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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROBERT WAGNER et al.,

Plaintiffs and Appellants,

v.

CITY OF SAN DIEGO et al.,

Defendants and Respondents.

D058232

(Super. Ct. No. 37-2009-00096370-  
CU-PO-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Joan M. Lewis, Judge. Reversed.

The record here shows the decedent in this wrongful death case may have been walking on a trail which runs between a guardrail and a sheer cliff above the ocean when she fell from the cliff and was fatally injured. Because the trail was not part of a public street, the municipality which owns the trail argued in the trial court that it is immune from liability for her death as a matter of law. The trial court agreed with the municipality and granted its motion for summary judgment. We reverse.

Although the evidence in the record permits an inference the decedent was walking west of the guardrail and on the trail, the evidence also permits the inference the decedent was walking on the shoulder of a public street east of the guardrail when she tripped or fell over the guardrail and from there over the cliff. If a trier of fact accepted the later inference, the immunity the municipality asserts would not apply. Thus, in light of the conflicting inferences raised by the record, the trial court erred in finding the statutory immunity applied as a matter of law.

#### FACTUAL AND PROCEDURAL BACKGROUND

At the time of her death in November 2008, Kristan Wagner (Kristan) lived near the Sunset Cliffs Natural Park (the park), which is owned by defendant the City of San Diego (the city). Cliffs in the park are immediately west of Sunset Cliffs Boulevard and are separated from the street by 23-inch-high guardrails. Although a narrow trail runs between the guardrails and the edge of the cliffs, in areas the city believes are dangerous access to the trail from the street is barricaded with a chain and signs warn that the cliffs are unstable and dangerous. The chain barricades do not prevent members of the public from stepping over the chain or the guardrail and walking along the hazardous portions of the trail. Witnesses report that this is a common practice in the area.

The trail that is west of the guardrail was paved at one point with black top which over time has been worn down and in places has broken off where the cliff has eroded leaving relatively large gaps in the trail.

Kristan frequently walked along the cliffs at the park. At approximately 5:30 p.m. on November 29, 2008, Kristan left her home to once again walk or run along the cliffs in the park. She dressed in exercise apparel and sent a text message to a friend telling him she was going out for an evening run. Later that evening the friend sent her further texts and she did not respond; when another friend went to Kristan's house, the friend found the lights on, candles burning and Kristan's purse. Due to heavy fog in the area the following morning, the beach below the cliffs was not visible until the early afternoon of November 30, 2008. At that point, passersby saw Kristan lying motionless on the beach just below the 800 block of Sunset Cliffs Boulevard. The trail along the cliffs above where Kristan was found is one that was barricaded with a chain by the city and where the city posted signs warning the public the cliffs are dangerous.

Emergency response personnel from the city found Kristan on the beach and determined she died from an apparent 40- to 50-foot fall off the cliffs. A medical examiner at the scene noticed multiple fractures to her left arm and bruises and abrasions on her forehead, back and buttocks.

At the top of the cliffs above the area where Kristan was found, the medical examiner found that blacktop had eroded leaving open gaps in the trail on the west side of the guardrail. The medical examiner also observed shrubbery on the west side of the guardrail which the examiner believed might have obstructed a pedestrian's view of the gaps in the trail. From the point above where Kristan was found, the examiner looked over the cliff and found that the dirt was loose and there were no outcroppings a person who fell could grab.

The medical examiner found no evidence Kristan was on the east side of the guardrail on Sunset Cliffs Boulevard when she fell: there was no blood in the street and no damage to the guardrail. A later autopsy concluded Kristan died from multiple blunt force injuries. The expert who performed the autopsy did not find any evidence Kristan tripped over the guardrail and then fell to her death.

Kristan's parents, plaintiffs and appellants Robert Wagner and Marie Wagner (the Wagners), filed a wrongful death complaint against the city. After conducting discovery, the city moved for summary judgment. The city argued the evidence showed Kristan fell while walking or running on the trail between the guardrail and the cliff and that because the trail was not part of the street and was in its natural condition, the city was immune from liability under the provisions of Government Code sections 831.2 and 831.4. The trial court agreed with the city and granted the city's motion. Following entry of judgment, the Wagners filed a timely notice of appeal.

## DISCUSSION

### I

The standard of review on appeal from a judgment entered on an order granting summary judgment is familiar. "In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court's determination of a motion for summary judgment." (*Lenane v. Continental Maritime of San Diego, Inc.* (1998) 61 Cal.App.4th 1073, 1079.) Thus, on appeal we determine whether the party opposing the motion has shown the existence of a triable, material factual issue. (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 832.) We "liberally construe

plaintiffs' evidentiary submissions and strictly scrutinize defendants' own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiffs' favor." (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) However, in order to prevail, the party opposing the motion must set forth "specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(1).)

In *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826 (*Aguilar*), the Supreme Court established that in order to prevail on a motion for summary judgment a defendant need not conclusively negate an element of the plaintiff's cause of action. Rather, in accordance with federal law: "All that the defendant need do is to 'show[ ] that one or more elements of the cause of action . . . cannot be established' by the plaintiff. [Citation.] In other words, all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action—for example, that the plaintiff cannot prove element X. Although he remains free to do so, the defendant need not himself conclusively negate any such element—for example, himself prove not X." (*Aguilar, supra*, 25 Cal.4th at pp. 853-854, fns. omitted.)

In meeting his or her burden, a defendant must present evidence, in the form of affidavits, declarations, admissions, answers to interrogatories, depositions or matters of which judicial notice must be taken. (*Aguilar, supra*, 25 Cal.4th at p. 855; Code Civ. Proc., § 437c, subd. (b).)

In addition to presenting evidence which negates an element of plaintiff's cause of action, "[t]he defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence—as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (*Aguilar, supra*, 25 Cal.App.4th at p. 855, fn. omitted.)

Once a defendant has met his or her burden of showing that a cause of action has no merit, " '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. The plaintiff . . . may not rely upon the mere allegations of denials' of 'his pleadings to show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.' " (*Aguilar, supra*, 25 Cal.4th at p. 849.)

The plaintiff's burden in defeating a motion for summary judgment is only a burden of production and only a burden of making a prima facie showing of a triable issue of fact. (*Aguilar, supra*, 25 Cal.4th at p. 850.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at p. 851.)

Importantly, the plaintiff can defeat a defense motion for summary judgment by showing "the defense evidence itself permits conflicting inferences as to the existence of the specified fact." (*Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 756-757.) "The dispositive question in all cases is whether the evidence before the court, viewed as a whole, permits *only* a finding favorable to the defendant with respect to one or more

necessary elements of the plaintiff's claims—that is, whether it negates an element of the claim 'as a matter of law.' [Citation.]" (*Ibid.*, italics added.)

## II

In the trial court and again on appeal the Wagners argue the path west of the guardrail was part of Sunset Cliffs Boulevard and hence not protected by the immunity provided by either Government Code section 831.2 or Government Code section 831.4.<sup>1</sup> We reject this classification of the path west of the guardrail.

We recognize sidewalks are parts of streets and highways. (See *In re Devon C.* (2000) 79 Cal.App.4th 929, 933.) However, the path west of the guardrail is not a sidewalk appurtenant to Sunset Cliffs Boulevard within the meaning of Vehicle Code section 555. Vehicle Code section 555 defines sidewalks as that portion of a highway

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<sup>1</sup> Government Code section 831.2 states: "Neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach."

Government Code section 831.4 provides in pertinent part:

"(a) Any unpaved road which provides access to fishing, hunting, camping, hiking, riding, including animal and all types of vehicular riding, water sports, recreational or scenic areas and which is not a (1) city street or highway or (2) county, state or federal highway or (3) public street or highway of a joint highway district, boulevard district, bridge and highway district or similar district formed for the improvement or building of public streets or highways.

"(b) Any trail used for the above purposes.

"(c) Any paved trail, walkway, path, or sidewalk on an easement of way which has been granted to a public entity, which easement provides access to any unimproved property, so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of any condition of the paved trail, walkway, path, or sidewalk which constitutes a hazard to health or safety. Warnings required by this subdivision shall only be required where pathways are paved, and such requirement shall not be construed to be a standard of care for any unpaved pathways or roads."

delineated for pedestrian travel by curbs, barriers or markings. We note that the path where Kristan fell is not only physically separated from Sunset Cliffs Boulevard by the guardrail, but that the chain barricade and warning signs the city has placed at either end of the path expressly discourage its use as a walkway. In light of those undisputed conditions, it cannot be said that the path was delineated "for pedestrian travel."

We reject the Wagners' additional contention a street or highway is defined by the scope of a governmental entity's right-of-way. The Wagners cite no authority for this proposition. In this regard we note the immunity provided by Government Code section 831.4 was enacted to "encourage public entities to open their property for public recreational use, because 'the burden and expense of putting such property in a safe condition and the expense of defending claims for injuries would probably cause many public entities to close such areas to public use.'" (*Armenio v. County of San Mateo* (1994) 28 Cal.App.4th 413, 417.) There are no doubt innumerable instances where governmental entities have left portions of their rights-of-way unused and available to the public for recreational use. Thus defining a street as coterminous with a right-of-way would undermine the express purposes of section 831.4.

### III

Contrary to the Wagners' argument in the trial court and on appeal, the city placed Kristan's location at the time she fell in issue when it made its motion for summary judgment. The city's statement of undisputed facts included No. 66, in which the city asserted: "[Kristan] died when she fell from the cliffs west of Sunset Cliffs Boulevard." In its memorandum of points and authorities the city consistently asserted that Kristan

was in the barricaded area, west of the guardrail, when she fell. However, we agree with the Wagners the record does not establish that fact as a matter of law.

The record shows without contradiction that Kristan was found on the beach 40 to 50 feet below the 800 block of Sunset Cliffs Boulevard. Photographs in the record show without contradiction that the path west of the guardrail is very narrow and dangerous and most significantly that any person who tripped or slipped on the path west of the guardrail was quite likely to fall all the way down to the beach because there is nothing on the west side of the guardrail which would prevent such a fall. The record also shows that, notwithstanding barricades at either end of the trail, signs warning of the hazardous nature of the cliffs, and the guardrail, it is a common and frequent practice for pedestrians in the area to walk on the west side of the guardrail.

The record also contains the observations of the medical examiner present at the scene when Kristan's body was found. At points above where Kristan was found and west of the guardrail the medical examiner saw gaps in the trail where blacktop had eroded, leaving a sheer 40- to 50-foot drop to the beach. The examiner also observed shrubbery which she believed might have obstructed the ability of pedestrians to see the gaps in the trail.

The photographic evidence and the observations of the medical examiner plainly support an inference Kristan was walking on the west side of the guardrail, stepped into one of the gaps in trail on the west side of the guardrail and tragically fell to her death. However, the evidence presented by the city does not permit *only* a finding favorable to the city. The location of where Kristan was found also permits an inference that instead

of falling while walking on the trail west of the guardrail, Kristan was either walking east of the guardrail, was frightened by a car and fell over the guardrail or was sitting on the guardrail and fell over backwards. Because these conflicting inferences are certainly within the realm of possibility and not excluded in any sense by the evidence presented by the city, the city did not establish Kristan's location at the time of her fall as a matter of law.

#### IV

Because the city did not establish Kristan's location as a matter of law, it did not show that it was entitled to immunity as a matter of law. Neither Government Code section 831.2 nor Government Code section 831.4 provides immunity for defects in public streets.<sup>2</sup> If a trier of fact determines Kristan was east of the guardrail when she fell, on the shoulder of Sunset Cliffs Boulevard, neither immunity would apply. Thus the trial court erred in granting the city's motion for summary judgment.

We hasten to point out the limits of our holding. As we have noted, the record supports an inference that Kristan in fact fell west of the guardrail in an area that appears to be a trail within the meaning of section 831.4.<sup>3</sup> Thus, although the city has not established its right to immunity as a matter of law, on this record a *trier of fact* could

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<sup>2</sup> *Ante*, fn. 1.

<sup>3</sup> As we have noted, the city has taken measures to warn the public about the dangers of using the path, including a chain barricade and posting signs warning pedestrians about the eroding cliffs. Nonetheless it appears to be a path which allows pedestrians to view the scenic opportunities provided by the park. (Gov. Code, § 831.4, subd. (b).)

reasonably conclude Kristan was west of the guardrail when she fell and the city is therefore immune from liability. Moreover, even without regard to any immunity, the Wagners bear the burden of showing that a dangerous condition of the city's property caused Kristan's death. (Gov. Code, § 835.) Because the city's motion was based on its immunity claim, nothing in the record on appeal shows what, if any, dangerous condition on the east side of the guardrail caused Kristan's death.

#### DISPOSITION

The judgment is reversed. The Wagners to recover their costs of appeal.

BENKE, Acting P. J.

I CONCUR:

McINTYRE, J.

I CONCUR IN THE RESULT:

AARON, J.