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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

STEPHEN HOLBROOK et al.,
Plaintiffs and Appellants,

v.

TOWN OF MORAGA,
Defendant and Respondent.

A143035

(Contra Costa County
Super. Ct. No. MSC11-02194)

In this personal injury action, Stephen and Elizabeth Holbrook (collectively, plaintiffs) appeal the trial court’s order granting summary judgment to defendant Town of Moraga (Town). We affirm.

BACKGROUND¹

About 8:30 p.m. on July 4, 2010, plaintiffs, Kathleen Bjornstad, and Benjamin Bjornstad left plaintiffs’ home to watch the fireworks.² Stephen, who has been unable to

¹ “Because this is an appeal from a summary judgment, we draw the following facts from the moving and opposition papers in connection with defendants’ motion for summary judgment. We accept all facts listed in defendants’ separate statement that plaintiffs did not dispute. We also accept all facts listed in defendants’ separate statement that plaintiffs *did* dispute, to the extent that (1) there is evidence to support them [citation], and (2) there is no evidence to support the dispute [citation]. Finally, we accept all facts listed in plaintiffs’ separate statement, to the extent that there is evidence to support them. [Citation.] We disregard any evidence not called to the trial court’s attention in the separate statement of one side or the other, except as necessary to provide nondispositive background, color, or continuity.” (*Doe v. California Lutheran High School Assn.* (2009) 170 Cal.App.4th 828, 830–831.)

walk since the mid-1990s, drove his mobility scooter and the others walked. When they left, it was still light outside.

Plaintiffs had been going to the fireworks display for more than ten years, and every year they took the same route. This route included a stretch of Moraga Way running east-west where a sidewalk starts in the middle of the block and continues east. A permanent barricade marked with orange reflectors is located at the west end of the sidewalk. A concrete curb ramp is present shortly after the sidewalk begins, requiring a 90 degree approach. The ramp has neither a contrasting color or detectable raised bumps on its surface to distinguish it from the rest of the sidewalk. In addition to these permanent features, on this night there was a temporary “sawhorse” barricade, approximately five feet long with yellow-orange reflective material, located in the street approximately 10 to 20 feet west of the ramp. The Town placed such temporary barricades to prevent parking along Moraga Way for the fireworks. As the party proceeded east on Moraga Way, they initially walked on the side of the road then moved to the sidewalk when it began. Stephen drove his scooter up the ramp without incident. They continued further, then stopped and watched the fireworks.

After the fireworks, Benjamin led the way back followed by Stephen, with Elizabeth and Kathleen last. Kathleen lost sight of Benjamin and Stephen before they reached the end of the sidewalk; at this time she also saw a police car driving west on Moraga Way. As Benjamin approached the end of the sidewalk, he saw the temporary barricade had been moved onto the ramp, perpendicular to the sidewalk, and a car was parked where the barricade had been. A nearby streetlight was not functioning and the area was darker than it had been in previous years. Benjamin stopped next to the temporary barricade on the ramp. He saw Stephen stop, rotate left so that he was 90 degrees to the street, and then drive off the sidewalk. Stephen fell in the street approximately eight feet east of the ramp. Stephen suffered multiple injuries in the fall,

² For convenience, we refer to Stephen and Elizabeth Holbrook and Kathleen and Benjamin Bjornstad by their first names. No disrespect is intended.

including a concussion and brain injuries. He has no memory of seeing the ramp or of how the accident occurred.

Plaintiffs sued the Town, asserting causes of action for a dangerous condition of public property (Govt. Code, § 835)³ and loss of consortium.⁴ The operative first amended complaint alleges the Moraga Way sidewalk and street constituted a dangerous condition because of the placement of the temporary barricade in the ramp; poor design of the ramp, sidewalk, and street; and inadequate lighting. The Town moved for summary judgment, arguing the undisputed facts fail to show either a dangerous condition existed, any dangerous condition caused plaintiffs' injuries, or the Town had notice of any dangerous condition. The trial court granted summary judgment to the Town. This appeal followed.

DISCUSSION

“ ‘A motion for summary judgment “shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” [Citation.] In considering a request for summary judgment by a defendant, the statute instructs that such a party “has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.” [Citation.] An appellate court reviews de novo a trial court’s decision to grant a summary judgment motion.’ ” (*Mixon v. Pacific Gas & Electric Co.* (2012) 207 Cal.App.4th 124, 130 (*Mixon*).

“The Government Claims Act (§ 810 et seq.; the Act) ‘is a comprehensive statutory scheme that sets forth the liabilities and immunities of public entities and public

³ All undesignated section references are to the Government Code.

⁴ Additional defendants and causes of action are not at issue on this appeal.

employees for torts.’ [Citation.] Section 835, the provision of the Act at issue in this case, prescribes the conditions under which a public entity may be held liable for injuries caused by a dangerous condition of public property. [Citation.] Section 835 provides that a public entity may be held liable for such injuries ‘if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, [and] that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred.’ In addition, the plaintiff must establish that either: (a) ‘[a] negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition . . . ,’ or (b) ‘[t]he public entity had . . . notice of the dangerous condition . . . a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.’ [Citation.] [¶] The Act defines a “[d]angerous condition” as ‘a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.’ [Citation.] Public property is in a dangerous condition within the meaning of section 835 if it ‘is physically damaged, deteriorated, or defective in such a way as to foreseeably endanger those using the property itself.’ ” (*Cordova v. City of Los Angeles* (2015) 61 Cal.4th 1099, 1104–1105 (*Cordova*).

Plaintiffs contend three characteristics rendered the area a dangerous condition: the temporary barricade, the design of the ramp, and the inadequate lighting. Plaintiffs’ theory is that Stephen mistook the temporary barricade placed in the curb ramp with the permanent barricade marking the end of the sidewalk, estimated the location of the ramp based on his assumption that the temporary barricade was the permanent barricade, and therefore misjudged the location of the ramp. Plaintiffs contend if the ramp was marked with either a color or texture that contrasted with the sidewalk—a “detectable warning”—Stephen would have realized his mistake before he drove off the sidewalk. In addition, plaintiffs claim the accident would not have happened if the area had been adequately lit because Stephen would have been able to determine that the temporary barricade was not

the permanent barricade and/or that the ramp was not where he thought it was. We consider each of these characteristics in turn.

I. *Temporary Barricade*

Because plaintiffs do not contend a Town employee placed the temporary barricade in the ramp, they must show the Town “ ‘had . . . notice of the dangerous condition . . . a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.’ ” (*Cordova, supra*, 61 Cal.4th at p. 1105.)

The Town submitted evidence it had no knowledge the temporary barricade had been moved to the ramp. Plaintiffs argue this fact is disputed, pointing to Kathleen’s testimony that she saw a police car driving west on Moraga Way, toward the ramp, shortly before the incident. Plaintiffs contend this evidence gives rise to the inference that the police saw the temporary barricade had been moved into the curb ramp. Undisputed evidence shows that at this time, the area around the ramp was dark, there was no contrasting color marking the ramp’s location, and pedestrians were walking in the same street the police car was driving down.

“ ‘[W]hen opposition to a motion for summary judgment is based on inferences, those inferences must be reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork.’ ” (*Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1298–1299.) “Where, as here, the plaintiff seeks to prove an essential element of her case by circumstantial evidence, she cannot recover merely by showing that the inferences she draws from those circumstances are *consistent* with her theory. Instead, she must show that the inferences favorable to her are *more reasonable or probable* than those against her. [Citations.] . . . [A plaintiff] cannot survive summary judgment simply because [the inference] is *possible . . .*” (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483.) The inference proposed by plaintiffs, while possible, is too speculative to create a triable issue of fact given the low visibility and competing demands on the police’s attention.

Plaintiffs alternatively argue the Town was negligent in leaving the temporary barricades unattended because “[i]t was foreseeable that if the area was left unguarded

people would attempt to park at this location, and that the ‘No Parking’ signs would be moved. Defendant testified that movement of the barricades had been a problem in the past, and this was one of the reasons why it did inspections.” However, the testimony plaintiffs cite in support of this proposition states only that there had been “incidents where some of them [the barricades] had got pushed over.” The Town’s experience with barricades being pushed over did not render it foreseeable that an unattended barricade would be moved 10 to 20 feet onto a curb ramp.

Because plaintiffs have not shown a triable issue of material fact that the Town had notice of the temporary barricade in the ramp or acted negligently in leaving the temporary barricades unattended, the Town cannot be held liable for the consequences of someone having moved the barricade onto the ramp.

II. *Poor Ramp Design*

Plaintiffs argue the ramp design—specifically, the lack of detectable warnings—constituted a dangerous condition.⁵

As discussed above, a dangerous condition is one that “ ‘creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.’ ” (*Cordova, supra*, 61 Cal.4th at p. 1105 [quoting § 830].) “[T]he

⁵ At times in their briefs, plaintiffs also claim the ramp was dangerous because it was located at a 90 degree angle to the sidewalk and had an excessive slope. However, plaintiffs have not argued these characteristics caused Stephen’s fall. Specifically, in the portion of their opening brief regarding causation, plaintiffs argue: “The only differences between [Stephen’s] prior usage of the ramp and the time of the incident is that there was a temporary barrier in the ramp and there was a lack of lighting at the time of the incident. This suggests that the only reason the incident occurred was because of these added elements. The lack of detectable warning did not allow him to determine his position without the benefit of light.” Plaintiffs conclude: “Plaintiffs established that the area was in a dangerous condition due to the lack of detectable warning, the presence of the barrier and the lack of lighting and that the combination of these conditions were a substantial factor in the happening of the incident.” Accordingly, we do not consider whether the 90 degree angle and excessive slope constituted a dangerous condition. (*Cordova, supra*, 61 Cal.4th at p. 1105 [“a public entity may be held liable for injuries *caused by* a dangerous condition of public property,” italics added].)

intent of the statute is ‘to impose liability only when there is a substantial danger which is *not* apparent to those using the property in a reasonably foreseeable manner with due care.’ ” (*Mathews v. City of Cerritos* (1992) 2 Cal.App.4th 1380, 1384; accord, *Biscotti v. Yuba City Unified School Dist.* (2007) 158 Cal.App.4th 554, 558.) Accordingly, “premises liability may not be imposed on a public entity when the danger of its property is readily apparent.” (*Biscotti, supra*, at p. 560.)

The ramp may well have been difficult to locate, as plaintiffs claim. However, the aspect rendering it difficult—the lack of demarcation from the surrounding sidewalk by color or texture—is readily apparent to a person looking for a ramp to exit the sidewalk. Such a person might reasonably look to a landmark, such as the permanent barricade, to help locate the ramp. But even with the help of the permanent barricade (and setting aside any mistake in identifying the permanent barricade), a person would know only that he was in *approximately* the correct place. Because there are no detectable warnings clearly identifying the ramp’s location, a person exercising due care would still be very careful in approaching the approximate location of the ramp. For example, he might move toward the curb slowly so that he could see the ramp and ensure he was on it, or he might seek assistance from companions in identifying the correct location of the ramp. He would do more than simply find the ramp’s approximate location and exit the sidewalk. Because the lack of detectable warnings is readily apparent and does not create a substantial risk of injury when the ramp is used with due care, we conclude the lack of detectable warnings does not render the ramp a dangerous condition.

Huffman v. City of Poway (2000) 84 Cal.App.4th 975, relied on by plaintiffs, is distinguishable. In *Huffman*, an actor was injured after falling through a trapdoor on stage in a city theater. (*Id.* at pp. 980–981.) The actor knew the trapdoor was open behind him when he fell while performing new blocking–movements on stage—and singing during the first rehearsal with the trapdoors at this theater. (*Ibid.*) The actor argued there should have been a guardrail, spotter, or colored tape marking the location of the trapdoors. (*Id.* at p. 981.) The Court of Appeal reversed judgment notwithstanding the jury verdict for the city, concluding “[a] jury could infer these alerting mechanisms

are employed because even when ordinary performers exercising due care are aware of the location and dangers posed by the open trapdoors, they nevertheless need additional warning systems, *considering the conflicting demands on their attention.*” (*Id.* at p. 993, italics added.) The court emphasized that a factfinder could reasonably conclude a performer exercising due care would need more than just the awareness of the trapdoors, finding “a trier of fact could conclude that a reasonable performer was subjected to competing demands on his attention: he was present to rechoreograph existing blocking, he had to become acclimated to the impact that a new set of stage apron dimensions had on his preexisting choreography, and he was listening to the director and interacting with fellow performers. A trier of fact could weigh these competing demands on a reasonable performer’s attention in assessing whether a performer using due care would have been able to focus a substantial amount of his attention on locating openings obscured by the absence of highlighting mechanisms.” (*Id.* at p. 992, fn. 20.) Plaintiffs have not shown any similar competing demands on the attention of a person navigating the sidewalk curb ramp.⁶

III. *Inadequate Lighting*

Plaintiffs contend inadequate lighting resulting from the broken streetlight constituted a dangerous condition. “Plaintiffs’ argument is a variant of the claim that a public entity is negligent for failing to provide street lights—a claim that has long been rejected. A public entity is under no duty to light its streets. [Citation.] ‘ “In the absence of a statutory or charter provision to the contrary, it is generally held that a municipality is under no duty to light its streets even though it is given the power to do so, and hence, that its failure to light them is not actionable negligence, and will not render it liable in damages to a traveler who is injured solely by reason thereof.” ’ [Citations.] A duty to

⁶ The parties dispute whether the ramp was in violation of certain regulations requiring detectable warnings, in arguing whether the Town had notice of the condition of the ramp. Because we conclude the lack of detectable warnings did not constitute a dangerous condition, we need not decide this issue. We also need not decide whether the lack of detectable warnings caused plaintiffs’ injuries.

light, ‘and the consequent liability for failure to do so,’ may arise only if there is ‘some peculiar condition rendering lighting necessary in order to make the streets safe for travel.’ [Citation.] In other words, a prior dangerous condition may require street lighting or other means to lessen the danger but the absence of street lighting is itself not a dangerous condition.” (*Mixon, supra*, 207 Cal.App.4th at p. 133.)

Plaintiffs argue the ramp design constituted a “peculiar condition” obligating the Town to adequately light the area. As an initial matter, we note neither party has cited a case finding such a peculiar condition. Instead, the cited cases have uniformly found *no* peculiar condition. (*Mixon, supra*, 207 Cal.App.4th at p. 134 [no peculiar condition shown where “ ‘lighting configuration’ ” rendered “the areas before and after the intersection [where the plaintiffs were injured] . . . more brightly lit, making the intersection a more difficult to perceive ‘black hole’ ”]; *Plattner v. City of Riverside* (1999) 69 Cal.App.4th 1441, 1445 [no peculiar condition where the plaintiff had “not shown there was anything dangerous about the crosswalk other than the absence of light”]; *Antenor v. City of Los Angeles* (1985) 174 Cal.App.3d 477, 483–484 [no peculiar condition where other characteristics of intersection did not constitute dangerous condition]; *Sykes v. County of Marin* (1974) 43 Cal.App.3d 158, 164 [no duty to light parking lot where the plaintiff was robbed; “The fact that the parking area was not lighted is not the kind of dangerous condition contemplated by the Legislature in its legislation concerning defective or dangerous condition of public property.”].)

We have concluded the lack of detectable warnings on the ramp was not a dangerous condition, therefore, this characteristic did not require the Town to provide light. (*Mixon, supra*, 207 Cal.App.4th at p. 133.) Plaintiffs also argue the ramp’s 90 degree angle and excessive slope constituted a peculiar condition. As noted above, plaintiffs do not contend these characteristics caused Stephen’s fall. Plaintiffs have provided no authority for the proposition that a public entity is liable where the peculiar condition obligating the entity to provide light did not in fact cause the injury. We therefore decline to consider their contention that the 90 degree angle and excessive slope obligated the Town to light the ramp. (*Cahill v. San Diego Gas & Electric Co.* (2011)

194 Cal.App.4th 939, 956 [“ ‘The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived.’ ”].)

Plaintiffs also argue the lack of lighting can combine with other factors to create a dangerous condition, relying on *Hurley v. County of Sonoma* (1984) 158 Cal.App.3d 281 (*Hurley*). In *Hurley*, the Court of Appeal reversed summary judgment for the defendant, reasoning that a number of factors, including “the absence of lighting,” could “combine to create a dangerous condition” (*Id.* at p. 286.) *Hurley* is distinguishable. We have already concluded the Town is not liable for the temporary barricade. The lack of detectable warnings combined with inadequate lighting is still a condition that is readily apparent to a person trying to locate the ramp. Indeed, plaintiffs argue the ramp “was virtually indistinguishable from the sidewalk under regular lighting conditions,” which suggests the lack of lighting does not significantly increase the ramp’s danger. Again, a person using due care would move slowly toward the ramp to attempt to see it and, if the lack of light made it too difficult to see, he would seek assistance from his companions or wait for illumination from the headlights of a passing car. We conclude the lack of detectable warnings combined with the lack of lighting do not constitute a dangerous condition.

Plaintiffs have failed to show a triable issue of fact on the issue of inadequate lighting. Because of this conclusion, we need not decide whether the Town had actual or constructive notice that the streetlight was broken or whether the broken streetlight caused plaintiffs’ injuries.

IV. *Evidentiary Rulings*

Plaintiffs challenge multiple evidentiary rulings made by the trial court. We need not decide whether these rulings were error because, even assuming they were, the evidence would not change our decision. Plaintiffs’ expert’s opinion that the lack of detectable warnings and inadequate lighting constituted a dangerous condition does not alter our analysis, because “the fact that a witness can be found to opine that such a condition constitutes a significant risk and a dangerous condition does not eliminate this court’s statutory task, pursuant to section 830.2, of independently evaluating the

circumstances.” (*Davis v. City of Pasadena* (1996) 42 Cal.App.4th 701, 705.) Excluded evidence regarding the ramp’s 90 degree angle and excessive slope is not relevant because plaintiffs have not argued these characteristics caused Stephen’s fall. Evidence regarding causation related to the ramp’s design, regulations governing the ramp’s design, and the Town’s notice that the streetlight was not functioning are immaterial because we have concluded these issues need not be decided.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.

(A143035)