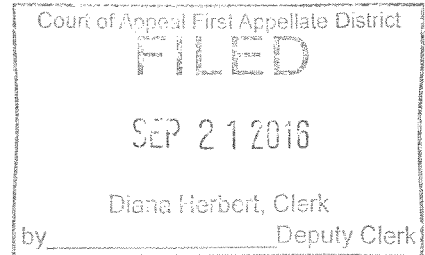


NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE



24 HOUR FITNESS USA, INC. et al.,
Petitioners,

v.

THE SUPERIOR COURT OF
SAN MATEO COUNTY,

Respondent;

LOUISE AUSTIN et al.,

Real Parties in Interest.

A148875

(San Mateo County
Super. Ct. No. CIV 531455)

The operators of an exercise gym, 24 Hour Fitness USA, Inc. and 24 Hour Fitness Worldwide, Inc. (collectively, 24 Hour), petition for a writ of mandate to set aside the superior court’s order denying their motion for summary judgment and to issue a new order granting the motion. Petitioners maintain they are not liable for injuries sustained by a gym patron absent gross negligence and that the evidence fails to support a reasonable inference that they were grossly negligent in not immediately calling 911 when a patron, real parties in interest’s deceased husband and father, Terence Austin, complained of an elevated heart rate. This court requested the submission of opposition to the petition and advised the parties that this court was considering the issuance of a peremptory writ in the first instance pursuant to *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180 (*Palma*). Having reviewed the petition, opposition, and supporting documentation, we shall grant the writ and direct the superior court to grant summary judgment.

Undisputed Evidence Presented on the Motion for Summary Judgment

Terence Austin signed a 24 Hour gym membership agreement containing a release of liability and assumption of risk clause in which he agreed that 24 Hour would not be responsible for damages caused by 24 Hour's ordinary negligence.¹

On July 18, 2014, Terence Austin was examined by a cardiologist. Among other complaints, Austin told his physician that he had three episodes of elevated heart rate while exercising on a treadmill. The cardiologist referred Austin for a cardiac stress test and advised him not to exercise pending review of the results of the test.

The stress test was scheduled but not yet performed when Austin went to a 24 Hour gym to exercise on July 25, 2014. He was 51 years old. At around 5:02 p.m. another gym patron observed Austin in apparent distress. Austin was leaning over a waist-high bank of lockers, propped on his elbows and forearms with his head up, and perspiring heavily. The member brought Austin's condition to the attention of a 24 Hour employee, personal trainer Larry Katsanas, who immediately approached Austin to investigate. Austin told Katsanas "I can't seem to get my heart rate down." Austin did not complain of chest pain, shortness of breath or numbness. Katsanas thought Austin was experiencing heat exhaustion. Katsanas brought over an exercise bench for Austin to sit on and, shortly afterwards, decided that the employee break room would be a better place to sit as it was the coolest place in the gym.

Katsanas asked 24 Hour employees William Hobson and Jorge Rosales to escort Austin to the break room and stay with Austin while he cooled down. As Austin started walking to the break room, he mistakenly picked up another gym patron's cell phone and

¹ The clause provides, in relevant part, that use of petitioners' facilities "involves the risk of injury Specific risks vary from one activity to another and the risks range from minor injuries to major injuries, such as catastrophic injuries including death. In consideration of your participation in the activities offered by 24 Hour, you understand and voluntarily accept this risk and agree that 24 Hour, its officers, directors, [and] employees . . . will not be liable for any injury, including without limitation, personal, bodily, or mental injury, economic loss or any damage to you, your spouse . . . or relatives resulting from the negligence of 24 Hour or anyone on 24 Hour's behalf or anyone using the Facilities whether related to exercise or not"

water bottle. When the patron told Austin the phone and bottle were his, Austin returned them and apologized in a lucid and polite manner. Katsanas thought Austin's action in grabbing someone else's cell phone and water bottle showed confusion. Katsanas thought 911 should be called and asked personal trainer Cynthia Cooley to call. Katsanas declared, "Although I felt Mr. Austin should be checked out, I did not believe his condition was life threatening." 911 was not called at that time, which was about 5:05 p.m.

Hobson and Rosales accompanied Austin into the break room. Rosales asked Austin how he was doing. Austin said he was feeling a little dizzy and that his heart rate had become elevated while doing interval training on a treadmill in which he would run as fast as he could for five minutes, slow down until he recovered, then run for another five minutes as fast as he could. While speaking to Rosales, Austin spoke with a clear voice, sat upright in a chair without assistance, was breathing without difficulty and did not have trouble saying words or expressing his thoughts. Rosales thought Austin was overheated due to his workout and just needed to cool down. He gave Austin a glass of water to drink and an ice bag to put on the back of his neck. Rosales believed Austin's heart rate was slowing and that he was feeling better. Rosales declares that at no time did Austin ask him or Hobson for medical assistance or ask them to call 911.

Austin himself did not call 911 but exchanged several text messages with his wife while sitting in the break room. Sometime after 5:00 p.m., Austin's wife texted Austin asking him to pick up something from the store and Austin replied "I can't" and, later, explained he was feeling "sick." His wife asked "Do you want me to come and pick you up?" Austin replied no, he just needed to recover but shortly afterwards texted that he did want her to pick him up. His wife asked if it was the gym on Bovet Street and he replied yes and told her he was in the trainer's office.

Austin's wife reached the gym within minutes, arriving around 5:16 p.m., which was about 15 minutes after the fellow patron had first alerted a 24 Hour employee that

Austin was not well.² When Austin's wife arrived at the gym, Katsanas and another 24 Hour employee told her she should call 911, and she did so, at 5:18 p.m. Austin's wife made the call and entered the break room while speaking to the 911 operator. She testified that her husband was sitting slumped in a chair with his head hanging down and an ice pack on the back of his neck.

With paramedics en route, the 911 dispatcher asked Austin's wife various questions to assess his condition. A transcript of the 911 call shows that Austin's wife reported her husband to be awake and breathing and, when asked if he was "completely alert," the wife relayed the question to Austin who responded "yes." The wife relayed several additional questions between Austin and the dispatcher. Austin said he was hyperventilating, had difficulty breathing and that his heart rate had been elevated for an hour and 15 minutes. One to two minutes after the wife entered the break room Austin passed out. Rosales and Hobson caught Austin as he was falling from the chair and placed him on the floor. Austin went into convulsions. Katsanas called a medical emergency "code blue" and a physician who was a gym patron came into the break room to lend aid. The physician testified that Austin was breathing and not in cardiac arrest when the physician entered the room but Austin soon stopped breathing. A 24 Hour employee, Evan McDaniel, began CPR. McDaniel was a former emergency medical technician trained in CPR. The paramedics arrived less than one minute after Austin stopped breathing. The paramedics continued CPR, then defibrillated Austin's heart. Austin arrived at the hospital with a pulse and heart rate but never regained consciousness and died on July 30, 2014, five days after collapsing at the gym.

Discussion

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law."

² Austin's wife testified that a 24 Hour employee told her Austin had been in the break room for 40 minutes. The testimony was excluded as hearsay and, in any event, undisputed evidence presented by both parties shows the actual time was about 15 minutes.

(*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476, citing Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment must show that one or more elements of the plaintiff's cause of action cannot be established or that there is a complete defense. (Code Civ. Proc., § 437c, subd. (p)(2).) If the defendant meets this burden, the burden shifts to the plaintiff to present evidence creating a triable issue of material fact. (*Ibid.*) A triable issue of fact exists if the evidence would allow a reasonable trier of fact to find the fact in favor of the party opposing summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

Petitioners argue they met their burden of showing that plaintiffs could not establish the duty element of their negligence cause of action by producing Austin's contractual release of liability for ordinary negligence and undisputed evidence which they contend conclusively negates gross negligence. The release of liability was valid and enforceable against claims of ordinary negligence. (*Grebing v. 24 Hour Fitness, Inc.* (2015) 234 Cal.App.4th 631, 637.) The release does not absolve petitioners of gross negligence, defined as "a ' " " 'want of even scant care'" or 'an extreme departure from the ordinary standard of conduct.' " (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 754.) Whether a defendant's conduct constitutes gross negligence is generally a question of fact, but not always. (*Id.* at pp. 766-767.)

There is no evidence here that would allow a reasonable trier of fact to find gross negligence. 24 Hour employees, believing Austin to be overheated, provided him with water, an ice pack, and a cool place to rest. They remained with him to assess his recovery. Austin spoke lucidly with the employees and exchanged text messages with his wife in which he arranged to have her pick him up. When Austin's condition worsened, 24 Hour employees were there to summon a doctor and perform CPR.

Austin's wife and children, plaintiffs below and real parties in interest here, claim 24 Hour was grossly negligent in failing to call 911 during the period of time between Katsanas's observation that Austin was unwell to 15 minutes later when Austin collapsed with a heart attack. But Austin did not complain of chest pain, shortness of breath or numbness, saying only "I can't seem to get my heart rate down." Austin did not tell

anyone at the gym that he had suffered prior episodes of rapid heart rate and had been advised by a cardiologist not to exercise until he passed a heart stress test. Austin appeared to be a heat-exhausted 51-year old man who overdid his workout. No reasonable trier of fact could find that the gym personnel were grossly negligent for failing to call 911 under the circumstances: a patron complaining of nothing more than an elevated heart rate, making no request for medical assistance, and who himself chose not to call 911 although he had the ability to do so. Austin's death was tragic but is not attributable to gross negligence of petitioners.

Disposition

The expedited *Palma* procedure may be employed "when petitioner's entitlement to relief is so obvious that no purpose could reasonably be served by plenary consideration of the issue." (*Ng v. Superior Court* (1992) 4 Cal.4th 29, 35; see also *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1236-1273, 1240-1241. Here, no facts supporting a finding of gross negligence have been alleged or presented in opposition to the summary judgment motion. Therefore, let a peremptory writ of mandate issue directing respondent superior court to vacate its June 22, 2016 order denying summary judgment and to issue a new order granting summary judgment. Upon issuance of the writ, the stay of proceedings previously ordered by this court shall be dissolved. The parties shall bear their own costs incurred in this writ proceeding.

Pollak, Acting P.J.

We concur:

Siggins, J.

Jenkins, J.

A148875

