

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

IRBY McDONALD,

Plaintiff and Appellant,

v.

SOUTHERN CALIFORNIA EDISON  
COMPANY,

Defendant and Respondent.

E054245

(Super.Ct.No. CIVVS1003304)

**OPINION**

APPEAL from the Superior Court of San Bernardino County. Gilbert G. Ochoa,  
Judge. Affirmed.

Law Offices of Ripley & Associates and Vickie L. Cartony for Plaintiff and  
Appellant.

Patricia A. Cirucci for Defendant and Respondent.

On July 14, 2011, the trial court granted defendant Southern California Edison  
Company's motion for summary judgment. The trial court found that defendant "met its  
prima facie burden of showing that it was immune from liability to Plaintiff because it

showed that Plaintiff was injured during recreational activities on property in which [defendant] owned an easement.”

Judgment was entered on July 22, 2011. Plaintiff Irby McDonald appeals, contending that the recreational use immunity statute (Civil Code section 846)<sup>1</sup> is inapplicable and, if it is applicable, an exception for willful or malicious activity applies.

“We review an order granting summary judgment de novo, considering all the evidence set forth in the moving and opposition papers, except that to which objections have been made and sustained. [Citations.] In undertaking our independent review, we apply the same three-step analysis as the trial court. First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable issue of material fact. [Citations.] ‘We need not defer to the trial court and are not bound by the reasons for [its] summary judgment ruling; we review the ruling of the trial court, not its rationale. [Citation.]’ (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 100-101; see also Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843; *Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal.App.4th 497, 502-503.)

---

<sup>1</sup> Unless otherwise indicated, all further statutory references are to the Civil Code.

## I

### ISSUES FRAMED BY THE PLEADINGS

The complaint alleges that plaintiff was jogging in Victorville when he fell on the stump of a power pole installed by defendant. The stump was alleged to be a dangerous and unsafe condition created by defendant. As a result, he was injured. Two causes of action, for negligence and for dangerous condition of property, were alleged.

Defendant answered with a general denial and nine affirmative defenses, including a defense that the complaint was barred by the doctrine of recreational use.

The issue presented by defendant's summary judgment motion was whether the defendant had established its affirmative defense under section 846, and, if so, whether plaintiff had met his burden of showing triable issues of material fact.

## II

### HAS DEFENDANT ESTABLISHED ITS RECREATIONAL IMMUNITY DEFENSE?

Section 846 provides: "An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section."

The section defined "recreational purpose" to include a number of activities. Since jogging was not included in the definition, plaintiff contended that it was not a

recreational purpose. Defendant contended that the list was merely illustrative, not exhaustive.

Section 846 also provides an exception: “This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration . . . ; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.” Plaintiff contended that the exception was applicable.

The summary judgment motion alleged that the action was barred by the statute and that defendant therefore did not owe any duty of care to plaintiff. Defendant therefore claimed that it established an affirmative defense to the action and was entitled to judgment as a matter of law.

A. *Elimination of Suitability Exception.*

Plaintiff contends on appeal that the statute is inapplicable. First, he argues that this was not the type of land contemplated by the Legislature when it enacted the statute. He asserts that the statute only applies to land use for recreation, citing *Paige v. North Oaks Partners* (1982) 134 Cal.App.3d 860. However, as defendant points out, *Paige* was effectively overruled by our Supreme Court in *Ornelas v. Randolph* (1993) 4 Cal.4th 1095. In that case, our Supreme Court said, “Beginning with [*Paige*] and continuing through a series of decisions culminating in the case under review [citations], the Courts of Appeal have recognized what amounts to a *third*, nontextual element of section 846

immunity. They have held, in addition to the requisite interest in land and recreational purpose, that the property in question must also be ‘suitable’ for a recreational pursuit in order to qualify for the statutory immunity.” (*Id.* at 1103.)

After discussing the suitability exception at length, our Supreme Court abolished it: “[A]ssuming the requisite ‘interest’ in land, the plain language of the statute admits of *no* exceptions, either for property ‘unsuitable’ for recreational use or otherwise.” (*Ornelas v. Randolph, supra*, 4 Cal.4th at p. 1105.)

**B. *Recreational Purpose.***

Plaintiff next contends that since jogging, walking, or running are not activities listed in the statute, they are not for a “recreational purpose.” In effect, he argues that the list is exhaustive.

The case law is otherwise. “Plaintiff does not contend that the list of activities set forth in section 846 is exhaustive; nor indeed would the plain language of the statute support such a claim. The statutory definition of ‘recreational purpose’ begins with the word ‘includes,’ ordinarily a term of enlargement rather than limitation. [Citations.]” (*Ornelas v. Randolph, supra*, 4 Cal.4th at p. 1101.)

“There is no ambiguity in section 846. By stating that a recreational purpose ‘includes such activities as’ those listed therein, the statute clearly indicates that the list is merely illustrative of the activities which constitute a recreational purpose within the meaning of the section. Under the ‘usual, ordinary import’ of the plain meaning of

section 846, other recreational uses similar to those listed fall within the purview of the statute.” (*Valladares v. Stone* (1990) 218 Cal.App.3d 362, 369.)

“The definition of ‘recreational purpose’ in section 846 is so extensive it includes nearly any leisure activity.” (*Shipman v. Boething Treeland Farms* (2000) 77 Cal.App.4th 1424, 1431, overruled on other grounds in *Klein v United States of America* (2010) 50 Cal.4th 68, 81, fn. 6.)

We therefore agree with defendant that the examples of recreational purposes in the statute are not exhaustive and that jogging is clearly a recreational purpose. Accordingly, defendant has established the elements of a complete defense to the action, i.e. that an element of the cause of action, a duty of care, cannot be established because of the recreational use immunity under section 846.

The burden then shifted to plaintiff to demonstrate that there are material issues of fact to be tried.

### III

#### PLAINTIFF HAS NOT SHOWN THE EXISTENCE OF A TRIABLE ISSUE OF MATERIAL FACT

Plaintiff argues that he falls within the exception for “willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity . . . .” (§ 846.) He cites *Charpentier v. Von Gelderen* (1987) 191 Cal.App.3d 101: “‘Willful or wanton misconduct is intentional wrongful conduct, done either with a knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the

possible results.’ [Citation.] ““Three essential elements must be present to raise a negligent act to the level of wilful misconduct: (1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril. [Citations.]” [Citation.]” (*Id.* at p. 113.)

The case also states, “It is a longstanding rule of pleading that a mere conclusory allegation that a defendant has committed willful or malicious misconduct is insufficient. ‘[It] is necessary to specify the particular acts upon which the wilful misconduct of a person is charged.’ [Citations.]” (*Charpentier v. Von Gelderen, supra*, 191 Cal.App.3d at p. 114.)

In response to the summary judgment motion, plaintiff argued that “Defendant’s [*sic*] cut down a stump in an area with a well worn path indicating it’s [*sic*] use as a sidewalk. Defendant further returned to the area to perform other repairs and inspections and chose not to remove the stump. The area the stump [was in] was obviously traversed regularly and still they chose to leave it [as] a dangerous obstacle.”

The only declaration submitted by plaintiff was a declaration of plaintiff’s counsel regarding the attached documents. The only record citations in plaintiff’s brief under this topic are to a photograph of the location of the accident and to 70 pages of documents apparently obtained from defendant.

In plaintiff’s response to defendant’s statement of undisputed facts, plaintiff cites his response to interrogatories, which state that defendant “willfully left approximately 6

inches protruding out of the ground and [failed] to warn of the dangerous condition.”

Plaintiff also alleges a lack of information, which prevents him from citing documents or persons having knowledge of the issue.

Plaintiff states that “[d]efendant and their [*sic*] employees attempted to remove a power pole at Luna and Del Gado Road in the City of Victorville but left a stump on October 4, 2010.” He asserts that defendant’s employees returned to the area on numerous occasions to perform maintenance and repairs but did not remove the stump. Finally, plaintiff states that “[t]here was a worn path in the area of the stump that the general public used for walking.” Based on those facts, plaintiff contends that defendant’s actions were willful.

On this record, we fully agree with defendant and the trial court that plaintiff failed to submit any evidence of a triable material issue of fact in response to the summary judgment motion. Plaintiff has simply failed to present evidence of facts showing, with particularity, that defendant had knowledge of the peril and knowledge of the probability of injury and that it consciously failed to act to avoid the peril.

(*Charpentier v. Von Gelderen, supra*, 191 Cal.App.3d at pp. 113-114.)

The trial court therefore properly found, by granting the summary judgment motion, that defendant established its affirmative defense under section 846 and that plaintiff failed to state any facts creating a material factual issue for trial.

IV

DISPOSITION

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

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI  
Acting P. J.

We concur:

KING  
J.

CODRINGTON  
J.