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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ANNIE LEE SAMPSON, Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Respondent.	B278514 (Los Angeles County Super. Ct. No. BC522883)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles F. Palmer, Judge. Affirmed.

Wesierski & Zurek, Frank D'Oro, Debbie Yen and Lynne E. Rasmussen for Plaintiff and Appellant.

Michael N. Feuer, City Attorney, Blithe S. Bock, Assistant City Attorney and Shaun Dabby Jacobs, Deputy City Attorney, for Defendant and Respondent.

Annie Sampson sued the City of Los Angeles for personal injuries she suffered when she tripped over an elevated sidewalk slab. A jury found that the uplift was a dangerous condition but that the City did not have notice of the condition. Judgment was entered in favor of the City. On appeal, Sampson contends the evidence established that the City had constructive notice of the sidewalk defect. We conclude that substantial evidence supports the jury's finding, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 5, 2013, Sampson, who was 81 years old, tripped while walking on the City sidewalk near her home. She broke her ankle. The sidewalk slab upon which she tripped lay between a tree and a wall, and was upraised due to the tree's roots. The slab rose at a slant: near the tree, the block was almost flush with the adjacent slab; near the wall, the slab was raised in elevation by three inches. Sampson tripped on the middle of the slab which was raised above its neighbor by approximately one inch and a half to two inches.

In September 2013, Sampson filed a complaint against the City for her personal injuries. The case proceeded to a jury trial in July 2016.

Sampson presented evidence of "inter-departmental correspondence" between City employees in 2006 stating that "sidewalk inspections are conducted responsive to requests for service referencing damaged sidewalks . . . [and] during the course of parkway tree inspections . . . ." John Kim, a supervisor for the City's Urban Forestry Division, testified that he was not familiar with the memo. He inspected City trees within the parkway but did not inspect sidewalks. When he tasked other

employees with tree inspections, he did not instruct them to inspect sidewalks.

Sampson presented photographic evidence that the slab had been upraised to some extent since April of 2009. In September 2009, all of the trees on Sampson's block—including the one next to the sidewalk uplift—were inspected by the Urban Forestry Division to determine if they needed trimming. There was no evidence the sidewalk uplift at issue had been reported at that time or that an Urban Forestry employee saw any sidewalk defect. According to Kim, if a division employee had noticed the sidewalk uplift, he or she would have had it repaired.

Richard Lopez, a superintendent for the City's Bureau of Street Services, testified that a phone line was maintained for members of the public to report defects in City streets and sidewalks. When a request for service was made, the City responded by inspecting the reported location. The City had not been notified of the sidewalk uplift Sampson had tripped over, and had not inspected it.

The City had, however, received eight requests between 2008 and 2013 for services on the block where Sampson lived. The complaints concerned illegal dumping on the sidewalk or parkway, abandoned news racks, a leaf blower violation, a street pothole, and street resurfacing. All of the requests sought services for locations that were 100 to 200 feet from where Sampson fell. Lopez confirmed that if an employee from his department had noticed the sidewalk uplift, the employee might have repaired it.

The jury entered a defense verdict, finding that the sidewalk uplift was a dangerous condition but that the City did not have notice of it. Sampson moved for a new trial and

judgment notwithstanding the verdict. The trial court denied both motions, and Sampson timely appealed.

DISCUSSION

1. *Applicable Law*

The Tort Claims Act (Gov't Code, § 810 et seq.) provides that a public entity is immune from liability except as otherwise provided by statute.[1] (§ 815.) Section 835 sets forth the conditions of public entity liability in connection with a dangerous condition of property:

"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, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either: [¶] (a) 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 [¶] (b) The 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."

There was no evidence that a City employee caused the dangerous condition, so subdivision (a) does not apply. Rather, the question is whether the City had actual or constructive notice of the dangerous condition in sufficient time to remedy it. Sampson effectively acknowledges the City did not have actual

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[1] All further statutory references are to the Government Code.

notice but argues that the evidence established the City had constructive notice. Under section 835.2, a "public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had 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.

On the issue of due care, admissible evidence includes but is not limited to evidence as to:

"(1) Whether the existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate (considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise) to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property.

"(2) Whether the public entity maintained and operated such an inspection system with due care and did not discover the condition." (§ 835.2, subd. (b).)

In summary, "constructive notice may be imputed if it can be shown that an obvious danger existed for an adequate period of time before the accident to have permitted the [public entity], in the exercise of due care, to discover and remedy the situation . . . ." (*State v. Superior Court of San Mateo County* (1968) 263 Cal.App.2d 396, 400.) "The questions of whether a dangerous condition could have been discovered by reasonable

inspection and whether there was adequate time for preventive measures are properly left to the jury. [Citations.]" (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 842–843.)

We review Sampson's claim that the jury's finding is unsupported by the evidence under the substantial evidence standard. (*Pope v. Babick* (2014) 229 Cal.App.4th 1238, 1245–1246.) " 'In applying this standard of review, we "view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. . . ." [Citation.]' [Citation.] ' "Substantial evidence" is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value.' [Citation.] We do not reweigh evidence or reassess the credibility of witnesses." (*Ibid.*) As for the court's denial of Sampson's JNOV motion, we also review the ruling for whether any substantial evidence supports the jury's conclusion. (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.)

2. *Substantial Evidence Supports the Finding that the City Did Not Have Constructive Notice of the Sidewalk Uplift*

A. *There Was No Presumption of Constructive Notice*

Sampson first argues that the existence of a dangerous condition for over four years creates a presumption of constructive notice. She relies on *Nicholson v. Los Angeles* (1936) 5 Cal.2d 361 (*Nicholson*) for this proposition.[2] In *Nicholson*, the plaintiff sued for injuries from tripping over a sidewalk uplift that was an inch and a half high. (*Id.* at p. 364.) The condition

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[2] Sampson cites to several cases for this proposition which, in turn, all rely on *Nicholson*.

had existed for "several months." (*Ibid.*) The court found the City did not have constructive notice of the defect. (*Id.* at p. 367.)

The court noted that other cases had found a presumption of constructive notice where a dangerous condition of a sidewalk had existed "for a considerable length of time." (*Nicholson*, *supra*, 5 Cal.2d at p. 365.) However, the court found that each of those cases involved "a more conspicuous defect" and additional factors such as prior accidents "which served to put those in charge upon inquiry as to the safety of the existing condition." (*Id.* at p. 366.) The "more conspicuous defects" involved in cases which applied the presumption included a pit and bridge that lacked guard rails, a piano insecurely supported on a dolly, and a tree that fell across a roadway. (*Ibid.*)

As in *Nicholson*, the defect at issue here is a sidewalk uplift of less than two inches, not a "more conspicuous defect," and there were no "additional factors" such as prior accidents at the scene that supported the application of a presumption of constructive notice. (*Nicholson*, *supra*, 5 Cal.2d at p. 366.) We recognize that the passage of time, along with other factors, may support a jury's finding of constructive notice. That is far different than saying that the passage of time, when considered in light of all the evidence here, compelled the jury to find as a matter of law that the City was constructively aware of the sidewalk's dangerous condition.

B. *Substantial Evidence Supports the Finding that the Sidewalk Uplift Was Not "Obvious"*

Under section 835.2, the threshold question is whether "the dangerous condition was obvious and whether it existed for a sufficient period of time." (*Heskel v. City of San Diego* (2014) 227 Cal.App.4th 313, 317.) The fact-finder must then determine

whether "the public entity maintained and operated" a "reasonably adequate" "inspection system with due care" such that it "should have discovered the condition and its dangerous character." (§ 835.2, subd. (b).) We address each of these questions in turn.

Assuming that the amount of time the sidewalk uplift had existed—four years—was a "sufficient period of time," there was substantial evidence by which the jury could find the uplift was not "obvious" or "of such a conspicuous character that a reasonable inspection would have disclosed" it. (§ 835.2, subd. (b); *Kotronakis v. San Francisco* (1961) 192 Cal.App.2d 624, 630.)

Courts construing "obviousness" under section 835.2 have suggested the condition must be "conspicuous or notorious." (*Van Dorn v. San Francisco* (1951) 103 Cal.App.2d 714, 719.) Here, the evidence showed that the sidewalk uplift was gently sloped: near the center of the sidewalk, there appeared to be no uplift between the two sidewalk blocks, however, near the wall, there was an uplift of approximately three inches. In the middle of the block, where Sampson tripped and where one could reasonably infer that most pedestrians tred, the uplift was less than two inches.

John Kim, the City tree surgeon supervisor, testified that if he or one of his colleagues had seen the sidewalk uplift, they would have had it repaired. Yet, in 2009, one of his colleagues inspected the tree adjacent to the sidewalk block and did not request a repair. From this, a jury could infer that the inspector did not notice the uplift.

Richard Lopez, the City Street Services superintendent, testified that his department had responded to eight service

requests on the same block as the sidewalk uplift. He further stated that if his department had seen the sidewalk uplift, they might have repaired it. The jury could have inferred from the evidence that the uplift had not been repaired that Street Services employees had not seen it.

This was substantial evidence the dangerous condition was not "obvious" within the meaning of section 835.2.

C. *There is Substantial Evidence the City Maintained a Reasonably Adequate Inspection System With Due Care*

Even assuming the evidence established unequivocably that the sidewalk uplift was obvious, we conclude there is substantial evidence the City exercised due care in its operation of a reasonably adequate inspection system.

Sampson argues the evidence established the City did not maintain a reasonably adequate inspection system because (1) the sidewalk uplift existed for four years without detection by the City, (2) the City's employees, Kim and Lopez, were unaware of the City policy that sidewalks should be inspected during the course of parkway tree inspections, and (3) the City's policy of inspection upon request is unreasonable because the evidence was that people generally do not make these requests.

There was conflicting evidence as to what the City's sidewalk inspection policy was. On the one hand, Sampson presented evidence of City correspondence from 2006 referring to a policy of inspecting sidewalks during parkway tree inspections and in response to requests for services. On the other hand, the testimony of City employees indicated that City employees did *not* inspect sidewalks during parkway street inspections, but rather only in response to requests for services.

From this evidence, the jury could have reasonably concluded that the 2006 correspondence was not the City's official policy, just a memorandum. The jury was also entitled to conclude that the City no longer followed the policy presumably in effect in 2006 of inspecting sidewalks during the course of parkway tree inspections. Kim testified that the Urban Forestry Division's current policy regarding sidewalk defects was to request a repair if an employee noticed a defect. Lopez testified that the Street Services bureau inspected a sidewalk upon receiving a request for services and, if the inspection revealed a defect, they would repair it. Thus, the jury may have reasonably found that the system implemented by the City was to inspect a sidewalk when notified of a problem at that location. Lopez's testimony indicated this system was operated with "due care"—he testified that the system was followed by his employees.

We disagree with Sampson's argument that the City's inspection system was unreasonable as a matter of law because it did not discover the uplift within four years. Section 835.2 provides that a determination of whether a system is "reasonably adequate" involves consideration of "the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise." (§ 835.2, subd. (b)(1).) Sampson does not address these factors: she does not discuss the practicability or cost of the present system versus an alternative system that required the City to initiate inspections of sidewalks without a request for service; and she does not address the likelihood and magnitude of the potential danger to sidewalk users under the current system versus a more stringent inspection system.

On this issue, we believe Supreme Court's comments in *Nicholson* are relevant: "It is well settled that a municipality is not an insurer of its public ways and is not bound to keep them so as to preclude the possibility of injury or accident. . . . 'It is a matter of common knowledge that no sidewalk is perfect, and that certain irregularities and inequalities in the surface of such sidewalks exist, not only in the city and county of San Francisco, but in all cities. . . . While a municipality is required to exercise vigilance in keeping its streets and sidewalks in a reasonably safe condition for public travel, it is by no means an insurer against accidents, nor can it be expected to keep the surface of its sidewalks free from all irregularities.' [Citations.] The doctrine of constructive notice cannot be so applied as to effect a change in the substantive obligations of the City." (*Nicholson*, *supra*, 5 Cal.2d at p. 365.)

As for Sampson's argument that members of the public may generally be unaware that they can make a request for services and do not make such requests, there was substantial evidence to the contrary. Specifically, there was evidence that eight requests had been made for services on Sampson's block during the several years prior to the accident.

This was substantial evidence the City maintained a reasonably adequate inspection system with due care within the meaning of section 835.2.

DISPOSITION

The judgment is affirmed. Respondent to recover costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

ROGAN, J.*

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