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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SEAN MONZON et al., Plaintiffs and Appellants, v. SOUTHERN CALIFORNIA REGIONAL RAILROAD AUTHORITY et al., Defendants and Respondents.	B231921 (Los Angeles County Super. Ct. No. PC046540)

APPEAL from a judgment of the Superior Court of Los Angeles County. Barbara M. Scheper, Judge. Reversed.

Law Offices of Martin N. Buchanan, Martin N. Buchanan; Girardi, Keese, David R. Lira for Plaintiffs and Appellants.

Sims Law Firm, Michael E. Murphy, John E. Stobart for Defendants and Respondents.

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Sean Monzon, Thelma Calove, Myra Elizabeth Calove, and Myra Jaclyn Calove appeal from a judgment in favor of respondents Southern California Regional Railroad Authority ("Metrolink"), Los Angeles County Metropolitan Transportation Authority ("MTA"), and Union Pacific Railway, on appellants' complaint, after respondents' motion for summary judgment was granted. Finding triable issues of fact, we reverse.

Background

On January 11, 2009, 32-year-old Myra Theresa Calove went hiking in Chatsworth Park with her husband, appellant Sean Monzon, her sisters, appellants Myra Elizabeth Calove and Myra Jaclyn Calove, and two others. (Appellant Thelma Calove is decedent's mother. She was not part of the hiking group.) There is a train tunnel, Tunnel 27, adjacent to the park, and the hikers walked into the tunnel, wrongly believing that it had been abandoned and was no longer used for trains. A train entered the tunnel, coming toward them. The hikers ran. The engineer stopped the train, but could not stop in time, and Myra Theresa Calove was hit by the train and was killed.

The railroad right-of-way where the incident occurred is partly owned by Union Pacific and partly by the MTA. Metrolink operates the railroad pursuant to a Joint Powers Agreement which includes the MTA.

Appellants filed this lawsuit.[1] Against Union Pacific, the complaint brought a cause of action for negligence, alleging that Union Pacific had failed to ensure that there was fencing between the park and the tracks and tunnel, and had failed to ensure that proper warning signs were installed and maintained. Against Metrolink and the MTA, the cause of action was for dangerous condition of public property, again with allegations concerning the lack of fencing and warning signs. There was also a cause of action for

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[1] National Railroad Passenger Corporation ("Amtrak"), was also a defendant, as were the City of Los Angeles, the County of Los Angeles, and State of California. Appellants are not appealing that judgment. Respondents' motion also addressed allegations relating to the train engineer's training and education. Again, there is no appeal from the ruling in favor of respondents on those allegations.

negligent infliction of emotional distress against all defendants, brought on behalf of Monzon, Myra Elizabeth Calove, and Myra Jaclyn Calove.

Factually, the complaint alleged that none of the hikers understood that they were walking on an active train track, but believed that it was an abandoned track, that the No Trespassing signs posted in the area were unreadable due to graffiti, that the chain link fence which partially separated the area from Chatsworth Park had been torn away; that the area around the tunnel was in a condition of "visible neglect" and that there were no fences, barriers, lights, guard rails or legible signs or warnings of the existence of an active railroad.

The complaint also alleged that appellants saw other hikers on the tracks and in the tunnel, and that defendants had actual or constructive knowledge that pedestrians coming from the park entered the tunnel.

Respondents moved for summary judgment on the grounds that none of them had a duty to warn because the danger was obvious; that the causes of action against Union Pacific were barred under Civil Code section 846, on recreational immunity; and that the causes of action against the MTA and Metrolink failed because there was no dangerous condition of public property in that appellants were not acting with due care. (Gov. Code, § 830, subd. (a).) Respondents also moved on the ground that Myra Jaclyn Calove could not maintain a claim for emotional distress because she was not contemporaneously aware that her sister was being injured.

The trial court granted summary judgment on all causes of action and entered judgment for respondents.

Facts at Summary Judgment

The area; signs and fences

It was undisputed that Metrolink had posted three signs, the purpose of which was to keep people off the rail. One, just outside the tunnel, is a two-part sign on a post. The top portion says "No Trespassing" and the bottom part has a circle with a cross through it,

a symbol for no trespassing.[2] There are also two signs painted on the tunnel façade. They say: "Private Property No Trespassing No Loitering."

Both sides proposed undisputed facts concerning the legibility of the signs, citing in support photographs of the signs and some of appellants' deposition testimony.

Respondents' facts were that the sign on the post was partially obscured by graffiti but that the signs on the tunnel were not, that all three signs were "posted in clear view of anyone standing near the east tunnel portal,"[3] and that Monzon and Myra Jaclyn Calove admitted in their depositions that the writing on all three signs was legible in photographs taken on the day of the accident.

Appellants disputed the fact with reference to the same deposition testimony respondents cited in support, and proposed that the No Trespassing sign was illegible due to graffiti and that the signs on the tunnel façade were faded and obscured.

The trial court sustained respondents' objections to appellants' proposed fact,[4] and found that it was undisputed that although one of the signs was "sprayed with graffiti, the two signs painted on the façade of the tunnel were not obscured by graffiti and were legible." However, on this record, the legibility of the signs at the relevant time and in the relevant place was disputed.

Monzon's deposition testimony was that he could read the words in a close-up picture of the No Trespassing sign shown to him at his deposition. Myra Elizabeth

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[2] That, at least, is the testimony of Metrolink's Person Most Knowledgeable, Dale Stuart.

[3] Appellants disputed those facts by objecting that they were argumentative and an improper conclusion, but the court ruled that because appellants had not filed evidentiary objections pursuant to California Rules of Court, rule 3.1354, any fact disputed with only an objection was deemed undisputed.

[4] Respondents wrote "argumentative, lacks foundation, conclusory and illusory, misstates the evidence . . . ," then argued the evidence that appellants could read the signs when shown photographs at their depositions. Of course, the citation to other evidence is not an objection, it is an attempt to dispute the fact. The rest of respondents' objections are, on close examination, similar. One of the difficulties with this case is that both parties proposed as undisputed facts matters which are only interpretations of evidence.

Calove was shown a close-up photograph of that sign and testified that "looking at it now, . . . I can kind of read it." Myra Jaclyn Calove was shown a photograph of the No Trespassing sign and said that she could read it "but hardly." She was shown a photograph of the painted sign on the tunnel and could not read it.

In our record, the photographs of the No Trespassing sign show a two-part sign, the bottom part of which is obscured by graffiti and the top part of which is at least partly obscured. Photographs of the signs on the tunnel façade show what appears to be a pale stencil, quite high up on the wall. The signs appear to be faded and chipped, and in the photographs, the lettering is difficult to see.

We make these comments only to describe the disputed facts. Unless the photographs were susceptible to only one interpretation -- which is not the case -- we cannot make findings on the facts. Nor can the trial court, on summary judgment.

Appellants also proposed that "Metrolink allowed the warning signs to fall into disrepair," citing in support the testimony of Metrolink's Dale Stuart, who testified that the painted signs on the tunnel façade had not been maintained since Metrolink took over responsibility in 1994 or 1995, and that there was no schedule for maintaining the sign on the post. As to that sign, maintenance would be at the discretion of the track inspector, "as long as he can visually see what the sign says." Stuart also testified that the sign was not acceptable to him, as System Bridge Maintenance Manager, because it had too much graffiti. He would not necessarily change it, because it could be covered in graffiti again the next day, but would not take it down, because if he did, there would be no warning at all.

Respondents objected to the proposed fact with a string of objections ("argumentative, lacks foundation, conclusory and illusory, misstates the evidence") and argued that Stuart had only testified concerning the sign on the post, and that appellants' deposition testimony showed that the signs were legible.

The court sustained the objection, a ruling which appellants contend was incorrect. We agree, under any standard of review. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535.) Stuart's deposition testimony supports the proposed facts, which are neither

argumentative nor without foundation. Further, respondents' citation to appellants' testimony concerning the photographs shown to them at their depositions is not an objection, but an attempt to dispute the fact.

Respondents also proposed as undisputed that appellants denied observing any of the signs, again citing deposition testimony. In the cited portions, Monzon testified that he saw the posted No Trespassing sign, but not the signs on the train tunnel. Myra Elizabeth Calove testified that she saw the lower part of the No Trespassing sign, which was obscured by yellow graffiti, but did not see the top part. In the photograph, with the graffiti, the sign looked "not valid." This was one of the reasons why she believed that the tunnel was abandoned. She testified that "I was thinking, if that was active, if we weren't allowed to go in there, then whoever runs that place would have taken that down and made it legible for everyone to see, 'Do Not Enter.'" Myra Jaclyn Calove testified that she had seen none of the signs.

On this record, the court found that "it is undisputed that 'no trespassing' signs were posted but plaintiffs failed to read and/or appreciate them. Had they done so, they would not have entered the tunnel." This finding, however, departs from the facts, which is not that appellants failed to read the signs, but that they did not see them.

Appellants' activities

One of the hikers videotaped part of the hike, and based on the video and the deposition testimony, respondents proposed as undisputed that the group first saw the tracks from a vantage point above the tunnel, then climbed over rocks and boulders to get to the area of the track. This was undisputed.

Respondents also proposed as undisputed that "Myra Jaclyn Calove admits that the hiking group left the trail to get to the tunnel," and that "It is apparent from a review of the videos made on the day of the incident that the hiking group was not on a trail, but instead climbed over large boulders to reach the track and [tunnel]." In support, respondents cited the video, Myra Jaclyn Calove's deposition testimony, and Monzon's deposition testimony. Appellants disputed the facts with reference to additional Monzon deposition testimony.

In the portion of her deposition cited by respondents, Myra Jaclyn Calove testified that the group had been hiking for about 15 minutes before the accident, first on a pathway through grass. Then, "we saw like mountains that we can hike." The path "disappeared," and "it's just full of rocks and dirt." Monzon testified that the group hiked over rocks and boulders, and that there was no dirt path in that section. Later, when shown a portion of the video, he identified what he thought was a path, and testified that he believed that the tunnel was part of the trail.

In the portion of his deposition cited by appellants, Monzon testified that the trail "follows through the park, up the mountain and . . . through the tunnel, out to the other side again, because you cannot climb over one side without going through the tunnel." He knew this because he observed ten to fifteen people, in two groups, walking in and out of the tunnel.

The video itself shows the group hiking over dirt, and up and down rocks, in a hilly area. We cannot say that it is subject to only the interpretation respondents suggest, which is that appellants knowingly left a marked path.

Respondents proposed as undisputed that appellants knew that the tunnel was a train tunnel. Appellants disputed this fact by asserting that they believed that the tunnel was abandoned. In the cited portion of his deposition, Monzon testified that he thought that the tunnel was abandoned because "People were going in and out of there. There was trash all over the place. There were bottles and graffiti was covering the walls. It looked like nothing had gone there for at least 50 years, and there was no indication -- we didn't hear any trains the whole entire afternoon that we were there."

Myra Jaclyn Calove testified that she believed that the tunnel was abandoned "from the looks of it," specifying that she reached this conclusion because of the graffiti, because the tunnel was so easily accessible, and because she saw a family holding a baby come out of the tunnel. She asked the people what was in the tunnel. They said, "nothing." She also testified that while she was in the tunnel, she saw another couple, in the tunnel.

It was undisputed that "there were no roots, vegetation, damaged track structure, boulders on the track, or anything else that would have prevented a train from using the track and tunnel."

Respondents proposed as undisputed that "In fact, before they entered the tunnel, a train horn can be heard in the distance in the video Plaintiffs produced!" Appellants objected to this fact with reference to deposition testimony from several of the hikers, that they did not hear a train horn before they entered the tunnel. Monzon testified that he did not hear the horn.

Earlier Trespasses

It was undisputed that Metrolink records showed pedestrian activity in and around the tunnel, and that the engineer of the train involved in this incident had seen people in and around the tunnel on prior runs.

It was also undisputed that in 2000, Metrolink removed "shelving" inside the tunnel to mitigate against people hanging out in the tunnel. The deposition testimony cited in support of the fact establishes that the shelves were benches, or were used as benches. Dale Stuart testified that "In late '99, early 2000, we went in and gunited the tunnel, inner tunnel to get rid of all the shelving so everything inside no longer has a bench. There used to be benches in there, and we modified it so it all sloped down so nobody can sit inside." He further testified that this was done after a train crew had reported that people were sitting on the benches.

It was undisputed that as appellants entered the tunnel, a young family with children was exiting it and another family was entering. At least some of this is apparent on the video.

Appellants also proposed as undisputed that "from January 17, 2008 through October 30, 2009, there were nine reported cases of people in Tunnel 27." The proposed fact was supported with reference to the declaration of counsel asking the court to notice an exhibit, a "trespass/vandalism" report for the designated period, which counsel represented was produced by Metrolink. There are 9 entries concerning Tunnel 27. One of them states, under comments, "trespassers in Tunnel 27" and one states "trespasser

sitting on top portal, tunnel 27." The rest merely indicate "trespasser" as the incident and "tunnel 27" under comments.

Respondents disputed the fact with reference to an objection, that "There is no foundation for the statement by [counsel] who has no evidence that there were nine reported cases of people in Tunnel 27 as opposed to near Tunnel 27, and who has no foundation to interpret the document he cites." The court sustained the objection, a ruling which appellants contend is error. We can see that appellants' proposed undisputed fact that there were 9 incidents of trespass in the tunnel somewhat overstates the evidence, but we cannot see any foundational problem. Counsel declared that the document was produced in discovery, something which was surely within his personal knowledge.

Facts relating to the negligent infliction of emotional distress claim

Respondents proposed as undisputed that as appellants ran from the train, Myra Jaclyn Calove was ahead of Myra Theresa Calove, the decedent. Myra Jaclyn Calove did not look back, and at some point hugged the tunnel wall and closed her eyes. She did not hear the train hit her sister, and did not hear anything except the sound of the train as it came through the tunnel. She was not aware that the train had hit her sister until Monzon told her so, after the accident.

In the deposition testimony submitted in support of the proposed facts, Myra Jaclyn Calove testified that in the tunnel, after the train stopped, Monzon, frantic and crying, said "don't move, you could be hitting her," and "It hit her, it hit her --" She looked down "and saw it was my sister."

Appellants did not dispute the facts.

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); see also *id.*, § 437c, subd. (f) [summary adjudication of issues].) The moving party bears the burden of showing the court that the plaintiff 'has

not established, and cannot reasonably expect to establish, a prima facie case . . . .' [Citation.]" (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.)

"We review summary judgment appeals by applying the same three-step analysis applied by the trial court: First, we identify the issues raised by the pleadings. Second, we determine whether the movant established entitlement to summary judgment, that is, whether the movant showed the opponent could not prevail on any theory raised by the pleadings. Third, *if the movant has met its burden*, we consider whether the opposition raised triable issues of fact. We review these matters de novo." (*Hawkins v. Wilton* (2006) 144 Cal.App.4th 936, 939-940.)

On appeal from an order granting a motion for summary judgment, we examine the record de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) The moving party's affidavits are strictly construed while those of the opposing party are liberally construed. We accept as undisputed facts only those portions of the moving party's evidence that are not contradicted by the opposing party's evidence. In other words, the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences therefrom must be accepted as true. (*Fraizer v. Velkura* (2001) 91 Cal.App.4th 942, 945.)

Discussion

1. Obvious danger

"There is no obligation to give a warning of an obvious danger or one which should have been perceived by the invitee through ordinary use of his own senses." (*Royal Ins. Co. v. Mazzei* (1942) 50 Cal.App.2d 549, 552, see *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 67.) The trial court found that on the undisputed facts, there was an obvious danger here. We cannot agree.

We first consider respondents' assertion that established case law holds that there was an obvious danger, and see no such rule of law. Respondents rely on such cases as

Joslin v. Southern Pac. Co. (1961) 189 Cal.App.2d 382, *Herrera v. Southern Pacific Ry. Co*. (1961) 188 Cal.App.2d 441, and *Mallett v. Southern Pacific Co.* (1937) 20 Cal.App.2d 500, which are factually and legally inapposite.

Joslin, supra, and *Herrera, supra,* concerned trespass to moving train cars. In both cases, the plaintiffs were children who were injured jumping onto, or off of, moving freight trains. The cases found no liability under the obvious danger rule, that "Nothing could be more pregnant with warning of danger than the noise and appearance of a huge, rumbling, string of railroad cars." (*Herrera v. Southern Pacific Ry. Co*., *supra,* 188 Cal.App.2d at p. 449.) Further, both cases were decided before *Rowland v. Christian* (1968) 69 Cal.2d 108, and it is not at all clear that their reasoning remains legally viable. (*Silva v. Union Pacific Railroad Co.* (2000) 85 Cal.App.4th 1024, 1027-1028.)

Mallett v. Southern Pacific Co., supra, 20 Cal.App.2d 500 affirmed a jury verdict in favor of a plaintiff who was injured after she drove across railroad tracks which had inadequate lights and warnings. Respondents' citation to the court's passing comment that "It is true that a railroad track is itself ordinarily a warning of danger . . ." does not assist them, especially because the sentence ends ". . . at the crossing from either moving or stationary cars." (*Id*. at p. 507.)

Respondents also rely on *Christoff v. Union Pacific Railroad Co*. (2005) 134 Cal.App.4th 118, which is closer, but not determinative. In that case, the plaintiff walked on a narrow metal grid adjacent to the train tracks on a railway bridge. Plaintiff asserted that he believed that the walkway was a pedestrian walkway, but acknowledged that he did not have Union Pacific's permission to be on the bridge, and that he knew that it would be hazardous to be on the bridge when a train was crossing it. The court found obvious danger, finding that "'[i]t is a matter of common knowledge that it is dangerous to stand close to a fast moving train, both because of overhang and suction' [citation]" and that "[a]ny reasonable person would know that standing within a few feet of a high speed freight train is dangerous." (*Id*. at p. 127.)

We think that there were triable issues of fact here, and that the obviousness of the danger was a fact question for the jury. (*Chance v. Lawry's, Inc*. (1962) 58 Cal.2d 368.)

The cases respondents cite concern active train tracks, known to the plaintiff to be active, but this accident did not take place at a time and in a location where trains were running frequently on tracks known to be active, but instead in Southern California, in the present, a time and place where abandoned train tracks do exist. (See *Holmes v. South Pac. Coast Ry. Co*. (1893) 97 Cal. 161, 167 [railroad track upon which trains are constantly run is itself a warning].)[5] The tracks were not obstructed, but the tunnel was covered in graffiti and the area was full of debris. The tunnel was adjacent to a park used for hiking, and appellants were able to reach the tracks from the park without encountering a fence or other barrier. (See *The Luckman Partnership, Inc. v. Superior Court* (2010) 184 Cal.App.4th 30, 36 [guardrails on a catwalk constitute a warning].) There was graffiti on one of the No Trespassing signs, and the other signs appear (at least in our record) to be faded.

It is true, too, as appellants argue, ". . . that the hazard was open and obvious did not relieve defendant of all possible duty, or breach of duty, with respect to it. . . . [T]he obviousness of a condition does not necessarily excuse the potential duty of a landowner, not simply to warn of the condition but to rectify it. The modern and controlling law on this subject is that 'although the obviousness of a danger may obviate the duty to *warn* of its existence, if it is *foreseeable* that the danger may cause injury despite the fact that it is obvious (e.g., when necessity requires persons to encounter it), there may be a duty to *remedy* the danger, and the breach of that duty may in turn form the basis for liability . . . .' [Citations.]" (*Martinez v. Chippewa Enterprises, Inc*. (2004) 121 Cal.App.4th 1179, 1184.) "Whether such a duty existed depends upon a number of as yet unresolved factors, such as the foreseeability of harm, defendant's advance knowledge *vel non* of the dangerous condition, and the burden of discharging the duty. (See *Rowland v. Christian* (1968) 69 Cal.2d 108, 113.)" (*Id*. at p. 1185.)

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[5] In deposition testimony submitted by respondents, Myra Jaclyn Calove testified that she had seen trains on train tracks only twice before (except in movies), at a grade crossing on Roscoe.

Appellants ask us to consider those factors and find that respondents had a duty to fence the tracks, or otherwise prevent access to the tunnel, and respondents argue that the evidence established that they had no duty. We say only that respondents' summary judgment motion did not seek to negate the theory.[6] Thus, neither we nor the trial court had a record which would allow a thorough analysis. That is another reason why judgment should not have been entered in respondents' favor.

2. Recreational Immunity

Union Pacific moved for summary judgment on an additional ground, Civil Code section 846, which provides that "An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section. . . . [¶] . . . [¶] This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; . . ."

The issue on summary judgment was whether respondents demonstrated that appellants could not establish a prima facie case of willfulness.

The meaning of "willful" as the word is used in the statute was distilled in *Manuel v. Pacific Gas & Electric Co.* (2009) 173 Cal.App.4th 927. It is not merely negligence, but instead "involves a more positive intent to harm or to do an act with a positive, active and absolute disregard of its consequences." (*Id*. at p. 940.) It is generally marked by

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[6] For instance, there was some evidence concerning fencing, submitted by appellants and objected to by respondents. The evidence was that a city-owned fence ran along a portion of the northern border of the park, but did not start for 100 yards from eastern portal of the tunnel, (where appellants entered the tunnel), that there was no fencing over the rocky terrain, and that the City was called to perform maintenance on the fence at least once a month, sometimes as much as 2 or 3 times a month, because the fence "constantly gets cut." There was also evidence that the No Trespassing signs were very difficult to maintain. However, there was no evidence on alternative means of warning or protecting.

three characteristics; actual or constructive knowledge of the peril; actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger; and conscious failure to act to avoid the peril. It does not necessarily involve a subjective intent to injure. It is sufficient that a reasonable person under the same or similar circumstances would be aware of the highly dangerous character of his or her conduct. (*Ibid*.)

Whether a defendant had actual or constructive knowledge that injury was a probable, as opposed to a possible, result of the danger is to be determined by an examination of all the circumstances, including prior accidents; the defendant's knowledge that people were engaged in recreational activity at the location; the location of the property, including ease of access to the danger; and the maintenance of the property. (*Manuel v. Pacific Gas & Electric Co., supra,* 173 Cal.App.4th at p. 946, *Lostritto v. Southern Pac. Transportation Co*. (1977) 73 Cal.App.3d 737, 745.)

Under these standards and the evidence at summary judgment, there are triable issues of fact on willfulness. It was undisputed that Union Pacific knew that trespassers frequented the area of the tunnel, knew that the tunnel was an active train tunnel, and knew of the danger to pedestrians in an active train tunnel. Hikers from the adjacent park could reach the tracks and tunnel without encountering a fence or barrier. There was a triable issue on the legibility of the No Trespassing signs. There is no evidence that Union Pacific made any other effort to inform hikers, or the public in general, that the tunnel was an active train tunnel. (See *Christoff v. Union Pacific Railroad Co., supra,* 134 Cal.App.4th at p. 122 [where fencing not possible, railroad responded to reports of trespassing with arrests, and sponsored community awareness programs about the risk of trespassing on railroad property].)

3. Dangerous condition of public property

Metrolink and the MTA moved for summary judgment on the ground that there was no dangerous condition of public property, in that appellants were not acting with due care.

Under Government Code section 835, "Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury . . . ."

"Dangerous condition" is defined in Government Code section 830, subdivision (a.) It means "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property . . . is used with due care in a manner in which it is reasonably foreseeable that it will be used."

"Whether property is in a dangerous condition often presents a question of fact, but summary judgment is appropriate if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines that no reasonable person would conclude the condition created a substantial risk of injury when such property is used with due care in a manner which is reasonably foreseeable that it would be used." (*Mathews v. City of Cerritos* (1992) 2 Cal.App.4th 1380, 1382.)

Respondents phrase the question as whether the decedent was using due care, but that is not quite correct. "[I]t is 'well settled . . . that the negligence or lack of due care exhibited by a plaintiff-user of public property does not necessarily defeat [her] cause of action.' (*Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 130.) Section 830, subdivision (a), states property is in a 'dangerous condition' when it creates a substantial risk of injury when 'used with due care in a manner in which it is reasonably foreseeable that it will be used.' This phrase does not require that the plaintiff show he or she was using the property with due care. To allege a section 830 'dangerous condition' plaintiff is only required to show that the condition 'creates a substantial risk of harm when used with due care by the public generally . . . .' (*Murrell v. State of California ex rel. Dept. Pub. Wks.* (1975) 47 Cal.App.3d 264, 267.) '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, [she] has successfully alleged the existence of a dangerous condition regardless of [her] personal lack of due care.' (*Fredette v. City of Long Beach, supra,* 187 Cal.App.3d at p. 131.)" (*Milligan v. Golden Gate Bridge Highway & Transportation Dist.* (2004) 120 Cal.App.4th 1, 7.)

The factual arguments are familiar: respondents' motion was based on the theory that the warning signs were legible and danger was obvious, which, as we have seen, may not be determined on summary judgment. Respondents also argue that the very fact that the hiking group saw the train tracks from a high vantage point, then climbed down, establishes that decedent did not use due care, and that after viewing the video, no reasonable person could conclude otherwise.

We cannot see that on the evidence at this summary judgment, lack of due care is established as matter of law. Instead, there are triable issues of fact. The group certainly did hike up and down hills, but we do not know that in the context of a hike in the park, that establishes lack of due care.

4. Negligent Infliction of Emotional Distress

Respondents' theory was that Myra Jaclyn Calove could not maintain this cause of action because she did not see her sister being killed. However, the "requirement that the plaintiff be contemporaneously *aware* of the injury-producing event has not been interpreted as requiring visual perception of an impact on the victim. A plaintiff may recover based on an event perceived by other senses so long as the event is contemporaneously understood as causing injury to a close relative. (*Wilks v. Hom* (1992) 2 Cal.App.4th 1264, 1272–1273 [plaintiff was in the living room speaking to her children in their bedrooms when she saw, heard and felt one bedroom explode from a gas leak].) (*Bird v. Saenz* (2002) 28 Cal.4th 910, 916.) Myra Jaclyn Calove was in the tunnel when her sister was killed, and the evidence at summary judgment indicated that she knew of the accident and saw her sister's body immediately after the accident. There are thus triable issues of fact, and respondents were not entitled to summary judgment on this cause of action, as to this plaintiff.

Disposition

The judgment is reversed. Appellants are to recover costs on appeal.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

MOSK, J.