Filed 9/26/18 Walker v. City of Pasadena CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

LARRY D. WALKER, Plaintiff and Respondent, v. CITY OF PASADENA, Defendant and Appellant.	B281417 (Los Angeles County Super. Ct. No. GC049715)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mary Ann Murphy, Judge. Affirmed.

Thompson Coe & O'Meara and Michael R. Nebenzahl for Defendant and Appellant.

Steven Weitz, for Plaintiff and Respondent.

Defendant and appellant City of Pasadena (City) appeals from the judgment entered in favor of plaintiff and respondent Larry D. Walker (Walker) following a trial in which the jury found the City liable under Government Code section 835 for injury caused by a dangerous condition of its property. The City contends there was no evidence that it had actual or constructive notice of the dangerous condition (a sidewalk uplifted by tree roots) a sufficient time prior to Walker's injury. The City further contends testimony by Walker's expert witness on the issue of notice should not have been admitted.

Substantial evidence supports the jury's finding that the City had constructive notice of the dangerous condition a sufficient time prior to Walker's injury, and the trial court did not abuse its discretion by admitting the challenged expert testimony. We therefore affirm the judgment.

BACKGROUND

On December 27, 2011, Walker was injured when he fell from his bicycle while riding on a pedestrian sidewalk on Lincoln Avenue in the City of Pasadena. At the time of Walker's accident, two concrete slabs of the sidewalk were uplifted approximately four inches higher than the adjoining slabs. A palm tree seedling was growing beneath one of the uplifted slabs.

The uplifted portion of the sidewalk where Walker fell is between homes located at 1130 Lincoln Avenue and 1134 Lincoln Avenue. 1130 Lincoln Avenue was owned by Wande and Stelonislon Goncalves, and 1134 Lincoln Avenue was owned by Carol Lofton.

Walker filed this action for negligence based on premises liability against the City, the Goncalves, and Lofton on June 25, 2012. Walker settled his claims against the Goncalves and Lofton for $65,000; the settlement was determined to be in good

faith; and the Goncalves and Lofton were dismissed from the action with prejudice.

The matter proceeded to a jury trial against the City. Kay Greeley, a licensed civil engineer, licensed landscape architect, and a board-certified master arborist, testified as an expert witness on Walker's behalf. Greeley testified that she has worked for several Southern California cities as an expert witness and in developing or reviewing municipal tree protection plans. Much of that work involved assessing or mitigating the impact of tree roots on sidewalks.

Greeley did not observe the condition of the sidewalk at the time of the accident but relied on photographs taken by Walker or by the City's experts as the basis for her opinions. Greeley testified that the photographs depicted "a rise in between two slabs of the sidewalk approximately four inches in height." Greeley explained that because "[t]he sidewalk at this particular location has a line or a seam running down the center of it, . . . there's actually four squares of sidewalk involved . . . . [T]wo slabs that are on the upper side of the picture are raised about four inches above level. There is an asphalt patch that is on the adjacent two slabs, and then there is a palm tree seedling growing within the crack of -- or opening created by the offset of the upper two slabs." The photographs were published for the jury and were subsequently admitted into evidence. Greeley opined that that the buckling of the sidewalk was caused by tree roots emanating from either or both of the Goncalves and Lofton properties and was not caused by the palm plant that was growing between the sidewalk slabs at the time of Walker's injury.

When Walker's counsel asked Greeley whether she believed the condition of the sidewalk shown in the photographs constituted a dangerous condition, the City objected on the

grounds that the question called for a legal conclusion and was outside the scope of Greeley's expert designation. At a sidebar conference with counsel outside the presence of the jury, the trial court reviewed two separate expert designation declarations for Greeley. The most recent declaration, dated July 14, 2015, signed by Walker and served on the City, stated: "'Ms. Greeley is expected to offer testimony regarding the condition of the trees and landscape on the subject property and surrounding areas. She's also expected to testify as to causation of any alleged defect of the subject sidewalk.'" Based on Walker's declaration, the trial court initially agreed with the City that Greeley's opinion as to whether the sidewalk was a dangerous condition was outside the scope of the expert designation.

Walker's counsel then presented a second expert designation declaration that had been signed by Walker's previous attorney, Matthew Bartholomew, on January 3, 2014. That declaration had also been served on the City. The Bartholomew declaration stated in pertinent part: "'Ms. Greeley will testify about the uplifted condition of the public sidewalk, which the plaintiff contends constituted a dangerous condition which caused him to fall and suffer severe injuries. Ms. Greeley will testify as to the cause of the uplifted sections of the public sidewalk.'" Based on the Bartholomew declaration, the trial court allowed Greeley to testify that the condition of the sidewalk at the time of Walker's accident constituted a dangerous condition.

Over the City's objections, the trial court also allowed Greeley to testify as to whether the City had notice of the dangerous condition. The court overruled the City's objection that the testimony was outside the scope of the expert designation. The trial court based its ruling on the Bartholomew declaration, which stated that Greeley would testify that the

sidewalk constituted a dangerous condition, and the fact that notice was an element of the cause of action for dangerous condition of public property.

The trial court also overruled the City's objection on foundational grounds, and allowed Greeley to testify that the City had notice of the dangerous condition based on the following evidence: a sidewalk survey performed by the City in 2005 noted the presence of the condition, a call to the City by Wande Goncalves in 2008 reporting the condition, and two temporary asphalt patches on the sidewalk. Greeley testified that she reviewed a 2005 sidewalk survey performed by the City that noted the presence of an asphalt patch at the site of Walker's injury. Greeley further testified that asphalt patches are temporary, and that the City knew the condition would require a more permanent fix to prevent the problem from reoccurring. Greeley also testified, based on Wande Goncalves's deposition testimony, that the City placed a second asphalt patch on the sidewalk in 2008, after Goncalves called the City to report the condition.

After Greeley's testimony concluded, City Engineer Steven L. Wright testified on behalf of the City. Wright testified that since the year 2000, the City had conducted two sidewalk surveys, one in 2004-2005, and another in 2014-2015. The purpose of the surveys was to inventory the condition of the City sidewalks every 10 years and to note areas of damage. After the 2004-2005 survey was completed, the City placed temporary asphalt patches in the worst of the damaged areas. Wright testified that the City does not perform permanent repairs on its sidewalks but that its municipal code requires property owners to maintain the sidewalks adjacent to their properties. Wright further testified that when the City becomes aware of sidewalk damage it places a temporary asphalt patch on the damaged area

and notifies the property owner that it can either undertake the permanent repair at its own expense or pay the City a fee for the City to do so.

At the conclusion of the trial, the jury returned a special verdict in which they found that the City owned or controlled the sidewalk, which was in a dangerous condition at the time of the incident; the condition created a reasonably foreseeable risk of injury; the City had notice of the dangerous condition for a sufficient time to have protected against it; and the dangerous condition was a substantial factor in causing harm to Walker. The jury further found that Walker had sustained $138,062.40 in damages, that he was 20 percent responsible for his injuries and that the City 80 percent responsible. Judgment was entered on the special verdict, and this appeal followed. An amended judgment in the amount of $100,514.82, reflecting reductions, credits, and set-offs, and including costs in the amount of $14,413.90, was subsequently entered on March 20, 2017.

DISCUSSION

I. Standard of review

We review the City's challenge to the sufficiency of the evidence supporting the jury's verdict under the substantial evidence standard. (*Wilson v County of Orange* (2009) 169 Cal.App.4th 1185, 1188.) Under this standard, "[a]ll conflicts in the evidence are resolved in favor of the prevailing party, and all reasonable inferences are drawn in a manner that upholds the verdict. [Citations.]" (*Holmes v. Lerner* (1999) 74 Cal.App.4th 442, 445.)

We review the trial court's ruling on the admissibility of expert testimony for abuse of discretion. (*Burton v. Sanner* (2012) 207 Cal.App.4th 12, 18.) A court's discretion is abused only when there is a clear showing that it exceeded the bounds of

reason, considering all of the relevant circumstances. (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 332.)

II. Constructive notice of a dangerous condition

Government Code section 835, subdivision (b) provides that a public entity is liable for injury caused by a dangerous condition if the plaintiff establishes (1) the property was in a dangerous condition at the time of the injury; (2) the injury was proximately caused by the dangerous condition; (3) the dangerous condition created a reasonably foreseeable risk of the kind of injury sustained; and (4) the public entity had actual or constructive notice of the dangerous condition for sufficient time prior to the injury to have taken measures to protect against it. (Gov. Code, § 835, subd. (b); *Heskel v. City of San Diego* (2014) 227 Cal.App.4th 313, 317 (*Heskel*).)

"'Constructive notice,' under [Government Code] section 835.2, subdivision (b), requires a plaintiff to establish that the dangerous condition existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character. . . . [¶] Whether the dangerous condition was obvious and whether it existed for a sufficient period of time are threshold elements to establish a claim of constructive notice. [Citation.] Where the plaintiff fails to present direct or circumstantial evidence as to either element, his claim is deficient as a matter of law. [Citation.]" (*Heskel, supra,* 227 Cal.App.4th at p. 317.)

Substantial evidence supports the jury's finding that the City had constructive notice of the sidewalk's dangerous condition. Walker's expert, Greeley, testified that the City's 2005 sidewalk survey noted the presence of a temporary asphalt patch at the location where Walker was injured. That same location again required repair in 2008 when Wande Goncalves called the

City to report a defect in the sidewalk. In response to Goncalve's call, the City placed a second asphalt patch on the sidewalk approximately two weeks thereafter. Greeley testified that an asphalt patch is a temporary fix for a damaged sidewalk and that a more permanent repair measure is required to prevent the problem from reoccurring. The City's engineer confirmed that an asphalt patch is a temporary repair measure. Greeley testified that by placing a temporary asphalt patch on the sidewalk, the City had notice that a defective condition existed and would reoccur in the future. In addition to hearing the witnesses' testimony, the jury saw photographs showing the uplifted sidewalk slabs and a palm tree plant growing between the asphalt patch and the uplifted slabs. The evidence supports the jury's determination that the City had constructive notice of a dangerous condition.

The absence of evidence as to when, between the City's 2008 temporary repair and Walker's 2011 injury, the sidewalk again became uplifted does not preclude a finding of constructive notice by the City. The jury could have reasonably determined that tree roots do not cause sidewalks to become uplifted all of a sudden, but that the condition occurs gradually and worsens over time. Photographs showing the presence of a palm plant growing between the asphalt patch and the uplifted sidewalk slabs support a finding that the condition was obvious and that it existed for a sufficient period of time to establish constructive notice by the City.

We reject the City's argument that Walker was required to prove that the dangerous condition would have been discovered by a reasonably adequate sidewalk inspection system in order to establish constructive notice by the City. Government Code section 835.2, subdivision (b) states that admissible evidence as to whether a public entity, in the exercise of due care, should

have discovered the dangerous condition, "*includes but is not limited to* evidence as to . . . [w]hether the existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate." (Gov. Code, § 835.2, subd. (b)(1), italics added.) Presenting evidence of an inadequate municipal sidewalk inspection system is one way, not the exclusive way, of establishing constructive notice of a dangerous condition.

Nicholson v. City of Los Angeles (1936) 5 Cal.2d 361 (*Nicholson*), on which the City relies as support for its position, is distinguishable. The plaintiff in that case sued for injuries from tripping over a sidewalk that was uplifted by approximately one and a half inches. (*Id.* at p. 364.) Although there was evidence that the condition had existed for several months, the court in *Nicholson* found that the city did not have constructive notice of the defect because it was not "more conspicuous" and there were no "additional factors" such as prior incidents to charge the city with "inquiry as to the safety of the existing condition." (*Id.* at p. 366.) Here, in contrast, the sidewalk buckling was "more conspicuous" -- it was uplifted at least four inches, more than twice as high as that in *Nicholson*, and a palm plant was growing between the uplifted slabs. Moreover, the "additional factors" absent in *Nicholson* were present in this case, as the City had previously made temporary repairs to the sidewalk by installing asphalt patches on two separate occasions.

There is substantial evidence in the record to support the jury's finding that the City had notice of the sidewalk condition for a sufficient time before Walker's injury to have taken measures to protect against it.

III. Admissibility of expert testimony

The City contends Greeley's testimony regarding notice exceeded the scope of her expert designation and should have

been precluded. The record discloses no abuse of discretion. A trial court may exclude expert witness testimony when "the narrative statement fails to disclose the general substance of the testimony the party later wishes to elicit from the expert at trial." (*Bonds v. Roy* (1999) 20 Cal.4th 140, 148-149.) Walker's January 2014 expert designation declaration, on which the trial court relied in allowing the challenged testimony, disclosed "the general substance" of her anticipated testimony. Walker's declaration stated that "Greeley will testify about the uplifted sections of the public sidewalk which the plaintiff contends constitutes a dangerous condition." Notice of a dangerous condition is an essential element of a cause of action seeking to impose liability for such a condition on a public entity. The court did not abuse its discretion in concluding the expert declaration was broad enough to include the challenged portions of Greely's testimony, as her testimony regarding notice fell within the "general ambit" of whether the defendants were liable for a dangerous condition. (See *Jones v. Moore* (2000) 80 Cal.App.4th 557, 566.)

Contrary to the City's contention, Greeley's testimony regarding notice of a dangerous condition was a question of fact, not a question of law, and a proper subject of expert testimony. (See *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1127, 1129 [parties presented substantial evidence, including conflicting expert testimony, on the "fact specific" issue of whether the county had notice of a dangerous condition].) The City's argument that Greeley's testimony regarding notice was improperly based on speculation and conjecture is unsupported by the record. Greeley based her testimony on the City's placement of two temporary asphalt patches in the location of Walker's injury, one sometime before 2005, and the second in 2008; the City's knowledge that asphalt patches are temporary

fixes and that absent a more permanent fix, the buckling of the sidewalk would reoccur; and photographs taken at the time of Walker's 2011 injury showing the sidewalk slabs uplifted by four inches or more, and a palm plant growing between the asphalt patch and the uplifted slabs. The trial court did not abuse its discretion by allowing Greeley to testify on the issue of notice.

DISPOSITION

The judgment is affirmed. Walker shall recover his costs on appeal.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT