S235412

IN THE

Supreme Court

OF THE STATE OF CALIFORNIA

ALEKSANDR VASILENKO, et al.,

Plaintiffs and Appellants,

vs.

GRACE FAMILY CHURCH,

Defendant and Respondent.

OPENING BRIEF ON THE MERITS

AFTER A DECISION
BY THE COURT OF APPEAL
THIRD APPELLATE DISTRICT
[3d Civil No. C074801]

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Defendant and Respondent Grace Family Church, by and through its counsel of Record, respectfully submits its Opening Brief on the Merits.

ISSUE PRESENTED

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

I.

INTRODUCTION

In contravention to longstanding principles of premises liability, the Third Appellate District imposed a duty on a landowner where an invitee was injured on a public street abutting the premises owned, possessed, or controlled by the landowner, even though the landowner did nothing to create or enhance the risk and dangers of crossing a public street, and did not configure its own premises in a manner that ejected or forced the injured invitee to cross the street at the particular time, or in the place, or manner in which he did.

Plaintiff and Appellant Aleksandr Vasilenko was injured when he was struck by a car while he was crossing Marconi Avenue on foot after having parked his car in an overflow parking lot used by Defendant and Respondent Grace Family Church ("GFC") and located across the street from the church. (*Vasilenko v. Grace Family Church* (2016) 248

Cal.App.4th 146, 150 ("*Vasilenko*").) He had first attempted to park at the main church lot but it was full and he was told by a volunteer for GFC that he could park across the street. (*Ibid.*) On these facts, the Third Appellate District dismissed the general principle of premises liability which imposes a duty on a landowner only where a person was injured on premises owned, possessed, or controlled by the landowner, and diverged from cases involving injuries occurring on public streets or sidewalks adjacent to a landowner's premises such as *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, *Nevarez v. Thriftimart, Inc.* (1970) 7 Cal.App.3d 799, *Seaber v. Hotel Del Coronado* (1991) 1 Cal.App.4th 481, *Steinmetz v. Stockton City Chamber of Commerce* (1985) 169 Cal.App.3d 1142, and *Donnell v. California Western School of Law* (1988) 200 Cal.App.3d 715, all of which have consistently and routinely held that a landowner owes no duty to a person who was injured off the premises, on a public street or sidewalk over which the landowner had no control. Rather, the Third Appellate District found a duty by reaching to find that GFC's mere use of a parking lot which required its invitees to cross a busy public street created an unreasonable risk of injury off-site, and relying upon the factually distinguishable cases of *Barnes v. Black* (1999) 71 Cal.App.4th 1473 and *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139. In so doing, the Third Appellate District gave no weight to the fact that

Mr. Vasilenko was injured on a public street not owned, possessed, or controlled by GFC.

There is no question that a tragedy occurred when Mr. Vasilenko was injured while attempting to attend an event at GFC. However, the law does not impose a duty under the facts presented here, and the Third Appellate District's anomalous decision must be corrected.

II.

STATEMENT OF THE CASE

A. Statement of Facts

Plaintiff and Appellant Aleksandr Vasilenko crossed Marconi Avenue in Sacramento County, on foot, about seventy-five (75) west of an unmarked crosswalk at Root Avenue, when he was hit by a car and injured.[1] (*Vasilenko, supra,* 248 Cal.App.4th at p. 149; II CT 445.) GFC was located on Marconi Avenue, across the street from the Debbie Myer Swim School ("swim school"). (*Ibid.*; II CT 445.) GFC had an agreement with the swim school so that GFC could use the swim school's parking lot ("swim school lot") for persons attending GFC. (*Ibid.*; II CT 446.) This

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[1] Mr. Vasilenko was "jaywalking" across Marconi Avenue. Merriam-Webster defines the verb "jaywalk" as follows: "to cross a street carelessly or at an illegal or dangerous place." (Jaywalk, *Merriam-Webster.com.* <http://www.merriam-webster.com/dictionary/jaywalk> [as of October 5, 2016].) Pursuant to Sacramento City Code, Title 10, Chapter 10.20.020, "No pedestrian shall cross a through street within three hundred (300) feet of a crosswalk other than within such crosswalk, . . ." Accordingly, Mr. Vasilenko was "jaywalking" as he was illegally crossing Marconi Avenue at the time he was hit by the car.

stretch of Marconi Avenue between GFC and the swim school consists of five (5) lanes: two eastbound lanes, two westbound lanes, and a central universal left-turn lane. (*Ibid.*)

Church members at GFC volunteered to act as parking attendants during church services and special events. (*Ibid.*; II CT 446.) As parking attendants, they assisted drivers in navigating into and through the church's main parking lot and informed drivers of alternate places to park when the main lot was full. (*Ibid.*; II CT 446.)

On the evening of November 19, 2010, Mr. Vasilenko went to GFC to attend a function held there. (*Id.* at p. 150; II CT 445.) When he arrived at GFC, GFC's main church parking lot was full and a volunteer parking attendant gave him a map showing alternative parking lots and told him he could park across the street. (*Ibid.*; II CT 447; II CT 599.) Mr. Vasilenko parked at the swim school lot and crossed Marconi Avenue on foot without assistance or instruction from GFC volunteers. (*Ibid.*; II CT 445.) There were two volunteer parking attendants at the swim school lot. (*Ibid.*; II CT 447.) One of the volunteer parking attendants waved drivers into the swim school lot and the other directed drivers to a parking spot. (*Ibid.*)

Sergey Skachkov and his girlfriend also parked in the swim school lot around the same time as Mr. Vasilenko. (*Ibid.;* II CT 448.) Mr. Skachkov and his girlfriend crossed Marconi Avenue, midblock, heading northbound toward GFC, after looking both ways for oncoming

traffic. (*Ibid.*; II CT 448.) After having crossed the two eastbound lanes on Marconi Avenue, they stopped at the central universal left-turn lane, waiting a short period of time for some cars to pass. (*Ibid.*; II CT 448.) Mr. Skachkov noticed Mr. Vasilenko who was about fifteen (15) feet to his right. (*Ibid.*; II CT 448.) After waiting for some cars to pass, all three individuals attempted to cross the remaining two westbound lanes on Marconi Avenue. (*Ibid.*; II CT 448.) When Mr. Skachkov reached the center line dividing the two westbound lanes, he saw headlights approaching from his right, heading westbound. (*Ibid.*; II CT 448.) All three individuals began running. (*Ibid.*; II CT 448.) Mr. Vasilenko was hit by the car and injured. (*Ibid.*; II CT 448.)

B. Procedural Background

Plaintiffs and Appellants Aleksandr Vasilenko and Larisa Vasilenko (collectively "Vasilenko") filed a First Amended Complaint, adding GFC as a defendant and asserting the third and fourth causes of action against GFC. (I CT 62-68.) Vasilenko's third cause of action for "General Negligence" against GFC alleged that GFC created a foreseeable risk of harm to its invitees in operating the swim school lot because its invitees would have to cross Marconi Avenue to get to the church after parking in the swim school lot, and that GFC negligently failed and refused to offer any assistance or instruction for safe access to GFC from the swim school lot, resulting in injury to Vasilenko. (*Vasilenko, supra,* 248 Cal.App.4th at

pp. 150-151; I CT 67.) Vasilenko's fourth cause of action for "General Negligence" against GFC alleged that GFC knew or should have known that the volunteer parking attendants were not qualified or adequately trained or supervised to enable them to perform their duties in a reasonably safe manner. (*Id.* at p. 151; I CT 68.)

Mr. Vasilenko's wife, Larisa, brought the second cause of action for loss of consortium against GFC. (I CT 66.)

1. GFC's Motion for Summary Judgment and Judgment of Dismissal

GFC moved for summary judgment, primarily on the basis that it did not owe a duty to assist or provide instruction to Mr. Vasilenko about how to safely cross a public street which it did not own, possess, or control. (I CT 278-286.) Vasilenko asserted that GFC "breached its duty of care to plaintiff Aleksandr Vasilenko by establishing an overflow parking lot at a swim center across the street which required him to cross Marconi Avenue, a busy thoroughfare, . . ." (II CT 319), and that GFC "*did have control concerning where to establish the lot* and which use, selection, and control created the danger. . ." (II CT 321, italics in original).

The motion for summary judgment raised other grounds including that (1) assuming a duty existed, Vasilenko could not establish that GFC's failure to assist him or instruct him in crossing Marconi Avenue was a legal cause of his injuries, and that (2) Vasilenko could not establish that GFC

failed to reasonably train and educate the volunteer parking attendants. (I CT 285-286.)

The trial court granted the motion for summary judgment, finding that GFC "did not owe a duty of care to the plaintiff or other members of the public to assist them in safely crossing a public street, which it did not own or control." (III CT 611.) Vasilenko appealed the judgment of dismissal entered in favor of GFC. (III CT 774-788.)

2. The Court of Appeal Reverses the Judgment of Dismissal

In a 2-1 decision, the Third Appellate District reversed the judgment of dismissal entered in favor of GFC and remanded the matter with directions to vacate the trial court's order granting summary judgment in favor of GFC. (*Vasilenko, supra*, 248 Cal.App.4th at p. 159.)

a. The Majority Opinion

Justice Blease wrote the majority opinion, with Justice Butz concurring. They found that GFC owed Vasilenko a duty in that it owed a duty to take steps to protect invitees who parked in the swim school lot as the use of the swim school lot "required GFC's invitees who parked there to cross a busy thoroughfare [Marconi Avenue] in an area that lacked a marked crosswalk or traffic signal in order to reach the church, [and] exposed those invitees to an unreasonable risk of injury offsite, ..." (*Id.* at pp. 146, 149, 154, 156, 157.) The majority addressed the general

principle of premises liability which provides that a landowner owes no duty of care to persons injured on property the landowner does not own, possess, or control, but it dismissed this principle, concluding "that Vasilenko was injured on property that was not owned, possessed, or controlled by GFC is not dispositive of the issue of duty where, as here, property that was owned, possessed, or controlled by GFC was maintained in such a manner as to expose persons to an unreasonable risk of injury offsite." (*Id.* at p. 153.) In so doing, the majority relied on *Barnes v. Black* (1999) 71 Cal.App.4th 1473 ("*Barnes*") and *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139 ("*Bonanno*"), wherein an exception to the general principle applied, as cases applicable to the instant case. (*Id.* at pp. 153-155.)

The majority also considered two other grounds raised in the motion for summary judgment, but on which the trial court did not rely in granting the motion, to evaluate whether it could affirm the grant of summary judgment on these other grounds. (*Id.* at p. 158.) The first ground asserted that Vasilenko could not establish that GFC's failure to assist or instruct him in crossing the public street was a substantial factor in causing him harm. (I CT 285.) The majority found that a "reasonable juror could infer that Vasilenko would not have been struck by a car crossing Marconi Avenue had GFC not maintained and operated a parking lot across the street from the church." (*Vasilenko, supra,* 248 Cal.App.4th at p. 158.)

Therefore, the majority concluded that Vasilenko could establish the element of causation, and that summary judgment would not be properly sustained on this basis.

The second ground asserted that Vasilenko could not establish that GFC failed to adequately train and educate its volunteer parking attendants because the undisputed facts showed that they were adequately trained. (I CT 286.) The majority, however, found that there was a triable issue of fact as to whether an instruction by the volunteer parking attendants to those who parked in the swim school lot to cross the street at the intersection of Marconi and Root Avenues would be adequate. (*Vasilenko, supra,* 248 Cal.App.4th at pp. 158-159.)

b. Justice Raye's Dissent

Justice Raye dissented, concluding that the majority's "cited authorities are inapposite and the conclusion incorrect." (*Id.* at p. 159). Justice Raye disagreed that the instant case was analogous to *Barnes* or *Bonanno*, and concluded that while *Seaber v. Hotel Del Coronado* (1991) 1 Cal.App.4th 481 ("*Seaber*") and *Steinmetz v. Stockton City Chamber of Commerce* (1985) 169 Cal.App.3d 1142 ("*Steinmetz*") were factually distinguishable, the principles in *Seaber* were controlling. (*Id.* at p. 160.)

In distinguishing *Barnes* from the instant case, Justice Raye explained that the Court of Appeal in *Barnes* correctly found a duty due to facts that existed in that case. (*Ibid.*) In *Barnes,* the Court of Appeal

concluded that "the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury offsite." (*Barnes, supra,* 71 Cal.App.4th at p. 1478.) Justice Raye noted that "[i]t was not the mere location of the property adjacent to a busy street that gave rise to the duty recognized in *Barnes*. It was how the property was maintained: the construction of a sidewalk used by children to access a play area, adjacent to a driveway that sloped down to a busy street." (*Vasilenko, supra,* 248 Cal.App.4th at p. 160.) In contrast, in the instant case, Justice Raye noted, "the defendant performed no maintenance and made no improvements or alterations to the property that increased the risk beyond the risk posed by its location next to a busy street." (*Ibid.*)

Similarly, Justice Raye factually distinguished *Bonanno* from the instant case, stating, "*Bonanno* truly involved a dangerous condition of public property," and that "the defendant erected a bus stop that could only be reached by crossing a dangerous crosswalk," the existence of which was assumed. (*Id.* at p. 161.) In contrast to the instant case, Justice Raye noted, "Here, defendant erected nothing and there is nothing to suggest the parking lot was dangerous. Defendant simply made its parishioners aware of nearby parking and provided attendants to facilitate the positioning of their cars within the facility." (*Ibid.*)

Justice Raye noted the majority's acknowledgment of the general rule as applied in *Seaber*: " 'The courts . . . have consistently refused to recognize a duty to persons injured in adjacent streets or parking lots over which the defendant does not have the right of possession, management and control.' " (*Vasilenko, supra,* 248 Cal.App.4th at p. 157 (quoting *Seaber, supra*, 1 Cal.App.4th at p. 489).) Justice Raye also noted that "a landowner cannot be responsible for controlling or regulating pedestrian traffic across public streets," and that "[a] landowner has no duty to warn of dangers beyond its own property when the owner did not create these dangers." (*Ibid.*)

Justice Raye determined that the majority's attempt to differentiate this case from *Seaber* "is a distinction without a difference," and that *Seaber* was "noteworthy for its reaffirmation of the general rule that landowners owe no duty to prevent injury on adjacent property and for its explanation of the exceptions to the rule, where the management of property has increased the risk presented by the property's location." (*Id.* at pp. 157, 162.) Justice Raye succinctly stated, "[i]t was the property owner's management of the properties involved in the *Bonanno* and *Barnes* cases that led to the imposition of a duty and consequent liability." Justice Raye further distinguished the facts of the instant case: "Here, the church was not a property manager. The swim school merely gave permission to the church's members to park there. Unlike the poorly designed sidewalk

in the *Barnes* case, no features of the swim school parking lot had been altered by the church. The church did nothing to increase the risk posed by adjacent property over which neither it nor the swim club exercised control." (*Ibid.*)

In addition, Justice Raye raised significant public policy issues implicated by the duty imposed by the majority:

> [I]t is worth noting that parking lots servicing a multiplicity of businesses are frequently located next to busy streets. More will be built in the future as metropolitan areas become increasingly congested. The safety of streets and crosswalks has never been the responsibility of parking lot operators or businesses that rely on such parking lots; it is the responsibility of parking lot operators or businesses that rely on such parking lots; it is the responsibility of those who maintain the streets and those who choose to cross them. There is no compelling reason to refashion the rules of premises liability or principles of negligence to impose a duty on parking lot operators or owners of land adjacent to busy thoroughfares to guarantee the safety of pedestrians who cross such roadways.

On the foregoing basis, Justice Raye disagreed with the majority's analysis and application of *Barnes* and *Bonanno*, and concluded that he would affirm the trial court's grant of summary judgment in favor of GFC.

C. Standard of Review

"An action in negligence requires a showing that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the

breach was a proximate or legal cause of injuries suffered by the plaintiff." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673 (overruled on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512).) The existence of a duty is question of law for the court, and the Court determines de novo the existence and scope of a duty. (*Id.* at 674 (citing *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 124 ("*Isaacs*"); *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 770-771 ("*Cabral*").)

For a grant of a summary judgment motion, the Court takes the facts from the record that was before the trial court when it ruled on the motion. (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 716-717.) The Court reviews ' " ' . . . the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.' " ' (*Id.* at p. 717, quoting *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1035.) The Court " 'liberally construe[s] the evidence in support of the part opposing summary judgment and resolve[s] doubts concerning the evidence in favor of that party. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.)' " (*Ibid.*, citing *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.)

As to the issue of causation, it has two aspects: one is cause-in-fact which is a fact that is a necessary antecedent of an event, and the other is

public policy considerations. (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 352-353 ("*State Dept. of State Hospitals*").) It must be shown that "the defendant's act or omission was a 'substantial factor' in bringing about the injury. [Citations.]" (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 778 ("*Saelzler*").) This means that there must be "some substantial link or nexus between omission and injury." (*Ibid.*) A determination of causation is normally a question of fact, except " '. . . where the facts are such that the only reasonable conclusion is an absence of causation, the question is one of law, not of fact.' [Citations.]" (*State Dept. of State Hospitals, supra,* 61 Cal.4th at p. 353; *see also, Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205.) Thus, causation is a legal issue that is also subject to de novo review.

An appellate court may affirm the grant of summary judgment on any ground properly raised below, whether or not addressed by the trial court. (*Salazar v. Southern Calif. Gas Co.* (1997) 54 Cal.App.4th 1370, 1376.)

III.

ARGUMENT

A. The Court of Appeal Erred in Holding that the Use of the Swim School Lot Exposed Invitees Who Utilized the Swim School Lot to An Unreasonable Risk of Harm

The majority rejected long-standing principles of premises liability and the purpose for which a duty is not imposed on a landowner, in order to find that GFC owed a duty to Vasilenko although Vasilenko was injured on premises not owned, possessed, controlled, or maintained by GFC, and GFC did not own, possess, control, or maintain the overflow swim lot in any way that increased the risk beyond the risk posed by its location next to a busy street.

1. Development of Premises Liability

Civil Code section 1714(a) sets forth the general duty of ordinary care: "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself." (*Cabral, supra,* 51 Cal.4th at pp. 771-772.) There are exceptions to this duty and determining whether an exception to this general duty of care exists involves the factoring of the considerations set forth in *Rowland v. Christian* (1968) 69 Cal.2d 108.

These considerations include "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk covered." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 113 ("*Rowland*").) A possessor of land generally owes a duty of care to all persons who enter the possessor's premises, regardless of whether the person is an invitee, a licensee, or a trespasser. (*Id.* at p. 113.) Based on the *Rowland* factors, the courts of appeal have created an exception to the general duty rule in premises liability cases.

a. A Landowner Owes No Duty of Care to Invitees Injured on Adjacent Public Streets Which the Landowner Does Not Own, Possess, Control, or Maintain

In view of *Civil Code* section 1714 and *Rowland*, the courts of appeal have developed controlling legal principles for premises liability cases. The courts have consistently held that "a defendant cannot be held liable for the defective or dangerous condition of property which it [does] not own, possess, or control." (*Isaacs, supra,* 38 Cal.3d at p. 134; *Alcaraz*

v. Vece (1997) 14 Cal.4th 1149, 1162 ("*Alcaraz*"); *see also*, *Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 848.) The reasoning for this exception to the general duty is unassailable. "[T]he right of supervision and control 'goes to the very heart of the ascription of tortious responsibility....' " (*Connors v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850, 874, [dis. opn. of Mosk, J.], cited with approval in *Preston v. Goldman* (1986) 42 Cal.3d 108,119.) Accordingly, "the duty to take affirmative action for the protection of individuals coming onto one's property 'is grounded in the possession of the premises and the attendant right to control and manage the premises.' [Citation.]" (*Gray v. America West Airlines, Inc.* (1989) 209 Cal.App.3d 76, 81 ("*Gray*").) "[A]ll premises liability is based [on the principle] that possession includes the attendant right to manage and control, thereby justifying the imposition of a duty to exercise due care in the management of the property. [Citations.] The courts, therefore, have consistently refused to recognize a duty to persons injured in adjacent streets or parking lots over which the defendant does not have the right of possession, management and control. [Citations.]" (*Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 386 ("*Owens*").) "Similarly, an adjacent landowner has no duty to warn of dangers outside of his or her property if the owner did not create the danger." (*Annocki v. Peterson Enterprises, LLC* (2014) 232 Cal.App.4th 32, 37 ("*Annocki*"), citing *Seaber, supra,* 1 Cal.App.4th at pp. 487-488.)

The *Restatement Third of Torts* further affirms these fundamental principles of premises liability. In particular, the *Restatement Third of Torts,* section 54 provides for the duty of care for land possessors to those not on the possessor's land as follows:

> (a) The possessor of land has a duty of reasonable care for artificial conditions or conduct on the land that poses a risk of physical harm to persons or property not on the land.
>
> (b) For natural conditions on land that pose a risk of physical harm to persons or property not on the land, the possessor of the land
>
> > (1) has a duty of reasonable care if the land is commercial; otherwise
> >
> > (2) has a duty of reasonable care only if the possessor knows of the risk or if the risk is obvious.
>
> (c) Unless Subsection (b) applies, a possessor of land adjacent to a public walkway has no duty under this Chapter with regard to a risk posed by the condition of the walkway to pedestrians or others if the land possessor did not create the risk.

More specifically, Note (d.) of the *Restatement Third of Torts* section 54, explains, "Subsection (c) is a specific application of § 37, which provides that ordinarily there is no duty to rescue or protect another from risks that the actor had no role in creating. ***Subsection (c) also applies to***

adjacent public highways and streets, which are omitted only because no one would think that a land possessor did have a duty of care to others for conditions not caused by the possessor on public highways and streets adjacent to the possessor's land." (Emphasis added.)

Based on the foregoing principles, in premises liability cases, "[w]here the absence of ownership, possession, or control has been unequivocally established, summary judgment is proper." (*Isaacs, supra,* 38 Cal.3d 112, 134; *Gray, supra,* 209 Cal.App.3d at p. 81; *Seaber,* 1 Cal.App.4th at p. 487; *Contreras v. Anderson* (1997) 59 Cal.App.4th 188, 197 ("*Contreras*").)

b. Cases Routinely Reject the Existence of a Duty on a Landowner Where the Plaintiff Was Injured on An Adjacent Public Street or Public Sidewalk

The weight of authority in premises liability cases involving injuries occurring on a public street or public sidewalk adjacent to a landowner's property, except for *Barnes*, have found that the landowner possessing the property adjacent to the street where a pedestrian was injured did not owe a duty to the pedestrian.

For example, in *Owens,* the court found that the supermarket owed no duty to the customer who was struck by a car in the public street adjacent to the supermarket. (*Owens, supra,* 198 Cal.App.3d at p. 381.)

Plaintiff asserted that this roadway adjacent to the sidewalk in front of the market was used as a parking area for customers, and that the market had a duty to persons in the public roadway due to its use of the roadway as a parking area for customers. (*Id.* at p. 382.) In *Owens,* plaintiff relied on the principle that a landowner has a duty to exercise ordinary care to prevent injuries to persons on adjacent property or public streets caused by a natural or artificial condition of the property which the landowner controls, as well as asserted that a landowner is "liable to invitees for foreseeable injuries caused by the accidental, negligent or intentionally harmful acts of third persons." (*Id.* at p. 385.) The court refused to find a duty on either theory. The fact that plaintiff was injured on a public street was dispositive on the finding of no duty. (*See, id.* at p. 385 ("The fact that plaintiff was injured while in the public street, rather than on the premises possessed by the supermarket, also precludes application of the duty . . . .").)

Similarly, in *Nevarez v. Thriftimart, Inc.* (1970) 7 Cal.App.3d 799, 802-803 ("*Nevarez*"), a minor lived across the street from a shopping center and was injured in the street as he was making his way back home from the shopping center which was having a grand opening for a market. The court in *Nevarez* found that the market owed no duty on the basis that the market had no control over the public street or the drivers using the street. (*Id.* at p. 805.) The court also explained, "[t]he power to control public streets and regulate traffic lies with the state which may delegate local authority or

municipalities [citations] and only the state [citations] or local authorities, when authorized [citation] may erect traffic signs or signals . . . ." (*Ibid.*) Thus, the court found that a property owner had no duty to erect signs for the purpose of controlling or regulating traffic on adjacent public roads. (*Ibid*; *City of El Segundo v. Bright* (1990) 219 Cal.App.3d 1372, 1377.)

The court in *Donnell v. California Western School of Law* (1988) 200 Cal.App.3d 715, 717-718 ("*Donnell*") also found no duty where a student was attacked on a public sidewalk adjacent to the defendant school as he was walking from the school library to his car which was parked in the school's faculty parking lot. While plaintiff asserted that the school failed to warn students of the dangerous condition or to provide adequate lighting and security around the building and that students were forced to traverse an area known to be dangerous to the school because the school did not provide parking for its students, the court held, "[t]he law of premises liability does not extend so far as to hold Cal Western [the school] liable merely because its property exists next to adjoining dangerous property and it took no action to influence or affect the condition of such adjoining property." (*Id.* at p. 720.)

Likewise, in *Steinmetz*, no duty was imposed on a defendant that hosted a business mixer on its premises for an invitee that was fatally stabbed by a third person in an industrial park within which the premises was located, and where the decedent parked her car. (*Steinmetz, supra,* 169

Cal.App.3d at p. 1144.) In finding no duty, the court noted that the decedent was murdered off the premises leased by the defendant and on property that was not within the possession or control of the defendant. (*Id.* at p. 1146.) The court held that "[t]he duty to take affirmative action for the protection of individuals coming upon the land 'is grounded in the possession of the premises and the attendant right to control and manage the premises.' [Citation.] Generally, however, a landowner has no right to control and manage premises owned by another." (*Id.* at pp. 1146-1147.) While the plaintiff contended that the premises had inadequate parking and that defendant should have foreseen that invitees would have to park in other areas and thus should be required to insure safe ingress and egress to the premises, the court disagreed, "noting that it is impossible to define the scope of any duty owed by a landowner off premises owned or controlled by him." (*Id.* at p. 1147.) As a result, the court concluded that the defendant owed no duty of care to the decedent for an injury that occurred on the premises the defendant neither owned nor controlled. (*Id.* at pp. 1147-1148.)

In the same vein, the court found no duty in *Seaber* where a guest of a hotel was struck and killed in a marked crosswalk located on public property adjacent to the hotel property as the guest was leaving the hotel to get to a parking lot located across the street. (*Seaber, supra,* 1 Cal.App.4th at p. 484-485.) The court again affirmed that "a landowner is under no duty

to maintain in a safe condition a public street or sidewalk abutting upon his property [citation], or to warn travelers of a dangerous condition not created by him but known to him and not them [citation]." (*Id.* at p. 487-488.)

2. Justice Raye's Dissent Correctly Determined That the Principles Set Forth in *Seaber* and *Steinmetz* are Instructive and That GFC Owed No Duty to Vasilenko Under the Facts

Central to the Third Appellate District's decision was the determination that Mr. Vasilenko's injury on property that was not owned, possessed, or controlled by GFC was not dispositive of the issue of duty where the property that was owned, possessed, or controlled by GFC, to wit, the swim school lot, was maintained in a manner so as to expose persons to an unreasonable risk of injury offsite. (*Vasilenko, supra,* 248 Cal.App.4th at p. 153.) While acknowledging the general principles of premises liability, the majority dismissed the numerous cases which have held that the landowner owed no duty to persons injured on public streets or sidewalks adjacent to the landowner's premises, and relied upon *Barnes* and *Bonanno*, both cases which are factually distinctive to the case at issue.

Barnes provides that a landowner's duty of care is not limited to injuries that occur on premises owned or controlled by him but encompasses a duty to avoid exposing persons to risks of injury that occur off site if the *landowner's property* is maintained in such a manner as to

expose persons to an *unreasonable* risk of injury off-site. (*Barnes, supra,* 71 Cal.App.4th at p. 1478, italics added.) A finding of a duty under such circumstances is understandable in light of the facts of that case. The dangerous condition actually existed on the defendant's property, specifically, "the configuration of the defendant's property ejected the child into the street against his will or otherwise affirmatively caused the child to enter the street." (*Ibid.*) Thus, a landowner may owe a duty of care if the manner in which the landowner's property is maintained exposes persons to an unreasonable risk of injury off the landowner's property. But that is not the case here. To be applicable here, GFC's property or the swim school lot would need to have been maintained in such a manner so as to expose invitees or Mr. Vasilenko to an unreasonable risk of injury on Marconi Avenue. However, no facts here support such a theory. GFC did not reconfigure the swim school lot in any way so that it forced an invitee to cross Marconi Avenue at a particular time, place, or manner, nor did GFC control the way in which an invitee left the swim school after having parked there. Simply put, GFC's use of the swim school lot did not expose an invitee to an unreasonable risk of injury beyond the everyday risk of a public street running between two properties over which a person must traverse to get from one property to the other. GFC did nothing to create a danger or to make the swim school lot more dangerous merely by using the

swim school lot which was located next to a busy street that people needed to cross to get to the church.

Rather, under the general principles of premises liability articulated in *Seaber* GFC owed no duty of care because it did not own, possess, or control the dangerous condition—the public street which was located between the swim school lot and the church. It is undisputed that GFC does not own, possess, or control Marconi Avenue. It is undisputed that Mr. Vasilenko was told he could park his car across the street. (II CT 447.) None of these facts support a finding of duty under the rule set forth in *Barnes*, as they do not show that the church building or the swim school lot was maintained in a way as to expose Mr. Vasilenko to an unreasonable risk of injury on Marconi Avenue. Yet, Vasilenko seeks to impose a duty on GFC as a result of giving invitees the ability to park in the swim school lot. Parking at the overflow swim lot was simply an option available to Plaintiff. There is no evidence that Mr. Vasilenko was forced or required to park at the swim school lot. Indeed, the map given to drivers shows that there are two lots where invitees could park their car—the swim school lot **and** the Walnut & Marconi Business Plaza Parking lot, both of which were across the street from GFC, and required the invitee to cross a public street. (II CT 447; II CT 599.)

Despite the vital differences between *Barnes* and the instant case, Vasilenko asserts and the Third Appellate District's majority concluded,

that GFC controlled and maintained the swim school lot across the street from the church which created a foreseeable risk of harm to invitees who would park at the swim school lot and have to cross a public street without assistance or instruction from GFC regarding safe passage in crossing the street. (I CT 67-68.)

Notable is the way in which *Barnes* distinguished itself from *Brooks v. Eugene Burger Management Corp.* (1989) 215 Cal.App.3d 1611 ("*Brooks*"). The court in *Brooks* refused to impose a duty to provide fencing or some other means of confinement on a landowner's premises where a child was struck by a vehicle after walking into a public street in front of an apartment building. (*Id.* at pp. 1621, 1624.) In distinguishing itself from *Brooks*, the court in *Barnes* made clear that there must be some dangerous condition *on the landowner's property* in order for the landowner to be liable for an injury off-site. (*Barnes, supra,* 71 Cal.App.4th at p. 1479, italics added ("The plaintiff [in *Brooks*] did not allege the configuration of the defendant's property ejected the child into the street against his will or otherwise affirmatively caused the child to enter the street, as here.") The court in *Barnes* further noted that the court in *Brooks* "concluded the dangerous condition existed not on defendant's property but, rather, on the adjacent public street and, therefore, the landowner owed no duty of care." (*Id.* at p. 1479, citing *Brooks, supra,* 215 Cal.App.3d at p. 1624.) So too, here, the dangerous condition existed not

on the church building or the swim school lot, but on the adjacent public street, Marconi Avenue, and thus, GFC owed no duty of care. In short, there was no dangerous condition on GFC's property which is required in order for the rule set forth in *Barnes* to apply to the case at issue.

The Third Appellate District's majority also relied upon *Bonanno* but *Bonanno* not only involved a narrow issue which is not implicated here, but it is also factually distinguishable. The issue in *Bonanno* was limited to whether the location of a bus stop could constitute a dangerous condition of public property within the meaning of Government Code sections 830 and 835 where bus patrons had to cross a busy thoroughfare at an uncontrolled intersection to reach the bus stop. (*Bonanno, supra,* 30 Cal.4th at p. 144.) The case at issue does not involve a dangerous condition of public property as defined by Government Code sections 830 and 835.

More importantly, *Bonanno* is factually distinctive. There, the defendant public entity had created the dangerous condition because it owned and controlled the physical location of its own bus stop, and actually erected the bus stop in the place which forced users of the bus stop to have to cross a dangerous crosswalk. (*Id.* at pp. 148-151.) Notably, this Court in *Bonanno* distinguished itself from *Seaber* because the defendant public entity could move or remove a bus stop, which the defendant hotel in *Seaber* could not do. (*Id.* at p. 152.) Moreover, this Court in *Bonanno* noted that although the defendant public entity could not control traffic, it

controlled the location of the bus stop and could move or eliminate the bus stop without any undue burden. (*Ibid.*)

However, unlike the defendant public entity in *Bonanno*, here, GFC could not create a crosswalk on Marconi Avenue or move the swim school lot where there was a crosswalk or safe passage across Marconi Avenue. Similar to the defendant hotel in *Seaber*, GFC did not have an option to create a crosswalk, let alone move a crosswalk or the swim school lot. Therefore, the authority that remains, and that is applicable here, are the principles of premises liability set forth in *Seaber*, which rejected the imposition of a duty on a landowner to provide safe passage across a public street. (*Seaber, supra,* 1 Cal.App.4th at p. 489-490.)

Under *Seaber,* liability for premises liability is imposed where the landowner possesses the property such that it has the right to manage and control the property where the injury occurred. (*Id.* at p. 489.) Here, GFC did not manage and control Marconi Avenue, it did not create the swim school lot and place it in its location, and it did not do anything to the configuration of the swim school lot to force or eject invitees to cross Marconi Avenue at any specific time or place. Nothing about the physical characteristics of the swim school lot required Mr. Vasilenko to jaywalk across the five lanes making up Marconi Avenue, in the dark, rather than cross at the closest crosswalk. There was no affirmative conduct by GFC that created an unreasonable risk of harm. More to the point, GFC's

alleged affirmative conduct of directing invitees to the swim school lot, or any other overflow lot for that matter, across the street did not create a latent, unusual danger. The inherent hazard of crossing a public street, especially midblock, is not hidden.

Furthermore, the imposition of a duty on a landowner where the landowner did not have the right to manage or control the dangerous condition, and did nothing to property it did own, possess, or control to create an unreasonable risk of injury off-site, would overturn the numerous cases which limited the imposition of a duty on a landowner for injuries occurring on the landowner's premises, as well as eliminate the general principle of premises liability which imposes no duty on a landowner for injuries occurring on premises that the landowner does not own, possess, or control. Vasilenko's articulation of a duty on a landowner to provide safe passage across a public street by assisting or instructing pedestrians on how to cross the street goes too far. If by assisting invitees, Vasilenko proposes that there be a duty that GFC attempt to control traffic, such a duty has been rejected in *Seaber*. The court in *Seaber* held, "just as a property owner has no duty to erect signs for the purpose of controlling or regulating traffic on adjacent public roads and may in fact be prohibited from doing so, similarly a landowner cannot be responsible for such signage controlling or regulating pedestrian traffic across public highways. [Citations.]" (*Seaber, supra,* 1 Cal.App.4th at p. 492.)

Moreover, this duty would require a landowner to instruct an adult about how to cross a public street—a matter of common knowledge for which each person should be held responsible. The inherent dangers of crossing a public street consisting of five lanes of traffic were open and obvious as a matter of law. Presumably, Mr. Vasilenko drove on Marconi Avenue before parking in the swim school lot and crossing it, making him well acquainted with driving conditions, visibility, and the physical design of Marconi Avenue. Additionally, upon reaching the sidewalk, it could reasonably be inferred that Mr. Vasilenko could see that Marconi Avenue was a large street to traverse, made up of five lanes of traffic. Significantly, it has been held that, " 'there is no obligation to protect the invitee against dangers which are known to him, or which are so apparent that he may reasonably be expected to discover them and be fully able to look out for himself.' [Citations.]" (*Lucas v. George T.R. Murai Farms, Inc.* (1993) 15 Cal.App.4th 1578, 1590.) As applied here, the danger of crossing a public street is known to every adult, and the dangers of crossing Marconi Avenue would be readily apparent such that Mr. Vasilenko may reasonably be expected to discover them and be fully able to look out for himself. Consequently, based on the longstanding general principles of premises liability set forth in *Seaber* and *Steinmetz*, and the rationale behind the limitations on the imposition of a duty of care on a landowner, the trial court properly found there was no duty on GFC. (III CT 611.)

3. Application of *Rowland v. Christian* Factors Do Not Support the Imposition of a Duty on GFC

Not only is there no duty on GFC under the general principles of premises liability set forth in *Seaber*, but there is also no duty on GFC under an analysis of the *Rowland* factors. California law looks to the category of negligent conduct to determine the existence of a duty. (*Cabral, supra,* 51 Cal.4th at p. 774.) Foreseeability and policy considerations can justify a categorical no-duty rule. (*Id.* at pp. 771-772.) In evaluating foreseeability the court " 'is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether *the category of negligent conduct at issue* is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed. . . .' " (*Id.* at p. 772.) [Emphasis added.] In addition, the court looks to "whether carving out an entire category of cases from [the] general duty rule is justified by clear considerations of policy." (*Ibid.*)

Here, foreseeability and policy considerations justify no duty on GFC. The category of negligent conduct at issue here is GFC's alleged failure to instruct invitees on how to cross a public street, or assist invitees in crossing a public street. This purported failure is not sufficiently likely to result in the kind of harm experienced by Mr. Vasilenko such that

liability would be appropriately imposed on GFC. The purported negligence does not make Mr. Vasilenko's injury more or less probable as the act of crossing a public street and the inherent danger and risks of crossing a public street whether at a crosswalk or midblock, and the danger or risk of harm of crossing a public street is obvious, and is an act for which each person must be responsible for himself or herself.

As for policy considerations, limited parking and the concomitant necessity of crossing public streets to get from parking lots or parking spots to a particular business or place is a part of living in modern day society. Imposing a duty on a landowner to provide safe passage across a public street would not prevent future harm as the harm will exist regardless. More importantly, such a duty imposes an undue burden on a landowner to prevent all future harm to its invitees. As a practical matter, in today's society, landowners do not have the ability to provide sufficient parking on their premises for all invitees and invitees must park elsewhere and cross public streets. Attempting to prevent all such future harm is not realistically possible. One possible attempt to prevent such future harm may require landowners to employ persons to direct and inform invitees as to where the invitee should cross, *i.e.,* an intersection or marked crosswalk, which even then, may not prevent the harm, and the costs for a landowner to employ such persons may be passed along to the consumer or invitee. Alternatively, landowners may choose to no longer inform the public or

invitees of where they can park, leaving the community, consumers, and invitees to fend for themselves. Further, imposing a duty on a landowner to inform an invitee on a matter of common knowledge is an obvious burden which should not be imposed upon a landowner.

The other *Rowland* factors do not outweigh the foreseeability and policy considerations. While there is no question that Mr. Vasilenko suffered injury, there is no moral blame on GFC for this injury, and the connection between GFC's use of the swim school lot or failure to assist or instruct Mr. Vasilenko in crossing Marconi Avenue and his injury is not close. Parking at the swim school lot was merely an option that GFC made available to Mr. Vasilenko. Mr. Vasilenko was not required to park at the swim school lot. There were other options for parking, including the Walnut & Marconi Business Plaza Parking and the street. The suggestion that GFC's purported failure to inform Mr. Vasilenko on a matter of common knowledge is closely connected to his injury is unreasonable and untenable. Finally, while a landowner may obtain insurance for injuries on its land, if liability is expanded to encompass injuries on a public street adjacent to the premises, the cost of such insurance undoubtedly will rise, and may be prohibitive.

In sum, the *Rowland* factors do not support the imposition of a duty and foreseeability and policy considerations, in particular, weigh against finding a duty.

4. As GFC Owed No Duty to Vasilenko to Provide Safe Passage Across a Public Street, GFC Owed No Duty to Assist or Instruct Vasilenko on How to Access GFC From the Swim School Lot

Vasilenko's fourth cause of action asserts that GFC negligently failed and refused to offer any assistance or instruction for safe access to GFC from the swim school lot on the grounds that GFC failed to reasonably or adequately train its volunteer parking attendants. (I CT 68.) Since GFC owed no duty to provide safe passage across Marconi Avenue, GFC would not be liable for failing to assist or instruct its invitees on how to cross Marconi Avenue. Accordingly, as the viability of the fourth cause of action rests upon the viability of the third cause of action and there can be no liability under the third cause of action, there also can be no liability under the fourth cause of action.

5. The Duty of Care Imposed For Off-Site Injuries Does Not Apply Here

As set forth above, the duty of care imposed on a landowner for off-site injuries discussed in *Barnes* and *Bonanno* do not apply to the facts of this case. The heart of the discord created by the Third Appellate District's majority opinion arises from the conclusion that GFC exposed invitees to an unreasonable risk of harm merely from its use of the swim school lot that was located across the street from the church. The majority notes, "the

location of the overflow lot, which GFC concedes it controlled at the time of the accident, required GFC's invitees who parked there to cross a busy thoroughfare in an area that lacked a marked crosswalk or traffic signal in order to reach the church, thereby exposing them to an unreasonable risk of injury offsite." (*Vasilenko, supra,* 248 Cal.App.4th at p. 154.) However, it is undisputed that GFC did not control the location of the swim school lot; it did not have the power to choose where the swim school lot would be placed in proximity to the church and to a marked crosswalk or traffic signal. Nor could GFC erect a traffic signal or designate a marked crosswalk. Thus, GFC did not control the dangerous condition—the busy thoroughfare. "Without the 'crucial element' of control over the subject premises [citation], no duty to exercise reasonable care to prevent injury on such property can be found." (*Gray, supra,* 209 Cal.App.3d at p. 81.)

Johnston v. De La Guerra Properties, Inc. (1946) 28 Cal.2d 394 also involved an injury off-site. However, *Johnston* is inapplicable to this case. The landlord there was liable because he was in control of the adjoining property that was used as a parking lot and had graded it so that it sloped down to the private walk. (*Id.* at p. 397.) The court specifically found that the property owner "encouraged patrons of its tenants to park their cars on the adjoining property and approach the building by way of the private walk." (*Id.* at p. 400.) In contrast, here, GFC did nothing to the design of the swim school lot to encourage or force invitees to cross what was

obviously a public street consisting of five lanes of traffic, midblock, where there was no marked or unmarked crosswalk or traffic signal. The instant case is not one which implicates the duty imposed on landowners for injuries off-site.

6. The Special Duty of Care For Street Vendors Does Not Apply Here

The exception to the no duty rule for injuries occurring on premises not owned, possessed, or controlled by a landowner for street vendors likewise does not apply to this case. *Schwartz v. Helms Bakery Limited* (1967) 67 Cal.2d 232, 239-240, 242 ("*Schwartz*") held that "[a]n invitor bears a duty to warn an invitee of a dangerous condition existing on a public street or sidewalk adjoining his business which, because of the invitor's special benefit, convenience, or use of the public way, creates a danger," and imposed a duty on a street vendor, finding that the "driver undertook to direct plaintiff's activities by arranging to meet him up at the street across from his house." Courts have routinely rejected attempts to expand this special duty of care for street vendors to premises on fixed locations.

Steinmetz, *Nevarez*, and *Owens* explained the limitation of the street vendor duty to the unique operation of a traveling business. The court in *Steinmetz* provided the reasoning behind the imposition of a duty for a street vendor:

> The street vendor's business 'consisted of selling bakery goods from a truck. In coming to the truck for the convenience of defendants, patrons used the public streets and sidewalks as a means of access for the special benefit of defendants' business. Defendants may therefore be held liable for an injury occurring to their customer in the immediate vicinity of the truck if the circumstances causing the injury are within the range of defendants' reasonable supervision and control.' [Citation.] This elastic concept of business premises is uniquely appropriate to the vendor whose commercial activities are conducted from a mobile vehicle at shifting locations on the public streets. However, we know of no decision which has applied this standard to one whose business is conducted on private property in a fixed location. Indeed, it is difficult to perceive how such a rule could be fashioned.

(*Steinmetz, supra,* 169 Cal.App. 3d. at p. 1146.)

Similarly, in *Nevarez* the court refused to apply the street vendor cases to the operation of a supermarket, explaining, "[t]he rules laid down for street vendors are founded upon distinctions not here present . . . . While the street vendor cannot control traffic on the street around him he can, to a degree, control his own movements, the places where he will do business and, thus, the avenues of approach to it. " (*Nevarez, supra,* 7 Cal.App.3d at p. 805.)

Owens elucidates, "the court [in *Nevarez, supra,* 7 Cal.App.3d at p. 805 and *Steinmetz, supra,* 169 Cal.App.3d at p. 1146] limited the street

vendor 'exception' to the unique operation of a traveling business." (*Ibid.*) Accordingly, based on the distinctions made by the court in *Nevarez* and *Steinmetz*, the court in *Owens* "decline[d] to extend the duty recognized in street vendor cases to a commercial enterprise operating at a fixed location." (*Id.* at p. 388.)

In the case at issue, there are no allegations, let alone facts, to dismiss the reasoning in *Steinmetz*, *Nevarez*, and *Owens*, and to impose the duty of care of street vendors on a landowner at a fixed location. GFC did not direct egress from the swim school lot. Ultimately, there is no basis to depart from the refusal by the courts of appeal to apply the duty in street vendor cases to cases involving fixed locations such as this case.

B. Mrs. Vasilenko's Second Cause of Action for Loss of Consortium is Derivative of Mr. Vasilenko's Negligence Claims

In California, "each spouse has a cause of action for loss of consortium . . . caused by a negligent or intentional injury to the other spouse by a third party." (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 408.) A spouse's claim for loss of consortium is derivative of, and dependent on, the existence of a claim for tortious injury for the other spouse. (*LeFiell Mfg. Co. v. Superior Court* (2012) 55 Cal.4th 275, 284 ("*LeFiell*").) A cause of action for loss of consortium has four elements: " '(1) a valid and lawful marriage between the plaintiff and the person

injured at the time of the injury; [¶] (2) a tortious injury to the plaintiff's spouse; [¶] (3) loss of consortium suffered by the plaintiff; and [¶] (4) the loss was proximately caused by the defendant's act.' " (*Id* at pp. 284-285, quoting *Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 746, fn. 2.) Thus, if the plaintiff's spouse has no cause of action in tort, the plaintiff has no cause of action for loss of consortium. (*Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1067.) Under these principles, since Mr. Vasilenko has no viable cause of action for negligence, Mrs. Vasilenko has no cause of action for loss of consortium.

C. The Court of Appeal Erred In Finding That There Was A Triable Issue of Fact As To Whether GFC's Failure to Act Was A Legal Cause of Vasilenko's Injuries

As a threshold matter, since GFC owed no duty to Vasilenko to provide safe passage across the public street adjacent to GFC, Vasilenko's causes of action in negligence and premises liability must fail, the trial court ruling granted summary judgment must be affirmed, and the Court is not required to address the alternative argument regarding lack of causation. (*See, Brooks, supra,* 215 Cal.App.3d at p. 1624.) Nevertheless, the Third Appellate District concluded that summary judgment would not be properly sustained on the separate basis of Vasilenko's inability to establish the element of causation, finding that "[a] reasonable juror could infer that Vasilenko would not have been struck by a car crossing Marconi Avenue

had GFC not maintained and operated a parking lot across the street from the church." (*Vasilenko, supra,* 248 Cal.App.4th at p. 158.) This does not satisfy the element of causation. In order to establish causation, it must be shown that GFC's act or omission was a substantial factor in bringing about Mr. Vasilenko's injury. (*Saelzler, supra,* 25 Cal.4th at p. 778.) In other words, that there was a substantial link or nexus between GFC's use of the swim school lot and Mr. Vasilenko's injury. GFC did nothing more than make available an alternative area for Mr. Vasilenko to park his car. The fact that GFC informed Mr. Vasilenko that he could park at the swim school lot which was located across the street from the church, requiring him to cross the street to get the church does not establish that the use of the lot was a substantial factor in bringing about Mr. Vasilenko's injury. Something more than the mere operation of the swim school lot requiring Mr. Vasilenko to traverse a public street to get to the church need to have occurred to constitute a substantial factor in bringing about his injuries. That, however, is neither alleged, nor shown. Therefore, Vasilenko cannot establish the element of causation for the third and fourth causes of action and summary judgment would be properly granted on this ground.

IV.

CONCLUSION

The Third Appellate District's majority rejects the longstanding general principles of premises liability and strains to fit the facts of this case to the circumstances in *Barnes* and *Bonanno* to apply the duty rule promulgated for landowners for injuries off-site, and to reverse summary judgment. Under the facts of this case and the principles articulated in *Seaber* and *Steinmetz*, GFC owed no duty of care to Vasilenko as matter of law. Accordingly, GFC respectfully requests this Court to reverse the Third Appellate District Court's decision, and to affirm the grant of summary judgment.

Dated: October 18, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.504(d) of the California Rules of Court, the enclosed Opening Brief on the Merits has been produced using 13-point type including footnotes and contains 10,057 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: October 18, 2016

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PROOF OF SERVICE BY MAIL

In Re: OPENING BRIEF ON THE MERITS; No. S235412
Caption: ALEKSANDR VASILENKO, et al. v. GRACE FAMILY CHURCH
Filed: IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
(Constructively filed on this date pursuant to CRC R. 8.25(b)(3)(B).)

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of or employed in the County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 200 Del Mar Blvd., Suite 216, Pasadena, California 91105. On this date, I served the persons interested in said action by placing one copy of the above-entitled document in sealed envelopes with first-class postage fully prepaid in the United States post office mailbox at Pasadena, California, addressed as follows:

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I certify (or declare) under penalty of perjury that the foregoing is true and correct. Executed on October 18, 2016, at Pasadena, California.

E. Gonzales