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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| RITA G. WILLIAMS,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>CITY OF PASADENA,<br><br>Defendant and Respondent. | B277317<br><br>(Los Angeles County Super. Ct. No. BC572234) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Michelle Williams Court, Judge. Reversed.

Law Offices of Paul L. Ness and Paul L. Ness for Plaintiff and Appellant.

Michele Beal Bagnaris, City Attorney, and Lesley Cheung, Assistant City Attorney, for Defendant and Respondent.

Plaintiff and appellant Rita Williams (plaintiff) tripped and fell over uneven asphalt on a street in the City of Pasadena (the City). Plaintiff sued the City alleging, among other things, that it was liable for her injuries under Government Code section 835.[1] That statute makes a public entity liable for a dangerous condition on its property if, in addition to other elements, the plaintiff establishes that either "[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 "[t]he public entity had actual or constructive notice of the dangerous condition . . . a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." Plaintiff's complaint alleged both of these alternative theories of liability. In its motion for summary judgment, the City argued there was no evidence it had actual or constructive notice of the uneven asphalt but did not address whether the unevenness was created by one of its employees. We consider whether the trial court could properly grant summary judgment for the City.

## I. BACKGROUND

### *A. Plaintiff's Accident and Lawsuit*

In June 2014, plaintiff tripped and fell when crossing the street at the intersection of Del Mar Boulevard and Euclid Avenue in Pasadena. She suffered scraped knees and a broken wrist. When plaintiff returned to the scene about a week later, she observed a depressed patch of asphalt that was not even with the surrounding asphalt. She later sued the City.

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

Plaintiff's form complaint alleged a single cause of action for premises liability. The facts alleged in the complaint consisted of two sentences: "Plaintiff was [a] pedestrian . . . walking along the north side of Del Mar Blvd. and crossing Euclid Ave. Using the crosswalk[,] . . . she tripped and fell due to [a] defect in [the] surface of the roadway."

Plaintiff's premises liability cause of action asserted two legal theories of liability—general negligence and a dangerous condition on public property—and the latter theory (the only one pertinent to this appeal) asserted two independently sufficient sub-theories on which she sought to hold the City responsible for her injuries. Specifically, the complaint alleged both that the assertedly dangerous condition of the street was created by employees of the City and that the City had constructive notice of the existence of the dangerous condition in sufficient time prior to the injury to have corrected it.

*B. The City's Motion for Summary Judgment*

The City moved for summary judgment.[2] The motion argued plaintiff could not prevail at trial because the street condition was not dangerous as a matter of law and because plaintiff could not prove the asphalt patch was the proximate cause of her trip and fall. The motion additionally argued plaintiff could not prevail at a trial because there was no evidence the City had constructive notice of the alleged defect in the street before plaintiff's accident. Although the City's motion recognized a premises liability cause of action could succeed if

[2] The City did not seek summary adjudication in the alternative.

plaintiff were to establish the City created the allegedly dangerous condition (even in the absence of constructive notice), the City made no argument and introduced no evidence to establish plaintiff could not prove one of the City's employees or agents created the uneven asphalt patch in the crosswalk.

Plaintiff's opposition to the City's motion for summary judgment was not a model of clarity. But it did adequately argue summary judgment should not be granted because there were triable issues of fact on *both* dangerous condition theories of liability alleged in the complaint. That is to say, plaintiff argued, first, that "the moving party cannot say that a 'negligent or wrongful act or omission of an employee within the scope of his employment created the dangerous condition' [*sic*] . . . . Indeed, it cannot be denied that the opposite conclusion is a reasonable possibility: It would not be unreasonable for the finder of fact to infer that the defective repair patch that caused plaintiff's injuries was probably installed by City employees. From the color, apparent age, and other features of the patch in evidence, it is readily apparent that the patch was not part of the original installation of the roadway. The fact that the repair exists but the City is unable to document the repair weighs strongly in opposition to the motion for summary judgment." And second, with respect to constructive notice, plaintiff stressed that the depressed patch in the asphalt "does not appear to have been put there in recent years."

*C. The Summary Judgment Ruling*

After an unreported hearing, the trial court granted the City's summary judgment motion. With respect to the dangerous condition cause of action, the court expressly rejected the City's

contention that, as a matter of law, the uneven asphalt was not a dangerous condition.[3] The trial court, however, agreed with the City that it was entitled to summary judgment because the evidence established plaintiff had no prospect of proving the City had constructive notice of the allegedly dangerous condition. The court's order granting summary judgment did not address whether there was evidence a City employee acting within the scope of his or her employment created the dangerous condition.

## II. DISCUSSION

Plaintiff contends the order granting the City's motion for summary judgment should be reversed because, among other things, the motion did not discuss and the court did not decide whether there was a triable issue of fact as to whether the City created the uneven street patch on which plaintiff claimed to have tripped. While we believe the trial court's reasoning is sound on the issues it did address, the City did not satisfy its initial summary judgment burden to negate the City-created theory of dangerous condition liability and the trial court made no finding that plaintiff could not prevail on such a theory at trial. Summary judgment must therefore be reversed. (*Hawkins v. Wilton* (2006) 144 Cal.App.4th 936, 945 [summary judgment motion did not negate all theories of liability and "the trial court should have [accordingly] held that [the defendant] failed to carry his initial burden and stopped there"].)

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[3] The trial court did not address proximate causation on the merits. It declined to rule on causation because the City did not identify the issue in its notice of motion.

*A. Standard of Review*

"""A trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); [citation].) The moving party bears the burden of showing the court that the plaintiff "has not established, and cannot reasonably expect to establish,"' the elements of his or her cause of action. [Citation.]" [Citation.]"' (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 705 (*Ennabe*).) "If the defendant fails to meet this initial burden, it is unnecessary to examine the plaintiff's opposing evidence; the motion must be denied." (*Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 805.) We review a trial court's summary judgment ruling de novo. (*Ennabe*, *supra*, at p. 705.)

*B. The City Did Not Carry Its Initial Summary Judgment Burden*

"In California, public entity liability for personal injury is governed by statute. . . . [S]ection 835 sets out the exclusive conditions under which a public entity may be held liable for injuries caused by a dangerous condition of public property." (*Biscotti v. Yuba City Unified School Dist.* (2007) 158 Cal.App.4th 554, 558.) Succinctly stated, section 835 "provides for direct liability on the part of public entities for injuries caused by maintaining dangerous conditions on their property when the condition 'created a reasonably foreseeable risk of the kind of injury which was incurred' and *either* an employee's negligence or wrongful act or omission caused the dangerous condition *or* the entity was on 'actual or constructive notice' of the condition in

time to have taken preventive measures." (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347-348, italics added.)

In its motion, the City argued it did not have actual or constructive notice of the uneven asphalt, but it neither argued nor adduced evidence to show that, as a matter of law, its employees were not responsible for creating that street condition. The trial court's analysis was similarly limited, proceeding under the heading "Lack of Notice" and concluding only that "[the City] met its burden to show that it did not have constructive notice of the condition because there is no evidence that the condition existed for such a time that it should have noticed the condition" and "[p]laintiff failed to raise a triable issue of material fact concerning the duration of the alleged defect." Because the City did not negate all theories of liability alleged in plaintiff's complaint, summary judgment was inappropriate. (See, e.g., *Jameson v. Desta* (2013) 215 Cal.App.4th 1144, 1165 [summary adjudication reversed where the defendant failed to address theory of liability alleged in complaint]; *Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 717 [reversing summary judgment where the defendant did not show it was entitled to judgment with respect to all theories of liability].)

The City makes two counterarguments in an effort to preserve the judgment in its favor. Both are unavailing.

The first argument is procedural: The City asserts plaintiff cannot argue "for the first time on appeal" that "the City must have affirmatively shown that neither the complaint's allegation of constructive notice nor the allegation that the defect was created by City employees is supported by undisputed material facts." The contention fails because the City is wrong as a factual matter—plaintiff is not raising this argument for the first time on

appeal. Plaintiff's opposition to the City's motion contended "[i]t would not be unreasonable for the finder of fact to infer that the defective repair patch that caused plaintiff's injuries was probably installed by City employees."

The second argument is substantive, but it misapprehends applicable law. The City claims "[plaintiff] did not proffer any evidence that City employees caused the defect" and "merely speculates" that this could be so. In the City's view, this means summary judgment was proper. Under well-established summary judgment standards, however, a plaintiff's burden to demonstrate—with evidence—a triable issue of material fact is only triggered once the moving party shows "one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) Here, the City produced no evidence and made no argument to negate plaintiff's theory that its employees created the dangerous street condition. Because the City did not satisfy its initial burden, the City is not now in a place to complain about plaintiff's deficient evidentiary showing. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 840 ["A responding plaintiff has no evidentiary burden unless the moving defendant has first met its initial burden. [Citation.] Only after the moving defendant meets its initial burden does the burden shift to the plaintiff to demonstrate the existence of a triable issue"].)

## DISPOSITION

The judgment is reversed. Each party is to bear its own costs on appeal.

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BAKER, Acting P.J.

We concur:

MOOR, J.

KIM, J.*

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