Filed 10/22/12 Hurtado v. Century Housing Corp. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LEOPOLDO HURTADO, Plaintiff and Appellant, v. CENTURY HOUSING CORPORATION et al., Defendants and Respondents.	B232219 (Los Angeles County Super. Ct. No. BC397447)

APPEAL from a judgment of the Superior Court of Los Angeles County. Luis A. Lavin, Judge. Reversed and remanded.

Law Offices of Robert A. Brown and Robert A. Brown; Law Offices of Joseph A. Mijares, Jr. and Joseph A. Mijares, Jr.; Law Offices of Lyle F. Middleton and Lyle F. Middleton for Plaintiff and Appellant.

Veatch Carlson, Mark A. Weinstein, Keith G. Wileman, and Gina Genatempo for Defendants and Respondents.

Appellant Leopoldo Hurtado was the minor invited guest of tenants of a residential apartment complex owned and operated by respondents Century Housing Corporation, Mission Village Terrace, L.P., and Community Housing Assistance Program, Inc. While visiting the tenants' son, Hurtado fell from the roof of the apartment complex which he had accessed by climbing a stairwell ladder that led to an unsecured roof hatch. Hurtado filed a civil action against Respondents for negligence based on injuries he sustained in the fall. The trial court granted Respondents' motion for summary judgment on the ground that the action was barred by the recreational use immunity of Civil Code section 846.[1] On appeal, Hurtado contends that the section 846 does not apply in this case because, among other reasons, he was not using the property for a recreational purpose at the time his injury occurred, and he was the invited guest of a tenant who paid consideration for Hurtado's use of the property in the form of rent.

We conclude that the undisputed facts establish that Hurtado entered or used the property for a recreational purpose. However, the statutory exception to recreational use immunity for persons who enter property "for a consideration" applied in this case because, as an invited guest of a tenant at a secured apartment complex not accessible to the public, Hurtado was granted permission to enter the property for a consideration in the form of the tenant's rent. The judgment in favor of Respondents must therefore be reversed and the matter remanded for further proceedings consistent with this opinion.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Respondents are the owners and operators of a residential apartment complex located at 4001 North Mission Road in Los Angeles, California. At all relevant times, the perimeter of the complex was secured by locked gates and access to the property was limited to the tenants and their invited guests. The top-floor stairwell of the complex contained a ladder that was affixed to the wall. The ladder led to an overhead hatch

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[1] Unless otherwise stated, all further statutory references are to the Civil Code.

which opened directly onto the roof of the property. The hatch was not secured by a lock or other device that would limit access to the roof to authorized personnel. Neither the opening of the hatch nor the perimeter of the roof was secured by guard rails or other barriers.

On August 7, 2002, Hurtado, who was then 12 years old, was invited to the apartment complex by his friend, Raymond Herrera. Herrera and his family resided on the property as tenants of Respondents. According to Hurtado, he and Herrera were hanging out and "exploring" the third floor of the complex. At some point, Herrera went to his aunt's nearby home to retrieve a key to his apartment, planning to meet Hurtado at a playground located on the premises. While Hurtado was alone, he climbed the ladder in the stairwell and went through the overhead hatch onto the roof. Once on the roof, Hurtado began "walking around exploring." He saw various items on the roof and played with the some of them, including a ball. Hurtado recalled bouncing the ball and then suddenly falling off the roof. His next memory was waking up in the hospital.

The roof of the apartment complex was not intended for occupant's use. However, in the two years prior to Hurtado's fall, management at the property had received complaints from residents about children climbing onto the roof. According to Jose Andrade, a property management employee, residents complained about the presence of children on the roof approximately two to three times a month. On one occasion, Andrade personally observed a child on the roof painting graffiti. It was Andrade's understanding that children accessed the roof through the same stairwell ladder that Hurtado had used on the day he fell.

In March 2009, Hurtado filed a civil action against Respondents asserting a single cause of action for negligence. In his complaint, Hurtado alleged that Respondents were negligent per se because they failed to secure access to the roof of the apartment complex or to guard the perimeter of the roof in violation of various building and safety statutes, including the Los Angeles Municipal Code, chapter IV, article 1, division 67, sections 91.6707, 91.6711 and 91.6716.6, and the California Code of Regulations, title 8, sections 1632, 3209, 3210, and 3212. In September 2010, Respondents moved for summary

judgment, or in the alternative, summary adjudication on the grounds that (1) they were immune from liability under section 846, and (2) they were not required to comply with the building and safety statutes relied on by Hurtado. In December 2010, the trial court granted summary judgment in favor of Respondents on the ground that the action was barred by the recreational use immunity afforded by section 846. Following the entry of a final judgment for Respondents, Hurtado filed a timely notice of appeal.

DISCUSSION

On appeal, Hurtado challenges the trial court's order granting summary judgment in favor of Respondents. We conclude that the trial court properly determined that Hurtado entered or used Respondents' property for a recreational purpose within the meaning of section 846, but erred in deciding that Hurtado's presence on the property as the invited guest of a tenant at a secured apartment complex did not fall within the consideration exception to recreational use immunity. We further conclude that the matter must be remanded to the trial court for consideration of the arguments raised by the parties as to Respondents' motion for summary adjudication.

I. Standard of Review

"[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted.) "Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material facts exists as to that cause of action . . . ." (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.*, *supra*, at p. 850.) The party opposing summary judgment "may not rely upon the mere allegations or denials of its pleadings," but rather "shall set forth the specific facts showing that a triable issue of material fact exists . . . ." (Code Civ. Proc., § 437c, subd. (p)(2).) A triable issue of material fact exists where "the evidence would allow a reasonable trier of fact to find

the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co., supra,* at p. 850.)

Where summary judgment has been granted, we review the trial court's ruling de novo. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 860.) We consider all the evidence presented by the parties in connection with the motion (except that which was properly excluded) and all the uncontradicted inferences that the evidence reasonably supports. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) In so doing, we strictly construe the moving party's evidence and liberally construe the opposing party's, "accept[ing] as undisputed only those portions of the moving party's evidence that are uncontradicted." (*Hernandez v. Department of Transportation* (2003) 114 Cal.App.4th 376, 382.) We affirm summary judgment where it is shown that no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)[2]

The proper interpretation of a statute, and its application to undisputed facts, presents a question of law that is also subject to de novo review. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432; *California Veterinary Medical Assn. v. City of West Hollywood* (2007) 152 Cal.App.4th 536, 546.) The rules governing statutory interpretation are well-settled. We begin with the fundamental principle that "[t]he objective of statutory construction is to determine the intent of the enacting body so that the law may receive the interpretation that best effectuates that intent. [Citation.]" (*Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818.) To ascertain that intent, "we turn first to the words of the statute, giving them their usual and ordinary meaning.

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2 We note that, in his appellate brief, Hurtado cites to the separate statement in support of the summary judgment motion as the sole evidentiary support for some of his factual contentions. "[A] separate statement is not evidence; it *refers* to evidence submitted in support of or opposition to a summary judgment motion. In an appellate brief, an assertion of fact should be followed by a citation to the page(s) of the record containing the supporting evidence," not to the separate statement. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 178, fn. 4.) However, we decline Respondents' request that we disregard Hurtado's brief for failure to comply with this requirement.

[Citations.]" (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340.) We give effect to every word and clause so that no part or provision is rendered meaningless or inoperative. (*Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 274.) "If the statutory language is unambiguous, 'we presume the Legislature meant what it said, and the plain meaning of the statute governs.' [Citations.]" (*People v. Toney* (2004) 32 Cal.4th 228, 232; see also *Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268 ["'Where the statute is clear, courts will not "interpret away clear language in favor of an ambiguity that does not exist."'"].)

II. Section 846

Section 846, also known as the recreational use immunity statute, "establishes limited liability on the part of a private landowner for injuries sustained by another from recreational use of the land." (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1099, fn. omitted (*Ornelas*).) It provides, in pertinent part, that "[a]n 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." (§ 846, 1st par.) The statute sets forth three exceptions to this rule of limited liability as follows: "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; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner." (§ 846, 4th par.)

"Section 846 was enacted to encourage property owners to allow the general public to engage in recreational activities free of charge on privately owned property. [Citation.] The statutory goal was to constrain the growing tendency of private

landowners to bar public access to their land for recreational uses out of fear of incurring tort liability. [Citations.]" (*Hubbard v. Brown* (1990) 50 Cal.3d 189, 193.) It thus "provides an exception from the general rule that a private landowner owes a duty of reasonable care to any person coming upon the land. [Citations.]" (*Ornelas, supra,* 4 Cal.4th at p. 1099.) The California Supreme Court has summarized the statute's effect on a landowner's duty of care as follows: "Under section 846, an owner of any estate or other interest in real property owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give recreational users warning of hazards on the property, unless: (1) the landowner willfully or maliciously fails to guard or warn against a dangerous condition, use, structure or activity; (2) permission to enter for a recreational purpose is granted for a consideration; or (3) the landowner expressly invites rather than merely permits the user to come upon the premises. The landowner's duty to the nonpaying, uninvited recreational user is, in essence, that owed a trespasser under the common law as it existed prior to *Rowland v. Christian* [(1968) 69 Cal.2d 108]; i.e., absent willful or malicious misconduct the landowner is immune from liability for ordinary negligence. [Citations.]" (*Ornelas, supra,* at pp. 1099-1100, fn. omitted.)

As our Supreme Court further has observed, "the text of section 846 is extremely broad; the immunity applies to the 'owner of *any* estate or *any* other interest in real property, whether possessory or nonpossessory. . . .' The Legislature made no distinction between developed and undeveloped property or between urban and rural land, and imposed no requirement that the site be in a 'natural' or unaltered state." (*Ornelas, supra*, 4 Cal.4th at p. 1105.) The Legislature has established only "two elements as a precondition to immunity: (1) the defendant must be the owner of an 'estate or any other interest in real property, whether possessory or nonpossessory'; and (2) the plaintiff's injury must result from the 'entry or use [of the "premises"] for any recreational purpose.' (§ 846.)" (*Id.* at p. 1100.) Once these elements are met, the defendant is entitled to recreational use immunity unless one of the three statutory exceptions to immunity applies. (§ 846, 4th par.; *Ornelas, supra*, at pp. 1109-1100.)

III. Recreational Purpose

Hurtado does not dispute that Respondents have an ownership interest in the property at issue, but argues that the trial court erred in finding that he entered or used the property for a "recreational purpose" within the meaning of section 846. Hurtado asserts that the evidence instead established that he merely was walking around the apartment complex prior to accessing the roof from which he fell. This argument is unavailing.

Section 846 provides that "[a] 'recreational purpose,' as used in this section, includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites." (§ 846, 2d par.) The wide range of recreational activities enumerated in section 846 is illustrative and not exhaustive. (*Ornelas*, *supra*, 4 Cal.4th at pp. 1100-1101.) Hence, "it is not limited to activities which take place outdoors, and does not exclude recreational activities involving artificial structures." (*Id*. at p. 1101.) Rather, where the plaintiff's "presence [on the property] was occasioned by the recreational use of the property, and [the] injury was the product thereof," this element of the statute is satisfied. (*Id*. at p. 1102.)

It is well-established that playing is a recreational purpose within the meaning of section 846. In *Ornelas*, for instance, the minor plaintiff accompanied other children to an area where farm equipment was stored. While his companions climbed onto the equipment, the plaintiff sat on the ground playing with a hand-held toy and was injured when part of the equipment fell on him. The Supreme Court held that summary judgment in favor of the defendant landowner was proper because the plaintiff had "entered or used [the] defendant's property for a recreational purpose within the meaning of section 846." (*Ornelas, supra,* 4 Cal.4th at p. 1102; see also *Jackson v. Pacific Gas & Electric Co.* (2001) 94 Cal.App.4th 1110, 1115 (*Jackson*) [retrieving a kite is a recreational use of property under section 846]; *Valladares v. Stone* (1990) 218 Cal.App.3d 362, 369 [climbing a tree for play is a recreational purpose within the meaning of section 846].)

In this case, the undisputed facts establish that Hurtado entered the apartment complex to visit his friend, Herrera. The two boys spent some time "exploring" the common areas of the complex before separating so that Herrera could retrieve a key to his apartment. Herrera and Hurtado were supposed to meet again at a playground inside the property. While he was alone, Hurtado climbed onto the roof of the complex and began "exploring" that area. He played with various items that he found on the roof, including a ball, and he was bouncing the ball immediately before he fell off the roof. Given these uncontroverted facts, it is clear that Hurtado's presence in the common areas of the apartment complex and later on the roof of the complex were "occasioned by [his] recreational use of the property." (*Ornelas, supra*, 4 Cal.4th at p. 1102.)

Hurtado reasons that his purpose in entering the property was not to play on the roof, but to visit Herrera. He also points out that the only activity in which he engaged immediately prior to climbing onto the roof was walking around the common areas of the apartment complex. However, by its own terms, section 846 applies to "entry or use . . . for any recreational purpose." (§ 846, 1st par.) It is therefore sufficient that Hurtado's injury occurred as a result of his use of the property for a recreational purpose regardless of whether his initial intent when he entered the complex was to climb onto the roof, to play in the common areas, or to socialize with his friend. Consequently, the trial court properly determined that Hurtado entered or used Respondents' property for a recreational purpose within the meaning of section 846.

IV. Consideration Exception

Hurtado further contends that, even if his use of Respondents' property was for a recreational purpose under section 846, the rent paid by Herrera's family as tenants of the property was sufficient to trigger the statutory exception to recreational use immunity for "consideration . . . received from others." (§ 846, 4th par.) In support of this argument, Hurtado asserts that he had permission to enter the property as Herrera's invited guest at the time his injury occurred and that access to the property was limited by locked gates to tenants and their invited guests. We agree that, because the property was a secured

private apartment complex only accessible to tenants and their invited guests, the tenant's payment of rent to Respondents for use of the common areas of the property constituted "consideration . . . received from others" within the meaning of section 846.

Under the express terms of section 846, the recreational use immunity afforded by the statute does not apply when entry onto the property on which the injury occurred was "granted for a consideration." (§ 846, 4th par.) To trigger this statutory exception, the consideration must be paid for "permission to enter" the premises for a recreational purpose or "received from others for the same purpose." (Ibid.) Although "consideration is not limited solely to direct payment of entrance fees," it must, at minimum, "consist of a present, actual 'benefit bestowed or a detriment suffered.'" (*Johnson v. Unocal Corp.* (1993) 21 Cal.App.4th 310, 316 (*Johnson*).) Additionally, whether received directly or from a third party, it must be made "*in exchange for 'permission to enter'* the property" for a recreational purpose. (*Miller v. Weitzen* (2005) 133 Cal.App.4th 732, 740 (*Miller*).) However, nothing in the plain language of section 846 requires that the plaintiff be engaged in the specific recreational activity for which the consideration was given at the time the injury occurs.

The parties have not cited, nor is this Court aware of, any California cases that have addressed whether the rent paid by a tenant at a private residential apartment complex can constitute consideration within the meaning of section 846. The few published cases interpreting the exception have noted that the consideration required to preclude recreational use immunity generally is "paid 'in the form of an entrance fee.'" (*Miller, supra,* 133 Cal.App.4th at p. 739; see also *Johnson, supra,* 21 Cal.App.4th at p. 316 ["as regards section 846, we are aware of no cases in which consideration did not involve the actual payment of an entrance fee by plaintiff to defendant"]; *Moore v. City of Torrance* (1979) 101 Cal.App.3d 66, 72 (*Moore*) ["consideration means some type of entrance fee or charge for permitting a person to use specially constructed facilities"], disapproved on other grounds in *Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 Cal.3d 699, 710.) However, the express language of the statute contains no such limitation, but simply requires that permission to enter the property for a recreational

purpose be "granted for a consideration." (§ 846, 4th par.) Moreover, in contrast to this case, the above-cited cases addressing the consideration exception all concerned injuries occurring on property that was open to the general public for recreational use.

In *Johnson*, for instance, the plaintiff was injured during an annual company picnic on picnic grounds that were available for public use free of charge. (*Johnson*, *supra*, 21 Cal.App.4th at pp. 312-313.) The Court of Appeal concluded that a hold-harmless agreement indemnifying the owner of the picnic grounds from damages for injuries arising out of use of the property did not trigger the consideration exception because it was "not a present and actual benefit conferred within the meaning of section 846." (*Id*. at p. 317.) Similarly, in *Miller*, the plaintiff was injured while horseback riding on a public riding trail. (*Miller*, *supra*, 133 Cal.App.4th at pp. 734-735.) The Court of Appeal held that the trail maintenance fees paid by the plaintiff to her riding club did not constitute consideration under section 846 because the trail was "open to any member of the public without charge of any kind." (*Id*. at p. 740; see also *Moore*, *supra*, 101 Cal.App.3d at p. 72 [property taxes paid by family of child injured at public park was not consideration for entry into park within meaning of section 846].) The *Miller* court noted, however, that "the analysis might be different if [the plaintiff's] accident had occurred on a portion of the trail system that was *private* and could only be used by Riding Club members." (*Miller*, *supra*, at p. 740, fn. 11.)

Here, the undisputed facts show that Hurtado was injured at a private apartment complex secured by locked gates which limited access to the common areas of the property to the tenants and their invited guests. Hurtado was an invited guest of Herrera whose family were tenants at the apartment complex, and prior to Hurtado's fall, the two boys had spent time playing together in the common areas of the property. The boys briefly separated while Herrera went to retrieve a key to his apartment and they were planning on meeting again at a playground on the premises when Hurtado's injury occurred. Under these circumstances, we conclude that Hurtado's permission to enter the property was granted "for a consideration" in the form of rent paid by Herrera's family. (§ 846, 4th par.) Given that access to the apartment complex was restricted to

tenants and their invited guests, the tenants' payment of rent was consideration for the right to use the common areas of the property for recreational purposes and to invite their guests to do the same. Although Hurtado's injury did not occur in an area of the property intended for recreational use, his permission to enter the apartment complex was for the recreational purpose of playing with Herrera in the property's common areas. Absent such permission, Hurtado would not have had access to the roof of the complex where he was injured by climbing a stairwell ladder that was located in a common area. The consideration exception to recreational use immunity accordingly applied in this case.[3]

Respondents argue that applying the consideration exception to the circumstances presented here would be contrary to the legislative purpose of section 846 because it "would encourage Respondents to prevent entry to their property entirely to persons not expressly invited and force them to shield themselves from every potential liability to every uninvited guest." This argument does not withstand scrutiny. As discussed, the legislative purpose of section 846 "is to encourage owners to allow the general public to

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[3] In interpreting analogous state statutes on recreational use immunity, courts outside of California have applied the statutory exception for consideration paid to a property owner in circumstances similar to this case, i.e., where an invited guest of a rental property tenant or homeowners' association member was injured on property only accessible to the tenant or homeowner and his or her invited guests. (See, e.g., *Hallacker v. National Bank & Trust Co.* (3rd Cir. 1986) 806 F.2d 488, 492 [consideration exception in New Jersey statute applied where invited guest of lessee of private lakeside cabin was injured in diving accident because "the use of the dock and water in the vicinity of the cabin is an implied benefit of the cabin rental"]; *Simchuk v. Angel Island Community Assn.* (Mont. 1992) 833 P.2d 158, 162, overruled on other grounds in *Saari v. Winter Sports, Inc.* (Mont. 2003) 64 P.3d 1038, 1044 [consideration exception in Montana statute applied where invited guest of homeowners' association member was injured on basketball court because association "requires members . . . to pay dues for members and their guests to use the facilities" which "was necessary to create [plaintiff's] access" to basketball court]; *Knapp v. Hall Candletree Associates* (Ohio Ct.App., June 23, 1988, No. 87AP-1234) 1988 Ohio App. LEXIS 2503, pp. *2-*3 [consideration exception in Ohio statute applied where invited guest of tenant at apartment complex was injured in swimming pool because the "providing of a swimming pool made available to tenants and guests affects the rent that can be charged for the complex and makes the complex more desirable for rental purposes"].)

use their land for recreational purposes." (*Ornelas, supra*, 4 Cal.4th at p. 1103; see also *Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, 114 ["Legislature provided the immunity to encourage landowners to permit the '"general public to recreate . . . on privately owned property"'"].) Such purpose would not be served by upholding recreational use immunity here because Respondents already have taken affirmative steps to make their property unavailable for public use by securing the premises with locked gates. The only persons permitted to use the common areas of the property for recreational purposes are the tenants who pay rent to Respondents and their invited guests. The recreational activities that take place on the property thus are not allowed on a gratuitous basis, but "for a consideration." (§ 846, 4th par.) Because Respondents were not entitled to recreational use immunity under section 846 based on the consideration exception, the trial court erred in granting summary judgment in Respondents' favor.[4]

V. Respondents' Motion for Summary Adjudication

Respondents ask this Court to determine whether, as an alternative to summary judgment, they were entitled to summary adjudication because they did not owe a duty of care to Hurtado under the specific building and safety statutes cited in his complaint. Hurtado asserts that the issue of duty is not properly before this Court because it was raised in a prior motion for summary judgment filed by Respondents, which the trial court denied and Respondents failed to timely appeal.

The record reflects that Respondents first filed a motion for summary judgment in October 2009, which was denied by the trial court. However, none of the relevant documents related to that motion have been included in the record on appeal. In September 2010, Respondents filed a second motion for summary judgment on the ground that they were immune from liability under section 846, or in the alternative, for

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[4] In light of our conclusion that the consideration exception precluded Respondents from asserting recreational use immunity, we need not consider Hurtado's argument regarding the applicability of section 846 to claims of negligence per se.

summary adjudication on the ground that they did not owe Hurtado a duty of care under the building and safety statutes cited in his complaint. In his opposition, Hurtado argued that the issue of duty previously had been raised by Respondents and adjudicated by the trial court in denying the first summary judgment motion. Because the trial court granted Respondents' second summary judgment motion on the basis of recreational use immunity, the court never addressed whether it previously had adjudicated the issue of duty, and if not, whether the building and safety statutes relied on by Hurtado gave rise to a duty of care. Following Hurtado's filing of this appeal from the order granting Respondents' second summary judgment motion, Respondents filed a cross-appeal of the order denying their first summary judgment motion. Respondents' cross-appeal was dismissed, however, for failure to timely designate the appellate record and pay the statutory deposits or fees.

Because the record on appeal does not include any of the briefing from Respondents' prior motion for summary judgment or the trial court's ruling on that motion, this Court cannot determine whether the alleged inapplicability of the building and safety statutes at issue was previously argued by Respondents or adjudicated by the trial court. It does appear, however, that the issue of duty was raised in Respondents' prior summary judgment motion and that Hurtado opposed that motion, at least in part, on the ground that Respondents owed him a duty of care under these building and safety statutes. Accordingly, we must remand the matter to the trial court to determine to what extent the issues raised in Respondents' present motion for summary adjudication were previously decided by the court. If, as Hurtado contends, the trial court ruled on these issues in denying Respondents' prior summary judgment motion, then no further action is necessary because Respondents' cross-appeal of the order denying that motion has been dismissed. If, on the other hand, the trial court did not previously rule on these issues, then the court must determine what further action is appropriate with respect to adjudicating Respondents' present motion for summary adjudication.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion. Hurtado shall recover his costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.