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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

AMBER H., by and through her Guardian ad Litem, CAROL H.,

Plaintiff and Appellant,

v.

PARFUMS DE COEUR LTD. CORP. et al.,

Defendants and Respondents.

A153958

(Alameda County
Super. Ct. No. HG16801174)

Amber H., through her guardian ad litem, sued Parfums de Coeur, Ltd. Corporation and Save Mart Supermarkets, Inc., (collectively, defendants) alleging a defect in a body spray caused injuries she suffered in a fire. Specifically, Amber alleges defendants are liable, on negligence and strict products liability theories, for failing to adequately warn consumers that the spray is flammable or to use a color additive in the spray that would make the flames immediately visible when ignited. After concluding it was undisputed Amber intentionally ignited herself using the body spray, the trial court granted defendants' motion for summary judgment. We affirm.

BACKGROUND

A.

In June 2014, Amber, who suffers from pre-existing conditions including depression, seizure and thyroid disorders, chronic pain, migraines, visual impairment, and dizziness, was a resident at Hilltop nursing facility. She used a wheelchair.

One morning, a Hilltop nurse took Amber and four other residents outside for a supervised smoking break. The nurse gave a cigarette to Amber and lit her cigarette. Amber asked to stay outside when the smoking break was over. Before returning inside with the other residents, the nurse asked a Hilltop gardener to watch Amber.

Amber remained outside with the gardener for a total of 20 minutes. She spent five minutes finishing her cigarette and then sat in her wheelchair for another 15 minutes. She did not smoke another cigarette. The gardener then saw that Amber was on fire. He immediately called for help and removed a burning blanket from her lap.

One minute before he saw the flames, the gardener saw Amber spray herself with a perfume bottle, as she frequently did to cover the smell of smoke. The gardener also thought he saw Amber holding a cigarette lighter in her other hand while she sprayed herself with perfume. He was certain she did not have another cigarette. After the fire, the gardener found a bottle of Calgon body spray and a cigarette lighter on the ground. A label on the body spray says: "Warning: Flammable until dry. Do not use near fire, flame or heat."

Amber was treated at St. Francis Hospital's burn unit, over the course of 11 months, for second and third-degree burns covering 35 percent of her body. About a month after the fire, Amber spoke with Vickye Robinson, a recent divinity student graduate who, as a pastoral resident at St. Francis Hospital, "provided spiritual care to patients and their families." She was supervised by a reverend, but Robinson herself did not hold any position in a church.

As required by the pastoral residency program, Robinson recorded notes of her communications with patients on hospital computers. She understood that her notes were hospital records accessible by doctors and nurses to assist in medical treatment.

On July 18, 2014, Robinson wrote: "[Amber] talked at length about God's forgiveness of the things we do that aren't the right thing and asked Chaplain, 'Does God truly forgive?' . . . [Amber] then went on to disclose the true origin of her burn . . . which it turns out was self-inflicted. [Amber] states that she 'sprayed body spray on herself and

then set herself on fire. [Amber] states that 'she doesn't want any other staff to hear this . . . .' [Amber] then requested prayer and Chaplain prayed for [her]."

B.

In January 2016, Amber sued defendants (as the manufacturer and distributor of the body spray, respectively), alleging the following causes of action: (1) strict products liability; (2) breach of implied warranty; (3) breach of duty to provide adequate warning; and (4) negligence. Amber alleged the body spray had a defective formulation and lacked an adequate warning, which caused or contributed to her injuries.

Defendants filed a motion for summary judgment or, alternatively, summary adjudication. Relying on the gardener's deposition testimony and Robinson's July 18, 2014 chart entry, defendants argued Amber's causes of action all failed, as a matter of law, because it was undisputed she intentionally set herself on fire. Accordingly, Amber's intentional act either negated an element of each theory of liability or established an affirmative defense by breaking the causal chain between the defendants' conduct and her injuries.

Amber opposed the motion. However, having stipulated with defendants that she would not testify because she was "mentally unstable" and "intellectually and emotionally incapable of making decisions," Amber filed no declaration in support of her opposition. Instead, Amber primarily argued her statements to Robinson were not admissible because they were hearsay (Evid. Code, § 1200, subd. (a))[1] and protected by the clergy-penitent privilege (§§ 1030-1034).

She also submitted expert witness declarations stating that the body spray contained denatured alcohol, which was especially dangerous because it may burn invisibly, for 30 seconds to two minutes, when ignited. The experts opined that the danger "could have easily been eliminated by coloring" the denatured alcohol in the spray with additives. Had an additive been added, the experts believed Amber's injuries would have been less severe because the fire would have been detected sooner.

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[1] Undesignated statutory references are to the Evidence Code.

The trial court overruled Amber's evidentiary objections and granted defendants' motion for summary judgment. The trial court explained, "[D]efendants have submitted admissible evidence amounting to a prima facie showing that [Amber] intentionally ignited the fire that caused her injuries – a fact that would entitle [d]efendants to judgment as a matter of law based on an affirmative defense of supervening cause and/or based on [Amber]'s inability to prove at least one element of each of her causes of action. In response, [Amber] has neither articulated nor submitted any admissible evidence to support any theory of how any factor other than an intentional act by her caused the spray or its fumes to ignite." Accordingly, the court entered judgment in favor of defendants.

DISCUSSION

A.

Amber contends the trial court erred in granting summary judgment because her statements to Robinson are privileged under the clergy-penitent privilege and inadmissible hearsay.

1.

"[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that [it] is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted; accord, Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment must make a prima facie showing either that the plaintiff cannot establish one or more elements of a cause of action or that there is a complete defense. (§ 437c, subds. (o)(p)(2); *Aguilar*, at p. 850.)

On review, "we independently examine the record in order to determine whether triable issues of fact exist to reinstate the action." (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) We accept as true all facts and reasonable inferences shown by the losing party's evidence and resolve evidentiary ambiguities in her favor. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) Ordinarily, we review the trial court's ruling on evidentiary objections for abuse of discretion. (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.) But where, as here, "the facts are

undisputed, [a] privilege claim is one of law which is reviewed de novo." (*Doe 2 v. Superior Court* (2005) 132 Cal.App.4th 1504, 1515.) The party claiming an evidentiary privilege bears " 'the initial burden of proving the preliminary facts to show the privilege applies.' " (*Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th 417, 442, italics omitted.)

2.

Amber argues she met her burden. We disagree.

Unless the privilege has been waived, a penitent claiming the privilege may "refuse to disclose, and . . . prevent another from disclosing, a penitential communication." (§§ 912, 1033.) In order for a communication to be privileged under the clergy-penitent privilege, it must (1) be intended to be confidential; (2) be made to a member of the clergy who in the course of their religious discipline or practice is authorized or accustomed to hear such communications; and (3) the clergy member *has a duty under the discipline or tenets of their church, religious denomination, or organization to keep such communications secret.* (*Roman Catholic Archbishop of Los Angeles v. Superior Court, supra,* 131 Cal.App.4th at pp. 443-444; accord, § 1032.)

We assume, without deciding, that Amber satisfied her burden to show Robinson, in her role as "chaplain resident," was a "member of the clergy." Nonetheless, the trial court correctly determined Robinson had no duty to keep her communications with Amber secret. Contrary to Amber's assertion, "not every communication to a member of the clergy is privileged in the eyes of the law." (*People v. Edwards* (1988) 203 Cal.App.3d 1358, 1362.) A communication with a clergy member is privileged from disclosure only if " 'the discipline or practice of a church authorizes a member of the clergy to hear particular communications and imposes a duty of secrecy on the clergy member for such communications.' " (*Doe 2 v. Superior Court, supra*, 132 Cal.App.4th at pp. 1518-1519; accord, § 1032.)

Here, the record contains no evidence to support Amber's position that such a duty applied to Robinson. Robinson initially testified at her deposition that she considered the information she obtained from patients "confidential" but she did not identify any

religious organization imposing such a duty. And she quickly clarified that she was required to share notes of such conversations with doctors and nurses. Amber has shown no error. (Compare *People v. Johnson* (1969) 270 Cal.App.2d 204, 208 [no evidence to demonstrate duty] with *Doe 2 v. Superior Court, supra*, 132 Cal.App.4th at pp. 1512-1513 [church discipline book indicated all clergy were "charged to maintain all confidences inviolate"].)

3.

We reject Amber's argument her statements to Robinson were inadmissible hearsay.

" 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (§ 1200, subd. (a).) It is generally inadmissible unless an exception to the rule applies. (§ 1200, subd. (b).) When evidence contains multiple levels of out-of-court statements, each level must be analyzed separately to determine whether it is hearsay or non-hearsay, and if hearsay, whether each level falls within a hearsay exception. (§ 1201.)

The trial court concluded the first level of hearsay (Amber's out-of-court statement to Robinson) was admissible under the party admission exception (§ 1220) and that the second level (the statement recorded in the medical records) was admissible under the business records exception (§ 1271). Amber now concedes an exception applies to the second level of hearsay and focuses solely on the first level.

Amber maintains her statements to Robinson are not admissible as admissions because she was unavailable to testify. (See § 240, subd. (a)(3) [witness is "unavailable" if "[d]ead or unable to attend or to testify at the hearing because of then-existing physical or mental illness or infirmity"].) Amber's interpretation of section 1220 is unsupported. Although certain exceptions to the hearsay rule explicitly require the declarant to be "*unavailable* as a witness" (§§ 1230, 1291, 1310, 1311, 1370), section 1220 contains no similar language requiring the declarant be available to testify. Section 1220 provides: "Evidence of a statement is not made inadmissible by the hearsay rule when offered

against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."

Amber cites no authority holding that a party's out-of-court statement is inadmissible if the party is unavailable to testify. Instead, she relies on a Law Revision Commission comment to section 1220, which states: "The rationale underlying this exception is that the party cannot object to the lack of the right to cross–examine the declarant since the party himself made the statement. Moreover, the party can cross–examine the witness who testifies to the party's statement and *can explain or deny the purported admission*." (Cal. Law Revision Com. com., 29B pt. 4 West's Ann. Evid. Code (2015 ed.) foll. § 1220, p. 112), italics added.) According to Amber, an availability requirement must be read into the statute "[t]o ensure that a declarant has the opportunity to explain or deny an alleged admission."

When the language of a statutory hearsay exception is clear and unambiguous, it is not our role to add conditions to admissibility. (See *People v. Baldwin* (2010) 189 Cal.App.4th 991, 1003-1004 [language of section 1202 "does not make the hearsay declarant's unavailability a condition for introduction of the declarant's inconsistent statements"], disapproved on other grounds by *People v. Black* (2014) 58 Cal.4th 912, 919.) Law Revision Commission comments simply "do not trump the unambiguous language of the statute." (*Baldwin, supra*, at p. 1004.) Because section 1220 contains no explicit condition requiring Amber's availability, we cannot read such a condition into the statute.

B.

We also disagree with Amber's alternative argument that, even if her statements to Robinson were admissible, a triable issue of fact remained regarding her intent to harm herself.

She contends the trial court was obligated to accept more favorable inferences from her recorded statements to Robinson. She insists her statement that "she 'sprayed body spray on herself and then set herself on fire' " is ambiguous because she could have meant

that she set herself on fire by accident. Amber's interpretation is not logically or reasonably drawn from her statements read in context. If it was an accident, it makes no sense that Amber asked for forgiveness from God and said she did not " 'want any other staff to hear this.' "

Amber also submitted transcript excerpts from her mother's deposition, in which her mother testified Amber had previously engaged in self-harming behavior, such as cutting and overdosing on medication, that she characterized as "cr[ies] for help" rather than attempts at suicide. And Amber's doctor had observed, four days before the fire, that Amber exhibited "no suicidal ideations or self-inflicted" injuries. This evidence is insufficient to support a reasonable inference of accidental ignition. (See *Sinai Memorial Chapel v. Dudler* (1991) 231 Cal.App.3d 190, 196 [issue of fact "not created by 'speculation, conjecture, imagination or guess work' "]; Code Civ. Proc. § 437c, subd. (c) ["court shall consider all the evidence set forth in the papers . . . and all inferences *reasonably* deducible from the evidence"], italics added.)

C.

Finally, Amber contends the trial court erred in concluding that defendants are relieved of liability because her intentional self-harm or attempted suicide constituted a superseding cause of her injuries as a matter of law. We disagree.

1.

The superseding cause doctrine is an affirmative defense that absolves a tortfeasor of liability "even though [the tortfeasor's] conduct *was* a substantial contributing factor." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 573, fn.9.) The doctrine applies "when an independent event intervenes in the chain of causation, producing harm of a kind and degree so far beyond the risk the original tortfeasor should have foreseen that the law deems it unfair to hold him responsible." (*Ibid.*) In California, the doctrine requires more than mere negligence on the part of the intervening actor. " '[T]he fact that an intervening act of a third person is done in a negligent manner does not make it a superseding cause if a reasonable man knowing the situation existing when the act of the

third person is done would not regard it as highly extraordinary that the third person so acted . . . .' " (*Doupnik v. General Motors Corp.* (1990) 225 Cal.App.3d 849, 863.)

"To determine whether an independent intervening act was reasonably foreseeable, we look to the act and the nature of the harm suffered. [Citation.] To qualify as a superseding cause so as to relieve the defendant from liability for the plaintiff's injuries, both the intervening act *and* the results of that act must not be foreseeable. [Citation.] Significantly, 'what is required to be foreseeable is the general character of the event or harm . . . not its precise nature or manner of occurrence.' " (*Chanda v. Federal Home Loans Corp.* (2013) 215 Cal.App.4th 746, 755-756, italics added.) The law "requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse." (*Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 833.) However, "product misuse . . . is a superseding cause of injury that absolves a tortfeasor of his or her own wrongful conduct . . . when the misuse was ' "so highly extraordinary as to be unforeseeable." ' " (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1308.)

2.

Amber concedes that defendants could not be expected to anticipate her attempted suicide (or intentional self-harm) but contends they nonetheless cannot avoid liability because the type of injury she suffered ("severe burns" caused by exposing the product to a heat source) is foreseeable. She contends, "a trier of fact could conclude that even if [Amber]'s intentional conduct was an unforeseeable misuse of the body spray, such misuse was *not* the sole cause of her injuries because the defect in the composition of the body spray contributed to the *extent* and *severity* of those injuries." According to Amber, if the product was formulated with an additive to give color to any flames caused by ignition, she might still have been injured, but her burns would have been less severe because the gardener would have seen the flames when they were ignited and could have rendered aid sooner.

We are unpersuaded. First, the issue is not whether any defect in the body spray may have been an actual factor in causing Amber's injuries. That much is assumed when considering application of the affirmative defense. (*Soule v. General Motors Corp., supra,* 8 Cal.4th at p. 573, fn.9.) We also assume it is foreseeable someone using a flammable body spray could accidentally ignite it. The warning label addresses that precise risk, even if it does not warn of an "invisible flame." Nonetheless, here, both Amber's intentional act of lighting herself on fire after dousing herself with body spray and her injuries are unforeseeable. Amber suffered second and third-degree burns to more than a third of her body. We cannot fault defendants for failing to anticipate that a person would deliberately use body spray to set herself on fire and, as the fire burned and spread, fail to suppress it, cry out, or otherwise alert anyone. That is surely "harm of a kind and degree . . . far beyond the risk the original tortfeasor should have foreseen . . . ." (*Chandra v. Federal Home Loans Corp., supra,* 215 Cal.App.4th at p. 755; *Brewer v. Teano* (1995) 40 Cal.App.4th 1024, 1031 [a superseding cause is an act that is "extraordinary rather than normal"].)

Finally, we are not breaking new ground in concluding an intervening intentional act of attempted suicide or self-harm is a superseding cause as a matter of law. As defendants correctly point out, a similar rule has been stated in other tort cases. (See, e.g., *Tate v. Canonica* (1960) 180 Cal.App.2d 898, 901-903, 915 [suicide historically viewed as an intervening act breaking chain of causation unless "the negligent wrong causes mental illness which results in an uncontrollable impulse to commit suicide"].)

Here, Amber's injuries resulted from an intentional act of self-harm, and she presented no evidence establishing a triable issue regarding application of the *Tate* exception. The trial court did not err in concluding her conduct constituted a superseding cause as a matter of law. We need not reach the parties' remaining arguments.

DISPOSITION

The judgment is affirmed. Defendants are awarded their costs on appeal.

BURNS, J.

WE CONCUR:

JONES, P. J.

NEEDHAM, J.