (Code Civ. Proc., § 437c, subd. (a)(1)) only where the court is able to determine from the evidence presented that "there is no triable issue as to any material

than once the court expressed the view that *Chaffee's testimony regarding causation was speculative.*

fact and that the moving party is entitled to a judgment as a matter of law" (*id.*, § 437c, subd. (c)). A cause of action "has no merit" if one or more of the elements of the cause of action cannot be established. (*Id.*, § 437c, subd. (o).)

Thus, a defendant like the City or LB One has the burden of *persuasion* that one or more elements of the cause of action at issue "cannot be established." (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at pp. 849, 850, 853-854.) To meet this burden, the defendant has the initial burden of *production* to make a prima facie showing of the nonexistence of any triable issue of material fact. (*Aguilar*, at p. 850.) If the defendant meets this burden, then the burden of *production* shifts to the plaintiff to establish the existence of a triable issue of material fact. (*Id.* at pp. 850-851.)

Therefore, under these standards, we must determine whether Defendants have shown that Plaintiffs have not established, and cannot reasonably expect to establish, a prima facie case of causation and whether in response Plaintiffs' showing established a triable issue of material fact.¹³ (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) Although causation usually presents a question of fact, the issue can be decided as a matter of law where the facts allow only one reasonable conclusion. (*Milligan v. Golden Gate Bridge Highway & Transportation Dist.* (2004) 120 Cal.App.4th 1, 9 [Gov.

¹³ Causation is an element of Plaintiffs' cause of action against the City for creating a dangerous condition. (Gov. Code, § 835 ["a public entity is liable for injury *caused by a dangerous condition of its property* if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that *the injury was proximately caused by the dangerous condition*" (italics added)].) Causation is also an element of Plaintiffs' cause of action against LB One for negligence. (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205 [claim for premises liability based on negligence requires showing of "duty, breach, *causation* and damages" (italics added)] (*Ortega*).)

Code, § 835 claim for creating dangerous condition]; *Ortega, supra*, 26 Cal.4th at pp. 1205-1206 [premises liability claim based on negligence].)

In *Nola M. v. University of Southern California* (1993) 16 Cal.App.4th 421 (*Nola M.*), the plaintiff was raped on a university campus, and she sued the university on the basis it should have provided more campus security. (*Id.* at p. 424.) Following trial, the court entered a judgment in favor of the plaintiff, but the Court of Appeal reversed. (*Ibid.*) Assuming the existence of duty and breach, the appellate court concluded that the plaintiff failed to prove the breach was a legal cause of her injuries. (*Id.* at pp. 427-428.) More specifically, the court concluded that the plaintiff had to have done more than simply criticize, through the speculative testimony of security experts, the extent and worth of the defendant's security measures; instead, the plaintiff was required to have shown that her injuries were actually caused by the failure to have provided greater security measures (i.e., by the breach of the duty). (*Id.* at p. 435.) A different rule, the court observed, would place an unreasonable burden on the property owner: "To characterize a landowner's failure to deter the wanton, mindless acts of violence of a third person as the 'cause' of the victim's injuries is (on these facts) to make the landowner the insurer of the absolute safety of everyone who enters the premises." (*Id.* at p. 437.)

Plaintiffs rely on the following quote from *Nola M., supra*, 16 Cal.App.4th at page 436: " 'We think it comes down to this: When an injury can be prevented by a lock or a fence or a chain across a driveway or some other physical device, a landowner's failure to erect an appropriate barrier can be the legal cause of an injury inflicted by the negligent or criminal act of a third person.' " Tellingly, Plaintiffs ignore the very next

sentence of the opinion, which we find controlling (as did the *Nola M.* court): "But where, as here, we are presented with an open area which could be fully protected, if at all, only by a Berlin Wall, we do not believe a landowner is the cause of a physical assault it could not reasonably have prevented." (*Id.* at pp. 436-437, italics added; see *7735 Hollywood Blvd. Venture v. Superior Court* (1981) 116 Cal.App.3d 901, 905 [" 'It is an easy matter to know whether a stairway is defective and what repairs will put it in order[,] . . . but how can one know what measures will protect against the thug, the narcotic addict, the degenerate, the psychopath and the psychotic?' "].)

Here, like the university campus in *Nola M.*, Swan Canyon is "an open area which could be fully protected, if at all, only by a Berlin Wall" (*Nola M.*, *supra*, 16 Cal.App.4th at p. 437) — regardless whether there was a gap in the fence at the end of the Alley. Thus, here, as in *Nola M.*, the actions of neither the City nor LB One are "the cause of a physical assault it could not reasonably have prevented." (*Ibid.*)

Even more on point is *Leslie G.*, *supra*, 43 Cal.App.4th 472. There, the plaintiff alleged she was raped by an unknown assailant while in the garage of her apartment building. (*Id.* at p. 476.) She sued the defendant building owners, asserting that the breach of duty of due care in failing to repair a broken security gate to the garage contributed to — i.e., was a substantial factor in causing — her injuries. (*Ibid.*) The *Leslie G.* plaintiff's security expert provided much more detailed testimony than Chaffee provided here: the apartment building was located in a high-crime area; functioning security gates were critical to ensuring tenants' safety; the nonfunctioning gate " 'allowed' " the assailant to enter and ultimately assault the plaintiff; the defendant

should have hired an on-site manager to perform regular inspections and repairs of the gate and other entrances; the assailant selected the garage because of both its isolated, remote nature, and the opportunities to hide and escape if necessary. (*Id.* at pp. 478-479.) The Court of Appeal affirmed summary judgment, concluding that the security expert's opinions were too speculative to furnish a causal link between the defendant's breach of duty and the injuries from the assault. (*Id.* at p. 488.) In reaching this decision, the court stated: "Since there is no direct evidence that the rapist entered or departed through the broken gate (or even that the broken gate was the only way he could have entered or departed), [the plaintiff] cannot survive summary judgment simply because it is *possible* that he *might* have entered through the broken gate." (*Id.* at p. 483.)

We recognize that Plaintiffs here do not contend that the gap in the fence caused the assailant and his two companions to enter Swan Canyon.¹⁴ The language and analysis in *Leslie G.*, however, are no less persuasive. "[W]hen an injury can be prevented by a simple physical device [or repair to a fence], then it is technically *possible* for the landowner's failure to install such a device [or to repair such a fence] to be a legal cause of a plaintiff's injuries. By no stretch of the imagination, however, . . . [is] the failure to install such a device [or to repair such a fence], without more, . . . sufficient to *prove* causation." (*Leslie G.*, *supra*, 43 Cal.App.4th at p. 485, fn. 5.) That is because a

¹⁴ According to Plaintiffs, "Here, a repaired fence: (1) would have prevented Hasten and Byrd from crossing into Swan Canyon and sitting on the small concrete platform, and (2) the attacker would likely not have been coming from within Swan Canyon on the dirt slope towards the LB One property and 44th Street Alley slope next to Hasten and Byrd. Thus, the missing fence . . . was directly involved with the invitation and allowance of criminal activity to be in close proximity with Hasten and Byrd."

" 'mere possibility of a causal connection is insufficient to raise the requisite inference of fact.' " (*Id.* at p. 486.) For these reasons, the *Leslie G.* court held that a victim's negligence claim against the owner of property 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 [defendant's] negligence, the assault would not have occurred." (*Id.* at p. 488.)

Thus, in the present case, as *Leslie G.* explains, because there is evidence that the shooting could have occurred *even in the absence of 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."¹⁵ (*Leslie G.*, *supra*, 43 Cal.App.4th at p. 488.) The gap in the fence was not a substantial factor in causing (or contributing to or amplifying) Plaintiffs' injuries, because the gap in the fence did not — using the language in Plaintiffs' description of the alleged causation (see fn. 14, *ante*) — *cause* Plaintiffs to be on the concrete platform¹⁶ or *cause* the assailant to be drawn

¹⁵ In *Leslie G.*, the Court of Appeal disregarded the expert's testimony, because the facts on which it was based were speculative. (*Leslie G.*, *supra*, 43 Cal.App.4th at p. 487.) Here, we disregard the expert's testimony because, regardless of the facts on which it is based, the opinions themselves are speculative. (See pt. III.A., *ante*.) For purposes of the causation analysis, the result is the same.

¹⁶ The argument that the gap in the fence may have *allowed* Plaintiffs to enter Swan Canyon and be on the concrete platform is insufficient to establish a triable issue of material fact as to causation given the number of unfenced entrances — including two less than 100 yards from the concrete platform, one of which was merely one lot south of where the Alley dead ends into the canyon.

toward Plaintiffs. Plaintiffs contend that by reason of the evidence of prior criminal activities in the neighborhood and photographs in and around the canyon, the shooting was foreseeable and Defendants owed Plaintiffs a duty to properly maintain the fence. Even if we assume the existence and breach of this duty (which we do not decide), however, there is no evidence or inferences from evidence that the breach contributed to Plaintiffs' injuries in this case. "A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to determine the issue in favor of the defendant as a matter of law." (*Leslie G.*, at p. 484, citing Prosser & Keeton, Torts (5th ed. 1984) § 41, p. 269.)

For these reasons, the trial court properly granted Defendants' motions for summary judgment.

DISPOSITION

The judgment in favor of the City is affirmed. The judgment in favor of LLC and Payless is affirmed. The City, LLC and Payless are entitled to recover their respective costs on appeal from Hasten and Byrd. (Cal. Rules of Court, rule 8.276(a).)

IRION, J.

WE CONCUR:

HALLER, Acting P. J.

McDONALD, J.