Filed 2/6/17 Hidalgo v. Southern Cal. Rail Authority C2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SABRINA RAQUEL HIDALGO et al., Plaintiffs and Appellants, v. SOUTHERN CALIFORNIA RAIL AUTHORITY, Defendants and Respondents.	B268534 (Los Angeles County Super. Ct. No. BC473647)

APPEAL from a judgment of the Superior Court of Los Angeles County. Donna Fields Goldstein, Judge. Reversed and remanded with directions.

Knickerbocker Law Firm, Richard L. Knickerbocker for Plaintiffs and Appellants.

Hawkins Parnell Thackston & Young, Ryan K. Marden for Defendants and Respondents.

Jose Jesus Hidalgo (Hidalgo) was riding his horse on railroad tracks in the Pacoima neighborhood of Los Angeles. Just as Hidalgo and the horse crossed over a railroad bridge spanning a wash, they were struck by a southbound train. Tragically, both Hidalgo and the horse died.

Hidalgo's survivors, plaintiffs and appellants Sabrina Raquel Hidalgo, Jesus J. Hidalgo, Tatianna Devina Hidalgo, and Cynthia Ashley Hidalgo (collectively, plaintiffs), sued defendants and respondents Southern California Regional Rail Authority, dba Metrolink (Metrolink), and Los Angeles County Metropolitan Transportation Authority (MTA) (collectively, defendants). The operative complaint stated three causes of action, for (1) negligence, based on allegations that defendants were vicariously liable for the locomotive engineer's own negligence, (2) negligent hiring, retention, and supervision, and (3) premises liability.

The trial court granted summary judgment in favor of defendants. With respect to the first cause of action, defendants' sole argument, and the trial court's only basis for granting the motion, was that defendants could not be liable for the engineer's negligence because he was an independent contractor, not their employee. We reverse the judgment, because we find that plaintiffs raised triable issues of material fact as to whether the engineer was a dual or special employee of defendants. We further conclude that summary adjudication in defendants' favor was appropriate on the second and third causes of action.

BACKGROUND

Evidence presented on defendants' motion for summary judgment

On February 11, 2011, at approximately 3:00 p.m., Hidalgo was riding his horse southbound on railroad tracks that run parallel to San Fernando Road between Branford Street and Sheldon Street in Pacoima.

Approximately .4 miles south of Branford Street, both the railroad tracks and San Fernando Road cross the Tujunga Wash on separate bridges. The railroad tracks cross the wash on a narrow railroad bridge, approximately 75 feet long. Just west of the railroad bridge, San Fernando Road crosses the wash on a much wider bridge, with two southbound lanes, two northbound lanes, a center lane, and a sidewalk that runs along the west side of the bridge.

Rather than take San Fernando Road or its sidewalk across the Tujunga Wash, Hidalgo elected to ride his horse on the railroad bridge. At the southern end of the railroad bridge, he and the horse were struck and killed by a Metrolink train.

The locomotive engineer who operated the train, Michael Hyman, provided a declaration in support of defendants' motion for summary judgment. According to Hyman's declaration, on the day of the incident, he was employed by Amtrak while operating the Metrolink train. The train traveled southbound at approximately 79 miles per hour as it approached Branford Street. Hyman sounded the train horn while approaching and crossing Branford Street. After crossing Branford Street, Hyman saw an object on the railroad tracks in the area of the Tujunga Wash railroad bridge. He sounded the train horn and bell. A few seconds later, he recognized the object as a man on a horse, continued sounding the horn and bell, and began slowing the train by throttling down and using the automatic brake. When he realized the man and horse were not clearing from the tracks, Hyman employed the emergency brake; nevertheless, the train still struck and killed Hidalgo (and the horse) just past the southern end of the Tujunga Wash railroad bridge.

Defendants also submitted the declaration of an expert witness, Foster Peterson, with experience as a locomotive engineer and a railroad accident investigator. Peterson analyzed the subject train's locomotive event recorder (or, as more commonly known, the "black box"). Peterson determined that the train did not exceed the 80 mile per hour speed limit for the Class 4 track on which it traveled. He further concluded that Hyman sounded the train horn in the required sequence for the Branford Street grade crossing, that the train horn and bell were sounded as a warning after the train crossed Branford Street, and that the horn and bell continued to be activated through impact with Hidalgo. Additionally, Hyman first slowed the train by applying the train's automatic brake and then applied the emergency brake as he approached the Tujunga Wash.

Evidence showed that MTA owns the property where the incident occurred and that Metrolink maintains the railroad tracks. Both MTA and Metrolink are public entities.

In opposing the motion for summary judgment, plaintiffs presented evidence that the railroad tracks in the area of the Tujunga Wash bridge were not fenced. Plaintiffs also submitted a declaration from a paralegal who noted the presence of transients, tire tracks, shopping carts, bicycles, trash, and graffiti in the area near where the accident occurred. According to plaintiffs, this evidence demonstrated there was heavy pedestrian traffic on or near the railroad tracks.

With regard to the status of Hyman's employment, while acknowledging that Hyman was referred to as an "employee" of Amtrak in the contract between Metrolink and Amtrak, plaintiffs submitted evidence that they contended demonstrated an employment relationship with Metrolink, including: Hyman operated a train owned by Metrolink that was

subject to Metrolink rules for operation; prior to operating Metrolink trains, Hyman was required to undergo training on Metrolink rules; Metrolink set the train schedules; Metrolink reimbursed Amtrak its actual costs for employee compensation and training; Metrolink personnel could personally observe and review the conduct of Amtrak employees on the Metrolink trains; and, subject to certain conditions pertaining to employee conduct, Metrolink could bar an individual Amtrak employee from working on Metrolink trains.

Grounds for the motion and the trial court's ruling

Defendants relied on the following grounds in moving for summary judgment (or, in the alternative, summary adjudication): (1) the first cause of action for negligence failed because the locomotive engineer was not employed by defendants; (2) the second cause of action for negligent hiring, retention, and supervision was preempted by federal law; and (3) the third cause of action for dangerous condition of public property failed because plaintiffs could not show the railroad tracks were a dangerous condition under the Government Code. Plaintiffs opposed the motion.

The trial court accepted defendants' arguments and granted summary judgment. In doing so, the court found that plaintiffs did not adequately counter defendants' assertion that Hyman was not their employee, that the second cause of action was preempted by federal regulations, and that the third cause of action failed because the presence of railroad tracks was an open and obvious danger.

Plaintiffs timely appealed from the subsequent judgment.

DISCUSSION

Code of Civil Procedure section 437c, subdivision (c) provides that a motion for summary judgment shall be granted if the papers submitted show there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. A defendant may meet its burden on

summary judgment by presenting evidence that either demonstrates the plaintiff cannot prove one or more elements of its causes of action or that establishes a complete defense. (Code Civ. Proc., § 437c, subd. (p)(2).) The burden then shifts to the plaintiff to set forth specific facts showing a triable issue of fact material to the causes of action or defense. (*Ibid*.)

We evaluate a summary judgment ruling de novo, independently reviewing the record to determine whether there are any triable issues of material fact. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.) "In practical effect, we assume the role of a trial court and apply the same rules and standards that govern a trial court's determination of a motion for summary judgment." (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1258.) Doubts are resolved in favor of the party opposing the judgment, and we are not bound by the trial court's reasons for the summary judgment ruling. (*Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 181; *Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89, 97.)

I. <u>First cause of action</u>

In their first cause of action, for negligence, plaintiffs assert that defendants are liable under Government Code section 815.2 for the negligent operation of the train by an employee. Defendants argue, as they did in the trial court, that this cause of action fails for a single reason: Hyman was not defendant's employee, but instead was an independent contractor.

The Government Claims Act (Gov. Code, § 810 et seq.) provides that a public entity can be liable only as provided by statute. (Gov. Code, § 815; *State ex rel. Dept. of California Highway Patrol v. Superior Court* (2015) 60 Cal.4th 1002, 1009 (*Alvarado*).) The doctrine of respondeat superior, as it applies to public entities, is codified in Government Code section 815.2, subdivision (a). (*Miklosy v. Regents of University of California* (2008) 44

Cal.4th 876, 900.) That section states: "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment . . . ." (Gov. Code, § 815.2, subd. (a).) "Employee," as referred to in the statute, is defined as "an officer, judicial officer . . . employee, or servant, whether or not compensated, but does not include an independent contractor." (Gov. Code, § 810.2.)

In moving for summary adjudication on the first cause of action, defendants relied solely on the declarations of Hyman and an Amtrak supervisor. Both of these declarations stated that, at the time of the accident, Hyman was an Amtrak employee. Based on this evidence, defendants contended that they could be not be liable under Government Code section 815.2 because it only applies to acts or omissions of employees, and Hyman was an independent contractor, not an employee. In opposing defendants' motion, plaintiffs set forth evidence, as noted above, that they contended showed Hyman was an employee, or dual employee, of defendants.

We look to the common law to determine whether Hyman could be considered an employee of defendants.[1] (See *Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal.4th 491, 500 [applying common law test of employment with regard to general statutory reference to "employees"]; *Briggs v. Lawrence* (1991) 230 Cal.App.3d 605, 614-618 [applying common law test in determining public defender was public employee]; see also *Alvarado, supra,* 60 Cal.4th 1002, 1012-1014.) *Alvarado*, which examined whether a tow truck driver could be considered an employee of the California Highway Patrol under Government Code section 815.2, explained the

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[1] Defendants moved jointly for summary judgment, and do not argue that they potentially face different grounds for liability. As such, we do not analyze whether Hyman may have had an employment relationship with only one, but not the other, defendant.

common law basis for finding a special or dual employment relationship. "Under the common law, a special employment relationship arises when a "'general" employer . . . lends an employee to another employer and relinquishes to [the] borrowing employer all right of control over the employee's activities . . . .' [Citation.] 'During this period of transferred control, the special employer becomes solely liable under the doctrine of respondeat superior for the employee'10
s job-related torts. [Citations.]'" (*Id*. at p. 1008.) Nevertheless, not all special employment relationships are exclusive. "'Where general and special employers share control of an employee's work, a "dual employment" arises, and the general employer remains concurrently and simultaneously, jointly and severally liable for the employee's torts.'" (*Ibid*., quoting *Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 492, 494-495.)

Alvarado also explained that the common law recognizes factors in addition to the right of control in assessing whether an employer-employee relationship exists. (*Alvarado, supra,* 60 Cal.4th 1002, 1013.) Citing sections 220 and 227 of the Restatement Second of Agency (defining "servant" and analyzing a "servant lent to another master," respectively), the court noted other potential characteristics of an employment relationship: """(a) [W]hether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular

business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.'"" (*Alvarado,* at pp. 1013-1014.) The *Alvarado* court also identified factors under which a special employment relationship is not indicated: "'The employee is (1) not paid by and cannot be discharged by the borrower, (2) a skilled worker with substantial control over operational details, (3) not engaged in the borrower's usual business, (4) employed for only a brief period of time, and (5) using tools and equipment furnished by the lending employer.'" (*Id.* at p. 1014.)

Analyzing these factors in light of the evidence presented by plaintiffs in opposing the motion for summary judgment, we find that plaintiffs raised a triable issue of fact as to whether Hyman was a special or dual employee of one or both defendants (as well as Amtrak). (See *Millsap v. Federal Express Corp.* (1991) 227 Cal.App.3d 425, 431 ["'Whether a person is an employee or an independent contractor is ordinarily a question of fact but if from all the facts only one inference may be drawn it is a question of law.'"].) Although evidence showed that Hyman was employed by Amtrak, the evidence did not foreclose the possibility that he was also employed by both defendants, or at least by Metrolink. Metrolink appeared to have substantial control over Hyman's work activities: Hyman was required to go through training on Metrolink rules; while operating Metrolink trains, Hyman was required to abide by Metrolink operating rules; Metrolink set the train schedules with which Hyman complied; and Metrolink could observe and review Amtrak employees and, in certain cases, bar Amtrak employees from Metrolink trains. Other factors also weighed in favor of a special or dual employment relationship: the services Hyman provided were not distinct from Metrolink's general activities of transporting passengers; Metrolink supplied the train

Hyman operated; and it appears that Hyman's work with Metrolink was expected to be long-term, not brief.

Although the totality of this evidence was not, by itself, determinative of whether Hyman was an employee of defendants under Government Code section 815.2, it was sufficient to show a triable issue of fact.[2] Defendants argued only that Hyman was not an employee of defendants, but the evidence presented did not establish this assertion as a matter of law. Accordingly, the trial court erred by adjudicating the first cause of action in favor of defendants.

II. Second cause of action

Plaintiffs' second cause of action, for negligent hiring, retention, and supervision, was properly adjudicated in defendants' favor because, as argued by defendants, it was preempted by federal regulations.

The Federal Railroad Safety Act (FRSA) was enacted by Congress in 1970 "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." (49 U.S.C. § 20101.) The Federal Railroad Administration (FRA), under the authority of the Secretary of Transportation, issues regulations under the FRSA. (See 49 U.S.C. § 20133(a); *Southern California Regional Rail Authority v. Superior Court* (2008) 163 Cal.App.4th 712, 719.)

The FRSA contains an express preemption clause stating, in part: "A State may adopt or continue in force a law, regulation, or order related to railroad safety . . . until the Secretary of Transportation . . . prescribes a

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[2] We note that a public entity can, in certain situations, be liable for a tortious act or omission by the entity's independent contractor. (Gov. Code, § 815.4.) However, since we have determined that the trial court erred in granting summary judgment as to the first cause of action, and because plaintiffs did not raise the potential applicability of Government Code section 815.4 in their opening brief on appeal, we do not address the issue.

regulation or issues an order covering the subject matter of the State requirement." (49 U.S.C. § 20106(a)(2).) Thus, FRA regulations generally preempt covered state and local statutes and regulations, as well as covered common law tort claims.[3] (*CSX Transp., Inc. v. Easterwood* (1993) 507 U.S. 658, 664; *Fair v. BNSF Railway Co.* (2015) 238 Cal.App.4th 269, 278; *Prentice v. National Railroad Passenger Corporation* (N.D.Cal. 2014) 2014 U.S. Dist. LEXIS 108585 at p. *16 (*Prentice*).) Under the governing standard, a state law relating to railroad safety will be preempted if its subject matter is "substantially subsume[d]" by federal regulation. (*CSX Transp.,* at p. 664.) A state law or regulation "'covers the same subject matter' as an FRA regulation if it addresses the same safety concerns as the FRA regulation." (*Burlington Northern R. Co. v. State of Mont.* (9th Cir. 1989) 880 F.2d 1104, 1105.) A party may still seek damages under state law, however, for injury resulting from a railroad's failure to comply with federal regulations or the railroad's own rules created pursuant to federal regulation. (49 U.S.C. § 20106(b)(1)(A), (B).)

Directly relevant here, FRA regulations prescribe standards for the "eligibility, training, testing, certification and monitoring" of locomotive engineers. (49 C.F.R. § 240.1(b) (2015).)[4] Among other things, these regulations: establish criteria for eligibility of an individual as a locomotive engineer based on prior safety conduct (49 C.F.R. § 240.109); require the

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[3] Under certain conditions not applicable here, a state law or regulation relating to railroad safety that is more stringent than a federal law or regulation will not be considered preempted. (49 U.S.C. § 20106(a)(2)(A)-(C).)

[4] All further references to the Code of Federal Regulations are to the 2015 edition. The cited regulations were identical in 2011, at the time of the material events here.

railroad to provide training on personal safety, operating rules and practices, condition of equipment, train handling, and safety rules (49 C.F.R. § 240.123); require testing for qualification as a locomotive engineer (49 C.F.R. § 240.125); require the railroad to determine that a person demonstrate safe skills, including proper application of rules, prior to certifying the person as an engineer (49 C.F.R. § 240.211); require procedures for monitoring the performance of locomotive engineers (49 C.F.R. § 240.129); and require locomotive engineers to be recertified every three years (49 C.F.R. § 240.201). Furthermore, 49 Code of Federal Regulations, part 240.5 expressly states that these regulations generally preempt any state law or regulation covering the same subject matter.

As such, state law claims of the sort plaintiffs make in the second cause of action—for negligent hiring, training, and retention of a locomotive engineer—are preempted by FRA regulations. (*Prentice, supra,* 2014 U.S. Dist. LEXIS 108585, at pp. *18-29 ["claims based on a state law standard of care regarding negligent hiring, supervision, discipline or retention" of engineer preempted]; see also *Union Pacific R. Co. v. California Public Utilities* (9th Cir. 2003) 346 F.3d 851, 868; *Carter v. AMTRAK* (N.D.Cal. 2014) 63 F. Supp.3d 1118, 1155-1157; *Abboud v. Union Pac. R.R. Co.* (N.D.Cal. 2004) 2004 U.S. Dist. LEXIS 32245, at pp. *30-31.) Rather than base claims for negligent hiring, training, and retention on a state law standard, "the only state law claim that a plaintiff may pursue on these subjects must demonstrate that the railroad violated the federal standards set forth in the FRA regulations." (*Prentice, supra,* 2014 U.S. Dist. LEXIS 108585, at p. *27.)

Defendants submitted evidence in the form of declarations demonstrating that Hyman was certified as a locomotive engineer in

compliance with federal regulations. In opposing defendants' motion, plaintiffs failed to identify any violation of an FRA regulation (or a railroad rule based on a federal regulation) with respect to Hyman's hiring, training, or retention. Without evidence of such a violation, plaintiffs' claim "is based only a state law duty of care, which is preempted." (*Prentice, supra,* 2014 U.S.Dist. LEXIS 108585, at pp. *25-26.) Therefore, the trial court properly decided the second cause of action in defendants' favor.

III. <u>Third cause of action</u>

Plaintiffs' third cause of action, for premises liability, is based on a claim that the railroad bridge where the accident occurred was impermissibly dangerous. Plaintiffs contend that the railroads tracks in the vicinity of the railroad bridge should have been fenced off, and that warning signs about the danger of the tracks were insufficiently clear. Plaintiffs also argue that evidence showed frequent transient and pedestrian activity in the area.

In their appellate briefs, plaintiffs seek to impose a standard of care on defendants that is applicable to landowners generally. This is the wrong standard to apply here, however, because "[a] public entity may be liable for injuries caused by a dangerous condition of its property only as provided by statute." (*Schonfeldt v. State of California* (1998) 61 Cal.App.4th 1462, 1465 (*Schonfeldt*).)

In general, and in pertinent part, "a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes [1] that the property was in a dangerous condition at the time of the injury, [2] that the injury was proximately caused by the dangerous condition, [3] that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that . . . [¶] . . . [¶] [4] (b) [t]he 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." (Gov. Code, § 835.)

The Government Code defines a "dangerous condition" as "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).) Therefore, with respect to property owned by a public entity, "[a] condition is not a dangerous condition . . . 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 . . . was used with due care in a manner in which it was reasonably foreseeable that it would be used*." (Gov. Code, § 830.2, italics added.) "Thus, even though it is foreseeable that persons may use public property without due care, a public entity may not be held liable for failing to take precautions to protect such persons." (Cal. Law Revision Com. com., 32 pt. 2 West's Ann. Gov. Code (2012 ed.) foll. § 830, p. 7.)

Based on these governing standards, although the issue of whether the state of a property constitutes a dangerous condition is usually a question of fact, it may be decided as a matter of law if no reasonable person could conclude the statutory definition of dangerous condition is met. (*Biscotti v. Yuba City Unified School Dist.* (2007) 158 Cal.App.4th 554, 558-559 (*Biscotti*); *County of San Diego v. Superior Court* (2015) 242 Cal.App.4th 460, 469.) "[T]he plaintiff has the burden to establish that the condition is one which creates a hazard to persons who foreseeably would use the property

with due care." (*Mathews v. City of Cerritos* (1992) 2 Cal.App.4th 1380, 1384 (*Mathews*).)

A number of opinions have decided the issue of dangerous condition as a matter of law based on a plaintiff's lack of due care or the lack of danger to a foreseeable user of a property. In *Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122 (*Fredette*), the plaintiff was seriously injured when he dived off a pier into a shallow lagoon. In affirming the judgment in favor of the defendant city, the appellate court noted that the plaintiff's contributory negligence alone did not defeat a cause of action under Government Code section 835. (*Fredette,* at p. 130.) Contributory negligence is a defense that may be asserted by the public entity but has "no bearing upon the determination of a 'dangerous condition' in the first instance." (*Id.* at p. 131) "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." (*Ibid.*) Nevertheless, judgment in favor of the city was appropriate because the plaintiff was unable to show the property was dangerous when used with due care. (*Id.* at pp. 131-132.) The danger of diving from the pier was apparent, and "no reasonable person could conclude that a swimmer, exercising due care and confronted with the notice that the condition itself provided, would have used the pier as a diving platform." (*Id.* at p. 132.)

In *Mathews,* a child tried to ride his bike down a steep and slippery hill in a public park, and ended up hitting a block wall. The appellate court determined that summary judgment was appropriate because "the danger of riding a bicycle down a very steep, wet, grassy hill is obvious from the

appearance of the property itself, even to children exercising a lower standard of due care." (*Mathews, supra,* 2 Cal.App.4th 1380, 1385.)

In *Schonfeldt*, judgment on the pleadings in favor of the defendant state was proper because a teenager, who was struck by a truck after climbing a freeway fence and running across the freeway, used the freeway "without due care in a manner which is not reasonably foreseeable." (61 Cal.App.4th 1462, 1464.)

And in *Biscotti*, the appellate court affirmed an order granting summary judgment in favor of the defendant city because a child, who was injured while using a fence to prop his bicycle he then stood on to pick oranges, did not use the fence with due care in a reasonably foreseeable manner. (158 Cal.App.4th 554, 557.) Not only was use of the fence in that manner not reasonably foreseeable; if any reasonable person used the fence as a prop, they would have appreciated the readily apparent danger. (*Id.* at pp. 560-561.)

These cases—in which obvious, apparent hazards precluded a finding of foreseeable use of property with due care—are directly apposite to the facts and circumstances presented here. Railroad tracks are an "open and obvious danger." (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 126; see also *Thomas v. Burlington Northern Santa Fe Corp.* (E.D.Cal. 2007) 2007 U.S. Dist. LEXIS 53218 at p. *25 [railroad tracks were an "'open and obvious'" warning of trains].) Indeed, the condition of the railroad tracks at the accident site here—crossing a narrow bridge intended only for railroad use—made the danger even more apparent than railroad tracks alone normally would. While almost any activity on railroad tracks is obviously dangerous, traveling across a railroad bridge (whether on a horse or not) is particularly dangerous, because while a person on railroad tracks generally

can step off to the side to avoid being struck by a train, a bridge allows only one possible direction for escape when a train is approaching.

Plaintiffs bore the burden of establishing that the railroad bridge could foreseeably be used by a person exercising due care. (See *Mathews, supra,* 2 Cal.App.4th 1380, 1384.) We find it beyond dispute that crossing a bridge intended only for railroad use is not something that could generally be considered use of the property with due care. This conclusion is heightened here by the fact that the railroad bridge was located directly next to a regular traffic bridge with a sidewalk.

Plaintiffs argue that evidence of human activity in the area near the railroad bridge showed that defendants had notice of a dangerous condition. Whether being in the general vicinity of the tracks at this location could be considered a foreseeable use is an issue that does not concern us, however. The only necessary conclusion is that using the railroad bridge to cross over the wash is not an exercise of due care. Even if pedestrian use of the bridge were foreseeable (a matter plaintiffs did not establish), the use could not be with due care, and therefore defendants cannot be held liable. (See Cal. Law Revision Com. com., 32 pt. 2 West's Ann. Gov. Code, *supra,* foll. § 830, p. 7.)

Finally, the asserted lack of sufficient warning signs or fencing near the railroad bridge does not serve as a basis for liability. When the danger of the property is eminently apparent but the user unreasonably chooses to use the property anyway, a lack of signage or fencing does not revive an otherwise defective claim against a public entity. (See *Fredette, supra,* 187 Cal.App.3d 122, 131 [lack of barricades and signs near dangerous pier was immaterial]; *Mathews, supra,* 2 Cal.App.4th 1380, 1383 [lack of warning signs about riding bicycles was insignificant]; *Durham v. City of Los Angeles*

(1979) 91 Cal.App.3d 567, 577 [city had no duty to fence area near railroad tracks].)

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court with directions to enter an order denying defendants' motion for summary judgment, but granting summary adjudication in favor of defendants on the second and third causes of action.

The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

HOFFSTADT, J.

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* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.