Filed 2/25/15 Flores v. Cal. Dept. of Transporation CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

RICARDO FLORES,

Plaintiff and Appellant,

v.

STATE OF CALIFORNIA DEPARTMENT OF TRANSPORTATION et al.,

Defendants and Respondents.

2d Civil No. B251720
(Super. Ct. No. 1384258)
(Santa Barbara County)

Plaintiff brought an action against the State of California Department of Transportation and its contractors (collectively "Caltrans") for injuries suffered in a bicycle accident on public property. The jury found a dangerous condition on public property, but found the type of accident was not reasonably forseeable. On appeal plaintiff contends the findings are inconsistent, the not-forseeable finding is not supported by the evidence and the trial court erred in its cost award. We reverse the award of costs for exhibits not used at trial. In all other respects we affirm.

FACTS

On June 30, 2011, Ricardo Flores was riding his mountain bicycle on Cathedral Oaks Road in the city of Goleta. The mountain bicycle was the bicycle he used to go jumping at Elwood.

At the time, Caltrans and its contractors were doing construction work on the street. The work left a rough ground-down area in the asphalt. The ground-down area ran parallel to the gutter. It left a ridge 1.8 inches in height running along the outer edge of the cement gutter where the cement met the asphalt.

Flores did not fall as he crossed the traverse edge of the ground-down area. Flores was approximately half-way, or 40 feet, into the ground-down area when he fell with his bicycle.

In his complaint Flores alleged that the grooves in the asphalt caused him to fall. In his deposition he testified, "I was just jumping, riding my bike, and all of a sudden I am falling." At trial he testified that his front tire rubbed against the elevation caused by the grinding; he went sideways, the bicycle hit the sidewalk and he flew over the handlebars.

Flores testified he rode his bicycle through the ground-down area "a few times" prior to the accident. He noticed the pavement had been scraped. He had no prior problems riding through the area or rubbing up against the gutter.

John Tyson, Caltrans' accident reconstruction expert, testified. He said rubbing a tire against the elevation caused by the grinding would not in itself cause the bicycle to turn toward the curb. Tyson opined Flores' accident occurred when he tried to jump the curb on his bicycle. Tyson said his opinion is consistent with Flores' deposition testimony that he was jumping his bicycle when the accident happened.

At least 50 bicyclists a day safely traversed the ground-down area in the four months the area was there.

The jury found that the property was in a dangerous condition at the time of the accident. The jury also found, however, that the dangerous condition did not "create a reasonably forseeable risk that this kind of accident would occur."

DISCUSSION

I.

Flores contends his accident was reasonably forseeable.

In order to prevail in an action against a public entity, the plaintiff must prove, among other matters, "that the dangerous condition [of the public entity's property] created a reasonably forseeable risk of the kind of injury which was incurred . . . ." (Gov. Code, § 835.)

It is not enough that the plaintiff proves the dangerous condition created a forseeable risk that some accident might occur. Instead, the jury was instructed the plaintiff must prove "[t]hat the dangerous condition created a reasonably foreseeable risk of the *kind of accident that occurred* . . . ." (CACI No. 1100, italics added.) The jury interrogatory contains the same language. Flores does not take issue with either the instruction or the interrogatory.

Flores' contention is based on a view of the evidence most favorable to himself. But that is not how we view the evidence on appeal.

In viewing the evidence, we look only to the evidence supporting the prevailing party. (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 872.) We discard evidence unfavorable to the prevailing party as not having sufficient verity to be accepted by the trier of fact. (*Ibid.*) Where the trial court or jury has drawn reasonable inferences from the evidence, we have no power to draw different inferences, even though different inferences may also be reasonable. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 376, pp. 434-435.) The trier of fact is not required to believe even uncontradicted testimony. (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1028.)

Thus, where, as here, the judgment is against the party who has the burden of proof it is almost impossible for him to prevail on appeal by arguing the evidence compels a judgment in his favor. That is because unless the jury makes specific findings in favor of the losing plaintiff, we presume the jury found plaintiff's evidence lacks sufficient weight and credibility to carry the burden of proof. (See *GHK Associates v. Mayer Group, Inc.*, *supra*, 224 Cal.App.3d at p. 872.)

Here the jury found a dangerous condition of public property, but that it did not create "a reasonably forseeable risk that this kind of accident would occur." The findings are not inconsistent. The jury could conclude that there was a danger some kind of accident might occur, but that Flores failed to prove it was reasonably forseeable that "this kind of accident would occur." The jury was not compelled to believe the accident occurred as Flores claimed. The jury may have found that the accident happened as Flores was attempting to jump the curb on his mountain bicycle, or the jury may have concluded that Flores simply failed to prove how the accident happened.

Flores' reliance on *Martinez v. County of Ventura* (2014) 225 Cal.App.4th 364, is misplaced. There, we determined the county's design immunity defense was not supported by substantial evidence. We reversed a judgment in favor of defendant county.

But design immunity is an affirmative defense on which the county had the burden of proof. (*Martinez v. County of Ventura*, *supra*, 225 Cal.App.4th at p. 369.) Where the party with the burden of proof produces no substantial evidence, the party has failed to carry its burden as a matter of law. (*Id.*, at p. 373 [a public entity's failure to prove any of the elements of design immunity is fatal to that defense].)

Here Flores had the burden of proof. We must presume he failed to produce sufficient credible evidence to carry that burden. (See *GHK Associates v. Mayer Group, Inc.*, *supra*, 224 Cal.App.3d at p. 872 [We discard evidence unfavorable to the prevailing part as not having sufficient verity to be accepted by the trier of fact].) Under the circumstances, Caltrans need point to no evidence to support a defense verdict.

II.

Flores contends the trial court erred in awarding $17,416.68 in costs.

Allowable costs are stated in Code of Civil Procedure section 1033.5 (hereafter section 1033.5).

Flores argues the trial court erred in awarding $6,589 for exhibits Caltrans did not use at trial. There is a split of authority on the question.

Flores relies on *Ladas v. California Auto Association* (1993) 19 Cal.App.4th 761, 773, for the proposition that costs for exhibits not actually used at trial are not recoverable. In *Ladas*, judgment was entered for defendant before trial. The court denied costs for exhibits under section 1033.5, subdivision (a)(12) (now subdivision (a)(13)). That subdivision allows costs for exhibits "'*if they were reasonably helpful to aid the trier of fact.*'" (*Ladas*, *supra*, at p. 775.) The court held the subdivision did not allow costs for exhibits not used at trial.

But in *Applegate v. St. Francis Lutheran Church* (1994) 23 Cal.App.4th 361, the court held that even if costs for exhibits not used at trial would not be allowed under section 1033.5, subdivision (a)(12), they can still be allowed in the trial court's discretion under subdivision (c)(4). Subdivision (c)(4) provides, "Items not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion."

Seever v. Copley Press, Inc. (2006) 141 Cal.App.4th 1550, 1558-1560, however, disagrees with *Applegate*. The court noted that the discretion extended by section 1033.5, subdivision (c)(4) is expressly limited to "[i]tems not mentioned in this section." (*Id.*, at p. 1559.) The court reasoned that section 1033.5, subdivision (a)(12) expressly allows as costs photocopies of exhibits, but only if they are reasonably helpful to the trier of fact. The subdivision implicitly disallows costs for copies of exhibits that are not helpful to the trier of fact; that includes, exhibits not used at trial. Thus the court has no discretion to award costs for copies of exhibits not used at trial. The court gives section 1033.5, subdivision (a)(10) as an example. That subdivision allows an award of attorney fees when authorized by contract, statute or law. But no one would argue subdivision (c)(4) gives the court discretion to award attorney fees that are not so authorized.

Seever is persuasive. Section 1033.5, subdivision (c)(4) gives the trial court discretion to award costs only for "[i]tems not mentioned in this section."

Subdivision (a)(13) mentions costs for exhibits. The trial court has no discretion to award such costs under subdivision (c)(4).

A year after *Seever* was decided, *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 856-857, held that costs for exhibits not used at trial were properly awarded under the discretionary authority of section 1033.5, subdivision (c)(4). Without mentioning either *Applegate* or *Seever*, the court stated: "Although the Department did not use the majority of its exhibits at trial, nothing indicates it could have anticipated that they would not be used. An experienced trial judge would recognize that it would be inequitable to deny as allowable costs exhibits any prudent counsel would prepare in advance of trial." (*Id.*, at p. 856.)

But an award of costs is not simply a matter of equity. It requires an interpretation of section 1033.5. *Seever* has the most reasonable interpretation. We must reverse the award of costs for exhibits not used at trial.

Concerning video depositions, Flores cites *Science Applications International Corporation v. Superior Court* (1995) 39 Cal.App.4th 1095, 1105, for the proposition that they are not necessary or reasonable. More recent cases, however, have noted that it has been almost 20 years since *Science Applications* was decided, and during that time the use of technology in the courtroom has become commonplace and less expensive. (*Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 991.) It is within the trial court's discretion to allow recovery of such costs. (*Ibid.*) Flores points to no abuse of discretion here.

The remaining costs challenged by Flores include fees for discovery motions, a certificate of nonappearance at a deposition, and expedited deposition transcript fees. The reasonableness and necessity of such costs was the subject of a factual dispute wherein each party blamed the other for incurring the costs. Suffice it to say, we must presume the trial court resolved the factual issues in favor of Caltrans. (See *Kunzler v. Karde* (1980) 109 Cal.App.3d 683, 688 [We must indulge in al intendments and presumptions to support the trial court's order unless contradicted by the record].) The trial court did not abuse its discretion.

We reverse the award of costs for exhibits not used at trial. In all other respects the judgment is affirmed. Costs on appeal are awarded to respondents.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Thomas P. Anderle, Judge

Superior Court County of Santa Barbara

Law Offices of Kristofer Kallman, Kristofer Kallman; Loskamp & Wohlgemuth, Edwin K. Loskamp, for Plaintiff and Appellant.

Thomas|Lucas, Timothy D. Lucas, Kevin J. McConville for Defendants and Respondents.