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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

LUCAS KANDEL, Minors, etc., et al. Plaintiffs and Appellants, v. CITY OF THOUSAND OAKS et al., Defendants and Respondents.	2d Civil No. B194356 (Super. Ct. No. SC041735) (Ventura County)

While hiking in lands owned and managed by Conejo Open Space Conservation Agency (COSCA), appellants and three other minors came upon a storm drain. They climbed into a catch basin and entered a drainage pipe, which angled sharply upward. Appellants turned back and waited at the mouth of the pipe while the three other minors continued upward. On their descent, they slipped and collided with appellants, injuring them. They filed a tort action against the City and one of the minors, alleging a dangerous condition of public property, and negligence. Both moved for summary judgment, which the trial court granted. We conclude that appellants failed to establish the existence of a dangerous condition of public property and affirm.

FACTS AND PROCEDURAL HISTORY

On February 16, 2004, appellants Lucas Kandel and Jordan Flores decided to hike in the Arroyo Conejo Open Space. Appellants were accompanied by three other

minors, Justin Flores, Jonathan Flores and respondent Dustin Urquhart. Justin Flores and Jonathan Flores are not parties to the appeal.

Three of the boys had visited the Arroyo Conejo Open Space the day before the accident and returned to explore a cave. They brought water, food and flashlights. The boys started the hike at the Rancho Conejo Playground. They visited a waterfall, then proceeded to a second waterfall where they explored a cave. They continued north along the Conejo creek in an area that had no trail. The boys stopped when they reached a storm drain and catch basin. By this time they had been hiking for two to three hours and the temperature was approximately 80 to 90 degrees.

The catch basin had 2- to 4-foot high walls. The boys climbed over the wall and felt cool air blowing out of a drainage pipe. They sat down inside the basin and could see water coming through the pipe and moss in the bottom of the basin. Urquhart suggested that the boys explore the pipe. Justin said it was not a good idea.

The boys crawled into the pipe on their hands and feet in a hunched-over position. Urquhart was in the lead, followed by Jonathan Flores, Lucas Kandel, Jordan Flores and Justin Flores. After advancing three feet into the pipe it was too dark to see. As they crawled, the slope of the pipe changed abruptly and became very steep. Jordan Flores became frightened and turned around. Lucas Kandel said he would stay with Jordan. Urquhart climbed 400 feet into the pipe.

Appellants (Lucas and Jordan) left the pipe, but re-entered it to be in the shade. They waited for 15 minutes, and then called up to the other boys, who had reached a flat area. The boys called out that they were on their way down, and appellants stopped about 5 to 10 feet from the exit, while still inside the pipe. The other boys crabwalked down the pipe, to keep themselves above the water. Justin sat down in the water, so he could slide down the pipe. The boys began sliding too fast and lost control. They tumbled down and collided with appellants, injuring them.

The operative pleading is third amended complaint. Appellants, through their guardians ad litem, filed a tort action against the City of Thousand Oaks, Conejo Recreation and Parks District, and the Conejo Open Space Conservation Agency

(collectively City), alleging that the City was liable for creating a dangerous condition on public property. They also named Dustin Urquhart in the complaint and alleged a cause of action against him for negligence.

Appellants contended that they were injured while sitting at the open end of the storm drain. They claimed that the "open storm pipe and open catch basin/water flow dissipater" constituted a dangerous condition and proximately caused appellants' injuries. They alleged that the City could have prevented their injuries by installing a device to "secure the openings" of the storm drain and catch basin.

The storm drain had been the property of COSCA since 1995. Appellants claimed that COSCA knew or should have known that people were entering the pipe and catch basin because there was trash and evidence of campfires nearby. The catch basin was marked with graffiti and part of the basin had been repainted to cover it. Appellants indicated that there were no warning signs near the storm drain, nor was there a fence, grate or barrier to protect people from injury. They claimed that the danger presented was that others could climb in the drain pipe without knowing of the steep incline, lose traction and risk injury to themselves or others.

The City and Urquhart answered and moved for summary judgment. The trial court granted both motions.

City's Motion for Summary Judgment

The City alleged in its motion for summary judgment that 1) there was no dangerous condition of public property; 2) the actions of third parties (i.e., the boys sliding down the pipe) cannot constitute a dangerous condition; 3) the condition of which appellants complained was open and obvious; 4) appellants assumed the risk of injury; and 5) the City is immune from liability under Government Code sections and 830 and 831.7.

Appellants filed opposition to the City's motion. They contended that the City was liable for their injuries because it had actual or constructive notice but failed to take measures to protect against the dangerous condition. Appellants claim they used the

property with due care and did not behave recklessly by sitting inside the pipe waiting for their friends.

Appellants also alleged that the doctrine of assumption of the risk does not apply. They asserted that they were unaware of the condition of the pipe until their companions entered it. They had no knowledge of the configuration of the pipe, so could not appreciate the danger it presented "in conjunction with the other children's conduct." Appellants claimed that "taking a walk in nature" is not an inherently risk activity, within the meaning of the doctrine.

Trial Court's Ruling

When the trial court granted the City's motion for summary judgment, it sated that ". . . it does not appear that the property could be used with due care, and so as an alternate ground in addition to the primary assumption of risk analysis, . . . this does not appear to be a dangerous condition as defined by Government Code Section 830, so on both those grounds the government entities' motions are granted."

A formal order was issued granting summary judgment in favor of City. The trial court indicated that "the application of the Doctrine of Primary Assumption of the Risk and the undisputed [f]acts established that no 'dangerous condition' of public property as defined by Government Code Section 830 et seq., existed or proximately caused or contributed to [appellants'] injuries. The court granted summary judgment in favor of Urquhart based on the doctrine of primary assumption of the risk. The rulings on both motions were reduced to a single judgment, which was entered on August 11, 2006.

On appeal, appellants claim the trial court erred in granting the City's motion for summary judgment, but raise no claim of error as to its grant of summary judgment in favor of Urquhart. The City and Urquhart both filed reply briefs. Although Urquhart's counsel appeared at oral argument, he did not participate.

DISCUSSION

Summary judgment is appropriate when no triable issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. A

defendant seeking summary judgment has the burden of establishing through admissible evidence a complete defense to the action or the absence of an element essential to plaintiff's case. We independently review the motion on appeal to determine the effect of the supporting declarations and evidence. (Code Civ. Proc., § 437c, subds. (c) & (f)(1); *Rosenblum v. Safeco Ins. Co*. (2005) 126 Cal.App.4th 847, 856.) We affirm the summary judgment if it is correct on any legal theory. (*Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, 1481; *Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1071.)

Dangerous Condition of Public Property

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." (Gov. Code, § 830, subd. (a).)

A public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that (1) the property was in a dangerous condition at the time of the injury; (2) the injury was proximately caused by the dangerous condition; and (3) the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred. (§ 835.) Where the facts are undisputed, the existence of a dangerous condition is a question of law. (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 148.)

Appellants argue on appeal that it was reasonably foreseeable that a hiker would, on a hot day, sit in the storm drain to cool off. It was also foreseeable that a hiker might enter the drain pipe, climb the steep incline "and potentially fall down it and injure themselves or others." They contend that this is especially likely with children, who are held to a lower standard of care than adults.

We disagree. The trial court correctly concluded that no dangerous condition existed. Appellants climbed into a catch basin, crawled up a slippery storm drain in the dark, crawled back down the pipe, and sat inside. This cannot be said to be a use of the storm drain with due care. Nor was it reasonably foreseeable that the storm

drain would have been used in this manner. The storm drain was accessible only by two to three hours of hiking in a remote area without marked trails. It was not foreseeable that the minors would obtain access to the storm drain, much less climb inside the pipe.

We reject appellants' argument that the storm drain constituted a dangerous condition because there were no warning signs or a fence or grate to act as a barrier to prevent the boys' access. Appellants were not injured by the storm drain or catch basin, but by the collision when their friends slid out of the drain pipe. The City owed no duty to protect appellants from the actions of their friends.

Primary and Secondary Assumption of the Risk

Determining whether the primary assumption of risk doctrine applies is a legal question to be decided by the court. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 313 (*Knight*).) The existence of a duty of care is a legal question that we may review de novo. (*Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 993.)

Persons have a duty to use due care to avoid injury to others and may be held liable if their careless conduct injures another. (Civ. Code, § 1714.) To establish a cause of action for negligence, a plaintiff must prove that the defendant owed him a duty of care. (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1197.) An exception to this general rule is the doctrine of primary assumption of the risk. (*Ibid.*)

Knight, supra, 3 Cal.4th 296, distinguished between the doctrines of "primary" and "secondary" assumption of the risk. Primary assumption of the risk applies when the defendant does not owe a duty of care to protect the plaintiff from the risk of harm that caused the injury. Secondary assumption of the risk applies where the defendant has breached a duty of care owed to the plaintiff, but the plaintiff chooses to encounter a known risk created by defendant's breach. (*Id.* at pp. 314-315.) Primary assumption of the risk is a complete bar to recovery, while secondary assumption of the risk "is merged into the comparative fault scheme . . . ." (*Id.* at p. 315; *Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1068.)

In the sports setting, "conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself." (*Knight, supra,* 3 Cal.4th at p.

315.) A defendant has a duty to use due care not to increase the risk above those inherent in the sport. (*Id.* at p. 316.) A defendant's liability turns on the whether another's conduct was an "inherent risk" of the sport and whether the defendant had a legal duty to protect the plaintiff against a particular risk of harm. (*Id.* at pp. 316-317.) A coparticipant in a sport cannot be held liable for careless conduct, but only is liable when he intentionally injures the plaintiff or engages in conduct so reckless it was totally outside the range of activities involved in the sport. (*Id.* at p. 321; *Ford v. Gouin* (1992) 3 Cal.4th 339, 342.) Conduct that is merely careless is barred by the primary assumption of the risk doctrine. (*Ibid.*)

To determine whether primary assumption of the risk rather than comparative negligence principles apply, a court must examine the nature of the activity, the relationship of the plaintiff and defendant to the activity and to each other. (*Childs v. County of Santa Barbara* (2004) 115 Cal.App.4th 64, 70; see *Knight, supra,* 3 Cal.4th at pp. 316-317.) For example, recreational dancing is not subject to primary assumption of the risk. (*Bush v. Parents Without Partners* (1993) 17 Cal.App.4th 322, 329.) A defendant who operated a dance hall spread Ivory Snow Flakes on the dance floor, causing a dancer to slip on the substance and fall. The trial court granted summary judgment in favor of the defendant. The reviewing court reversed, holding that the *Knight* rule was inapplicable because falling was not a risk inherent in the activity of recreational dancing. (*Ibid.*) Moreover, the defendant had breached a duty of due care by spreading the substance on the floor. Thus, the dancer's fault in dancing on the floor did not operate as a complete bar to her recovery. (*Id.* at p. 330.)

We addressed a similar issue in *Childs v. County of Santa Barbara, supra,* 115 Cal.App.4th 64. There, a child was injured while riding a scooter on a county sidewalk. She fell after riding over a section of the sidewalk that was three inches higher than the adjoining slab of sidewalk concrete. The plaintiff sued, alleging a dangerous condition of public property. The County did not defend on the basis of governmental immunity, but contended that scooter riding was a sport or recreational activity, thus her

claim was barred by primary assumption of the risk. The trial court granted the County's motion for summary judgment.

We concluded that the record did not establish that the child was engaged in a "sport or sport-related recreational activity" subject to the doctrine of primary assumption of risk and noted that the risk of falling did not cause an activity to be inherently dangerous. (*Childs v. County of Santa Barbara, supra,* 115 Cal.App.4th at pp. 70-71.) "Falling or a comparable mishap is possible in any physical activity but is not necessarily an *inherent danger* of the activity." (*Id.* at p. 73.) We reversed the order granting summary judgment because a triable issue existed as to whether the plaintiff was riding her scooter in such a manner that primary assumption of the risk would bar recovery. (*Id.* at pp. 74-75.)

Appellants assert that the primary assumption of the risk doctrine is inapplicable because cooling off in the drain pipe was not a sport and did not involve any challenge or potential risk of injury. They claim that, although they began their day by hiking, the only activity they were engaged in at the time of the injury was "relaxing and cooling down in the storm drain" while their companions continued to climb into the pipe.

Appellant were not engaged in a sport or sports-related recreational activity at the time of the injury. All five hiked into an open space and had stopped to explore several areas, including the storm drain. All five entered the drain, although appellants turned back. That three of the boys slipped on the pipe, fell and collided with appellants does not transform their hiking and exploration into a recreational activity subject to primary assumption of the risk.

The City had no direct relationship with the boys' activity--it simply owned and maintained the property upon which they chose to hike and explore. The trial court erred in concluding that appellants' recovery was barred by the primary assumption of the risk. However, the error does not alter the outcome. As has been established, no dangerous condition existed. (Gov. Code, § 835.) Thus, the City bears no liability for appellants' injuries.

Hazardous Recreational Activity

The City raises as a defense that it is immune from liability pursuant to Government Code section 831.7 because appellants were engaged in a hazardous recreational activity on public property. We need not address the contention because we have concluded that appellants were not engaged in a recreational activity when they were injured.

We affirm the judgment. Costs on appeal are awarded to respondents.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

William Liebmann, Judge

Superior Court County of Ventura

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