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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

JAMIE FINN,

Plaintiff and Appellant,

v.

ROB MILLIER et al.,

Defendants and Respondents.

H037065

(Santa Clara County

Super. Ct. No. CV178048)

I. INTRODUCTION

Plaintiff Jamie Finn sued defendants Rob and Jennifer Millier for injuries she suffered after hitting a speed bump and crashing her bicycle on defendants' private road. The trial court held that the action was subject to the recreational immunity of Civil Code section 846 (section 846) and granted defendants' motion for summary judgment. We shall affirm.

II. LEGAL FRAMEWORK

When a motion for summary judgment has been granted in favor of the defense the reviewing court must decide with respect to each cause of action whether the defendant has established that the plaintiff does not have or cannot obtain the evidence to support a necessary element of the claim. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853.) Summary judgment would also be appropriate if the defendant has established a complete defense to each cause of action. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) We conduct our review de novo, using the same process the

trial court used to decide if there is a triable issue of material fact. We consider all the evidence (except that to which an objection has been sustained), strictly construing the defendant's moving papers and liberally construing those of the plaintiff to decide if the undisputed material facts show that the defendant is entitled to judgment as a matter of law. (*Ibid.*; see also *Jackson v. Pacific Gas & Electric Co.* (2001) 94 Cal.App.4th 1110, 1113 (*Jackson*).

The undisputed facts of this case are as follows.

III. FACTS

Defendants live on Upper Thompson Road (Thompson Road), which is located off Skyline Boulevard in a remote rural area of Santa Clara County. The road is less than a half-mile long, serves four homes, and dead ends at a Christmas tree farm. It is a private road, maintained by the owners of the homes it serves.

Defendants purchased their home on Thompson Road in 1998. They soon discovered that during the winter holiday season vehicles accessing the Christmas tree farm would drive at unsafe speeds down the road. Defendants asked the sheriff's department to do something about the problem but the sheriff's department was unable to help since the road was private. Defendants installed a 15-mile-per-hour speed limit sign on the portion of the road they owned but the winter visitors did not heed the sign. In October 2009, defendants had a paving company install two speed bumps on defendants' portion of the road. The first of the two speed bumps was located about 100 to 125 feet past the speed limit sign. Since moving to Thompson Road in 1998, defendant Rob Millier observed bicyclists on the road only once; defendant Jennifer Millier recalls having seen bicyclists on the road on one or two occasions. Even though the road was only rarely used by bicyclists, defendant Rob Millier, a bicyclist himself, had the paving contractor cut out a four to five inch gap in the middle of each speed bump so that bicycles and motorcycles could easily steer through.

On June 12, 2010, plaintiff was on a recreational bicycle ride with a group of friends when she inadvertently turned onto Thompson Road, thinking it was Skyline Boulevard. She did not know she had entered private property. She did not see the speed bump. She hit the speed bump and was thrown from her bicycle and injured.

IV. PROCEDURAL BACKGROUND

Plaintiff sued defendants describing three causes of action: general negligence, premises liability (willful or malicious failure to warn), and general negligence (negligence per se). Defendants moved for summary judgment, citing section 846. The trial court found that the section applied and granted the motion. Judgment was entered on May 27, 2011. This timely appeal followed.

V. DISCUSSION

As pertinent here, 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.”¹

¹ Section 846 provides in full:

“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.

“A ‘recreational purpose,’ as used in this section, includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.

“An owner of any estate or any other interest in real property, whether possessory or nonpossessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby (a) extend any assurance that the premises are safe (continued)

Thus, there are two preconditions to application of section 846: the defendant must be the owner of the real property and the plaintiff's injury must result from entry or use of the property for a recreational purpose. (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1100 (*Ornelas*)). There is no dispute that defendants are the owners of the real property where the speed bump was located or that plaintiff was on a recreational bicycle ride on the day she was injured. Plaintiff argues, however, that because she did not intend to turn onto Thompson Road, she did not enter the land for a recreational purpose. Plaintiff cites *Smith v. Scrap Disposal Corp.* (1979) 96 Cal.App.3d 525 (*Smith*) in support of the argument. The case is distinguishable.

In *Smith, supra*, 96 Cal.App.3d at pages 528 through 529, the plaintiff was injured when, upon returning from a fishing trip with his friends, he and the others stopped and climbed upon a bulldozer on the defendant's land. The plaintiff claimed that he had been on the land only to encourage his friends to get off the bulldozer. The trial court granted summary judgment for the defendant on section 846 grounds. The appellate court reversed. "Whether the statute applies to [the defendant] will turn on the factual question of plaintiff's intent when he entered the storage area [where the bulldozer was located], which is not appropriately resolved on a summary judgment motion." (*Smith, supra*, at

for such purpose, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section.

"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 other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.

"Nothing in this section creates a duty of care or ground of liability for injury to person or property."

p. 529.) The factual question was: Was the plaintiff's intent recreational--did he intend to fool around on the bulldozer--or was his intent nonrecreational--did he intend only to insist that the others stop fooling around and get back in the car? The fact that he had been returning from a fishing trip at some other location was immaterial. (*Ibid.*)

Plaintiff argues that *Smith* stands for the fact the underlying purpose of the trip is not determinative of the plaintiff's purpose in entering the defendant's land. This is correct but it does not aid plaintiff. The underlying purpose of her trip was a recreational bicycle ride. By arguing that she *inadvertently* turned onto Thompson Road, plaintiff implicitly concedes that her intent was to continue her recreational ride. She did not turn onto Thompson Road to deliver a package or visit a friend. She was there with the intent to engage in a recreational pursuit.

It has been said that “[t]he reason the Legislature enacted section 846 was to reduce landowner tendency to remove real property from recreational access. [Citation.] Such exemption from tort liability promotes the use of private land for general public recreational use.” (*Smith, supra*, 96 Cal.App.3d at p. 529.) Plaintiff maintains that this legislative intent is advanced only when the plaintiff enters the defendant's land intentionally. But if section 846 applied only to recreational users who intend to enter private land, landlords would not be discouraged from closing off their land to avoid liability to those who might stray there inadvertently. In any event, as defendants point out, *Jackson, supra*, 94 Cal.App.4th 1110, effectively defeats the argument.

While not precisely on point, *Jackson* is analogous to the case at hand. In *Jackson*, the plaintiff was a young boy who went outside to fly a kite. The kite became entangled in the power lines and the boy was injured trying to retrieve it. (*Jackson, supra*, 94 Cal.App.4th at p. 1115.) He argued that retrieving the kite was not a recreational activity. The appellate court rejected the argument. “[The boy's] presence on the PG&E easement was ‘occasioned by’ his recreational activity [citation]; therefore,

the recreational use immunity statute applies.” (*Ibid.*, citing *Ornelas, supra*, 4 Cal.4th at p. 1102, fn. omitted.)

Like the recreational kite-flying that was interrupted by the kite’s accidentally straying into the power lines, plaintiff’s bicycle riding accidentally left its intended route. Notwithstanding the inadvertence, plaintiff was engaged in a recreational activity when she pedaled along Thompson Road. Her presence there was occasioned by the recreational activity in which she was engaged. The fact that she had taken a wrong turn does not change the character of her activity.

Plaintiff cites Justice Panelli’s dissent in *Ornelas, supra*, 4 Cal.4th at pages 1112 through 1113 in support of her argument that the land to which section 846 applies must be suitable for recreational use. As persuasive as the dissent might be, we look to the majority opinion for the rule. The majority held that there was no suitability exception to section 846 immunity. (*Ornelas, supra*, at p. 1106.)

Plaintiff finally argues that even if her negligence claims are barred by section 846, the section does not bar the premises liability claim because her injuries were the result of defendants’ willful failure to warn of the “invisible speed bump.” Indeed, the fourth paragraph of section 846 specifies that the 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.”

“Willful” failure to warn is not mere negligence; it involves a more positive intent to harm or to do an act with a positive, active and absolute disregard of its consequences. (*Manuel v. Pacific Gas & Electric Co.* (2009) 173 Cal.App.4th 927, 940.) To prove willful failure to warn the plaintiff must usually show that the defendant had actual or constructive knowledge of the peril; actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger; and *conscious* failure to act to avoid the peril. It is sufficient that a reasonable person under the same or similar circumstances would be aware of the “ ‘highly dangerous character of his or her

conduct.’ ” (*Ibid.*) Whether a defendant had actual or constructive knowledge that injury was a probable result of the danger (not just the possible result) is to be determined by examining all the circumstances, which would include, among other things, that the defendant knew people engaged in recreational activity at the location of the dangerous condition, that the condition had resulted in prior accidents, and the dangerous condition was easily accessible. (*Id.* at p. 946.)

Plaintiff argues that defendants had actual or constructive knowledge that the “invisible speed bump” was dangerous and that their failure to warn of the bump or to label the road as private so that recreational riders would not mistake it for Skyline Boulevard, was “willful or malicious” conduct. The argument is unavailing because there is no evidence to support it.

Plaintiff points to the decision to install a five-inch gap in the speed bump as evidence that defendants knew the bump was dangerous. But plaintiff’s position is that the speed bump was dangerous because it was “invisible.” She argues that “a reasonable person in the Defendants[’] position would have been aware of the danger of failing to warn persons using Thompson Road of the existence of the invisible speed bump.” But there is no evidence that defendants knew or should have known that the speed bump was “invisible.” To the contrary, by installing the gap to allow a bicycle to steer through it, defendants had to have believed that a bicyclist would see the bump.

There is no other evidence to support the willful failure to warn cause of action. There is no evidence of prior accidents and no evidence that bicyclists traveled the road with such frequency that defendants should have known of the probability of future injury. Indeed, defendants had seen bicyclists on their road no more than three times in 12 years. There is, therefore, no evidence from which a reasonable jury could find that defendants had actual or constructive knowledge that injury was the probable result of failing to make the speed bump more conspicuous and that they consciously failed to act to avoid the peril. At worst, they were negligent. And under section 846, they are not

liable to recreational users for negligence. Accordingly, the trial court was correct in granting defendants' motion for summary judgment.

VI. DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.