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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GEOFFREY CHEN,

Plaintiff and Appellant,

v.

THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA,

Defendant and Respondent.

G050467

(Super. Ct. No. 30-2012-00554113)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Kim Garlin Dunning, Judge. Affirmed.

Greene, Broillet & Wheeler, Bruce A. Broillet, Scott H. Carr, Tobin M.
Lanzetta, Molly M. McKibben; Esner, Chang & Boyer and Holly N. Boyer for Plaintiff
and Appellant.

McCune & Harber, Stephen M. Harber and Grace H. Kang for Defendant
and Respondent.

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INTRODUCTION

After suffering a serious injury on the campus of the University of California, Irvine (UCI), Geoffrey Chen sued the Regents of the University of California (the Regents), claiming that his injuries resulted from a dangerous condition on public property maintained by the Regents. A jury found in favor of the Regents. Chen, claiming instructional error, appeals. We affirm.

In answering a question from the jury, the trial court instructed the jury with the actual language of the applicable statute, Government Code section 835. As we will explain, that instruction was correct. Chen's proposed response to the jury's question was a less correct statement of the law than that given by the court. For these reasons, his challenge must fail.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Chen was a student at UCI. On March 28, 2010, while riding his bicycle across the UCI campus, Chen took a shortcut across a grassy slope adjacent to a pedestrian/bicycle pathway. Chen had been up and down that shortcut route many times before without a problem, and had seen many other people using it.

On that day, however, Chen's bicycle went over a four-foot-high cement block retaining wall, which was obscured by vegetation; a catch basin below the retaining wall was protected by a metal drain cover. Chen was thrown from his bicycle, and landed on his head on the drain cover. As a result of the accident, Chen suffered a spinal cord injury, and is paralyzed from the chest down.

Chen sued the Regents for, among other things, a dangerous condition of public property. (Gov. Code, § 835.) A jury found in favor of the Regents, and judgment was entered. Chen's motion for a new trial was denied.

DISCUSSION

I.

STANDARD OF REVIEW

“The propriety of jury instructions is a question of law that we review de novo.” (*Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 418.)

II.

THE TRIAL COURT DID NOT ERR BY INSTRUCTING THE JURY WITH THE LANGUAGE OF GOVERNMENT CODE SECTION 835.

A.

The challenged instruction

Chen contends the trial court erred in responding to a question from the jury regarding one of the jury instructions and a related portion of the special verdict form. The instruction was read to the jury as follows:

“Geoffrey Chen claims that he was harmed by a dangerous condition of UCI’s property. To establish this claim, Geoffrey Chen must prove all of the following:

“1. That the property was in a dangerous condition at the time of the incident;

“2. That the dangerous condition created a reasonably foreseeable risk of the kind of incident that occurred;

“3. That the negligent or wrongful conduct of UCI’s employee acting within the scope of his or her employment created the dangerous condition; [¶] Or [¶] That UCI had notice of the dangerous condition for a long enough time to have protected against it;

“4. That Geoffrey Chen was harmed; and

“5. That the dangerous condition was a substantial factor in causing Geoffrey Chen’s harm.” (Some capitalization omitted.)¹

That instruction tracked the version of CACI No. 1100 that was in place at the time of the trial. The instruction cited as its source and authority Government Code section 835, which reads: “Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property 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, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and 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) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.”

The special verdict form tracked the language of CACI former No. 1100. In relevant part, the verdict form asked the jury: “2. Did the dangerous condition create a reasonably foreseeable risk that this kind of incident would occur?”

During deliberations, the jury sent out a note stating: “Please define ‘this kind of incident’ as we cannot agree on what this means.” (Some capitalization omitted.)

¹ The court also instructed the jury with CACI No. 1102, as follows: “A ‘dangerous condition’ is a condition of public property that creates a substantial risk of injury to members of the general public when the property or adjacent property is used with reasonable care and in a reasonably foreseeable manner. A condition that creates only a minor risk of injury is not a dangerous condition. Whether the property is in a dangerous condition is to be determined without regard to whether Geoffrey Chen exercised or failed to exercise reasonable care in his use of the property.” (Some capitalization omitted.)

The trial court and the parties engaged in the following colloquy in response to the jury's note:

“The Court: ‘This kind of incident’ could refer to the conduct of plaintiff Geoffrey Chen, and his resulting injuries. It’s specific to this case, as opposed to the standard for a dangerous condition, which is pegged toward the general public and reasonable care, right?”

“[Chen’s counsel]: You know, I think that the proper answer to this question is probably that the kind of incident being discussed or asked about is a fall injury, because—is there a reasonable risk that one way or another people may fall over the side of this thing and get injured. That is the dangerous condition. [¶] In this particular instance, it happens to be a bicycle that he’s on, but we had testimony about other ways that this could happen, from kids going after a ball or something like that. [¶] And so it’s really, I think that probably the right answer to this is the kind of ‘incident’ means a fall incident producing injury.”

“The Court: Okay. So you’re proposing the language, quote, ‘this kind of injury,’ end quote, refers to a fall?”

“[Chen’s counsel]: This kind of incident refers to a fall at the wall, producing injury. [¶] . . . [¶]”

“[The Regents’ counsel]: Absolutely not, Your Honor. Absolutely not. That is plaintiff’s—that is just simply plaintiff’s argument to this case.”

“The Court: Do you have proposed language? [¶] . . . [¶]”

“[The Regents’ counsel]: I suggest, Your Honor, that we go back—because [Government Code section] 835 reads slightly different than this question—we read 835 to the jury. I think if we go beyond the statute, we are asking for difficulties here. [¶] . . . [¶]”

“The Court: Well, we could say—my preference is to give a context; that didn’t get me very far the last time we discussed this, but we may have to at some point

start going with context. [¶] Otherwise, when they say: please define this kind of incident, we could say—we could just say this kind of incident is defined in the context of, quote—a, quote, dangerous condition created by—that a dangerous condition created a reasonably foreseeable risk of the kind of injury, which was incurred. That’s just using the Legislature’s language, not any of ours. What do you think?

“[The Regents’ counsel]: I think that’s probably appropriate. [¶] . . . [¶]

“The Court: Okay. So what the court has proposed is, quote: [¶] ‘This kind of incident,’ end quote, is defined in the following context: That the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred. [¶] Which is exactly the language from Government Code section 835. [¶]

“[Chen’s counsel]: Well, our thought on that, Your Honor, our issue is, if the jury comes back and asks, what is meant by ‘kind of injury,’ does it have to be a T-5 paraplegia, that sort of thing. I realize you’re taking the language out of the statute, but at any rate, that would be what our objection is.

“The Court: Okay. You already rejected the court’s first suggestion, which I can always use over your objection, I suppose, which is, this kind of incident refers to the conduct of Geoffrey Chen and his resulting injuries.

“[Chen’s counsel]: Well, but I do think that—

“The Court: Do you object?

“[Chen’s counsel]: Yes.

“The Court: Okay, thank you. [¶] [The Regents’ counsel], what about, ‘this kind of incident is defined in the following context,’ then basically a quote from [Government Code section] 835?

“[The Regents’ counsel]: I believe that either of the court’s suggestions would be fine. Frankly, it’s a little hard to object to the language of the statute itself.

“[Chen’s counsel]: I understand that.”

The court instructed the jury as follows: “‘This kind of incident’ is defined in the following context: That the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred.”

Thus, the trial court used the statutory language of “kind of injury” (Gov. Code, § 835) in answering the jury’s question about the phrase “kind of incident” contained in the jury instruction.

B.

The trial court did not err by instructing the jury with the actual language of the statute.

We conclude the trial court correctly determined that “kind of incident” meant “kind of injury which was incurred” (Gov. Code, § 835), and that the court’s response to the jury’s question regarding the meaning of “kind of incident” was proper. Our conclusions are reinforced by the totality of the record.

Most importantly, we conclude that instructing the jury with the language of Government Code section 835 was proper. It is well recognized that instructing a jury with the actual language of a statute is generally proper. (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1131 [interpreting instruction using the language of Government Code section 835]; *Garrison v. Pearlstein* (1924) 68 Cal.App. 334, 340; *Pemberton v. Arny* (1919) 42 Cal.App. 19, 23; see 7 Witkin, Cal. Procedure (5th ed. 2008) Trial, § 268, p. 321.) “‘If the [statutory] language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend.’ [Citation.]” *Metcalf v. County of San Joaquin, supra*, at p. 1131.) Here, the statutory language was clear, and instructing the jury with the actual language of the statute in this case would not result in absurd consequences. The foreseeability of the kind of injury resulting from a dangerous

condition on the government-owned property is a matter that could be determined by a jury, based on the evidence in the case.²

Our conclusion that a jury instruction based on the actual language of Government Code section 835 would not result in absurd consequences is reinforced by the fact that, since the time of the trial in this case, CACI No. 1100 has been amended, and now uses the same language with which the jury was instructed in the present case. In June 2016, the Judicial Council of California approved a change to CACI No. 1100, which was proposed by the Judicial Council’s Advisory Committee on Civil Jury Instructions.³ CACI No. 1100 now provides that a plaintiff must prove “[t]hat the dangerous condition created a reasonably foreseeable risk of *the kind of injury* that occurred.” (Italics added.) The entity charged with overseeing the standardized civil jury instructions in California has indicated the phrase “kind of injury” is preferable to the phrase “kind of incident” in cases such as this one.

² We recognize that a leading treatise on tort claims against government entities notes that the meaning of “kind of injury” in Government Code section 835 “has not been clarified by any court” (Alstynne et al., Cal. Government Tort Liability Practice (Cont.Ed.Bar 2016) § 12.40, p. 12-59), and that it could refer either to “the nature of the interest invaded” (*ibid.*), or “the *precise manner* in which the injury occurred” (*id.* at p. 12-60). The language proposed by Chen, discussed *post*, does not meet either of these tests, and, therefore, we need not in this opinion determine which test is preferable.

³ We take judicial notice of the following official records of the Judicial Council of California: (1) Judicial Council’s Advisory Committee on Civil Jury Instructions, report to the Judicial Council of California, May 6, 2016; and (2) Judicial Council of California, meeting minutes, June 24, 2016. (Evid. Code, §§ 452, subd. (c), 455, 459.) The parties agree that the Judicial Council’s official records may be judicially noticed by this court. (*Whittaker v. Superior Court* (1968) 68 Cal.2d 357, 362, fn. 4 [official records of the Judicial Council are proper matters for judicial notice]; *Vidrio v. Hernandez* (2009) 172 Cal.App.4th 1443, 1457, fn. 7 [appellate court took judicial notice of reports to Judicial Council recommending amendment to a rule of court].)

C.

The instructional language proposed by Chen would not have corrected any alleged incompleteness or lack of clarity.

The Regents argue that Chen waived his right to challenge the instructional error on appeal because he did not request an alternative or clarifying instruction.

“Where, as here, “the court gives an instruction correct in law, but the party complains that it is too general, lacks clarity, or is incomplete, he must request *the additional or qualifying instruction in order to have the error reviewed.*” [Citations.]’ [Citation.]

Plaintiff’s failure to request any different instructions means he may not argue on appeal the trial court should have instructed differently. [Citations.]” (*Metcalf v. County of San Joaquin, supra*, 42 Cal.4th at p. 1131 [reviewing and interpreting a different element of a Government Code section 835 claim].)

During the colloquy between the court and counsel regarding the jury’s question about the meaning of “kind of incident,” Chen’s counsel suggested the following language: “This kind of incident refers to a fall at the wall, producing injury.” Assuming that this suggested language constitutes a clarifying or additional instruction, as required by *Metcalf v. County of San Joaquin*, there was no error. The language actually used by the trial court is more correct than the language proposed by Chen. The addition of the instruction proposed by Chen would not have clarified the language drawn directly from Government Code section 835; to the contrary, it would have obscured, or even misstated, the applicable law because, as noted *ante*, the language proposed by Chen does not fit within either possible meaning of section 835’s language. Chen’s challenge to the jury instructions fails.⁴

⁴ Given our holding, we need not address the Regents’ additional argument regarding immunity under the Government Code.

DISPOSITION

The judgment is affirmed. Respondent to recover costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.