2d Civil No. B287329
Consolidated with B289429

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 1

VALERIE PRYOR,

Plaintiff and Appellant,

v.

FITNESS INTERNATIONAL, LLC
et al.,

Defendants and Respondents.

Appeal from Los Angeles Superior Court
Case No. BC633381
Honorable Stephen P. Pfahler

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Court of Appeal
State of California
Second Appellate District, Division One

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: B287329

Case Name: **Valerie Pryor v. Fitness International LLC, et al.**

Please check the applicable box:

□ There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208.

■ Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1. LAF, Inc., a California corporation	Ownership interest of 10% or more in Fitness International, LLC
2. Seidler Fitness Holdings II, LP, a Delaware limited partnership	Ownership interest of 10% or more in Fitness International, LLC
3.	
4.	
5.	

Please attach additional sheets with Entity or Person Information if necessary.

/s/ Gary J. Wax
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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

PAGE

Other Authorities

INTRODUCTION

Employers are not strictly liable for their employees' personal conduct—especially their private, illegal drug use. Yet appellant seeks to hold defendant/respondent LA Fitness liable for damages caused by its employee who surreptitiously became intoxicated on illegal drugs during his workday, was discharged from his workday and then caused a fatal car-on-bicycle accident after he drove away from work. As a matter of law, LA Fitness owes no duty to the general public to protect them from an employee who becomes intoxicated at work without its approval or encouragement and then drives off the premises.

As alleged, LA Fitness's employee seemed fine when he arrived at work to begin his on-premises job selling health club memberships, a job that required no car. At some point, the employee disappeared and took illegal drugs—heroin or some other mind-altering substance. It then became obvious to his boss at LA Fitness that he was unable to accomplish his only job responsibility of reading a pre-written script to clients to sell them memberships. He was obviously "impaired and/or intoxicated." Based on the employee's erratic behavior and his inability to intelligibly communicate with LA Fitness's prospective members, the LA Fitness club manager terminated his workday and ordered him "to leave work before his shift concluded." The manager didn't tell him what transportation he

should use or where he should go. He simply ordered the employee off the premises.

The employee left LA Fitness, driving his girlfriend's car, without any further job duties. In his drug-addled state, he hit and killed a bicyclist, and then fled the scene. The driver was convicted and incarcerated for his crimes.

The bicyclist's widow, plaintiff/appellant Valerie Pryor, sued the driver, the driver's girlfriend who owned the car, and LA Fitness as the driver's employer. The trial court, on demurrer, dismissed the claims against employer LA Fitness because it was neither vicariously nor directly liable for its employee's off-duty driving.

The fundamental problem with all of the claims against LA Fitness—for both vicarious *and* direct liability—is that the complaints allege no facts suggesting that the employee's illegal drug use and the resulting car-on-bicycle collision had any nexus or connection to the employee's particular job duty to sell LA Fitness memberships. LA Fitness is a health club. Illegal drug-use is prohibited there. The employee used drugs covertly. Nothing about the employee's role at LA Fitness would make taking illegal drugs and driving intoxicated the employer's responsibility. The injury is not connected any way to selling health club memberships. The lack of any nexus is fatal to all of the claims—both vicarious and direct.

The law is clear that an employer is not vicariously liable for an employee's conduct outside the scope of employment. An employee's personal, in-the-shadows drug use is a quintessential example of a deviation from employment duties unrelated to any employer objective. It is strictly for the employee's purely personal gratification. Likewise, with exceptions not pertinent here, the going-and-coming rule deems employees outside the scope of their employment and beyond their employer's control or responsibility when commuting or driving before or after work. The employee, thus, was acting outside the scope of employment when he left work and got behind the wheel of his girlfriend's car to drive away from LA Fitness.

Plaintiff's novel attempt to impose direct liability on the employer for allowing or directing an off-duty employee to leave the premises goes nowhere. Employers owe no duty to the public at large not to hire persons who might have substance abuse issues, a medical condition (e.g., epilepsy), or anger-management issues that might lead to adverse personal conduct *when they are not on duty*. They owe no duty to the public at large not to order an off-duty employee or any other person off of their premises or to restrain such a person from leaving or to call first responders to take charge of such a person. Plaintiff's "public policy" construct would impose a duty on *all* employers to sniff around and investigate their employees for illegal drug use or any other

potentially problematic personal behavior (e.g., alcohol use, illness, legal prescription medication, upsetting personal interactions) before they commute off-premises. This new duty would impose a significant burden on employers, require employers to control employees' off-duty or non-work-related behavior, and run afoul of employees' privacy rights.

Finally, the opening brief does not argue that the trial court abused its discretion in denying leave to amend, waiving the issue on appeal. Nor did plaintiff proffer any potential additional facts to be pleaded either in the trial court or on appeal. The conclusive presumption, therefore, is that the complaints, as presented, are the best that she can allege. They are not only insufficient, they affirmatively negate any LA Fitness liability.

The judgment must be affirmed.

STATEMENT OF THE CASE[1]

A. The facts alleged.

1. LA Fitness's on-premises employee, Guidroz, sells health club memberships.

James Guidroz worked as a membership sales counselor at an LA Fitness health club in Stevenson Ranch for approximately one year—a job requiring him to read a script to prospective new customers to sell them health club memberships. (1AA 155 ¶10, 156 ¶14.) He did not need a car to do his job.

2. Guidroz takes illegal drugs causing him to be intoxicated and unable to perform his job, so he is ordered to end his shift and leave.

Guidroz appeared to be "fit to perform his job duties" when he first arrived to work on the day at issue. (1AA 156 ¶15.) At some point while at work, LA Fitness Stevenson Ranch club manager Esdras Mendoza, observed that Guidroz's behavior

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[1] The facts are stated as they appear in the operative complaints. (*Haro v. City of Solana Beach* (2011) 195 Cal.App.4th 542, 546.) The negligence and negligence per se claims were dismissed after the first amended complaint (1AA 150); accordingly, we cite to that complaint in describing the facts alleged for those claims. The remaining facts are stated as alleged in the second amended complaint. That facts are alleged does not mean that they are true; LA Fitness disputes that they are.

began to change: "his attention span had shortened, he had begun to slur his words, he was sweating, and his short-term memory appeared impaired." (*Ibid.*)

Mendoza suggested that Guidroz take his lunch break to see if his condition would improve. (1AA 157 ¶16.) But when Guidroz returned, Mendoza observed behaviors indicating "that Guidroz was intoxicated, impaired, and/or under the influence of a chemical substance." (1AA 157 ¶¶16-17.) His "eyes were dilated and glossy," he "was vacillating from a lethargic state to an urgent, excited state," "he was exhibiting slower comprehension than usual," and he "had trouble recalling the simple script provided to membership counselors to use while interacting with prospective customers." (1AA 157 ¶16.)

Mendoza concluded that Guidroz was unable "to perform his job responsibilities" and ordered him "to leave work before his shift concluded." (1AA 157 ¶¶16-18; see also 1AA 153 ¶3, 158 ¶20.) There's *no* allegation that Guidroz was ordered to "go home," or that LA Fitness "sen[t] him home." (See AOB 11.) Rather, he was told to "leave work." (1AA 157 ¶18.)

Plaintiff alleges that LA Fitness knew or should have known that Guidroz was a heroin addict with "substance abuse problems" and had a "habit of driving in an impaired state while under the influence of intoxicating substances." (1AA 158 ¶20; see also 1AA 153 ¶3 [alleging that LA Fitness knew or should

have known that Guidroz was a heroin addict].) The only basis for LA Fitness's supposed knowledge or reason to know was that Guidroz commonly spent twenty to thirty minutes in the restroom, "or otherwise disappear[ed] from his work station with little or no explanation." (1AA 29 ¶3, 32 ¶15, 34 ¶19.)

Pryor further alleges, "LA Fitness employees knew that, although the State of California had suspended Guidroz's driving privileges …, Guidroz continued to drive to work in a personal automobile and did so on a regular, consistent and/or not infrequent basis." (1AA 34 ¶19.)

3. Guidroz leaves LA Fitness, driving his girlfriend's car, ultimately striking and killing a bicyclist.

Guidroz left LA Fitness driving his girlfriend's car. (1AA 153 ¶2, 158 ¶20; 2AA 271.) He "was impaired and driving under the influence of heroin and/or another mind altering substance(s)." (1AA 153 ¶2; see 1AA 37 ¶32.) Due to his impaired state, he failed to see bicyclist Roderick T. Bennett riding in the roadway. (1AA 159 ¶22.) He struck Mr. Bennett from behind, mortally injuring him. (1AA 153 ¶1, 159 ¶¶21-22; 2AA 271; see 1AA 36 ¶27, 39 ¶40.)

Guidroz ultimately pled guilty to "gross vehicular manslaughter while intoxicated (heroin) in violation of

[California] Penal Code 191.5(a)," for which he is currently serving a ten-year prison sentence. (2AA 271; see AOB 19, fn. 1.)

B. The court dismisses plaintiff's direct and vicarious negligence liability lawsuit against employer LA Fitness, holding there is no connection between the employee's personal drug use, the job, and the accident.

1. The trial court sustains LA Fitness's demurrer to the first amended complaint—denying leave to amend the vicarious-liability claims but granting leave to amend the direct-liability claims.

Valerie Pryor—individually and as the successor-in-interest to her late husband's estate (Pryor)—sued Fitness International, LLC dba LA Fitness (LA Fitness), the driver/employee (Guidroz), and his girlfriend/car-owner (Rodriguez). (1AA 10, 12-14.)

Pryor alleged that LA Fitness was vicariously liable for Guidroz's negligence and negligence per se, claiming that Guidroz was acting within the scope of his employment when he drove away from work under the influence of heroin and when he crashed into Mr. Bennett. (1AA 13-14 ¶12, 17-21.) She alleged LA Fitness was directly liable under theories of negligent

supervision and negligent hiring/retention, and sought derivative survival action damages. (1AA 21-26.)[2]

The first amended complaint alleged:

- *Vicarious liability*. Guidroz was within the course and scope of his employment when he left work and drove away after his shift had been terminated making LA Fitness vicariously liable for his conduct. (1AA 31-32 ¶12, 34-40 ¶¶20-47.)
- *Direct liability*. LA Fitness had legal duties (1) to investigate Guidroz's heroin use before hiring him and while he was acting within the scope of his employment, (2) to warn unknown third parties outside of LA Fitness of his drug use, and (3) to terminate Guidroz once it knew (or should have known) that he was a heroin user. (1AA 41 ¶49, 42-43 ¶55.) LA Fitness was required "to humanely, properly and safely address his condition, including his impairment on [the day in question]." (1AA 33 ¶17.) LA Fitness's lack of supervision and continued retention of Guidroz directly and proximately caused Bennett's death. (1AA 42 ¶¶51-52, 43 ¶¶56-57.)

[2] Pryor did not name LA Fitness in her third cause of action for negligent entrustment against Rodriguez, Guidroz's girlfriend. (1AA 21-22.)

Pryor did *not* allege that LA Fitness "supplied whatever chemical substances caused him to be impaired …." (2RT 8; see 1AA 28-46.) Nor did she allege that anybody witnessed Guidroz taking heroin or any other substance. (See 1AA 28-46, 152-171.)

LA Fitness demurred, arguing:

- It could not be vicariously liable for any of its employee's torts because Guidroz was "acting outside of the course and scope of his employment" when he became intoxicated on heroin or some other intoxicant and when he left work for another destination. (1AA 56.)
- It could not be directly liable for negligent operation of a motor vehicle because it "did not own, operate, control, or entrust the vehicle involved in the subject accident." (1AA 56; see also 1AA 103.)
- It could not be directly liable for negligent supervision or negligent hiring/retention because "[t]here was no nexus to the employee's actions and his job." (2RT 13; see also 1AA 56, 66-68, 95-102.)

The court sustained the demurrer without leave to amend as to vicarious liability claims against LA Fitness (negligence and negligence per se, the first and second causes of action, respectively). (1AA 147, 150, citing 1AA 29 ¶2; see 2AA 271.) As alleged, Guidroz was not within the scope of his employment

either when he took drugs or drove away from LA Fitness after his shift was terminated. The trial court would later reject Pryor's attempt to raise two exceptions to avoid the going-and-coming rule: "[T]he facts alleged do not support a finding that Guidroz was undertaking a special risk or was on a special errand at the time of the incident." (2AA 273.)

The court sustained the demurrer but granted leave to amend as to the direct-liability claims and the derivative survival claim (negligent supervision, negligent hiring/retention, survival—the fourth, fifth and sixth causes of action). The court observed that Pryor alleged no facts establishing a nexus or connection between the employee's job duties, the employee's impairment, and the accident. (2RT 5; 1AA 147, 150.) Nonetheless, due to the liberal policy of allowing leave to amend, the trial court gave Pryor "the opportunity to try to cure the defects" in the direct-liability-claim allegations. (1AA 151.)

2. The trial court sustains LA Fitness's demurrer to the second amended complaint without leave to amend the remaining direct-liability claims.

Despite the court's order precluding Pryor from amending her negligence and negligence per se allegations, and her promise not to move forward with those claims after the trial court granted the demurrer without leave to amend (2AA 216, fn. 5),

she nonetheless re-alleged those claims in her second amended complaint (1AA 160-164). She also added a handful of new vicarious-liability allegations attempting to clarify the line between her direct-liability and vicarious-liability claims. (1AA 152, 157-158, 160-164; see 1AA 191; 2AA 216, fn. 5, 272; compare, e.g., 1AA 30 ¶4 with 1AA 154 ¶4.)

In particular, she newly alleged legal conclusions that "at the time of the incident, Guidroz was acting within the scope of his employment, was under the control of such defendants, and/or was by leaving the workplace as instructed embarking upon a special errand for the exclusive benefit of such defendants," thereby making LA Fitness "vicariously responsible, under the doctrine of *respondeat superior*, for Decedent's death and Plaintiffs' injuries and damages as alleged herein." (1AA 161 ¶31, original italics; see also 1AA 154 ¶4 [LA Fitness is liable for the acts of its employee under the doctrine of respondeat superior].)

Pryor made two minor substantive amendments to the allegations in the causes of action for which the court had granted leave to amend: (1) in her negligent hiring/retention claim, she added that LA Fitness failed to use reasonable care in "responding to any information they obtained concerning him and his condition" (compare 1AA 167-168 ¶58 with 1AA 43 ¶55); and (2) in her survival claim, she added another legal conclusion that

LA Fitness had "vicarious responsibility under the doctrine of *respondeat superior* (compare 1AA 169 ¶64, original italics, with 1AA 44 ¶61).

Almost three months later, in response to LA Fitness's second demurrer, Pryor filed an expert declaration attaching general human resources recommendations found on the Internet. (2AA 234-254.) Pryor acknowledged that doing so was "not appropriate." (2AA 222, fn. 8.) She did not attach the declaration or its exhibits to the complaint, incorporate them into the complaint by reference or otherwise plead them.

The expert declaration opined—based on his review of only two pages in LA Fitness's 30-page employee handbook—that LA Fitness provided no guidance to supervisors "on how to deal with an employee who is reasonably suspected to be impaired at work." (2AA 238.) The handbook pages were neither attached nor quoted. (2AA 234-252.) Rather, the expert presumptively hypothesized that after-work dangerous conduct was an "inherent risk of employing any individual who may become impaired while at work." (2AA 219.)

In demurring to the second amended complaint (1AA 181-199; 2AA 255-264), LA Fitness objected to the unalleged and extraneous expert declaration (2AA 257, 261) and to Pryor re-alleging the vicarious-liability claims which the trial court had dismissed without leave to amend (1AA 182, 191). As to the

direct-liability claims, LA Fitness pointed to Pryor's failure to allege any facts supporting a nexus between Guidroz's alleged intoxication and his job at LA Fitness—i.e., interacting with potential customers to sign up new members. (1AA 182, 191-195, 197; 2AA 256-260.) The alleged drug use was "purely personal conduct" from which LA Fitness "derived no benefit" and was not "customary or incidental" to the job of selling health club memberships. (1AA 193, 195.)

Pryor proffered no additional facts that she might allege.

The trial court did not consider Pryor's new vicarious-liability allegations, holding them "improperly pled" in light of the previous denial of leave to amend the vicarious-liability claims. (2AA 272.)

It adopted the second amended complaint's direct-liability allegations as true: (1) Guidroz was employed by LA Fitness at the time of the incident; (2) the incident "occurred after Guidroz left work for the day and during his drive home"; (3) Guidroz's girlfriend, Rodriguez, owned the car that Guidroz was driving; and (4) while impaired, Guidroz negligently operated the vehicle which struck and killed the bicyclist, Mr. Bennett. (2AA 271.) In addition, LA Fitness had no relationship with the decedent; and the incident occurred when Guidroz was off-duty and off-premises. (2AA 272.) Based on these alleged facts, it sustained LA Fitness's demurrer without leave to amend. (2AA 267-273.)

It did so because the second amended complaint, like the first amended complaint, failed to allege "a connection between Guidroz's alleged intoxication and his employment at [LA Fitness]," or an inference "that Guidroz's alleged drug use was a foreseeable consequence of his employment." (2AA 272.) LA Fitness derived no benefit from Guidroz becoming intoxicated. (*Ibid.*) It was personal conduct—unconnected to his job responsibilities—neither customary nor incidental to his employment. (*Ibid.*)

With neither a vicarious- nor direct-liability basis, the survival claim failed as well. (2AA 273.)

C. The trial court enters judgment of dismissal; plaintiff timely appeals.

The trial court signed and entered the judgment of dismissal in favor of LA Fitness. (2AA 274-277; see 2RT 303.) Pryor timely appealed from the judgment of dismissal (2AA 283 [Appeal No. B287329]), and from an amended judgment (2AA 327 [Appeal No. B289429]) which added the costs amount recoverable by LA Fitness (2AA 298-299). This Court consolidated the appeals pursuant to the parties' stipulation under Case No. B287329. (AOB 17.)

STANDARDS OF REVIEW

A. Demurrer standard.

A trial court's sustaining of a demurrer is reviewed de novo. (*Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 43.) Properly pleaded facts and items of which the court takes judicial notice are accepted as true, "but not contentions, deductions or conclusions of fact or law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 842; Code Civ. Proc., § 430.30, subd. (a).) If the demurrer was properly sustained on any ground, the judgment must be affirmed regardless of whether the trial court acted on that ground. (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324.)

B. Leave to amend standard.

Denial of leave to amend is reviewed for an abuse of discretion. (*Traders Sports*, *supra*, 93 Cal.App.4th at p. 43.) The plaintiff bears the burden of proffering additional factual allegations that demonstrate a reasonable possibility that the pleading defect can be cured by amendment. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) Otherwise, the reviewing court must affirm. (*Blank*, *supra*, 39 Cal.3d at p. 318.)

C. Materials not alleged in, attached to, or incorporated by reference in the complaints.

The only relevant materials on review from the trial court's demurrer ruling are the allegations in the relevant complaints and judicially noticeable matters. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; see also *Adams v. Paul* (1995) 11 Cal.4th 583, 586 [on appeal from an order sustaining a demurrer, the relevant facts are drawn from the pleadings].)

To the extent the opening brief cites material outside the complaints' four corners for which judicial notice has not been sought and would be improper (see, e.g., AOB 20-22, 28, 30), the unalleged materials must be disregarded or stricken (Cal. Rules of Court, rule 8.124(b)(3)(A) [appendix must not "(c)ontain documents or portions of documents filed in superior court that are unnecessary for proper consideration of the issues"]; *The Termo Co. v. Luther* (2008) 169 Cal.App.4th 394, 404 [noncompliance with the California Rules of Court justifies court in striking improperly included materials from the record]; 2AA 234-254 [expert's unpled declaration and hearsay materials]).

This Court previously denied Pryor's request for judicial notice of a settlement with Guidroz (driver) and his girlfriend (car owner). The opening brief's references to that document must be disregarded. (See AOB 28, fn. 8, 47.)

ARGUMENT

I. LA Fitness Cannot Be Vicariously Liable; When Its Employee Took Illegal Drugs And Collided—Off Duty—With A Bicyclist, He Was Acting Outside The Scope Of His Job Selling Health Club Memberships.

A. Employers are only liable for employees' conduct causally connected to the scope of employment, not for employees' personal deviations, such as recreational drug use.

"[T]he law is clear that an employer is not strictly liable for all actions of its employees during working hours." (*Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004.) To be liable for an employee's tortious conduct, the employee must be acting within the scope of his or her employment. (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296; *Bussard v. Minimed, Inc.* (2003) 105 Cal.App.4th 798, 803-807; Civ. Code, § 2338.) The "scope of employment" standard applied in vicarious liability cases is more restrictive than the "arising out of and in the course of employment" standard applied in workers' compensation cases. (*Saala v. McFarland* (1965) 63 Cal.2d 124, 128-129, fn. 3; accord, *Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 468.)

It is "'[t]he losses caused by the torts of employees, which as a practical matter *are sure to occur in the conduct of the*

employer's enterprise, [that] are placed upon that enterprise itself, as a required cost of doing business." (*Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 959-960, italics added; accord, *Lisa M.*, *supra*, 12 Cal.4th at p. 299; *Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 161.)

For an employer to be vicariously liable there must be "a causal nexus or reasonable relationship between the duties of employment and the conduct causing injury." (*Baptist*, *supra*, 143 Cal.App.4th at p. 161; see *Lisa M.*, *supra*, 12 Cal.4th at p. 297; *Bailey v. Filco, Inc.* (1996) 48 Cal.App.4th 1552, 1560.) For there to be a causal nexus:

- The incident leading to the injury must be "an 'outgrowth' of the employment," or "foreseeable from the employee's duties"; or,
- The risk must be """inherent in the working environment""" or """typical of or broadly incidental""" to the employer's enterprise.

(*Lisa M.*, *supra*, 12 Cal.4th at pp. 298-301, citations omitted; AOB 13, 29 [acknowledging the overlapping tests].) Regardless of which test is used, the fundamental question is "whether the employee's act is foreseeable *in light of the duties the employee is hired to perform*." (*Alma W. v. Oakland Unified School Dist.* (1981) 123 Cal.App.3d 133, 142, italics added.) "That the

employment brought tortfeasor and victim together in time and place is not enough." (*Lisa M.*, at p. 298.)

Pryor argues that adhering to the Supreme Court's "nexus" standard "misse[s] the mark." (AOB 31.) Instead, she urges a made-up standard, specifically rejected by the Supreme Court: She claims vicarious liability attaches simply because "at the time Guidroz was working, during the course of his regularly scheduled shift, on LA Fitness['s] premises, he became significantly impaired." (AOB 32; see also AOB 11.) Wrong. A bald allegation that Guidroz was at work when he set in motion events leading to a non-work crime or tort does not make LA Fitness vicariously liable. (*Lisa M.*, *supra*, 12 Cal.4th at p. 298 [sexual molestation of patient]; *Farmers Ins. Group*, *supra*, 11 Cal.4th at p. 1005 [sexual harassment of co-workers].)

Whether misguided or not, Supreme Court precedent is binding. And the Supreme Court's repeated holding on this issue is not misguided. If employers are strictly liable for everything arising out of their employees' conduct during the workday—even purely personal pursuits—then few employees will be hired, and certainly not without an intrusive and searching review of all prospective employees' private lives. Nowhere does the law impose such an obligation.

Next, Pryor argues that *anytime* "an impaired employee is on company premises—whether under the influence of alcohol or

illegal drugs or otherwise impaired, for any reason"—the scope of employment test is met. (AOB 32.) Wrong again. (See *Calrow v. Appliance Industries, Inc.* (1975) 49 Cal.App.3d 556, 564-574 [employer not liable for vehicle accident caused by off-duty employee who became intoxicated on premises].) Employers are not responsible for an employee's covert drug or alcohol use any more than they are responsible for the impairment of an off-duty employee who becomes ill from food poisoning, the flu or a hangover. There's no allegation that the drugs were supplied by LA Fitness or shared with anyone at work; nor does Pryor allege that Guidroz took heroin as part of a *work-related* or work-sanctioned event. (*Farmers Ins. Group*, *supra*, 11 Cal.4th at p. 1005.) Rather, as the trial court correctly held, "Guidroz's intoxication was personal in nature." (2AA 272.) He "deviated from his employment duties and employment relationship," and thus, was outside the scope of his employment. (*Ibid.*)

B. LA Fitness's employee was on a substantial personal deviation from his job when he took illegal drugs.

1. An employee's personal and unforeseeable deviations are outside the scope of employment.

If an employee "substantially deviates" from his or her employment duties for personal purposes, or if his conduct is "so unusual or startling that it would seem unfair to include the loss

resulting from it among other costs of the employer's business," the employer is acting outside the scope of employment as a matter of law. (*Farmers Ins. Group*, *supra*, 11 Cal.4th at pp. 1003-1005, italics omitted; *Bailey*, *supra*, 48 Cal.App.4th at p. 1561 [no vicarious liability where employee has "substantially deviated from his or her duties for personal purposes"].)

"Stated another way, '[i]f an employee's tort is personal in nature, mere presence at the place of employment and attendance to occupational duties prior or subsequent to the offense will not give rise to a cause of action against the employer under the doctrine of respondeat superior.' [Citation.] In such cases, the losses do not foreseeably result from the conduct of the employer's enterprise and so are not fairly attributable to the employer as a cost of doing business." (*Farmers Ins. Group*, *supra*, 11 Cal.4th at p. 1005; see also, e.g., *Bailey*, *supra*, 48 Cal.App.4th at p. 1565 [no nexus between employee's job as electronics salesperson and personal errand during paid break to leave site and buy cookies for co-workers to eat]; *Alma W.*, *supra*, 123 Cal.App.3d at p. 140 [no nexus between employee's sexual molestation of a student and job as school custodian mopping floors and cleaning rooms].)

Where an employee's acts are undertaken solely for his "personal gratification" with "no purpose connected to the employment," they are outside the scope of employment,

as a matter of law. (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1430, citing *Farmers Ins. Group*, *supra*, 11 Cal.4th at p. 1007; see also *Hoblitzell v. City of Ione* (2003) 110 Cal.App.4th 675, 683 [City not vicariously liable when its employee posed as a building inspector and threatened contractor at construction site in another jurisdiction: Employee's misconduct "did not arise from the employer's enterprise but arose for personal reasons"]; *Calrow*, *supra*, 49 Cal.App.3d at pp. 564-574 [off-duty employee who became obviously intoxicated on work premises with other employees and with full knowledge of management outside scope of employment in ensuing off-premises vehicle accident].)

Whether an employee is acting within the scope of employment is a question of law when the facts are undisputed and there are no conflicting inferences. (*Hinman*, *supra*, 2 Cal.3d at p. 963.) "In some cases, the relationship between an employee's work and wrongful conduct is so attenuated that a jury could not reasonably conclude that the act was within the scope of employment." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 213.) That is precisely the case here.

2. The complaint undeniably alleges that Guidroz was acting for his own personal reasons, not his employer's, when he took drugs at work.

Pryor's allegations, taken as true, establish that Guidroz was acting outside the scope of his employment both at the time he took illegal drugs and at the time of the accident. Other than the coincidence of time and place, his drug use and intoxicated driving had nothing to do with his job.

As alleged in the complaint, he was a "membership counselor" at the "health club," LA Fitness—a job requiring him to read a "'script'" to prospective new customers to sell them health club memberships. (1AA 155 ¶10, 156 ¶14.) His drug use was antithetical to his performing those duties—he could not competently sell health club memberships—so his supervisor ordered him to cut short his work shift and leave work before his shift concluded. (See p. 19, *ante*.)[3]

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[3] Pryor claims that "severe illness" or impairment due to being severely ill could have been the reason Guidroz was acting erratically. (AOB 30, 44.) But that contradicts her allegations that Guidroz caused the accident because he was driving under the influence of heroin or some other mind-altering substance. (1AA 153 ¶2; see 1AA 37 ¶32.) In any event, illness also had nothing to do with his job duties. Pryor's claim reveals that her theory is not limited to drug use but extends to *any* employee condition that might impair the employee's driving.

Pryor's conclusory allegation that Guidroz was "acting within the scope of [his] employment and/or under the control of [his] employer" does not change that. (1AA 36 ¶27; see 1AA 31-32 ¶¶12-13.) Nor does the bald assertion that LA Fitness accepted the risk of Guidroz's personal conduct "as an incident of the risks inherent in owning and operating LA Fitness," because it knew of Guidroz's addiction or of his work-shift impairment. (1AA 34 ¶19, 158 ¶19.) What matters are pleaded *facts*, not legal conclusions. (See *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126 [court does not assume the truth of contentions, deductions or conclusions of law]; *Maystruck v. Infinity Ins. Co.* (2009) 175 Cal.App.4th 881, 888-889 [alleging conclusions without factual support is "fatal to the complaint"]; *Stonehouse Homes LLC v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 539 [conclusory allegations do not withstand demurrer].)

There are no *facts* alleged to support the conclusory allegations. To the contrary, Pryor alleges that LA Fitness *terminated Guidroz's shift* due to his conduct: It deemed him unfit to perform functions within the scope of his employment. Recreational illegal drug use, categorically, does not benefit employers. (*Calrow*, *supra*, 49 Cal.App.3d at pp. 570-571 [recreational drinking at workplace not within scope of employment because it was not "'conceivably of some benefit to the employer'"]; see *Lisa M.*, *supra*, 12 Cal.4th at p. 301 [sexual

molestation of patient]; *Farmers Ins. Group*, *supra*, 11 Cal.4th at pp. 1007-1013 [lewd propositions and offensive touching of other deputy sheriffs working at county jail had nothing to do with deputy's job duties]; *Kephart v. Genuity, Inc.* (2006) 136 Cal.App.4th 280, 285, 296 [road-rage car accident caused by employee unrelated to his job; "no evidence of a work-related dispute, and no evidence that (the employee) somehow thought he was serving (the employer's) interests in engaging in his intentional misconduct"].) Contrary to the opening brief's claim, there's no allegation that Guidroz's motivation for taking drugs while at work was attributable to anything work-related or endorsed by LA Fitness. (Cf. AOB 13-14, 32.)

Pryor doesn't allege that anybody at LA Fitness supplied drugs to Guidroz, saw him take drugs at work, or condoned his doing so. (See 2RT 8; see 1AA 28-46.) The nature of the work involved—i.e., interacting with prospective customers to sell them health club memberships (1AA 156 ¶14)—did not predictably create a risk of taking illegal drugs or driving under the influence on public streets. Pryor nowhere alleges (presumably because she cannot) that Guidroz's heroin use on the day in question arose out of his specific job duty of selling health club memberships. (See 1AA 28-45, 152-171.)

Nor does she allege that taking heroin at work and driving while intoxicated is an "outgrowth" of selling health club

memberships. (See *Lisa M.*, *supra*, 12 Cal.4th at pp. 298-300; *Farmers Ins. Group*, *supra*, 11 Cal.4th at p. 1011.) Nor could she plausibly do so. Guidroz's sole duty was to interact with customers in order to persuade them to invest in a healthy, fit lifestyle by working out at a "health club." (1AA 155 ¶10, 156 ¶14.) Taking heroin during work and then driving while intoxicated was completely contradictory to that responsibility. (*Lisa M.*, *supra*, 12 Cal.4th at p. 299 [no employer duty where employee's conduct would be "'unusual or startling'" given particular job duties].)

Guidroz took drugs for the sole purpose of personally gratifying himself and for no work purpose. That conduct was a substantial personal deviation from any scope of employment. LA Fitness is not vicariously responsible for that action.

C. The going-and-coming rule bars plaintiff's claim based on the employee's commute.

1. Absent special circumstances, employees are outside the scope of employment when they commute to and from work.

The scope-of-employment limitation to employer vicarious liability is embodied in the going-and-coming rule. That rule is a guide to determining whether an injury occurred within the course and scope of employment. (*Aetna Casualty & Surety Co. v.*

Workers' Comp. Appeals Bd. (1986) 187 Cal.App.3d 922, 927.) Employees are deemed to be outside of the scope of employment during their daily commute. (*Hinman*, *supra*, 2 Cal.3d at p. 961; *Hartline*, *supra*, 132 Cal.App.4th at pp. 465-466.) Thus, employers are generally exempt from liability for tortious acts committed by employees while on their way to and from work. (*Ibid*.) The going-and-coming rule "has particular application to vehicle accidents of employees whose jobs do not embrace driving." (*Harris v. Oro-Dam Constructors* (1969) 269 Cal.App.2d 911, 917.)

2. When the employee drove away from work, off duty, he was outside the scope of employment.

Guidroz's job selling health club memberships in no way embraced driving. (See 1AA 32 ¶14.) Nor did he have any further work-related driving duties when he drove away from LA Fitness. (See 1AA 29 ¶3, 34 ¶20 [alleging that LA Fitness ended his work shift].)

When Guidroz drove away from LA Fitness, he was outside the scope of employment as a matter of law. (See *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 722-723; *Harris*, *supra*, 269 Cal.App.2d at p. 918; accord, *Lynn v. Tatitlek Support Services, Inc.* (2017) 8 Cal.App.5th 1096, 1108-1115 [employee outside scope of employment while commuting 500 miles from jobsite to

home; employer did not dictate means of commute]; *Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 102-105 [employee outside scope of employment while driving company truck 140 miles back to jobsite after buying a car with family on day off]; *Sunderland v. Lockheed Martin Aeronautical Systems Support Co.* (2005) 130 Cal.App.4th 1, 12 [employer "exercised no control over (employee's) choice of transportation generally or over his movements at the time he collided with plaintiffs' vehicle"]; *Helm v. Bagley* (1931) 113 Cal.App. 602, 605 [employee outside scope of employment while commuting home for dinner "in his own automobile and on his own business, which in no manner pertained to the business of his employer"].)

Pryor does *not* allege (1) that LA Fitness required Guidroz to drive to and from work; (2) that driving was part his job responsibilities on that particular day; (3) that LA Fitness asked him to perform any work-related services upon his departure; (4) that LA Fitness directed him where to go, or how to get there; or (5) that LA Fitness paid his travel expenses. (See *Ducey*, *supra*, 25 Cal.3d at p. 723; 2AA 273 [trial court: Pryor failed

to allege that Guidroz "was required to meet clients or perform any of his job duties off-site"].)[4]

Driving his girlfriend's car after being ordered to leave was in no way inherent in, or incidental to, Guidroz's particular job of selling health club memberships. It was simply the "going" part of the going-and-coming rule: He was either on his commute home or going elsewhere on his own post-work time. There is no allegation that LA Fitness told him where to go or how to get there. As the lyric goes, he was effectively told "you don't have to go home, but you can't stay here."

Pryor claims that Guidroz was still within the scope of his employment because he still had four hours left on his scheduled (but canceled) shift and was still "'on the clock,'" even though his supervisor told him he was not working anymore and ordered him to leave. (AOB 11, 19, 36, 38.) Not so. An employer's scheduling changes, even if made on short notice, have no impact on the scope of employment analysis. (See *Blackman v. Great American First Savings Bank* (1991) 233 Cal.App.3d 598, 602 ["the employment relationship is suspended from the time the employee leaves his place of work until he returns"]; *Sherar v. B & E Convalescent Center* (1975) 49 Cal.App.3d 227, 231

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[4] The opening brief makes no argument that Guidroz was required to use a car as a condition of employment or as to the "required vehicle" exception. Any such argument is waived.

[employee's travel to and from her work was not within scope of employment even though she sometimes traveled "at special hours at the request of her employer" and her "hours of duty were subject to change on short notice"]; *Riddle v. Arizona Oncology Services, Inc.* (Ct.App. 1996) 924 P.2d 468, 472 [186 Ariz. 464, 468] [that employer ordered employee to end work shift "makes no difference in resolving the duty issue"].) "To base the determination of duty on the precise timing of events would be arbitrary." (*Riddle*, at p. 472.)

Pryor does not dispute—and, in fact, affirmatively alleges in both complaints—that Guidroz was unable "to perform his job responsibilities" as a health club "membership counselor" and that his supervisor ordered him "to leave work before his shift concluded." (1AA 31-33 ¶¶10, 14, 16-18 [FAC], 155-157 ¶¶10, 14, 16-18 [SAC].) When he "drove away in a gray 2014 Lexus owned by his girlfriend Rodriguez," his workday was over: His supervisor ordered him "to cut short his work shift and leave the LA Fitness location[.]" (1AA 34 ¶20 [FAC]; 158 ¶20 [SAC].) Any conclusory allegation that Guidroz was within the scope of employment because he would have been at work had LA Fitness not ended his shift is unsupportable and contrary to the complaint's own allegations.

3. LA Fitness did not create an "instrumentality of danger," the employee's covert and unauthorized drug use did.

Pryor contends that "the going-and-coming rule is beside the point" because "Guidroz became a time bomb," or "'instrumentality of danger' while at work." (AOB 33, 35-36.)

But she relies only on inapposite cases where employees become intoxicated or impaired at company-*planned* or company-*endorsed* events, and were thus, deemed to be acting within the scope of employment. (See AOB 33-35, citing *McCarty v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 677, 682-683 [employer-authorized drinking party]; *Childers v. Shasta Livestock Auction Yard, Inc.* (1987) 190 Cal.App.3d 792, 799, 805 [employer told employee to "(g)o have a beer"]; *Purton v. Marriott Int'l, Inc.* (2013) 218 Cal.App.4th 499, 509-510 [company Christmas party]; *Harris v. Trojan Fireworks Co.* (1981) 120 Cal.App.3d 157, 165 [same].) There is no such allegation here. Pryor doesn't even clearly allege where Guidroz's drug use took place. (See 1AA 32-33, ¶¶15-16, 156-157 ¶¶15-16.) Nor does she allege that anyone at LA Fitness saw Guidroz take drugs let alone that anyone at LA Fitness condoned it. Guidroz did not become intoxicated within the scope of his employment.

Guidroz's illegal drug use was covert and unauthorized. According to Pryor's complaint, as soon as LA Fitness's club manager knew or should have known that Guidroz was high on something—because it was objectively obvious that he could no longer perform his job responsibilities—he ended Guidroz's work-shift and ordered him to leave. (1AA 31-34 ¶¶10, 14, 16-18, 20.) Properly taking these allegations as true, LA Fitness never authorized or condoned Guidroz's drug use. In order to fall within Pryor's proffered "instrumentality of danger" cases, Guidroz's intoxication had to have occurred *within the scope of employment*. LA Fitness's after-acquired knowledge about the employee's intoxication is irrelevant absent its *approval*.

Calrow v. Appliance Industries, Inc., *supra*, 49 Cal.App.3d 556, is on point. There, plaintiffs were injured when an intoxicated driver crashed into their car. (*Id.* at p. 559.) The drunk driver was a "habitual drunkard" and "known alcoholic." (*Id.* at pp. 559, 561.) His employer knew that "he drank heavily," and "was an alcoholic." (*Id.* at p. 561.) He'd been so intoxicated at company holiday parties that his supervisor would have to "carry him to the car for his wife to take him home." (*Ibid.*)

On one particular night, a co-worker showed up with more than a gallon of wine and asked the alcoholic employee (whose shift had ended but who had returned to the employer's premises) if he wanted to "guzzle it down with him." (*Ibid.*) Everybody—

including his supervisor—came out of the factory to drink wine together next to a food truck parked on the premises. (*Ibid.*) The supervisor never told the employee to stop drinking, and the employee continued to drink until the wine was gone, which was right before closing time. (*Ibid.*)

The clearly intoxicated, alcoholic employee drove away toward his nearby house crashing into another car injuring its driver and passenger. (*Id.* at pp. 561-563.) They sued the employer, claiming it should be "responsible" for the employee's drunk-driving accident. (*Id.* at pp. 559, 563.) In opening statement, plaintiffs' counsel argued that the employer knew its employee was a "habitual drunkard and/or was obviously intoxicated at the time," and tacitly encouraged the drinking on the night in question, which created a legal duty. (*Id.* at p. 559.)

The trial court granted nonsuit based on the opening statement holding that the employee drunk-driver was acting outside the scope of employment at the time of the accident. (*Id.* at pp. 559-560.) Although the drunk driver "was on the premises" while drinking, he was "not at work." (*Id.* at p. 564.)

Calrow affirmed, holding that the employee was "not acting in the course of his employment at any time pertinent herein." (*Id.* at pp. 571-574.) No facts were proffered "tending to show that the drinking which took place on [the employer's] premises was 'conceivably of some benefit to the employer' or that such

drinking had become 'a customary incident of the employment relationship'"; nor was the alcohol supplied by the employer. (*Id*. at pp. 571, 573.)

Here, just like in *Calrow*, the plaintiff alleged no facts showing that the employer supplied the intoxicant, that the voluntary intoxication provided a conceivable benefit to the employer or that it was customary in the working relationship. That the intoxication may have taken place on the employer's premises is of no moment. Nobody at LA Fitness saw or even knew that Guidroz was taking illegal drugs before, or at the time, he took them. As soon as his impairment became objectively obvious, LA Fitness ended his work-shift and ordered him to leave. Even if LA Fitness knew Guidroz was a heroin addict as Pryor attempts to allege, *Calrow* makes such knowledge irrelevant. The only distinction between *Calrow* and this case is that Guidroz caused his own intoxication during work hours as a personal diversion. But that makes no difference. LA Fitness played no role in fostering or encouraging his drug use. It has no vicarious liability.

4. Ordering an intoxicated employee to leave the premises neither tasks him with a work-related "special errand" nor creates a work-related "special risk."

Pryor asserts that when LA Fitness ordered Guidroz off the premises it was sending him on a "special errand" or creating an employment-related "special risk," thereby avoiding the going-and-coming rule and other bars to vicarious liability. (AOB 36-40.) Neither attempted dodge works.

"Special Errand." The first amended complaint contains *no* "special errand" allegations whatsoever. (See 1AA 28-47.) Pryor only added them to her second amended complaint after the court denied her request for leave to amend the first amended complaint. (See 1AA 157 ¶17, 161 ¶31, 164 ¶42).

But even the second amended complaint's unauthorized "special errand" allegations are fruitless. Pryor alleged that "by leaving the workplace as instructed," Guidroz "embark[ed] upon a special errand for the exclusive benefit of [LA Fitness]." (1AA 157 ¶17, 161 ¶31, 164 ¶42; see AOB 37-38.) To begin with, this allegation is nothing more than a factually vacant legal label. Ordering Guidroz off the premises because he could not perform the job he was hired to do was not sending him on a special errand to complete a task for the employer's benefit. The only "special errand" was leaving the workplace. The "special errand"

exception does not apply "'when the only special component is the fact that the employee began work earlier or quit work later than usual.'" (*General Ins. Co. v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 595, 601 [referring to it as the "special mission" exception].) And that's precisely why the trial court rejected Pryor's new "special errand" allegations. (2AA 273.)

In *Caldwell v. A.R.B., Inc.* (1986) 176 Cal.App.3d 1028, the employer ordered an oil-plant jobsite shut down due to safety concerns caused by heavy rain. (*Id*. at p. 1038.) An employee drove away from the jobsite and collided head-on with the plaintiff. (*Id*. at p. 1031.) The plaintiff claimed the "special errand" exception applied for the same reason as Pryor here: that the employer somehow benefitted from sending the employee home early thereby avoiding liability for workplace injuries. (*Id*. at pp. 1037-1038.) Pryor comparably claims in the opening brief that LA Fitness benefitted from Guidroz leaving because it avoided having to deal with his impairment. (AOB 38.) In either case, the "work stoppage," "can hardly be deemed a benefit to the employer." (*Caldwell*, at p. 1038.) Employers avoid overtime obligations when employees leave work on time and they undoubtedly benefit when employees arrive at work on time. Neither creates a "special errand."

"Special Risk." Nowhere does either complaint use the phrase "special risk." Nor does the opening brief pinpoint where in the complaint the special risk allegations supposedly appear.

Pryor, apparently, is relying on the same allegations she claims support the "special errand" exception's application, but do not. (AOB 39-40.) None of her allegations satisfy the threshold requirement for applying the exception: demonstrating "a causal nexus between [the decedent's] injury *and the employee's job*." (*Depew v. Crocodile Enterprises, Inc.* (1998) 63 Cal.App.4th 480, 488, citing, e.g., *General Ins. Co.*, *supra*, 16 Cal.3d at p. 600, italics added.) A mere connection in time or place to the jobsite is not enough; there must be a nexus to *the nature of the job's particular duties*. (*Id.* at pp. 489-490 [requirement that restaurant manager work double shift, causing him to fall asleep while driving, was unconnected to job duties operating a restaurant]; *Caldwell*, *supra*, 176 Cal.App.3d at p. 1036 [sending employees home early in hazardous weather did not subject public "to a risk causally related to employment" as apprentice pipefitters].) The only causal connection to the risk was through Guidroz's personal use of illegal drugs, which was well outside the scope of his employment.

The trial court rejected Pryor's claim for that exact reason: The complaint alleged no "danger to the public stemming from Guidroz's normal work duties" (2AA 273, citing 1AA 156 ¶14);

there was "no connection between [Guidroz's] alleged intoxication and his employment as a sales associate" (2AA 272). Pryor's inability to allege a work-duties connection is fatal to her claim. Pryor cannot allege a nexus between Guidroz's on-premises job selling health club memberships and either his illegal, unauthorized drug-use or his intoxicated driving.

Pryor's construct would completely eviscerate the going-and-coming rule or create a new exception applying any time an employer asks or orders an employee to leave the premises.

D. Knowledge that an employee has a substance abuse problem is not enough to make the employer vicariously liable for conduct outside the scope of employment.

Pryor thinly alleges that LA Fitness knew or should have known that Guidroz was a heroin addict based on Guidroz's regular disappearances from his work station without explanation—sometimes to the bathroom. (1AA 29 ¶3, 32 ¶15, 34 ¶19.) Employees take breaks for a variety of reasons, including digestive problems or mental issues that an employer has no business knowing or even inquiring about. This is hardly a sufficient allegation that LA Fitness, in fact, knew or should have known that Guidroz was an addict.

But even if it was, that would not impose a duty on an employer regarding its employee's non-work-related activity.

Employers have no obligation to avoid hiring persons with substance-abuse problems, medical conditions like epilepsy, or any other potentially debilitating condition. (*Calrow*, *supra*, 49 Cal.App.3d 556 [employer not liable based on knowledge of alcoholic employee's drinking].) Imposing such a duty would be societally detrimental. It would bar employment to a substantial swath of the population. (See *Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1216-1218 [landlords owe no duty to not rent to gang members].) Employers are not guardians of employees' non-work behavior.

The opening brief argues that LA Fitness should be liable based on vague "policy reasons" derived from materials not alleged in or attached to the complaint. (AOB 28-32.) As we noted (see p. 30, *ante*), none of these materials are cognizable. In any event, the materials don't support, and in fact undermine, Pryor's claims.

The opening brief contends that (1) illegal drug-use by LA Fitness employees is foreseeable because LA Fitness has an unalleged drug policy, and (2) based on unalleged, cherry-picked, Internet-blog opinions, illegal drug-use is foreseeable "in *any* business with a workforce." (AOB 20-22, 29-30, italics added.)

Neither source—even if relevant—establishes that drug use is a normal incident to selling health club memberships (the required legal standard) or that any legal duty is owed. That an

employee's personal misfeasance is conceivable does not create vicarious liability. If it did employers would be liable for sexual molestation of patients and sexual harassment of co-workers. But the Supreme Court has held that they are not. (*Lisa M.*, *supra*, 12 Cal.4th at p. 298; *Farmers Ins. Group*, *supra*, 11 Cal.4th at p. 1005.)

Indeed, the cited blog illustrates the numerous fatal holes in Pryor's "public policy" claim. The author advises employers to be cautious when dealing with employees who seem like they may be intoxicated, because they actually may be ill and or/taking legal prescription medications: Never "accuse a worker" of being intoxicated, because it's always possible the employee has "'an illness'" or is on *legal* medication causing their impairment, and "'[a]n employee in this situation … should not be subjected to punitive measures.'"[5] The opening brief acknowledges the potential for such a scenario. (AOB 30.)

The blog goes on: Employers are within their legal rights to "discharge" or "discipline" an employee whose use of intoxicants "adversely affects his or her job performance or conduct." (See footnote 5, *ante*.) That's exactly what LA Fitness

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[5] Wilkie, *Drunk at Work: What HR Can Do About Employees Drinking on the Job* (Jan. 31, 2017) https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/drunk-on-the-job-.aspx [as of Sept. 5, 2018].

did. It ended the employee's shift and ordered him to leave when it became clear that he was intoxicated.

Illustrating another problem with relying on the Internet blog, the author disclaims defining any legal standard. Rather, she urges employers to "consult with a workplace attorney" to determine whether their particular procedures for dealing with on-the-job intoxication are supported by law. (*Ibid*.)

Pryor's "public policy" construct also directly conflicts with California's inalienable right to privacy. Yes, even drug users are guaranteed a Constitutional privacy right. (See Cal. Const., art. I, § 1.) Pryor nowhere alleges that Guidroz agreed to submit to drug screening or questioning as a condition of employment. Without such consent, intrusion into his privacy about his personal drug use and/or addiction would require significant procedural safeguards to be constitutionally valid. (*Wilkinson v. Times Mirror Corp.* (1989) 215 Cal.App.3d 1034, 1051.)

"From the perspective of a plaintiff, imposition of vicarious liability would always serve the policy of giving greater assurance of compensation to the victim. But respondeat superior liability is not 'merely a legal artifice invoked to reach a deep pocket or that it is based on an elaborate theory of optimal resource allocation.'" (*Kephart*, *supra*, 136 Cal.App.4th at p. 297, quoting *Alma W.*, *supra*, 123 Cal.App.3d 133, 143-144.) "Respondeat superior always helps to assure victim compensation, if only by

bringing in another—usually deeper—pocket to provide that compensation. By itself, assuring victim compensation is nothing more than a statement of a desired result, not a means of analysis. The real question is whether, under California law, the employer's presumably deeper pocket should have to bear the loss of an employee's tort ...." (*Z.V. v. County of Riverside* (2015) 238 Cal.App.4th 889, 901, italics omitted.)

Where the employee's tort is unconnected to any employment purpose, there is no basis for respondeat superior liability. The vicarious-liability question requires a "*nexus between the employer's enterprise, the employee's scope of employment, and the nature of the underlying tort itself*." (*Ibid.*, italics added.) That is wholly absent here.

E. Plaintiff's authorities are inapposite; they all involve employer-authorized, encouraged or created intoxication or impairment.

None of Pryor's authorities overcome the scope of employment rule. In *McCarty*, a workers' compensation case that the opening brief cites (AOB 33, 35), the record demonstrated that on-premises "drinking parties had become a recognized, established and encouraged custom" during the workday (12 Cal.3d at p. 683). There is no such allegation here. There's no hint of employer-encouraged intoxication. To the contrary, the

employer ended Guidroz's shift because of his intoxication. Not surprisingly, in comparable circumstances, *Calrow* finds reliance on *McCarty* "misplaced." (*Calrow*, 49 Cal.App.3d at p. 570.)

Pryor's reliance on other authorized drinking or impairment cases is equally misplaced. (See AOB 33-36.) Those cases all stand for the principle that when "an employee undertakes activities *within his or her scope of employment* that cause the employee to become an instrumentality of danger to others," then the employer may be found vicariously liable. (*Childers*, *supra*, 190 Cal.App.3d at pp. 804-805, italics added.) *Only* if the risk is "created within the scope of the employee's employment" does the scope of employment follow the risk. (*Id.* at p. 805.)

For instance, in *Childers*, *supra*, 190 Cal.App.3d 792, "[a]bundant evidence showed [the employee's] consumption of alcohol occurred within the scope of her employment, thereby creating a risk that was a proximate cause of plaintiff's injuries." (*Id.* at p. 806.) The auction-yard foreman told his employees' to "'[g]o have a beer,'" which they knew meant to retrieve beer stored in the office. (*Id.* at p. 799.) "It was a regular practice for [the employer] to furnish alcoholic beverages on the premises to customers …." (*Ibid.*)

The ensuing drunk driving was within the scope of employment because the drinking (1) was undertaken with the

employer's permission, (2) was beneficial to the employer, and (3) was a customary incident of the employment. (*Id.* at p. 806.) It had become "a regular Friday night institution" for employees and customers to get drunk on the premises, so the employee's consumption of alcohol on that particular Friday was deemed to be "'part of the transaction of [the employer's] business.'" (*Ibid.*, quoting Civ. Code, § 2338.) But no comparable facts were alleged here. Guidroz's drug use was covert, unauthorized and not encouraged. It was cause to end his shift.

Similar to *Childers*, *Purton* involved an employee drinking alcohol and becoming intoxicated "at an *employer-hosted party*." (218 Cal.App.4th at p. 502, italics added.) As in *Childers*, the party and the employee's alcohol drinking "were a conceivable benefit" to the employer "or were a customary incident to the employment relationship" between the employer and its employees so as to bring the employee's drinking within the scope of employment. (*Id.* at p. 513.) The employer "provided alcohol and permitted the consumption of alcohol brought to the party by [the employee]." (*Id.* at p. 509.) *Purton* is nothing like this case.

Harris v. Trojan Fireworks Co., *supra*, 120 Cal.App.3d 157, is even less similar. There, the employee became intoxicated at a company Christmas party held "to improve employer/employee relations or to increase the continuity of employment by providing employees with the fringe benefit of a party, or to

improve relations between the employees by providing them with this opportunity for social contact." (*Id.* at p. 164.) The employer furnished the alcohol and intended the employee to consume it. (*Ibid.*) There's no comparable allegation about Guidroz's drug use here. His secret, illegal drug use was a far cry from being social or employer-approved.

Pryor's drinking cases—*McCarty*, *Childers*, *Purton*, and *Harris*—all address a context not present here: employees becoming intoxicated during *work-authorized* social activities.

Nor is *Bussard v. Minimed, Inc.*, *supra*, 105 Cal.App.4th 798, applicable. There, the employee became ill with headaches and nausea caused by her employer hiring a company to spray pesticides the night before. (*Id.* at p. 801.) She told her supervisors that she did not feel well enough to continue working, but that she felt well enough to drive home. (*Ibid.*) While driving home she rear-ended another driver stopped at a red light. (*Ibid.*) The employer created an "instrumentality of danger" because it was responsible for exposing the employee to pesticides. (*Id.* at p. 806.) There was a direct "causal connection" "between a work-related event"—the employer hiring a company to spray pesticide—and "the employee's subsequent act causing injury"—i.e., the car accident. (*Ibid.*) The employer *caused* the employee's condition. LA Fitness did not *cause* Guidroz's drug-induced intoxication.

LA Fitness played no role in its employee's drug-related decisions. It did not authorize his illegal drug use or even tacitly allow it, terminating his shift when he appeared affected.

* * *

Guidroz's drug-induced intoxication unequivocally lacked the necessary linkage to LA Fitness's enterprise as a health club or Guidroz's duty to sell health club memberships. The trial court properly sustained the demurrer to, and dismissed, the vicarious liability claims. The facts Pryor alleged place Guidroz squarely outside the scope of his employment.

II. There Is No Viable Direct-Liability Cause Of Action.

Pryor's direct liability claims are also baseless. Whether framed as negligent hiring and supervision or as general negligence, an employer owes no duty to the public at large as to its employees' non-work conduct.[6] "Failing to require a connection between the employment and the injured party would result in the employer becoming an insurer of the safety of every person with whom its employees come into contact, regardless of their relationship to the employer." (*Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1341.) That is the duty Pryor seeks to impose.

A. An employer owes no duty to the public at large to investigate or uncover an employee's covert drug use or to warn unknown third parties about it.

Pryor, in effect, argues that LA Fitness owed the world at large a direct and sweeping general duty of care to restrain or

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[6] The opening brief represents that the negligence and negligence per se claims (first and second causes of action) are *only* for vicarious liability, whereas the remaining claims, negligent hiring, negligent supervision/retention, the survival claim (fourth, fifth and sixth causes of action) are only based on LA Fitness's alleged direct liability. (AOB 13-16, 22-23, 26.) But the opening brief blurs the line between hiring and supervision/retention and general negligence. We address both.

warn of its employees' off-duty conduct. (AOB 42-49.) Under this logic, the reason for the employee's incapacity—drug use, alcohol intoxication, medical condition, illness, or emotional distress—does not matter.

Duty is ultimately a policy choice. It "'is simply a shorthand expression for the sum total of policy considerations favoring a conclusion that the plaintiff is entitled to legal protection.'" (*N.N.V. v. American Assn. of Blood Banks* (1999) 75 Cal.App.4th 1358, 1373.) It is a choice that cannot be informed by foreseeability alone. "'[T]here are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for [an] injury.' [Citation.] In short, foreseeability is not synonymous with duty; nor is it a substitute." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 552; see also *Day v. Lupo Vine Street, L.P.* (2018) 22 Cal.App.5th 62, 70, quoting *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 476 [even when a risk is foreseeable, "'policy considerations may dictate (that) a cause of action should not be sanctioned'"].)

The general rule, squarely applying here, is that one owes *no duty* to control others' conduct so as to prevent them from harming third persons, even where there may be a right to control them. (*Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 933; *Davidson v. City of Westminster* (1982) 32

Cal.3d 197, 203 [one generally "owes no duty to control the conduct of another, nor to warn those endangered by such conduct"]; see also *Megeff v. Doland* (1981) 123 Cal.App.3d 251, 259 [conclusory allegations that defendants knew tortfeasor had propensity for violence insufficient as a matter of law].)[7]

This principle has been repeatedly applied to off-duty conduct by employees where the employer did not cause the employee's conduct or condition. For example, *D'Amico v. Christie* and *Henry v. Vann* (1987) 518 N.E.2d 896 [71 N.Y.2d 76]—two New York appeals decided together—reject Pryor's direct-employer-duty theory under indistinguishable facts and address the same question: whether employers "should be liable for injuries caused by the off-premises drunk driving of adult, off-duty employees who have consumed intoxicants." (*Id*. at p. 897.) Applying the same common law principles as California courts apply, New York's highest court held that an employer who orders an employee off the worksite owes no direct duty to users of the public highways who may later be injured by him. (*D'Amico*, *supra*, 518 N.E.2d at pp. 901-903.)

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[7] Plaintiff's claim of the employer's right to control is ironic here. Such a right consists of the employer's ability to discipline the employee up to and including terminating a shift or employment. But doing so, exercising its maximum control powers, is the exact employer conduct that plaintiff claims to be the neglect.

In *Henry*, the second of the consolidated appeals, a supervisor smelled alcohol on the employee's breath "and noticed his eyes 'did not look right,' so he told the employee "he was too intoxicated to perform his duties safely, fired him, and told him to leave the premises." (*Id.* at p. 898.) The supervisor then watched the employee walk out of the plant and get into his car to drive home. (*Ibid.*) The court rejected the claim made by the plaintiff injured in the ensuing vehicle accident that the supervisor's "independent act of directing or allowing [the employee] to drive while too intoxicated to work was negligent and a direct cause of the foreseeable accident that resulted in the [decedents'] deaths." (*Ibid.*) It did so even though plaintiffs asserted, comparably to here, that by firing the intoxicated employee instead of taking charge of him, the employer acted negligently. (*Id.* at p. 902.)

Henry rejected "the recognition of a third tier of responsibility—neither that of the person who himself consumed the [intoxicant] and operated the vehicle, nor that of the person who provided him with the [intoxicant], but that of an employer, for failing to control or supervise him after terminating his employment." (*Id.* at p. 901.) It did so, in part, because imposing such a duty would raise "vexing," unanswerable questions, as to an employer's responsibilities. (*Id.* at p. 902.) The employer's liability could not be limited to intoxication but would necessarily

include any physical or emotional condition unrelated to work that might impair driving—e.g., epilepsy, stomach flu, lack of sleep, emotional distress. But where does an employer's obligation stop? How far does an employer have to pry into its employees' private lives? Does it have to investigate employees who spend a long time in the restroom (the "notice" alleged here) to determine if it is drug use or a medical condition? The open-ended nature of the proffered duty, a duty at odds with centuries of law, counsels against creating it.

The same conclusion is reached in *Riddle v. Arizona Oncology Services, Inc.*, *supra*, 924 P.2d 468, a mirror image of this case—procedurally, legally, and factually—other than substituting cocaine for heroin. Like this case, it was decided at the pleading stage. The plaintiff's material allegations were virtually exact to Pryor's:

(1) The employee "had a history of drug abuse which was known" to the employer. (*Id*. at p. 469.)

(2) The employee arrived to work "high on cocaine," and she "consumed additional cocaine while at work." (*Ibid*.) "She was conspicuously intoxicated and incapable of performing her work duties." (*Ibid*.)

(3) Her "intoxication was not caused, contributed to or condoned" by the employer. (*Id*. at p. 472.)

(4) Based on her "condition and severely impaired motor function," her employer "ordered" her to leave the premises "before the end of her work shift" as a radiology technician. (*Id*. at p. 469)

(5) The employer "knew or should have known" that the employee "could not safely operate a vehicle in her intoxicated condition." (*Id*. at pp. 469-470.)

(6) "In compliance with her employer's order" the employee "left work." (*Id*. at p. 470.)

(7) Shortly after leaving the premises, the employee drove her vehicle across the centerline colliding head-on with plaintiff's vehicle and seriously injuring him. (*Ibid*.)

(8) The accident occurred "during [the employee's] normal work shift." (*Ibid*.)

(9) There was no allegation that the employer ordered or required the employee to drive. (*Id*. at p. 472.)

Change only the names, substance abused, and job title and *Riddle* is this case.

Like Pryor here, the plaintiff in *Riddle* argued that because the accident occurred shortly after the employee left the workplace, and the accident occurred "during her regular work shift," which was cut short by the employer, the employer owed a direct duty of care to the injured plaintiff. (*Ibid*.) *Riddle* held

that an employer cutting the workday short "makes no difference in resolving the duty issue[.]" (*Ibid.*) "For all practical purposes, [the employee's] shift terminated, albeit prematurely, when she was told to leave." (*Ibid.*) The same is true here: LA Fitness terminated Guidroz's work-shift, ending his workday.

Exactly like the employer in *Riddle*, the LA Fitness club manager simply instructed Guidroz "to leave the premises because of h[is] intoxicated condition and inability to work." (*Ibid.*; see 1AA 153 ¶3, 157 ¶¶16-18.) LA Fitness neither furnished Guidroz with the intoxicants nor the vehicle. LA Fitness neither suggested the mode of transportation nor where Guidroz should go upon leaving. Guidroz was an adult, responsible for himself. Under these circumstances, LA Fitness had no duty to control Guidroz's actions or to prevent him from operating a vehicle. (See *Riddle*, at p. 472.)

Pryor cites *no* case, in California or elsewhere, imposing a duty on an employer to control the conduct of an off-duty employee, even an intoxicated one, where the employer did not cause the employee's condition and the conduct did not arise out of work-related activity.

B. A public policy analysis confirms that an employer does not owe the duty plaintiff claims.

Pryor premises her novel duty theory on the broad principles in *Rowland v. Christian* (1968) 69 Cal.2d 108, and other vague "public policy" standards. (AOB 41-49.) But the proffered new direct-liability duty generates more "public policy" evils than it solves and raises more questions than it answers. Duty is not something formulated for a particular sympathetic case. It is a legal directive as to how persons—here employers—are to act. Foreseeability is not enough, especially where the true cause and instrumentality of harm is someone else. (See *Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077, 1096-1097 [regardless of foreseeability, a church or business owes no duty to create a safe crossing of a public street from a designated parking lot; the moral blame attaches to the errant driver who hits a pedestrian].) Here, the proffered new employer duty creates a web of public policy conundrums:

1. If an employer hires, or knows of, an alcoholic or drug-addicted employee or even one that occasionally uses drugs or alcohol, does the employer have to vet each such employee at the end of each work day?

2. What right does an employer have to force a possibly-intoxicated employee whose shift has ended to remain

on the premises until he sobers up? (See AOB 45, fn. 14.) Isn't that false imprisonment?

3. In keeping the employee on the premises until the employer thinks it's safe to let the employee leave, does the employer have to pay the employee at the requisite hourly rate while the employee sobers up? What if the intoxication is discovered at the end of the workday? Is the employer precluded from closing until the employee is no longer impaired?

4. If the employer calls a taxi or Uber for the impaired employee, is the employer liable if the employee assaults the driver? Is the employer liable to the employee if the driver has an accident injuring the employee?

5. If the employer has a duty to call first responders (police, EMTs) to prevent a potentially impaired employee from driving, what effect will that have on the availability of emergency services?

There are undoubtedly more questions. But what these demonstrate is that imposing on employers this ill-defined new duty would have broad ramifications. It would require a significant expense for employers throughout California to re-train supervisors to have highly-specialized social-worker or drug-counselor skills, which may not be the supervisors'

strengths. It would impose liability on an innocent employer that did nothing to direct, encourage, or condone the dangerous behavior.

Pryor gives short shrift to the public policy factors crucial to the duty analysis (AOB 46-49), such as "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 of insurance. (See *Verdugo v. Target Corp.* (2014) 59 Cal.4th 312, 338-339 [burden on businesses negates all but "high degree" of foreseeability; no duty by retail store to maintain defibrillator on hand in case of a customer heart attack]; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 679-680 [no duty to protect patron from third-party crime absent prior similar incidents].) All of the factors weigh in favor of imposing no duty on LA Fitness:

- LA Fitness is not morally blameworthy in employing someone with a substance abuse problem. The moral blame falls squarely on the intoxicated driver who knowingly drove while under the influence of drugs. (See *Vasilenko*, *supra*, 3 Cal.5th at p. 1091; *Sakiyama v. AMF Bowling Centers, Inc.* (2003) 110 Cal.App.4th 398,

410 [moral blame fell on teenage drug users, not on premises who rented ice-skating rink for rave party].)

- LA Fitness had no right to control its employee after he left the jobsite. The off-duty employee was in the best position to prevent the harm that occurred. (*Vasilenko*, at pp. 1084-1087, 1091; *Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 494 ["those who have the right to control the employee's activities at any given time are in the best position to predict, evaluate, absorb, and reduce the risk that these activities will injure others"].)
- As the trial court held, imposing a duty in circumstances such as these would create an extreme burden on employers. (2AA 273.) Pryor's new duty would be triggered anytime employers "should know" the cause of employees' impairment, so employers would be "required to medically assess all employees before they leave the premises due to illness or any other circumstances which might cause impairment ...." (*Ibid.*)
- The tort system contemplates that drivers driving on personal business are liable for causing injuries to others while driving, which is why drivers are required to carry liability insurance. (*Vasilenko*, *supra*, 3 Cal.5th at p. 1091.)

Pryor cites *Kesner v. Superior Court* (2016) 1 Cal.5th 1132 (see AOB 42-45). But *Kesner* creates no duty here. *Kesner* recognizes a narrowly targeted duty—an exception to the normal no-duty rule—owed to a very small slice of the public. In *Kesner*, plaintiffs developed mesothelioma after exposure to asbestos fibers brought home on relatives clothing from jobs using asbestos. (*Id.* at p. 1141.) *Kesner* found a duty, but limited it to the employee's household members, a small slice of the public. (*Id.* at p. 1155.)

Kesner does not create a new rule that foreseeability is the sole determinant of duty. If it did, the Supreme Court would not have months later decided *Vasilenko v. Grace Family Church*, *supra*, 3 Cal.5th 1077, how it did. Rather, *Kesner* was premised on unique circumstances: (1) employees who worked with or around asbestos and who "carr[ied] asbestos fibers home with them" (an employment-generated risk), and (2) the class to whom the duty was owed was limited to "members of their household." (*Id.* at p. 1145.) It is nothing like this case. Guidroz's impairment had nothing to with his job. His physical presence at the LA Fitness club did not create the drug-induced risk of him driving while intoxicated. (See *Lisa M.*, *supra*, 12 Cal.4th at p. 298 [alleging time and place proximity is insufficient].) The plaintiff here is not one of a small category of members of the public, but a member of the public at large.

In pursuit of creating a new duty, the opening brief also cites unalleged sources plucked from the Internet: (1) a blog posted on the social-media website LinkedIn, purportedly written by an Arizona employment attorney, and (2) a blog posted by a non-lawyer employment-relations journalist. (See AOB 30 & fns. 9-10.) Pryor asserts that these unvetted, unscientific, cherry-picked, hearsay opinions somehow reflect accepted "'standards of practice'" in California or establish foreseeability of "workplace impairment." (AOB 21, fn. 3, 30 & fn. 9.) Not so. *Courts*—and *not* out-of-context Internet blogs—decide whether legal duties exist. (See *People v. Stamps* (2016) 3 Cal.App.5th 988, 996 ["The Internet 'provides no way of verifying the authenticity' of its contents and 'is inherently untrustworthy. Anyone can put anything on the Internet. No web-site is monitored for accuracy and *nothing* contained therein is under oath or even subject to independent verification absent underlying documentation,'" original italics].)

The "public policy" factors here, especially the burden to be imposed and the lack of moral blame that attaches to the employer of the surreptitiously drug-using employee, counsel against creating the novel duty Pryor seeks.

C. Plaintiff has no claim for negligent supervision or negligent hiring/retention.

Nor does LA Fitness owe a direct duty to the public at large to investigate its employees' drug use (or other proclivities to dangerous driving) before hiring them in non-driving jobs or to supervise or warn about the employees' extracurricular conduct.

An employer owes no duty to strangers as to how it hires or supervises its employees. *DeVillers v. County of San Diego* (2007) 156 Cal.App.4th 238, cited in the opening brief (AOB 26), perfectly illustrates this principle. There, an employee of the County's Office of the Medical Examiner stole toxic chemicals from the job and used them to poison her husband. (*DeVillers*, at pp. 245-247.) The husband's heirs claimed that the County had negligently hired the employee, failed to discover her drug-addicted history, and negligently supervised her allowing her to steal the chemicals. (*Id.* at p. 247.) The Court of Appeal rejected the claim: "As a general rule, citizens do not have a duty to prevent criminal attacks by third parties. [Citation.] Although an exception might exist when the citizen bears some special protective relationship *to the victim and* has *actual* knowledge of the assaultive propensities of the criminal actor, a citizen 'cannot be liable under a negligent supervision theory ... based solely on constructive knowledge or information they should have known.'" (*Id.* at p. 249, italics added.)

Intoxicated driving is not murder (although it is criminal; Guidroz was convicted of vehicular homicide and is serving time), but the principle is the same. Absent a special relationship with the victim, an employer owes no legal duty to stop an intoxicated or otherwise impaired person from driving on their own time.

The trial court's stated reasons why Pryor cannot, as a matter of law, allege her direct-liability claims were spot-on: (1) LA Fitness and the decedent had no special relationship; (2) "the incident occurred when Guidroz was off-duty and off [LA Fitness's] premises"; (3) Guidroz's taking illegal drugs and becoming intoxicated was "personal in nature," and a deviation from his employment duties; (4) Pryor cannot allege facts supporting a finding that Guidroz's alleged drug use and intoxication was (a) "customary or incidental to his employment," (b) an "outgrowth" of his employment duties, (c) "inherent in the working environment as a sales associate," or (d) "a foreseeable consequence of his employment." (2AA 272.)

There's another problem too. To establish negligent supervision, hiring or retention, "a plaintiff must show that a person in a supervisorial position over the actor had prior knowledge of the actor's propensity to do the bad act." (*Z.V.*, *supra*, 238 Cal.App.4th at p. 902.) Here, the bad act was hitting a bicyclist while driving intoxicated on illegal drugs. (See 1AA 159 ¶22, 166 ¶¶51-53, 167-168 ¶¶57-60.) That means Pryor

needs to have alleged sufficient facts to establish that LA Fitness knew or should have known that Guidroz "had a propensity for causing automobile collisions while driving under the influence" of heroin. (*Costa v. Able Distributors, Inc.* (1982) 653 P.2d 101, 105 [3 Haw.App. 486, 490].) Pryor alleges no such knowledge. Nor does she allege that LA Fitness knew of any prior accidents or arrests where Guidroz was driving while intoxicated. That omission is fatal to her negligent supervision and hiring/retention claims. (*Ibid.*)

The judgment dismissing the direct-liability claims must be affirmed.

III. The Survival Claim Has No Independent Basis.

Plaintiff's survival claim (the sixth cause of action) piggybacked on the other allegations of vicarious or direct liability. It alleged no independent basis for liability. If the vicarious and direct-liability claims fail, so does the survival claim. (*Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 858.)

IV. The Opening Brief's Failure To Proffer How The Complaint Could Be Amended To State A Cause Of Action Waives Any Claim That Leave To Amend Should Have Been Afforded.

Pryor had three opportunities to plead legally sufficient claims. (See 1AA 10-57, 152-171.) Her failure to do so, after multiple attempts, justifies the trial court's order sustaining LA Fitness's demurrers without leave to amend. (See *Ruinello v. Murray* (1951) 36 Cal.2d 687, 690 [trial court did not abuse its discretion in sustaining demurrer without leave to amend, concluding plaintiff would be unable to overcome deficiencies raised in demurrers].) "Where plaintiffs fail to allege a cause of action after numerous, successive attempts and without overcoming the same grounds for demurrer, the natural, probable and reasonable inference is that they are, under the circumstances, incapable of amending the pleadings to allege a good cause of action." (*Archuleta v. Grand Lodge etc. of Machinists* (1968) 262 Cal.App.2d 202, 210.)

Pryor bore the burden—both in the trial court and on appeal—to show in what manner her complaint could be amended with additional facts to state her claims and, equally important, how such amendments would change the legal effect of the pleading. (*Goodman*, *supra*, 18 Cal.3d at p. 349; *Hendy v. Losse* (1991) 54 Cal.3d 723, 742-743.) It is not up to the trial

court or appellate court to figure that out. (*Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 322.)

Pryor has *never* explained how she could amend the complaint to state viable claims if the court granted leave to amend. (See 1AA 90; 2RT 1-25, 301-303.) The opening brief likewise references no supplemental facts either already proffered or that might be proffered, that would justify granting leave to amend. Presumably, the second amended complaint contains the best facts that Pryor could allege.

The opening brief doesn't even assert that the trial court abused its discretion in denying leave to amend. Any argument that the trial court abused its discretion in denying leave to amend, thus, is waived. (See *Goodman*, *supra*, 18 Cal.3d at p. 349 [affirming sustaining of demurrer without leave to amend because plaintiffs failed on appeal to suggest pleadable facts that would survive demurrer].) Reply will be too late.

The opening brief's passing footnote reference to the leave to amend standard is insufficient. (See AOB 22, fn. 4 [noting the leave to amend standard, but failing to proffer new potential allegations]; *Kunec v. Brea Redevelopment Agency* (1997) 55 Cal.App.4th 511, 526, fn. 9 [‘“passing reference”” in brief “does not suffice to establish a legal argument”] *Stoll v. Shuff* (1994) 22 Cal.App.4th 22, 25, fn. 1 [passing reference to issue in opening brief footnote deemed not “serious effort to raise” issue on appeal

and waived]; Cal. Rules of Court, rule 8.204(a)(1)(B) [every point must be under a separate, enumerated heading and supported by argument].) And even if a footnote reference might suffice, this one does not. It fails to reveal *any* additional fact that might be pleaded. (See *Goodman*, *supra*, 18 Cal.3d at p. 349.)

The court was well within it discretion in denying leave to amend given the lack of any proffered additional fact.

CONCLUSION

After multiple tries, the facts that Pryor alleged not only failed to state either a vicarious- or direct-liability claim against LA Fitness, they affirmatively negated any such claim. The complaint acknowledges that there is no connection between the employee's conduct, his particular job selling health club memberships, and the fatal accident he caused. An employee's on-the-job illegal drug use is a quintessential personal deviation from pursuing the employer's ends. His post-shift-termination drive falls squarely within the classic going-and-coming rule. An employer owes no duty to the public at large regarding an employee's conduct outside the scope of employment.

There is no set of facts—certainly none ever identified—that would change this result. Accordingly, the trial court acted well within its discretion in denying leave to amend.

The judgment should be affirmed.

Date: September 11, 2018

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **RESPONDENT'S BRIEF** contains **13,821** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: September 11, 2018 /s/ Gary J. Wax

Gary J. Wax

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On September 11, 2018, I served the foregoing document described as: **RESPONDENT'S BRIEF** on the parties in this action by serving:

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(X) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/ Leslie Y. Barela
Leslie Y. Barela