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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

HEATHER ROSNOW,

Plaintiff and Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Defendant and Respondent.

A111356

(San Francisco County Super. Ct. No. 415997)

Plaintiff's car went from a complete stop in a city parking lot, jumped two six-inch curbs and crossed a 15-foot-wide sidewalk, then plunged into the San Francisco Bay. She sued the city for maintaining a dangerous condition on public property. The trial court granted summary judgment to the city and we affirm.

BACKGROUND

On December 25, 2001, Heather Rosnow was a passenger in a Jeep Cherokee driven by her husband, Jalil Laarif. Laarif drove the car to a parking lot east of the St. Francis Yacht Club and came to a stop in a parking space facing San Francisco Bay. The parking area was separated from the bay by a curb six inches higher than the surface of the parking area, a 15-foot-wide sidewalk, and another curb six inches higher than the

surface of the sidewalk. Plaintiff's car traveled over the first curb, the sidewalk and the second curb and fell into the bay. Laarif died.

Rosnow filed a complaint against the City and County of San Francisco (City) alleging causes of action for wrongful death and negligent infliction of emotional distress caused by a dangerous condition on public property. The City moved for summary judgment on the sole ground that the parking lot was not a dangerous condition as a matter of law because it did not pose a substantial risk of injury when used with due care. The trial court granted summary judgment to the City, ruling that "reasonable minds can only conclude that the risk posed by use with due care in a reasonably foreseeable matter is trivial."

DISCUSSION

I. *Summary Judgment Standard*

An order granting summary judgment is reviewed de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) Summary judgment is appropriate "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).) "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,* at p. 850.)

The summary judgment procedure involves shifting burdens. (*Aguilar, supra,* 25 Cal.4th at p. 849.) A defendant moving for summary judgment has the initial burden of producing evidence that the plaintiff cannot establish one or more of the elements of its cause of action or that there is a complete defense to that cause of action. (*Ibid.*; Code Civ. Proc., § 437c, subd. (o)(2).) Once the defendant meets this burden, the plaintiff bears the burden of producing evidence raising a triable issue of fact about the elements of the cause of action or a defense thereto. (*Aguilar,* at p. 849; Code Civ. Proc., § 437c,

subd. (o)(2).) The defendant always retains the burden of persuasion to show there are no triable issues of material fact and that the defendant is entitled to judgment as a matter of law. (*Aguilar*, at p. 850.)

In ruling on a summary judgment motion, a court must resolve all doubts in favor of the party opposing the motion. (*Saffro v. Elite Racing, Inc.* (2002) 98 Cal.App.4th 173, 178.) The court must strictly construe the evidence presented by the moving party and liberally construe the evidence of the opposing party. (*Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261.) The court's role is not to weigh the evidence, which is the province of the factfinder, but "it must nevertheless determine what any evidence or inference *could show or imply to a reasonable trier of fact*. . . . In so doing, it does not decide on any finding of its own, but simply decides what finding such a trier of fact could make for itself." (*Aguilar, supra,* 25 Cal.4th at p. 856.)

II. *Dangerous Condition on Public Property*

Liability against a public entity may only be established as provided by statute. (Gov. Code, § 815[1]; *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 809.) "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 . . . the] public entity had actual or constructive notice of the dangerous condition." (§ 835.) 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

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[1] All further statutory references are to the Government Code unless otherwise indicated.

will be used." (§ 830, subd. (a).) "A condition is not a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used." (§ 830.2.)

"The negligence of a plaintiff-user of public property . . . is a defense which may be asserted by a public entity; it has no bearing upon the determination of a 'dangerous condition' in the first instance. [Citations.] So long as a plaintiff-user can establish that a condition of the property creates a substantial risk to *any* foreseeable user of the public property who uses it with due care, he has successfully alleged the existence of a dangerous condition regardless of his personal lack of due care. If, however, it can be shown that the property is safe when used with due care 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). [Citation.]" (*Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 131.)

" 'Whether a given set of facts and circumstances creates a dangerous condition is usually a question of fact and may only be resolved as a question of law if reasonable minds can come to but one conclusion.' " (*Peterson, supra,* 36 Cal.3d at p. 810.)

III. *Analysis*

Rosnow argues that the City failed to meet its initial burden on summary judgment and that, in any event, she raised triable issues of material fact in her opposition to summary judgment by way of an expert witness declaration.

A. *City's Initial Burden*

In its moving papers, the City maintained that Rosnow could not establish that the parking lot was a dangerous condition, an essential element of her causes of action.

To demonstrate that the plaintiff cannot establish an element of a cause of action, a defendant may either conclusively negate the element or show that the plaintiff does not possess and cannot reasonably obtain the evidence necessary to prove the element. (*Aguilar, supra,* 25 Cal.4th at pp. 853-854.) A defendant must produce evidence to make either of these showings. (*Id.* at pp. 854-855.)

By summary judgment motion, the City attempted to conclusively negate an element of Rosnow's claims by arguing that as a matter of law the parking lot was not a dangerous condition. As evidence, the City relied on the physical layout of the parking lot. Plaintiff argued that the City failed to meet its initial burden because it did not produce evidence of circumstances relevant to the level of risk posed by the lot.

Section 830.2 requires a court to decide whether a condition on public property is not dangerous as a matter of law where the risk created by the condition is "of such a minor, trivial or insignificant nature *in view of the surrounding circumstances"* (emphasis added). In *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, the court enumerates factors that must be considered when determining whether a condition presents only a minor risk of harm as a matter of law. "The court should consider both the physical description of the condition, and 'whether there existed any circumstances surrounding the accident which might have rendered the defect more dangerous than its mere abstract [description] would indicate' . . . Where appropriate, the court should consider . . . the time and place of the occurrence [and] the court should see if there is any evidence that other persons have been injured on this same defect.' ([*Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 734.])" (*Sambrano*, at p. 234.)

Fielder demonstrates that in the absence of evidence of aggravating circumstances, a court may conclude based solely on the physical description of public

property that the property was not a dangerous condition as a matter of law. (*Fielder, supra,* 71 Cal.App.3d at pp. 732-734.) Accordingly, if the physical layout of the parking lot, without more, does not pose a dangerous condition to the general public, the City met its initial burden of production.

We so conclude. The physical layout of the parking lot did not pose a substantial risk of harm when the property was used with due care. The parking spaces were separated from the bay by two raised six-inch curbs and a 15-foot-wide sidewalk. The drop-off into the bay was open and apparent, and the sidewalk was plainly visible.

There is no dispute that the City is not liable if Laarif deliberately drove the car over the curbs, across the sidewalk, and into the bay: he would then have voluntarily encountered an obvious hazard.[2] (See *Fredette, supra,* 187 Cal.App.3d at p. 131.) Rosnow contends, however, that Laarif's accident could have occurred unintentionally and without negligence. She explains that a car can lurch forward unexpectedly due to a mechanical failure or sudden illness of the driver. In that situation, the existing barriers in the parking lot would not prevent the car from falling into the bay. Thus, she argues, a reasonable person could conclude that the condition of the property creates a substantial risk of injury even when a driver uses the parking lot with due care.

Rosnow relies on *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707 for her argument that the possibility of mechanical failure and sudden illness affecting a driver is an

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[2] The evidence in the record does not establish that Laarif deliberately drove his car into the bay. In her complaint, Rosnow alleged that Laarif died "when the aforesaid Jeep Cherokee vehicle being driven and operated by Jalil Laarif with his wife, Heather Rosnow, as a passenger, traveled from the aforesaid parking lot into the bay." We must draw all reasonable inferences from this allegation in Rosnow's favor. The phrase "driven and operated by" simply identifies the car as the one previously described in the complaint as the vehicle Laarif drove into the parking lot. The term "traveled" does not imply Laarif deliberately drove the car into the bay. The record is silent as to the reason the car traveled across the barriers and into the bay.

appropriate consideration when determining whether public property is dangerous as a matter of law. *Ducey* is distinguishable.

In *Ducey, supra,* 25 Cal.3d 707, plaintiffs were traveling on a freeway when a car going in the opposite direction crossed the median and struck them head-on. (*Id.* at p. 711.) On appeal, the plaintiffs argued that the absence of a median barrier on the freeway was a dangerous condition. (*Id.* at p. 712.) The state countered that the absence of a median barrier did not create a substantial risk of harm when the freeway was used with due care because cross-median accidents usually resulted from the negligence of drivers. (*Id.* at p. 719.) The court concluded "the evidence in the instant case was clearly sufficient for the jury to conclude that the lack of a median barrier created a substantial risk of injury even in the absence of negligent conduct. . . . [N]umerous expert witness identified various situations in which cross-median accidents might occur in the absence of negligence, as when accidents result, for example, from mechanical failure, sudden illness, or animals in the road." (*Ibid.*) However, *Ducey* was based on its particular facts about the surrounding circumstances: the freeway was heavily traveled at high speeds and there had been a history of cross-median accidents in the stretch of road where the plaintiffs were injured. (*Id.* at pp. 712-713.) It does not stand for the proposition that the possibility of a car accident resulting from mechanical failure or sudden illness defeats a defendant's summary judgment motion. Moreover, *Ducey* was an appeal from a jury verdict in favor of plaintiffs. The trial court did not rule as a matter of law that the highway condition was dangerous.

The surrounding circumstances in the case before us are that motorists in the parking spaces facing the bay are either at a stop or moving at very low speeds; they do not encounter any oncoming traffic. While it is possible that a car might lurch forward due to mechanical failure or the driver's sudden illness and travel fast enough to jump two curbs and cross a broad expanse of sidewalk, it is an unlikely occurrence that does not create a substantial risk of harm. Were we to hold that this possibility rendered the

parking lot dangerous, we would be requiring the City to be an insurer against injuries that arise from trivial defects on public property, contrary to the public policy underlying the Tort Claims Act (§ 810 et seq.). (*Fielder, supra,* 71 Cal.App.3d at p. 734.) "[T]he City of San Francisco has no duty to provide curbs or other protective features throughout the City which would in all cases prevent negligent motorists from driving from the street onto the sidewalk and damaging property or injuring persons." (*Curreri v. City etc. of San Francisco* (1968) 262 Cal.App.2d 603, 610.) It is only when a particular combination of circumstances converge that a property owner has a duty to install greater protective barriers. (*Id.* at p. 611; see *Constantinescu v. Conejo Valley Unified School Dist.* (1993) 16 Cal.App.4th 1466, 1475.) That combination of circumstances is not present here.

Finally, Rosnow argues this case is analogous to curb-jumping cases where courts have found private property owners liable. Rosnow relies on *Jefferson v. Qwik Korner Market, Inc.* (1994) 28 Cal.App.4th 990, which surveys cases where private property owners were found liable when they invited customers to stand adjacent to a parking lot in order to obtain service and motorists jumped the curb and injured the customers. (*Id.* at p. 995.) Rosnow argues those cases are analogous because in both situations there is a high likelihood of injury if an accident occurs. *Jefferson* explained there was a high likelihood in the curb-jumping cases that if a car jumped the curb, a pedestrian would be at the location and would be injured. (*Ibid.*) Here, Rosnow argues, if a car jumps the two curbs and the sidewalk in the parking lot, there is a high likelihood of injury to the driver because of the drop-off into the bay.

The analogy is unpersuasive. In the *Jefferson* cases, the property owner placed pedestrians in a position where they would be immediately injured if a car jumped a curb, whereas the City simply makes parking spaces available to drivers. The driver who might be injured by a curb-jumping incident is at least nominally in control of the vehicle that jumps the curb, and the injury occurs only after the car jumps a six-inch curb, crosses

a 15-foot-wide sidewalk and jumps another six-inch curb. The remote possibility of such an accident creates only a minor risk of injury to persons who use the parking lot with due care.

B. *Plaintiff's Expert Witness Evidence*

Rosnow next argues that, even if the City met its initial burden of production, summary judgment should have been denied because the declaration of her expert witness raised triable issues of material fact about whether the parking lot was a dangerous condition.

Harry J. Krueper, Jr., a civil and traffic engineer with 45 years experience, opined that the two curbs and the sidewalk were "inadequate to stop an automobile traveling from three-to-five miles per hour, and [were] not an adequate protective barrier separating automobiles from the drop-off into the bay." Based upon his education, training and experience, he opined "that at any location where there is a potential of a vehicle entering into a body of water or a canyon, or where there are other forms of a 'drop off' that would offer the potential for injury and/or death to the occupants of a motor vehicle, generally accepted and practiced [principles] of traffic engineering require[] the presence of a protective barrier. . . . [¶][¶] . . . a barrier wall or guardrail at least 27 inches in height, secured properly, would have prevented the Jeep Cherokee from traveling from the parking lot, down the approximate eight foot drop off, into the bay at the speeds previously evaluated. . . . [¶][¶] Had the parking stalls been adequately prepared and guarded, the subject vehicle would not have reached the bay causing the death of the occupant." He further stated, "[A]n accident like the one that occurred here could be caused in a number of ways not involving careless or negligent driving on the part of a driver, including, for example, mechanical failure or malfunction, such as spontaneous or sudden acceleration, brake failure, spontaneous slippage or shifting of the

gears (e.g., spontaneous shifting from 'Park' to 'Drive'), or the sudden onset of an illness or medical condition, such as a stroke, heart attack, or epileptic seizure."

Krueper's declaration does not alter our independent assessment that the parking lot was not dangerous as a matter of law. "[T]he fact that a witness can be found to opine that such a condition constitutes a significant risk and a dangerous condition does not eliminate this court's statutory task, pursuant to section 830.2, of independently evaluating the circumstances." (*Davis v. City of Pasadena* (1996) 42 Cal.App.4th 701, 705.) Krueper states that an accident could result from mechanical failure and sudden illness, and we have acknowledged this possibility and concluded it does not raise a substantial risk of harm. Krueper provides no factual information regarding the likelihood of such incidents that might change our evaluation. Krueper states that the curbs and sidewalk would not stop a car involved in such an incident if it was traveling three to five miles per hour, but the remote possibility that such an accident would occur at all renders it insufficient to raise a substantial risk of harm. Krueper also states that a larger barrier would prevent a car involved in such an accident from going over the curbs and the sidewalk and falling into the bay. But the fact that protective measures may have prevented a plaintiff's injury is not evidence that the absence of the protective measures created a dangerous condition on public property. (*McKray v. State of California* (1977) 74 Cal.App.3d 59, 62-63.)

Rosnow did not produce evidence of traffic patterns, typical weather conditions or a history or absence of prior accidents in the lot, the surrounding circumstances she acknowledges were relevant to our determination of whether the parking lot was a dangerous condition. She failed to raise triable issues of material fact regarding whether the property was a dangerous condition.

In sum, we hold as a matter of law that the property is not a dangerous condition. The City met its burden of producing evidence that Rosnow cannot establish an essential element of her claims.

DISPOSITION

The judgment is affirmed.

GEMELLO, J.

We concur.

SIMONS, Acting P. J.

BRUINIERS, J.*

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* Judge of the Superior Court of Contra Costa County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.