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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DEBBIE LOPEZ et al.,

Plaintiffs and Appellants,

v.

INTERNATIONAL SPEEDWAY
CORPORATION et al.,

Defendants and Respondents.

G049806

(Super. Ct. No. CIVDS1100002)

O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County,
John M. Pacheco, Judge. Affirmed.

Prata & Daley, Robert J. Prata and Todd A. Daley; Arent Fox and Stephen
G. Larson, for Plaintiffs and Appellants.

Lucas & Haverkamp, Stephen D. Lucas and Patricia Jo Custer for
Defendants and Respondents.

INTRODUCTION

Debbie Lopez and her four children (appellants) appeal from a judgment entered after the trial court granted summary judgment to the defendants in an action for the wrongful death of Joey Lopez (Lopez), Debbie's husband and the children's father, in a motorcycle accident. Respondents International Speedway Corporation, California Speedway Corporation, and WERA Motorcycle Roadracing, Inc., presented the court with releases signed by Lopez absolving them from liability for the accident. The trial court ruled that the releases were enforceable and that appellants had not presented evidence to create a triable issue of fact as to gross negligence, which would have negated the releases if it could have been established.

We affirm. We agree the releases were enforceable and appellants did not carry their burden to establish gross negligence, a burden that shifted to them after respondents made a prima facie case for enforcement of the releases. While the court's simultaneous granting of a motion to compel production of deposition documents and a motion for summary judgment seems incongruous, the fact remains that the court ordered the case dismissed and signed a judgment to that effect. We review the judgment, not the order granting the discovery motion.

FACTS

Lopez died after crashing his motorcycle at a race track in Fontana.¹ Respondent WERA Motorcycle Roadracing leased the track for motorcycle racing on the day of the accident from its owner, respondent California Speedway Corporation. Respondent International Speedway Corporation is California Speedway Corporation's parent company.

¹ Appellants' statement of facts regarding events occurring on the day of the accident is frustratingly lacking in citations to the record. (See Cal. Rules of Court, rule 8.204(a)(1)(C).)

On the day of the race, January 4, 2009, Lopez signed two releases.² One was an annual consent and release of liability form, in favor of WERA and of the racing association, promoters, and sanctioning organizations. This release provided, first, that Lopez had inspected the track and had found it safe and reasonably suited for his use and, second, that he (and his heirs) released a long list of entities and people from any claims for loss or damage from injury to his person or property. Lopez further acknowledged in the release that motorcycle racing was very dangerous and involved the risk of serious injury or death. The other release, entitled WERA Technical Verification Form, was part of a pre-race motorcycle inspection, one to which each racer had to submit his machine before being allowed to race. The release provided, first, that Lopez was aware of the risks of motorcycle racing and assumed them, and, second, that he released a similar list of people and entities from all liability for his injury or death.

On January 3, 2011, Lopez's widow sued respondents for wrongful death. The children were later added as plaintiffs by stipulation. They alleged that respondents had created one or more dangerous conditions on the track and had failed to warn Lopez, cure the danger, or otherwise exercise proper care. Respondents had also allegedly increased the foreseeable danger to those using the track and had acted recklessly, such that "their conduct was entirely outside the range of ordinary activity involved in motorcycle racing . . . and such that the risks to Lopez . . . were over and above those inherent in the sport." The rest of the complaint was similarly devoted to the respondents' negligence, their recklessness, and the unreasonable risk of harm they had created.

Respondents moved for summary judgment in January 2012. The basis of the motion was the releases. Respondents' evidence included a declaration of Bruce

² The day before the race, January 3, Lopez signed a WERA Motorcycle Roadracing Membership Form representing, among other things, that he had "inspected such restricted area [which included the track]" and found and accepted it as "safe and reasonably suited for the purpose of [his] use." Lopez further agreed to immediately leave any area he felt to be unsafe.

Rice, who had been racing directly behind Lopez on the day of the accident. Rice stated that it occurred on a straightaway *after* a curving portion of the track appellants had identified as the dangerous condition, and Rice opined that the front wheel of Lopez's cycle made contact with another racer's cycle, causing a violent wobble that ultimately resulted in the crash.

Appellants' opposition to the summary judgment motion included a declaration from one Justin Watkins, which stated that Watkins had seen the crash and Lopez lost control of his cycle when he rode over rough pavement after Turn #10. Relying on Watkins' declaration, three experts opined that the accident happened because respondents had removed a safety curb, designed to slow racers down, at turns 10 and 11 (an S-shaped formation) and had used orange cones at that point to force racers to ride onto a runoff area, the surface of which was not prepared or suitable for racing, where Lopez lost control of his cycle.

Appellants' opposition also included excerpts from Bruce Rice's deposition, in which he stated that he had not actually seen Lopez's cycle make contact with the other racer's, but had inferred it from his experience in motorcycle races and from watching Lopez and the other rider ahead of him. In the excerpts included in the opposition papers, Rice did not change his testimony about where the accident occurred.

The court held a hearing on the summary judgment motion on April 30, 2012. The court had not received the evidence and exhibits filed by respondents with their reply as of that date. The court gave appellants 10 days to brief a legal issue regarding gross negligence raised in the reply brief. At the same time, but without the benefit of respondents' reply evidence, the court stated, "[C]ausation remains a triable issue here given that the crash *appears to* have occurred in the runoff area, which was altered by defendants and included in the subject race route." The court set another hearing date for the summary judgment motion.

The evidence respondents submitted with their reply brief, which the court eventually received, contained a supplemental declaration from Justin Watkins. In it, Watkins stated that his view of the track was obstructed and he could not see exactly where Lopez was when he lost control of his machine. He further stated he had told appellants' investigator he did not have a clear view of the track and could not tell what caused Lopez to lose control, because he was already in trouble when Watkins first noticed him. None of this information was included in Watkins' original declaration.

The reply papers also included declarations from several motorcyclists who had raced on January 4, the day of the accident, and who testified that the orange cones did not "force" the racers to ride on the runoff area, but rather that the racers could go through this area or swing to the right to ride on smooth pavement. It was each racer's choice where to go.

At the continued hearing on May 31, the court offered appellants' counsel an opportunity to brief the supplemental Watkins declaration and to depose Watkins. Counsel refused the offer, saying, "I would respectfully submit that the Court could decide that issue [gross negligence] without further discovery one way or the other." "The legal issue, we do believe, is teed up, and we do not believe that there are any of these factual disputes that affect the issue of whether or not the release covers gross negligence." In light of counsel's refusals, the court stated it would rule on the motion as it was.

The court issued its ruling on the motion for summary judgment on June 12, 2012. The court granted the motion, explaining that appellants' claim was based on the grossly negligent condition of the track (the removed curb and the rough pavement) causing Lopez to lose control of his machine. Appellants' case therefore rested on the premise that Lopez lost control of his motorcycle on this stretch of the track, which premise in turn rested on the Watkins declaration submitted with the opposition papers. But in his supplemental declaration, Watkins explained that he could *not* see where

Lopez was when he lost control, because a concrete barrier blocked his view. There was, therefore, no competent evidence that Lopez lost control of his motorcycle on the allegedly defective portion of the track to call into question the eyewitness testimony of Bruce Rice, who was racing right behind Lopez, that the fatal wobble (in motorcycle racing parlance, a “tank-slapper”) occurred on a different portion.³ Furthermore, Watkins stated in his declaration that he told appellants’ investigator that he did not have a clear view of the accident (information omitted from his original declaration). Because there was no evidence that the accident happened on the allegedly defective portion of the track, there was no need to investigate “gross negligence.”⁴

After the court issued its final ruling, appellants applied ex parte for additional discovery or for reconsideration. The court denied the motion for reconsideration by minute order dated October 1, 2012, on the grounds that appellants had not presented any new evidence, in the sense of evidence that could not have been obtained before the hearing on the summary judgment motion, or presented anything to suggest Lopez had lost control of his machine on the bumpy portion of the track. As for getting additional discovery, appellants had not fulfilled the requirements of Code of Civil Procedure section 437c, subdivision (h). Simultaneously with the order denying the motion for reconsideration, the court issued a minute order granting appellants’ motion to

³ Watkins further stated in his supplemental declaration that “[i]f there was a racer riding behind Joe Lopez who saw him lose control, [Watkins] would defer to that person concerning Joe Lopez’s location on the track when that occurred because [Watkins] could not see where [Lopez] was.” There was just such a person – Bruce Rice.

⁴ The court also relied on declarations in the reply papers from several racers on the track on the day of the accident stating that the orange cones had not required them to ride on the rough pavement. There was smooth pavement to the right of the rough portion that the racers could ride on if they chose.

compel production of certain documents and awarding discovery sanctions to appellants.⁵ Judgment for respondents was entered on November 28, 2012.

DISCUSSION

On an appeal from an order granting summary judgment, we review the record de novo to determine whether defendants have conclusively proved that under no hypotheses is there a material issue of fact requiring a trial. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673-674, disapproved on other grounds in *Reid v. Google* (2010) 50 Cal.4th 512.) “[T]he declarations and evidence offered in opposition to the motion must be *liberally* construed, while the moving party’s evidence must be construed *strictly*, in determining a “triable issue” of fact.’ [Citation.]” (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 839.) “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted.) Defendants, as the moving parties, bore the initial burden to show the undisputed facts supported each element of their affirmative defense. (*Vahle v. Barwick* (2001) 93 Cal.App.4th 1323, 1328.) The signed release forms shifted the burden to appellants to create a triable issue of fact as to the enforceability of the releases.

⁵ Appellants made this motion on May 8, 2012, after the first hearing on the summary judgment motion but before the court issued its final ruling. The court issued a tentative ruling granting part of the motion and awarding sanctions to appellants on August 22, 2012, the same day as the hearing on the motion for reconsideration. After oral argument, the court took the discovery matter and the motion for reconsideration under submission and issued two separate minute orders on October 1, one denying the motion for reconsideration and the other adopting the tentative as to the discovery motion.

A release may be unenforceable for two reasons peculiar to releases.⁶ First, it may not clearly apply to the conduct upon which the lawsuit is based. (See *Benedek v. PLC Santa Monica* (2002) 104 Cal.App.4th 1351, 1356 (*Benedek*) [release must be “clear, unambiguous, and explicit”].) Second, while a release may be effective as to ordinary negligence, no release can absolve a defendant from responsibility for future gross negligence. (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 750 (*Santa Barbara*)).

In this case, appellants do not dispute the application of the releases to the events underlying the lawsuit. Their objection to the judgment ultimately rests on their contention that the trial court impermissibly resolved a question of fact.⁷ First, they assert that Justin Watkins’ two declarations created a triable issue of fact as to where Lopez lost control of his bike. They also assert that even disregarding Watkins’ first declaration, the evidence of their expert Peter Dill created a triable issue of fact as to this question.

It is important to define, and in some respects to disentangle, the issues presented to the trial court on summary judgment and to us on appeal. Respondents moved for summary judgment *solely* on the ground that the releases signed by Lopez were a complete defense to their liability for the accident, even if they had in fact been

⁶ Of course, a release can also be unenforceable for the same reasons that any contract would be unenforceable, e.g., it is unconscionable or was procured by fraud. (See *Allan v. Snow Summit, Inc.* (1996) 51 Cal.App.4th 1358, 1375-1376 (*Allan*) [analyzing release for unconscionability]; *Holcomb v. Long Beach Inv. Co.* (1933) 129 Cal.App. 285, 292 [release procured by fraud or lacking in consideration unenforceable].)

⁷ Appellants also contend the trial court was not allowed to consider the evidence submitted by respondents in their reply papers when ruling on the motion. Appellants’ opposition introduced new issues – particularly the declaration of Justin Watkins and the expert declarations – to which respondents were entitled to respond. The court gave appellants an opportunity to submit additional evidence to create a triable issue of fact, an opportunity their counsel turned down. (See *Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 69-73; see also *Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362, fn. 8.) Appellants’ failure to object to the reply evidence – notwithstanding a representation to the contrary in the opening brief – waives any claim of error on this ground. (See *Jimenez v. County of Los Angeles* (2005) 130 Cal.App.4th 133, 140.)

In their reply brief in this court, appellants argue for the first time that they did not receive proper notice of respondents’ motion for summary judgment. We do not consider arguments raised for the first time in reply briefs, absent some explanation for their tardiness. (See *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10; see also *Cold Creek Compost, Inc. v. State Farm Fire & Casualty Co.* (2007) 156 Cal.App.4th 1469, 1486.)

negligent. Respondents did *not* move for summary judgment on the ground of primary assumption of risk, a doctrine that would apply even in the absence of a release. (See *Cohen v. Five Brooks Stable* (2008) 159 Cal.App.4th 1476, 1490.)

This distinction is important, because it governs the type of evidence each side had to produce to obtain or defeat summary judgment. Because Lopez signed releases and respondents moved for summary judgment solely on that basis, evidence establishing or negating assumption of risk was irrelevant. Thus, evidence showing that respondents increased the risk of injury to the race participants, which would be meaningful in an analysis of assumption of risk, is superfluous when analyzing the effect of a release.

The injury that occurred here – a motorcycle crash – was exactly the type of injury contemplated by the releases Lopez signed. Further, as explained in *Allan, supra*, a discussion of whether respondents “increased the risk of injury” to Lopez is completely irrelevant in a case where he expressly absolved respondents of liability. A discussion of assumption of risk cases following *Knight v. Jewett* (1992) 3 Cal.4th 296 in a waiver and release of liability case “is essentially beside the point for one very fundamental reason: . . . its discussion of ‘primary’ and ‘secondary’ assumption of the risk, referred to *implied* assumption of the risk.”⁸ Here, it is beyond dispute that [decendent] signed an *express* assumption of the risk [agreement], which warned him in no uncertain terms that he could fall, lose control, collide with other objects, and otherwise suffer serious injury.

⁸ In *Knight v. Jewett, supra*, the California Supreme Court explained the express assumption of risk doctrine in the following manner: “One leading treatise describes express assumption of risk in the following terms: ‘In its most basic sense, assumption of risk means that the plaintiff, in advance, has given his *express* consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone. . . . *The result is that the defendant is relieved of legal duty to the plaintiff; and being under no duty, he cannot be charged with negligence.*’ (Prosser & Keeton on Torts, *supra*, § 68, pp. 480-481, fn. omitted, second italics added.) [¶] Since *Li [v. Yellow Cab]* (1975) 13 Cal.3d 804], California cases uniformly have recognized that so long as an express assumption of risk agreement does not violate public policy (see, e.g., *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, 95-101]), such an agreement operates to relieve the defendant of a legal duty to the plaintiff with respect to the risks encompassed by the agreement and, where applicable, to bar completely the plaintiff’s cause of action. [Citations.]” (*Knight v. Jewett, supra*, 3 Cal.4th at p. 308, fn. 4.)

Knight itself recognized that express assumption of the risk remains a complete defense in negligence actions. [Citations.] As *Knight* itself recognizes, so long as the express agreement to assume the risk does not violate public policy, it will be upheld and will constitute a complete bar to a negligence cause of action. [Citations.] [¶] Further, ‘assumption of the risk’ is a defense (complete or subsumed in comparative fault notions) to an *action for negligence*. Presumably, where a plaintiff has *expressly contracted not to sue for negligence*, discussion of defenses to an action for negligence would be irrelevant[.]” “The duty not to increase risks beyond those inherent in the sport (‘secondary implied assumption of the risk’) is a duty not to be negligent in that regard. An express agreement not to sue for injury, *even if the defendant is negligent*, obviates any need to further ‘discuss’ a negligence ‘duty.’” (*Allan, supra*, 51 Cal.App.4th at p. 1372, and fn. 4; see *Allabach v. Santa Clara County Fair Ass’n* (1996) 46 Cal.App.4th 1007, 1013.)

Accordingly, any argument by appellants that summary judgment was improper because respondents increased the risk of harm to Lopez through its negligent conduct simply misses the point. By signing the releases, Lopez expressly agreed to assume such a risk.

The only remaining impediment to enforceability of the releases is gross negligence on the part of respondents. Our Supreme Court has defined gross negligence as “““a want of even scant care””” or “““an extreme departure from the ordinary standard of conduct.””” (*Santa Barbara, supra*, 41 Cal.4th at p. 754.) Although gross negligence is generally an issue of fact, it can be determined as a matter of law. (*Ibid.*)

As defendants moving for summary judgment, it was respondents’ burden to make their prima facie case for enforcement of the releases. Appellants did not object to the introduction of these releases, so the trial court’s reliance on them cannot now be reviewed. Bruce Rice’s declaration established a prima facie case for the proposition that Lopez did *not* lose control of his motorcycle at the curving portion of the track appellants

had identified as defective. The burden then shifted to appellants to produce evidence creating a triable issue of fact as to gross negligence, i.e., that respondents did not display even “scant care” or that they exhibited “an extreme departure from the ordinary standard of conduct.” They therefore had to create a triable issue of fact as to (a) Lopez’s losing control of his machine on the part of the track they identified as being in a grossly negligent condition and (b) the condition of that part of the track. i.e., they had to show its condition exhibited “a want of even scant care” or “an extreme departure from the ordinary standard of conduct.”

Appellants could not establish gross negligence because they could not clear the first hurdle. That is, they could not create a triable issue of fact connecting Lopez’s loss of control with the portion of the track they claimed was defective. Appellants’ version of events rested on the initial declaration of Justin Watkins. In opposition to the motion for summary judgment, he stated, in one paragraph, that he had seen the entire crash occur, that Lopez lost control of the motorcycle on the uneven pavement of the runoff area after the S-curve, and he had not made contact with any other racer. In his much more detailed supplemental declaration, however, Watkins stated he was about 150 yards away from the place where Lopez lost control, and a concrete barrier and a fence obstructed his view of the track surface. He could see Lopez only from the waist up and could not tell exactly where he was on the track before he lost control. When he first noticed Lopez’s cycle, Lopez was already in the wobble that caused him to crash, and Watkins did not see what caused the wobble. He also could not see the runoff area from where he was standing and could not tell whether Lopez rode through that area. Moreover, he stated he had told plaintiffs’ investigator when he was interviewed that he could not see what caused Lopez to lose control and could not see the surface of the track, so he could not tell where Lopez was riding at the time.

Watkins’ two declarations did not create a triable issue of fact. His first declaration gave no details regarding his position at the track during the relevant events

or his ability to see what happened – information supplied in his supplemental declaration. If both declarations had been combined – if he had stated in a single declaration that he could not see the surface of the track and could not see where Lopez was on the track when he lost control and then stated “Lopez lost control when he ran over the uneven pavement” – this latter statement would have been ruled inadmissible for lack of foundation in personal knowledge. The fact it took two declarations to establish lack of foundation should not obscure this essential point.⁹ Watkins saw Lopez crash, but no one disputes that Lopez crashed. What Watkins could not see – which inability was masked by the conclusory phrasing of his first declaration – was what led up to the crash.

Watkins’ supplemental declaration established, first, he could not see where Lopez had been riding just before he lost control, and, second, he had told appellants’ investigator about his inability to see the surface of the track from where he stood. (See Code Civ. Proc., §437c, subd. (j).) The trial court in effect ruled that Watkins’ first declaration was inadmissible because it was not based on personal knowledge, which deficiency was established by the second declaration.¹⁰ (See Code Civ. Proc., § 437c, subd. (d) [declarations must show declarant competent to testify].)

The inadmissibility of Watkins’ first declaration in turn compromised the evidence of appellants’ expert, Peter Dill, who based his opinion in part on this evidence.¹¹ Dill also stated that “[m]easurements taken during my site inspection from the area where Lopez’ body came to rest are likewise consistent with his motorcycle

⁹ Watkins did *not* say in his first declaration that he had a clear view of the track and could see where Lopez was when he lost control.

¹⁰ We note that appellants’ counsel turned down the court’s offer to allow them time to depose Watkins or to brief the issue of the effect of his supplemental declaration before the court ruled on the summary judgment motion. In light of Watkins’ testimony that he had informed appellants’ investigator of his inability to see what happened, counsel may well have felt that the less heard from Watkins, the better.

¹¹ Dill’s opinion was also based on a site inspection of the track, deposition testimony of two California Speedway Corporation PMKs, a video of the race during which Lopez crashed, excerpts from Bruce Rice’s deposition transcript, still photos of the portion of the track appellants claimed to be dangerous, architectural and engineering plans of the race track, instructions for installing the race track fence, and the deposition transcript of an International Speedway Corporation PMK. This last piece of evidence was apparently used to establish International Speedway as a proper defendant. None of these things showed or indicated where Lopez crashed.

losing control at Turns #10 and #11 while at speed.” Dill gives no more information about these “measurements,” he does not reveal where Lopez came to rest, and he does not opine that the measurements were not also consistent with Lopez’s losing control of his motorcycle at the spot identified by Rice.

We agree with the trial court that Dill’s opinion was insufficient to create a material factual dispute as to where Lopez lost control, because Dill did not state any facts to support his opinion, other than his reliance on Watkins’ declaration. An opinion is only as good as the facts and reasons on which it is based. (*Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523; *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135 [“The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed.”].) “[Parties] cannot manufacture a triable issue of fact through use of an expert opinion with self-serving conclusions devoid of any basis, explanation, or reasoning.” (*McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1106.) As the court stated in *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483, a plaintiff “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.” (See *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 775,)

Appellants also contend that the trial court was somehow bound by its initial ruling at the first hearing on April 30 that there was a triable issue of fact as to causation, or at least that it was reversible error to change this ruling. This contention is meritless. The trial court made it abundantly clear at the hearing that nothing was set in stone. It wanted a brief on a legal issue, and it had not received the reply evidence, which it felt bound to examine. The whole matter was continued for another hearing at the end of May. The tentative ruling the court “adopted” explicitly stated that the matter was continued to allow for additional briefing and to permit the court to see the reply

evidence.¹² When everyone reconvened in May, the complexion of the case had obviously changed, owing mainly to Watkins' supplemental declaration, and the court offered appellants' counsel the chance to address this issue. Appellants' counsel declined the court's offer, so the court went with what it had. The final ruling is what counts. (See *Taormino v. Denny* (1970) 1 Cal.3d 679, 684; *United Pacific Ins. Co. v. Hanover Ins. Co.* (1990) 217 Cal.App.3d 925, 934.)

As for granting a motion to compel production of documents after issuing an order granting summary judgment, we have no ready explanation for what may have simply been a misunderstanding or an administrative slip-up. Whatever the reason for issuing the discovery order, there can be no question about the trial court's ultimate intentions. Appellants alerted the court to this anomaly by filing an objection to the proposed order granting summary judgment on October 16, 2012, reminding the court that it had granted the discovery motion on October 1. Nevertheless, the court entered judgment on November 28. This is the trial court's last word. To the extent appellants are claiming this discovery was necessary to oppose respondents' summary judgment motion, the time to request a continuance to conduct additional discovery was before they filed their opposition (see Code Civ. Proc., § 437c, subd. (h)), not after they lost. No such request was timely made.

¹² In the April 30 tentative, the court stated, "[C]ausation remains a triable issue here given that the crash *appears to* have occurred in the runoff area . . ." By May, this appearance had changed considerably, and therefore causation's status as a triable issue had altered.

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.