Filed 7/23/19 Hunter v. Anschutz Entertainment Group CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

LOVEY HUNTER, Plaintiff and Appellant, v. ANSCHUTZ ENTERTAINMENT GROUP et al., Defendants and Respondents.	E069724 (Super.Ct.No. PSC1402187) OPINION

APPEAL from the Superior Court of Riverside County. David M. Chapman, Judge. Affirmed.

Glenn Stern Law, Glenn E. Stern and Matthew P. Malczynski for Plaintiff and Appellant.

Manning & Kass, Ellrod, Ramirez, Trester, Jeffrey M. Lenkov, John M. Hochhausler and Steven J. Renick for Defendants and Respondents.

Plaintiff and appellant Lovey Hunter, a crossing guard employed by Contemporary Services Corporation (CSC), sued defendant and respondent Goldenvoice (Goldenvoice), a concert and music festival producer that had contracted with CSC for general crowd management services, because of injuries she suffered after she was struck by a pedicab,[1] while she was directing pedestrian traffic at the Coachella Music and Arts Festival (Coachella) in Indio, California.

The trial court granted summary judgment in Goldenvoice's favor, concluding the primary assumption of risk doctrine applies because "CSC was hired to manage the hazardous condition which [plaintiff] alleges was the cause of her injury." On appeal, plaintiff contends the court erred when it found CSC assumed the risk of managing the dangerous condition that caused her injuries. Because the undisputed evidence shows the risk of a pedestrian traffic accident was considered a normal part of the job for which CSC and plaintiff were hired, CSC's employees would have expressly assumed the risk of such a danger, and Goldenvoice therefore had no duty to protect them from it. Concluding summary judgment was properly granted, we affirm.

---

[1] We note that the record refers to a "pedal cab"; however, we will use the term "pedicab." (See Merriam-Webster Online Dictionary (2019) at <https://www.merriam-webster.com/dictionary/pedicab> [as of July 23, 2019].) The Vehicle Code also uses the term "pedicab" instead of pedal cab, and it defines a pedicab as a "bicycle that has three or more wheels, that transports" passengers or "pulls a trailer . . . that transports" passengers. (Veh. Code, § 467.5 subds. (a), (b).)

I. PROCEDURAL BACKGROUND AND FACTS

Goldenvoice produces and operates Coachella. Goldenvoice retained Going My Way Pedal Cab, LLC, (GMWPC) to provide pedicab services to concertgoers and CSC to provide "a high level of general crowd management services." Plaintiff was employed by CSC, working as a crossing guard during Coachella.[2]

On April 19, 2013, plaintiff was assigned crossing guard duty by CSC to ensure Coachella's concertgoers did not walk into a street at a certain location where a meet and greet was taking place. While managing pedestrians walking in an area restricted to pedestrians, plaintiff was struck by a pedicab, which she also called "a bicycle tram," and described it as "a tricycle that is used to move people throughout the Coachella music festival."[3] According to plaintiff, the driver of the pedicab "smashed [her] down," and she "hit the fence," causing her to suffer severe injuries.[4] The driver left the scene without giving his name or contact information.

---

[2] Although plaintiff testified that she worked for CSC as "a security officer," she clarified that she worked as a crossing guard while waiting to receive the paperwork from "the state" so she could perform the job of a security officer.

[3] According to plaintiff, the pedicab "is not readily visible among a throng of people because the tricycle with a person atop it is not large or tall enough to stand out in large crowds."

[4] Plaintiff's hip and knee were bruised and swollen; she was "wholly incapacitated" for approximately 10 days after the incident; she was unable to bathe or leave her house during the month after the incident; and she experienced depression during the year after the incident. However, her knee and back always hurt, and she has intermittent anxiety, shoulder pain, and occasional hip pain.

On April 21, 2014, plaintiff initiated this action for negligence and premises liability against Goldenvoice, Anschutz Entertainment Group (AEG), and Empire Polo Club (Polo Club), and later amended the complaint to add GMWPC.[5] On August 4, 2017, Goldenvoice moved for summary judgment on the grounds it "anticipated the inherent danger of both people and vehicles (cars and pedal cabs) and engaged CSC, [p]laintiff's employer, to provide security and crowd/traffic control services."[6] Goldenvoice pointed out that plaintiff "admitted her responsibilities included making sure there were no accidents and patrolling so that no one got hit." In opposing summary judgment, plaintiff argued Goldenvoice failed to introduce sufficient

---

[5] We note that the notice of appeal filed December 21, 2017, in this matter indicates plaintiff appeals from the judgment entered on October 26, 2019. That judgment states: "On October 20, 2017, the Court granted the Motion for Summary Judgment of Defendants [AEG], Goldenvoice, LLC, and [Polo Club] as to the Complaint of Plaintiff Lovey Hunter in its entirety. Accordingly, judgment is hereby entered in favor of Defendants [AEG], Goldenvoice, LLC, and [Polo Club], and against Plaintiff Lovey Hunter." This appeal, therefore, includes AEG, Goldenvoice, and Polo Club.

However, the appellant's opening brief states the appeal "is from the trial court's grant of a Motion for Summary Judgment or, in the Alternative, Summary Adjudication in favor of Defendant GOLDENVOICE, LLC." In its respondent's brief, Goldenvoice asserts the judgment should be summarily affirmed as to AEG and Polo Club since plaintiff "has not challenged the granting of summary judgment' in their favor. In the appellant's reply brief, plaintiff agrees, adding that she "submitted on the trial court's ruling" granting summary judgment as to AEG and Polo Club.

Since plaintiff limited her appeal to Goldenvoice only, we will therefore limit our discussion to the actions and issues relevant to Goldenvoice.

We also note that GMWPC is not a party to this appeal.

[6] In her reply brief, plaintiff claims Goldenvoice "did not raise the [primary assumption of risk] doctrine as a basis for its Summary Judgment Motion." Although Goldenvoice may not have used the exact term "primary assumption of risk doctrine," or referenced specific cases, the language it used supports the theory relied upon by the trial court in granting summary judgment.

admissible evidence to negate an element of her claims, and the contract between Goldenvoice and CSC failed to mention Coachella, traffic control, pedal cabs, or lighting.

The trial court granted the summary judgment motion on the grounds there is "no triable issue of fact that CSC assumed the risk to manage the dangerous condition which caused [plaintiff's] injuries." The court found no merit to plaintiff's argument the contract with CSC failed to mention traffic control or pedicabs because plaintiff "has offered no evidence that her injury was not caused by a hazard that CSC was hired to manage. . . . Pedalcabs were part of the pedestrian traffic[, and] . . . [c]ontrolling pedestrian traffic—an element of crowd control—was part of [plaintiff's] job duties." Notice of entry of judgment was filed October 31, 2017, and a notice of appeal was filed December 21, 2017.

II. DISCUSSION

Plaintiff contends the trial court erred in granting summary judgment because (1) there are triable issues of material fact whether CSC assumed the risk that caused her injuries, and (2) Goldenvoice failed to meet its initial burden. Plaintiff further alleges the court's order is contrary to the standards for ruling on summary judgments. We conclude summary judgment was properly granted based on the primary assumption of risk doctrine.

A. Standard of Review.

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." (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment has the initial burden of showing either that one or more elements of the cause of action cannot be established or that there is a complete defense. (§ 437c, subds. (o), (p)(2); *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768 (*Saelzler*).) If the initial burden is met, the burden shifts to the plaintiff to show the existence of a triable issue of fact with respect to that cause of action or defense. (§ 437c, subd. (p)(2); *Saelzler*, at p. 768.)

We review a summary judgment ruling de novo. (*Saelzler*, *supra*, 25 Cal.4th at p. 768.) "We must view the evidence submitted in connection with a motion for summary judgment in a light most favorable to the party opposing the motion and resolve 'any evidentiary doubts or ambiguities in plaintiff's favor.' [Citation.] We independently determine whether the record supports the trial court's conclusions that the asserted claims fail as a matter of law, and we are not bound by the trial court's stated reasoning or rationales." (*County of San Diego v. Superior Court* (2015) 242 Cal.App.4th 460, 467.)

B. Primary Assumption of Risk Doctrine.

"As a general rule, persons are liable for injuries they cause others as a result of their failure to use due care. [Citations.] The only exceptions to this rule are those

created by statute or clear public policy. [Citations.] [¶] One such exception is the assumption of the risk doctrine. Although traditionally viewed as a defense to an action for negligence, the modern doctrine of primary assumption of risk involves a situation where defendant does not owe a duty of care to plaintiff. Since such a duty of care is an element of the tort of negligence, such situations should perhaps be described as the absence of negligence." (*Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761, 1764-1765 (*Herrle*).) The doctrine of primary assumption of risk is "like the fundamental nature of duty itself in tort law, a legal conclusion based on the relationship between the parties." (*Herrle*, at p. 1767; see *Knight v. Jewett* (1992) 3 Cal.4th 296, 315-316 (*Knight*) [under the primary assumption of risk doctrine, participants in and operators of certain activities have no duty of ordinary care to protect other participants from risks inherent in the activity].)

"Primary assumption of risk cases often involve recreational activity, but the doctrine also governs claims arising from inherent occupational hazards. [Citations.] The bar against recovery in that context first developed as the 'firefighter's rule,' which precludes firefighters and police officers from suing members of the public for the conduct that makes their employment necessary. [Citations.] After *Knight*, . . . the firefighter's rule [was viewed] as a variant of primary assumption of risk, 'an illustration of when it is appropriate to find that the defendant owes no duty of care.' [Citation.] Whether a duty of care is owed in a particular context depends on considerations of public policy, viewed in light of the nature of the activity and the relationship of the parties to the activity." (*Gregory v. Cott* (2014) 59 Cal.4th 996, 1001-1002.)

"[The Supreme Court has] noted that the duty to avoid injuring others 'normally extends to those engaged in hazardous work.' [Citation.] '[The Supreme Court has] never held that the doctrine of assumption of risk relieves all persons of a duty of care to workers engaged in a hazardous occupation.' [Citation.] However, the doctrine does apply in favor of those who hire workers to handle a dangerous situation, in both the public and the private sectors. Such a worker, 'as a matter of fairness, should not be heard to complain of the negligence that is the cause of his or her employment. [Citations.] In effect, [the Supreme Court has] said it is unfair to charge the defendant with a duty of care to prevent injury to the plaintiff arising from the very condition or hazard the defendant has contracted with the plaintiff to remedy or confront.' [Citation.] This rule encourages the remediation of dangerous conditions, an important public policy. Those who hire workers to manage a hazardous situation are sheltered from liability for injuries that result from the risks that necessitated the employment." (*Gregory v. Cott*, *supra*, 59 Cal.4th at p. 1002; see *Priebe v. Nelson* (2006) 39 Cal.4th 1112, 1132 [plaintiff, "by virtue of the nature of her occupation as a [veterinary] kennel worker, assumed the risk of being bitten or otherwise injured by the dogs under her care and control . . . ."]; *Herrle*, *supra*, 45 Cal.App.4th at pp. 1764-1765, 1770-1772 [the primary assumption of risk doctrine bars nurse's aide's claim for damages resulting from an attack by a violent patient she was hired to care for].)

C. Application of the Primary Assumption of Risk Doctrine to CSC's Services for Goldenvoice.

The sole issue in this appeal is whether the doctrine of primary assumption of risk applies. According to plaintiff, because the contract between Goldenvoice and CSC for crowd management services failed to include any language "stating that CSC was responsible for bicycle tram traffic, pedal cab traffic, or traffic control as part of its crowd management services," the court erred in applying the doctrine to bar her claims. In response, Goldenvoice argues the court correctly applied the doctrine because it is not liable for injuries that result from the risks "inherent in the activity in which the plaintiff was engaged" in her employment as a crossing guard. We conclude the primary assumption of risk doctrine applies.

Goldenvoice contracted with CSC for "high level . . . general crowd management services." Specifically, the contract provides that CSC "shall provide a high level of general crowd management services as requested in writing (an 'Event Notice') by AEG in the form set forth on Exhibit 1 . . . ." Although exhibit 1 to the contract was blank, James Paige, chief operating officer of Goldenvoice, declared, "[a]mong the responsibilities of those employees of CSC providing security and crowd management services at Coachella 2013, . . . was to observe everyone, including the employees of Going My Way providing pedal cab services and make sure they were following the applicable rules, regulations and agreed upon traffic patterns in order to protect the safety of Coachella attendees." By her own admission, plaintiff agreed she was

responsible for "securing the area [by] making sure that no one walk[ed] out toward the street without [her] knowing, because they might get hit by the cars." She explained how she worked with other crossing guards and security officers, including her supervisor who was directing vehicular traffic along the street throughout the festival. Her supervisor would signal to her to let her know when it was safe for concertgoers to cross the road. Plaintiff had to be aware of her surroundings to prevent the concertgoers from being hit by a vehicle. In short, Goldenvoice hired CSC (and its employees who are crossing guards and security officers) to protect people from the risk of being hit by vehicles (motor or pedicab).

However, plaintiff contends the contract provides no evidence that CSC assumed a known risk of the type that caused her injuries because the words "traffic control" are missing in the description of CSC's services, which are limited to "general crowd management services." She takes issue with the term "crowd management services," asserting "'[c]rowd management' (or 'crowd control') as used in its ordinary sense is defined as managing large crowds of people and/or pedestrians to keep them safe, . . . not management of traffic, pedal cabs, and/or bicycle trams." In response, Goldenvoice asserts that plaintiff's description of her own duty "begs the question: safe from what?" According to plaintiff's testimony, she was to keep the concertgoers safe from vehicles with which they might come in contact with. Thus, if a crossing guard/security officer gets hit by a vehicle (motor or pedicab), the "particular risk of harm that caused the injury" was among the very risks the crossing guard/security officer was hired to

prevent. (*Knight*, *supra*, 3 Cal.4th at pp. 314-315; see *Herrle*, *supra*, 45 Cal.App.4th at p. 1765.)

Moreover, the scope of "general crowd management services" was provided through Mr. Paige's declaration. However, plaintiff argues that because the words "traffic control" are missing in the contract, Goldenvoice "'created' Contract language through the Declaration of James Pa[i]ge, the only evidence submitted to meet its burden that the Contract provided for CSC to manage pedal cabs, and thus, assume the risk for [plaintiff's] injuries." Not so.

"'Extrinsic evidence is admissible to prove a meaning to which the contract is reasonably susceptible. [Citations.] If the trial court decides, after receiving the extrinsic evidence, the language of the contract is reasonably susceptible to the interpretation urged, the evidence is admitted to aid in interpreting the contract. [Citations.] Thus, "[t]he test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible." [Citation.] [¶] 'The threshold issue of whether to admit the extrinsic evidence—that is, whether the contract is reasonably susceptible to the interpretation urged—is a question of law subject to de novo review.'" (*Iqbal v. Ziadeh* (2017) 10 Cal.App.5th 1, 8-9 [interpretation of the term "affiliates" of the defendants as used in a general release].)

Here, to the extent "general crowd management services" was not defined in the contract, Goldenvoice offered both plaintiff's testimony and the declaration of

Mr. Paige. Plaintiff admitted she was responsible for making sure pedestrians were not hit by vehicles. She worked with other CSC employees, including crossing guards and security officers, along with her supervisor who was directing vehicular traffic along the street throughout the festival, to prevent pedestrian/vehicle accidents. Mr. Paige testified that CSC employees' responsibilities included observing "everyone, including the employees of Going My Way providing pedal cab services and mak[ing] sure they were following the applicable rules, regulations and agreed upon traffic patterns in order to protect the safety of Coachella attendees." Contrary to plaintiff's assertion, Goldenvoice did not create contract language through Mr. Paige's testimony. Rather, Mr. Paige's declaration provided further evidence that the term "general crowd management services" included managing pedicabs, not just concertgoers and traffic along the street. We reject plaintiff's restrictive interpretation of the contract's language because it is not supported by the evidence. If the absence of the term "traffic control" is dispositive of the interpretation of "general crowd management services," then how did plaintiff's supervisor know to direct vehicle traffic along the street?

For the above reasons, we conclude the doctrine of primary assumption of risk applies to the general crowd management services, which CSC and plaintiff were contracted to provide at Coachella and, accordingly, Goldenvoice owed her no duty of care to prevent the injuries she incurred as a result.

III. DISPOSITION

The judgment is affirmed. Goldenvoice is awarded costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
Acting P. J.

We concur:

CODRINGTON
J.

RAPHAEL
J.