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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

ANTONIO ARRIAGARAZO et al., Individually and as Successors in Interest, etc., Cross-complainants and Appellants, v. COUNTY OF BUTTE, Cross-defendant and Respondent.	C086629 (Super. Ct. No. 161863)

A single-vehicle rollover accident on Bidwell Avenue in the County of Butte (Butte) initially took the lives of two young men who some evidence indicated had been front and rear passengers in the car. Diego Arriaga Rodriguez (Rodriguez), which some evidence indicated had been the young driver, suffered severe injuries and died about two years later. Rodriguez's father owned the car. Before Rodriguez died, the parents of one of the other young men sued Rodriguez and his father; as relevant here, Rodriguez's parents, Antonio Arriagarazo and Alicia Rodriguez De Arriaga (cross-complainants), cross-complained against Butte, alleging the accident site was a dangerous condition of public property.

Butte moved for summary judgment or summary adjudication, asserting among other things that undisputed material facts showed no dangerous condition existed at the accident site and the alleged dangerous condition did not cause Rodriguez's injuries. The trial court granted Butte's motion.

Cross-complainants now contend the trial court incorrectly found that the driver failed to act with due care, and they have stated a triable claim for dangerous condition of public property.

Our review indicates summary adjudication was appropriate. Accordingly, we will affirm the judgment.

BACKGROUND

A 1998 BMW M3 carrying 18-year-old Rodriguez, 19-year-old Bryant Mata and 20-year-old Austin Silver was found lying on its roof in Big Chico Creek in the early morning hours of January 26, 2014. Rodriguez's father was the registered owner of the BMW.

The car left Bidwell Avenue approximately 1,680 feet west of Rose Avenue, within an unincorporated area of Butte. Butte owned and maintained Bidwell Avenue. Residential homes with driveways lined the north side of the road. Big Chico Creek ran along the south.

Bidwell Avenue ran east-west and was approximately 16 to 18 feet wide at the accident site. There was one lane in each direction. The road was generally flat, but it had a super elevated (banked) curve at the accident site. There was a wide gravel shoulder between the curve and Big Chico Creek. A tree stump and a fallen tree were located 20 to 30 feet from the road on the riverbank.

There were no street lights at the accident site. There were also no centerline or other pavement markings on Bidwell Avenue at the site.

The posted speed limit on Bidwell Avenue at the accident site was 25 miles per hour. A black and white 25-mile-per-hour speed limit sign was posted approximately

1,600 feet east of the accident site for westbound traffic. A yellow winding road sign with a "next 1 1/4 mile" placard was posted approximately 1,625 feet east of the accident site for westbound traffic. The speed limit and winding road signs were in place on the date of the accident. The signs passed Butte's nighttime inspection for adequate reflectivity in 2011 and 2012. There were no other traffic signs for westbound Bidwell Avenue motorists until beyond the accident site.

The BMW was travelling west at the time of the accident. It went off the road after failing to negotiate the curve on Bidwell Avenue. There were no skid marks indicating that the BMW swerved or braked before it went off the road. The car landed in the creek below the road in approximately knee-high water. There was major rollover damage to the BMW.

CHP Officer Heather Bushey found Mata's identification in clothes left at the scene after Mata was placed in an ambulance. She and CHP Officer Michael Warner identified Mata as the front seat passenger. Mata was pronounced dead at the hospital.

Officer Warner testified he saw the face of the person removed from the driver's seat and he later confirmed that the driver was Rodriguez. Officer Bushey also confirmed the identity of Rodriguez. Rodriguez suffered serious injuries.

The backseat passenger was trapped in the rear seat and it took an extended period of time for firefighters to remove him. He was pronounced dead at the scene. It was undisputed that Silver was the rear passenger.

Officer Bushey prepared a CHP traffic collision report for the accident. The report identified Rodriguez as the driver and Mata as the front seat passenger. Officer Bushey testified that the identifications were based on her conversations with law enforcement officers and firefighters at the scene. The report concluded that the accident was caused by Rodriguez's inability to negotiate the curve because of intoxication and driving at a speed greater than was reasonable under the circumstances. The Butte County District Attorney's Office brought criminal charges against Rodriguez.

Steve and Christine Silver sued Rodriguez and his father. Rodriguez died on March 5, 2016. On September 19, 2016, cross-complainants, individually and as successors in interest to the estate of their son Rodriguez, filed a first amended cross-complaint against BMW of North America, LLC, Bayerische Motoren Werke Aktiengesellschaft, and Butte. The amended cross-complaint asserted causes of action against Butte for dangerous condition of public property and wrongful death. Cross-complainants alleged that Butte created, maintained and permitted the following dangerous condition of public property to exist: the portion of Bidwell Avenue where the crash occurred was "a windy, unmarked, unlit, extremely hazardous single-lane road that lacked proper lighting, reflective markings, signage or other warnings, and also had inadequate traffic barriers, improper grading, uneven surfacing, and/or dangerous encroachment from trees and debris," and "dangerous turns and excessive curvature" and there was a "fallen tree, tree stump, and other debris located in the shoulder of the roadway at an unsafe proximity to the road."

Butte filed a motion for summary judgment or summary adjudication, arguing the alleged condition was not dangerous as a matter of law, Butte did not create the alleged dangerous condition and did not have actual or constructive notice of the alleged condition, the alleged dangerous condition did not proximately cause cross-complainants' injuries and the amended cross-complaint was a sham because Rodriguez was the driver of the BMW at the time of the crash.

Butte presented the declaration of civil and traffic engineering expert Matthew Manjarrez to show that cross-complainants could not establish the existence of a dangerous condition at the accident site. Manjarrez inspected Bidwell Avenue, at and immediately adjacent to the location of the accident, and reviewed various documents, including the traffic collision report and related photographs taken by law enforcement officers. He opined that the accident site posed no significant risk of injury to motorists.

He concluded that the conditions were reasonable and drivers could safely navigate through the site when driving in an appropriate manner.

Traffic count data for Bidwell Avenue showed that in the 10-year period preceding January 26, 2014, approximately 1.3 million vehicles traveled on Bidwell Avenue through the accident site. Reviewing a report of accidents on Bidwell Avenue from 2006 to 2016 by the Statewide Integrated Traffic Records System (SWITRS) and a Butte summary listing reported accidents on Bidwell Avenue from 2003 through June 2015, Manjarrez identified two accidents at the site. The first occurred in the early morning hours of March 13, 2007, when a vehicle traveling westbound on Bidwell Avenue ran off the road and overturned. The cause of that accident was deemed to be driving at an unsafe speed. The second occurred in the early morning hours of March 8, 2010, and involved substantially similar facts as the present case: a driver drove under the influence and at a high rate of speed on westbound Bidwell Avenue, and his car ran off the road at the curve, went through the gravel shoulder, rolled over and landed in the creek. Butte presented evidence that its Department of Public Works did not receive any service requests relating to a safety deficiency for persons traveling through the accident site during the period September 4, 2003 through January 26, 2014.

In addition, Butte submitted the declaration of biomechanical engineering and accident reconstruction expert Jesse Wobrock, Ph.D. Wobrock inspected the accident site and the BMW and reviewed various documents, including the traffic collision report, photographs and toxicology reports. He opined that the BMW was traveling at about 45 to 55 miles per hour, failed to negotiate the curve, left the roadway, traveled through the gravel area, hit a tree stump and a felled tree, vaulted down the embankment and landed upside down in the creek. He concluded that driving at an excessive speed caused the crash.

A toxicology report for blood drawn from Rodriguez on January 26, 2014, showed that Rodriguez had a blood alcohol content of .06 and the presence of marijuana and

morphine. A toxicology report showed that Mata's blood alcohol content was .07 at the time of his death.

Cross-complainants submitted the declaration of highway and traffic engineering expert Edward Ruzak in opposition to Butte's motion. Ruzak concluded the accident site was in a dangerous condition and posed a significant, foreseeable risk of injury to users. He opined that (1) Bidwell Avenue did not conform with "the CalTrans design [for] striping and signage on a semi-rural, curving road;" (2) the speed limit for the curve should have been 20 miles per hour; (3) the history of collisions in the area gave Butte notice that it needed to improve the striping and signage so that the curve could be negotiated safely; (4) there were inadequate sight distances through the curve, resulting in a dangerous condition for motorists traveling at the speed limit; and (5) Butte installed barriers elsewhere on Bidwell Avenue, demonstrating knowledge of the dangerous conditions along the road. He also opined that the width of Bidwell Avenue was inadequate for modern vehicles and traffic operation.

Using a formula to calculate the comfortable speed, Ruzak opined that the safe speed for the curve was 19.45 miles per hour; thus, the 25-mile-per-hour speed limit sign posted on Bidwell Avenue was improper. He said Butte should have posted an advisory speed plate of 20 miles per hour because a driver traveling faster than 19.5 miles per hour could get close to the critical speed and lose control.

Ruzak averred there were 11 crashes on Bidwell Avenue in a 10-year period, but the SWITRS report he referenced showed all except two of the prior collisions occurred at locations different from the January 26, 2014 crash site. Prior accident evidence may be admitted to prove the existence of a dangerous condition only if the prior accident occurred under the same or substantially similar conditions as the one in question. (*Mixon v. Pacific Gas & Electric Co.* (2012) 207 Cal.App.4th 124, 138; *Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1072; *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 236-238, 243.) Nevertheless, Ruzak said

SWITRS showed a 2016 crash at the same location. (*Simmons v. Southern Pac. Transportation Co*. (1976) 62 Cal.App.3d 341, 365 [a subsequent accident is admissible to show a condition was dangerous].) It is unclear whether the 2016 crash is substantially similar to the one in the present case.

Cross-complainants also presented the declaration of Ted Kobayashi, an expert regarding accident reconstruction, highway design and injury causation. Kobayashi opined that the BMW left Bidwell Avenue at or near the curve, proceeded in a southerly direction, sideswiped a tree trunk and rotated in a counterclockwise direction, went over a log, contacted the sandy slope, then rolled over and landed in the creek. Based on his review of documentary evidence, it was his understanding that the BMW was travelling at 35 miles per hour when it left Bidwell Avenue. He opined, based on photographs taken of Rodriguez showing injuries to the right side of his shoulder and neck and left hip area, that Rodriguez was the front seat passenger at the time of the crash.

Manjarrez submitted a supplemental declaration in reply to cross-complainants' opposition papers. He said the comfortable speed for the curve was 24 miles per hour, not 19.45 as Ruzak determined. Manjarrez attested that downward speed zoning was not required in this case because the curvilinear alignment was apparent to an observant driver. He opined that sight distance was irrelevant because sight distance related to stopping distance after a hazard on the roadway became visible and the collision here did not involve a hazard on the roadway. He further explained why the location of the traffic barrier described in Ruzak's declaration was different from that of the January 26, 2014 accident site.

Butte also submitted a supplemental declaration from Wobrock. Wobrock criticized Kobayashi's opinion that the BMW was traveling at about 35 miles per hour when it left the roadway. According to Wobrock, Kobayashi's assumptions about the BMW's path of travel from the road to the creek were wrong. Wobrock also disputed Kobayashi's opinion that Rodriguez was the front seat passenger.

Following a hearing, the trial court granted Butte's motion for summary adjudication on the dangerous condition cause of action. It concluded Bidwell Avenue did not pose a substantial risk to users exercising due care in a reasonably foreseeable manner. It noted the undisputed fact that Butte posted signs warning of the winding road and speed limit about 1,600 feet from the accident site. The trial court said under the opinion of either party's expert, the BMW was travelling at a speed of at least 30 to 35 miles per hour on a winding, unlit road, with no central marking, at night and such was not due care. The trial court determined the issue of who was driving was not directly relevant to any of the elements of the dangerous condition cause of action.

Although the trial court's order only addresses the cause of action for dangerous condition of public property, judgment was entered in favor of Butte and against cross-complainants. Butte says, without contradiction from cross-complainants, that judgment was proper because the other cause of action against Butte was dependent on the dangerous condition claim. Cross-complainants appeal from the judgment.

STANDARD OF REVIEW

A defendant moving for summary judgment or adjudication may demonstrate that the plaintiff's cause of action has no merit and that the defendant is entitled to judgment as a matter of law by showing that the plaintiff cannot establish one or more elements of the cause of action. (Code Civ. Proc., § 437c, subds. (a)(1), (f), (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849, 853 (*Aguilar*).) The defendant may make such a showing by affirmatively proving that a specified fact does not exist or by showing that the plaintiff has no evidence to prove that fact. (*Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 756 (*Cole*).)

After the defendant meets its threshold burden, the burden shifts to the plaintiff to present evidence showing that a triable issue of one or more material facts exists as to that cause of action. (Code Civ. Proc., § 437c, subds. (p)(1), (p)(2); *Aguilar, supra,* 25 Cal.4th at p. 850.) The plaintiff may show that the defendant's evidence permits

conflicting inferences as to the existence of a specified fact or by presenting additional evidence of its existence. (*Cole, supra*, 205 Cal.App.4th at p. 756-757.) The plaintiff may not simply rely on the allegations of his or her pleadings but, instead, must set forth the specific facts showing the existence of a triable issue of material fact as to the cause of action. (Code Civ. Proc., § 437c, subds. (p)(1), (p)(2).) A triable issue of material fact exists if, and only if, the evidence reasonably permits the trier of fact to find the contested fact in favor of the plaintiff in accordance with the applicable standard of proof. (*Aguilar, supra*, 25 Cal.4th at p. 850.)

If the trial court concludes the evidence or inferences therefrom raise a triable issue of material fact, it must deny the motion. (*Aguilar, supra*, 25 Cal.4th at p. 843; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768 (*Saelzler*).) The trial court must grant the motion if the papers show there is no triable issue as to any material fact and the defendant is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)

We review an order granting summary judgment or adjudication de novo, employing the same three-step analysis as the trial court. (*Aguilar, supra*, 25 Cal.4th at p. 860; *Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal.App.4th 497, 503.) First, we identify the issues framed by the pleadings because it is those allegations to which the motion must respond. (*Hamburg*, at p. 503.) We then determine whether the defendant's showing establishes facts which negate the plaintiff's claims and justify a judgment in the defendant's favor. (*Ibid.*) If the defendant makes such a showing, we determine whether the plaintiff has demonstrated the existence of a triable, material issue of fact. (*Ibid.*)

We view the evidence in a light favorable to the party opposing summary judgment or adjudication, liberally construing that party's evidence while strictly scrutinizing the moving party's showing and resolving all doubts concerning the evidence in favor of the opposing party. (*Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 499-500; *Saelzler, supra*, 25 Cal.4th at p. 767.) We consider all of the evidence

offered in connection with the motion except that which the trial court properly excluded. (*Wilson v. 21st Century Ins. Co*. (2007) 42 Cal.4th 713, 717; *Gin v. Pennsylvania Life Ins. Co*. (2005) 134 Cal.App.4th 939, 946.) The trial court's stated reasons for granting summary judgment or adjudication are not binding on us because we review its ruling, not its rationale. (*Coral Construction, Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 336; *California School of Culinary Acts v. Lujan* (2003) 112 Cal.App.4th 16, 22 [" 'the appellate court may affirm a summary judgment on any correct legal theory, as long as the parties had an adequate opportunity to address the theory in the trial court.' "].)

DISCUSSION

Cross-complainants contend the trial court incorrectly found that the driver failed to act with due care, and they have stated a triable claim for dangerous condition of public property.

A

Government Code section 835[1] "prescribes the conditions under which a public entity may be held liable for injuries caused by a dangerous condition of public property. [Citation.] Section 835 provides that a public entity may be held liable for such injuries '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, [and] that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred.' In addition, the plaintiff must establish 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) '[t]he public entity had . . . notice of the dangerous condition . . . a sufficient time prior to the injury to have taken

[1] Undesignated statutory references are to the Government Code.

measures to protect against the dangerous condition.' " (*Cordova v. City of Los Angeles* (2015) 61 Cal.4th 1099, 1105 (*Cordova*); see *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1131-1132 [a public entity's liability as a property owner must be evaluated under section 835 and not under general negligence principles].) A dangerous condition is "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." (§ 830.)

With respect to public roadways, " 'a public entity is only required to provide roads that are safe for reasonably foreseeable careful use. [Citation.] "If . . . it can be shown that the property is safe when used with due care [generally] and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not 'dangerous' within the meaning of section 830, subdivision (a)." ' " (*Thimon v. City of Newark* (2020) 44 Cal.App.5th 745, 754 (*Thimon*).)

Nevertheless, that a third party's negligence was a proximate cause of the plaintiff's injuries does not preclude a finding of a dangerous condition. (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 152-153 & fn. 5; *Peterson v. San Francisco Community College Dist*. (1984) 36 Cal.3d 799, 810, fn. 8; see *Thimon, supra*, 44 Cal.App.5th at p. 754 ["When a third party's conduct is the immediate cause of a plaintiff's harm, the question becomes whether the dangerous condition 'increased or intensified' the risk of injury from the third party's conduct."]; *Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1348 [same].) Likewise, " '[w]here the condition of property pose[s] a substantial risk of injury to the ordinary foreseeable user exercising due care, the fact the particular plaintiff may not have used due care is relevant only to his [or her] comparative fault and not to the issue of the presence of a dangerous condition.' " (*Castro v. City of Thousand Oaks* (2015) 239 Cal.App.4th 1451, 1458-1459; see also *Cole, supra*, 205 Cal.App.4th at p. 768; *Lane v. City of Sacramento* (2010)

183 Cal.App.4th 1337, 1347-1348; *Milligan v. Golden Gate Bridge Highway & Transportation Dist*. (2004) 120 Cal.App.4th 1, 6-7.) "[I]f a condition of public property 'creates a substantial risk of injury even when the property is used with due care' [citation], a public entity 'gains no immunity from liability simply because, in a particular case, the dangerous condition of its property combines with [someone else's] negligent conduct to inflict injury.' " (*Cordova, supra,* 61 Cal.4th at p. 1105.)

Accordingly, any lack of due care by the driver of the BMW in this case did not necessarily preclude a finding of a dangerous condition at the accident site. But that does not end our analysis.

B

Cross-complainants argue there are triable issues of fact regarding whether particular conditions at the accident site were dangerous. Butte counters that cross-complainants could not rely on the declarations of their experts, Kobayashi and Ruzak, to raise a triable issue because the trial court erred in implicitly overruling Butte's objections to those declarations. Assuming without deciding that the trial court could properly consider the challenged portions of Kobayashi and Ruzak's declarations, and also assuming there is a triable issue regarding whether a condition at the accident site created a substantial risk of injury when used with due care in a reasonably foreseeable manner on January 26, 2014, we nevertheless conclude the papers submitted did not raise a triable issue regarding whether a dangerous condition proximately caused the relevant injuries.

As we have explained, a dangerous condition of public property need not be the sole cause of the plaintiff's injury for liability against the public entity to attach. (*Bakity v. County of Riverside* (1970) 12 Cal.App.3d 24, 32.) The requisite causal link may be established if the public entity's conduct and the conduct of another party concur as proximate causes of the plaintiff's injury. (*Harland v. State of California* (1977) 75 Cal.App.3d 475, 485.) To establish causation, cross-complainants must show that a

physical condition of Butte's property was a "substantial factor" in bringing about their harm. (§ 835; *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 312.) A plaintiff may prove causation through direct and circumstantial evidence and reasonable inferences drawn from that evidence. (*Bowman*, at p. 312.) But we cannot draw inferences " 'from thin air.' " (*Ibid*.)

Butte met its threshold burden of presenting evidence establishing that the relevant injuries were caused by the driver of the BMW and not a dangerous condition at the accident site. The burden then shifted to cross-complainants to produce evidence showing a triable issue of material fact regarding the necessary causal link. (*Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1105 (*Leyva*).) Cross-complainants failed to meet their burden. Although cross-complainants countered with evidence of dangerous conditions, they did not present sufficient evidence to raise a triable issue that the alleged dangerous conditions were a cause of the relevant injuries. Kobayashi averred that the BMW left the roadway "for reasons not clearly known." Ruzak did not provide an opinion about the cause of the relevant injuries.

There is no basis in the evidence for a jury to reasonably find that a physical condition of Bidwell Avenue was a substantial factor in bringing about the relevant injuries. Cross-complainants' appellate brief states in a conclusory fashion that a jury could reasonably find that the dangerous condition of the curve and Butte's failure to guard against danger proximately caused the collision. But they do not cite any portion of the record from which a jury could find such a causal link. Because cross-complainants failed to present evidence creating a triable issue of material fact regarding causation, the trial court properly granted summary adjudication. (*Leyva, supra*, 20 Cal.App.5th at p. 1105; *Constance B. v. State of California* (1986) 178 Cal.App.3d 200, 203, 210-212.)

Because cross-complainants did not raise a triable issue about an element of their dangerous condition cause of action -- causation -- we need not consider cross-complainants' additional arguments.

DISPOSITION

The judgment is affirmed. Butte shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

/S/
MAURO, J.

We concur:

/S/
BLEASE, Acting P. J.

/S/
ROBIE, J.