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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JEFFREY HUA, Plaintiff and Appellant, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant and Respondent.	E065198 (Super.Ct.No. RIC1402039) OPINION

APPEAL from the Superior Court of Riverside County. Daniel A. Ottolia, Judge. Affirmed.

Jeffrey Hua, in pro. per., for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Arthur K. Cunningham, Jeffry A. Miller, Ernest Slome and Brittany H. Bartold for Defendant and Respondent.

Plaintiff and appellant Jeffrey Hua sued defendant and respondent the Regents of the University of California (the University) for (1) negligence, (2) willful failure to warn/premises liability, and (3) dangerous condition of public property. The trial court

granted the University's motion for summary judgment. (Code Civ. Proc., § 473c.) Hua contends the trial court erred by granting summary judgment and sustaining the University's evidentiary objections. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. COMPLAINT

The facts in this subsection are taken from the allegations in Hua's complaint. In March 2012, Hua was a student at the University of California, Riverside (UCR). On March 3, 2012, Hua was walking on campus. In the area where he was walking, there is a row of concrete or metal poles (bollards). Each bollard has a locking latch that secures it to its housing. As Hua approached the bollards, "suddenly and without warning a [bollard] fell and landed on [Hua]," striking his foot. The bollard that fell was not properly secured to its housing. The University failed to properly secure the bollard.

Hua alleged (1) the University was negligent by failing to secure the bollard in its housing; (2) the University negligently maintained its property; (3) the University knew that failing to secure the bollard created a dangerous condition yet permitted the condition to exist; and (4) the University failed to warn Hua of the condition. Hua sought compensatory damages according to proof.

B. MOTION FOR SUMMARY JUDGMENT

The University moved for summary judgment. The University explained that, as a public entity, it is only liable for statutory torts—not common law torts. As a result, the University asserted Hua's common law claims of negligence and premises liability

failed. In regard to the dangerous condition of public property cause of action, the University asserted it had no notice of the allegedly loose bollard, and Hua did not allege the University had notice of the allegedly loose bollard. The University argued that the lack of notice of the condition caused the claim to fail.

The University attached portions of Hua's December 16, 2014, deposition transcript to its motion. At the deposition, Hua explained that he lives on campus. Hua was walking for exercise at the time of the incident at issue in this case. He walked to the edge of campus and then intended to return to his dormitory along the same path. As Hua walked toward the edge of campus, he passed the bollards at issue. Hua did not notice anything unusual about the bollards at that time.

When Hua reached the edge of campus, he turned around and walked back toward the dormitory. At that point, one man was walking in front of Hua. Hua explained that his foot was injured when the "pole fell backwards onto [his] foot." Hua could not recall if anyone was near the bollard or how the bollard was positioned before it fell. Hua could not recall how the bollard came to strike his foot. After the bollard fell on Hua's foot, the man who had been walking in front of Hua placed the bollard back in its housing. Hua then removed the bollard from its housing and placed it on the ground so it could be photographed by police.

Also attached to the University's motion was the declaration of UCR Police Officer Joseph Lara. Lara explained that in the location where Hua was injured metal bollards are inserted into a wide concrete walkway to prevent vehicles from using the walkway, but the bollards can be removed when necessary to allow vehicular traffic.

Lara began his shift at 7:00 a.m. on March 3. No one had reported any concerns about the bollards to Lara prior to Hua's call.

Lara responded to Hua's call for assistance on March 3. Hua told Lara he was walking behind a man who "accidentally knocked a loose yellow bollard on the ground. When it fell on the ground Hua was struck on the top of his right foot." Lara's police report of the incident was attached to Lara's declaration. The report reflected the same information *ante*: Hua was walking behind a man who passed by the bollards and "accidently knocked a loose bollard on the ground. When it fell on the ground Hua was struck on the top of his right foot."

Lara saw a red mark, approximately three inches in diameter, on Hua's foot. Hua's injury occurred at approximately 11:10 a.m. Michael Williams walked by Lara while Lara was photographing the bollard. Michael[1] told Lara that he walked by the bollards at 7:30 a.m. and 10:30 a.m. and at those times "the bollard was lying on the ground." A police sergeant placed the bollard back in its housing.

One page of Deann Williams's deposition transcript was attached to the University's motion. Deann and her husband were walking behind a man. The man reached down to pick up a pole. The pole fell on the man's foot.

The declaration of Erica Healander was also attached to the University's motion. Healander works in UCR's Office of Risk Management. Healander tracks all injuries on campus so any hazardous conditions can be remedied. The documentation of

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[1] We use first names due to witnesses sharing a last name. No disrespect is intended.

injuries dates back to January 2000. Since January 2000, no injuries caused by bollards were recorded.

C. OPPOSITION

Hua opposed the University's motion for summary judgment. Hua asserted that his dangerous condition of public property cause of action included an allegation that the University had notice of the loose bollard. Further, Hua contended he did not need to allege notice of the condition because the condition was created by a University employee. In regard to negligence, Hua asserted the University is liable under a theory of respondeat superior.

Hua attached exhibits to his opposition. Among the exhibits was (1) a portion of Hua's December 16, 2014, deposition transcript reflecting Hua walked near the athletic fields and parking lot 19; (2) a map of the UCR campus; (3) a print advertisement from UCR reflecting homecoming would take place on March 2 and 3, 2012, and providing the homecoming schedule of activities; (4) a newspaper article, describing the upcoming homecoming activities, such as a basketball game and music festival; (5) a printout of a UCR webpage reflecting the campus's transportation and parking services will "unlock bollards [for] authorized service providers"; (6) a portion of Hua's August 12, 2015, deposition transcript in which Hua said the bollard had been in an upright position leaning against a second bollard when the man walking in front of Hua grazed the bollard, causing the bollard to fall backward and strike Hua's foot.

In his opposition, Hua asserted that, from the foregoing evidence, it could reasonably be inferred that a University employee unlocked the bollard for a homecoming vendor, thereby creating the dangerous condition.

D. REPLY

The University replied to Hua's opposition. The University asserted, "There is no evidence that a UCR employee removed the bollard before the incident, and no evidence from which a reasonable inference could be drawn that a UCR employee had removed it." The University submitted written evidentiary objections. One of the objections, based upon hearsay, was to Michael's statement in Officer Lara's police report reflecting the bollard had been lying on the ground at 7:30 a.m. and 10:30 a.m.

E. RULING

The trial court concluded Hua's negligence and premises liability causes of action "fail to state a claim because a claim against the public entity must be by statute only. There is no common law liability." As to the dangerous condition of public property cause of action, the trial court concluded the University had no actual or constructive notice of the loose bollard.

The court said to Hua's trial counsel, "You're asking the Court to extrapolate from the fact that there were certain events that weekend there at the university to find constructive notice, but we just—the Court can't do that, absent some admissible evidence that in fact the university had notice. None of the facts of those activities indicate that UCR employees removed the bollard or unlocked it. The evidence of

actual knowledge is nonexistent. The Court cannot infer from the evidence that UCR employees created the condition.

"Officer Lara's report contains a statement made by a witness who indicated to the officer that the condition had existed for about three hours starting at 7:30 a.m. [in] the morning, and then again at 10:30 when the witness once again passed by the bollard just before the accident happened at about 11:00 a.m. The problem is that the witness's statement is hearsay. There is no exception to the hearsay rule. So the Court will sustain moving party's objection to the witness's statement in the report.
"Since [Hua] has provided no proof that the condition existed for a sufficient period of time, you have not shown constructive notice. [¶] Therefore, on the facts presented in this case, the Court does find for the defendant on the motion for summary judgment."

Hua's trial counsel argued that the police report was submitted by the University, and it was "a little disingenuous" of the University to object to its own evidence. The court asked if counsel had deposed Michael, who saw the bollard lying on the ground. Hua's trial counsel said he believed Michael had been deposed but Michael "didn't recall much"; Hua's trial counsel did not have a copy of the deposition transcript. The trial court responded, "Well, the problem is that the Court has to base its ruling on admissible evidence."

DISCUSSION

A. SUMMARY JUDGMENT

1. *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. [Citations.] 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.]' [Citation.] '[O]nce a moving defendant has "shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established," the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff "may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . ." '

" 'On appeal from the granting of 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. ' " (*Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th 264, 274.)

2. *NEGLIGENCE AND PREMISES LIABILITY*

Hua contends the trial court erred by granting summary judgment on the negligence and premises liability causes of action because there is statutory authority creating liability for the two torts.

"Except as otherwise provided by statute: [¶] [a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." (Gov. Code, § 815, subd. (a).)[2] Statutory law provides: "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." (§ 815.2, subd. (a).)

The University met its burden on the negligence and premises liability causes of action (showing Hua lacked a prima facie case) by explaining that the University is a public entity and is therefore generally immune from common law tort cause of actions. (§ 815, subd. (a).) The burden then shifted to Hua to show his causes of action fell within an exception to this rule.

Hua offers no evidence reflecting a University employee moved the bollard. One could speculate any number of scenarios that led to the bollard being loose, such as (1) there was an emergency and city police or firefighters unlocked or cut the lock on the bollard and moved the bollard; (2) an alumnus visiting for homecoming broke the latch on the bollard and moved the bollard; or (3) a student picked the lock on the bollard and moved the bollard. In Hua's complaint he alleged the bollards "each have a latch for a lock." We are unable to find evidence in the record concerning the condition of the locking latch at the time of Hua's injury, e.g., whether the lock was open, broken,

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[2] All subsequent statutory references will be to the Government Code unless otherwise indicated.

cut, et cetera. The lack of information concerning the condition of the lock makes it difficult to infer an employee unlocked the bollard.

Hua asserts homecoming events were taking place on campus, but provides no evidence connecting the homecoming activities with the loose bollard—there is only evidence that an event was taking place and a single bollard was moved. Without evidence connecting the two, such as a witness who saw vendor traffic driving on the pathway that would have necessitated the moving of the bollard, it cannot be inferred that a University employee moved the bollard.

Hua asserts his evidence that homecoming events were taking place on campus, is sufficient to create an inference that "it is more probable than not that" an employee moved the bollard for a vendor. Hua fails to provide evidence that makes the employee/vendor scenario any more likely than any other possibility, such as city police unlocking the bollard or an alumnus breaking the latch. Hua needs to support his theory with evidence such as (1) the lock not being broken, and (2) a witness who saw an employee unlocking the bollard, or a witness who saw a vendor moving a large object down the walking path, such that a bollard would need to be moved, or a witness who saw vendors driving on the walking path during the day. Hua fails to connect the moved bollard with an intact lock and the homecoming activities, such that one could reasonably infer an employee was responsible for moving the bollard.

Due to the lack of evidentiary support, we conclude Hua has not shown a triable issue of fact concerning the University's liability for an act of an employee (§ 815.2, subd. (a)). (See *Collin v. Calportland Company* (2014) 228 Cal.App.4th 582, 592 [a

mere possibility of causation does not create a triable issue of material fact].) Therefore, we conclude the trial court did not err by granting summary judgment on the negligence and premises liability causes of action.

3. *DANGEROUS CONDITION*

Hua contends the trial court erred by granting summary judgment on his cause of action for dangerous condition of public 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 under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." (§ 835.)

The first path for liability is that an employee created the dangerous condition. (§ 835, subd. (a).) The University asserted that, at Hua's December 2014 deposition, Hua had no recollection of how the bollard came to fall on his foot, and therefore it could not be shown that an employee created the dangerous condition. Further, the University provided evidence that there were no prior injuries on campus related to bollards, and no calls to Officer Lara on March 3 related to the loose bollard.

From this evidence, the University met its burden concerning Hua's failure to establish a prima facie case that an employee caused the bollard to be loose. Therefore, the burden shifted to Hua. As set forth *ante*, Hua has not provided evidence from which it can reasonably be inferred that a University employee unlocked and/or moved the bollard. Therefore, a triable issue of fact concerning a wrongful act or omission by an employee has not been shown. (§ 835, subd. (a).)

The second path to liability concerns whether the University had actual notice. (§ 835, subd. (b).) "A public entity had actual notice of a dangerous condition within the meaning of subdivision (b) of Section 835 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character." (§ 835.2, subd. (a).) The University showed that Hua did not know why the bollard fell on his foot, that Officer Lara had no knowledge of the loose bollard prior to Hua's injury, and that there were no prior bollard-related injuries documented on campus. From this evidence, the University met its burden of showing Hua's failure to establish a prima facie case of actual notice.

The burden shifted to Hua. Hua provided no evidence of actual notice. Rather, he relied on (1) the actions of an employee, and (2) constructive notice. Accordingly, we conclude there is no triable issue of fact concerning actual notice.

The third path to liability is constructive notice. (§ 835, subd. (b).) "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." (§ 835.2, subd. (b).)

The University provided the declaration of Officer Lara reflecting he did not receive a complaint about the loose bollard prior to Hua's call that Hua had been injured. The University also provided the declaration of Healander, who declared there were no previously documented injuries related to the bollards. The University provided Hua's December 2014 deposition transcript, which reflected Hua did not know why the bollard fell on his foot and that Hua did not notice anything unusual about the bollards when walking toward the edge of campus. Based upon this evidence, the University met its burden of demonstrating that Hua could not reasonably expect to establish a prima facie case on the element of constructive notice.

Thus, the burden shifted to Hua. Hua provided no admissible evidence that the University had constructive notice of the loose bollard. In Hua's December 2014 deposition, he said he did not notice anything unusual about the bollards when he initially passed them while walking toward the edge of campus. Constructive notice cannot be inferred because there is no indication of how long the bollard was loose. (§ 835.2, subd. (b).) Accordingly, the trial court did not err by granting the University's motion for summary judgment on the dangerous condition of public property cause of action.

B. EVIDENTIARY OBJECTION

1. *MICHAEL'S STATEMENTS*

Hua contends the trial court erred by sustaining the University's hearsay objection to Michael's statements in Officer Lara's police report.

We apply the abuse of discretion standard of review. (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.) " 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200.)

Michael told Officer Lara "that he had walked by that bollard at 0730 hours and at 1030 hours this morning. [Michael] advised that the bollard was lying on the ground both times he had walked by it." Michael's statement was made outside of court to Officer Lara. Officer Lara wrote a report outside of court. Thus, there are two levels of hearsay: (1) Michael's statement, and (2) Officer Lara's report of the statement. Officer Lara's report may be admissible as a record by a public employee. (Evid. Code, § 1280; *Rupf v. Yan* (2000) 85 Cal.App.4th 411, 431.) However, there is no hearsay exception for Michael's statements. Accordingly, we conclude the trial court did not abuse its discretion by sustaining the University's objections to Michael's statements.

Hua contends the trial court erred because Michael's hearsay statement falls within the hearsay exception for prior consistent statements. The exception provides, "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing." (Evid. Code, § 1236.) Hua's trial attorney asserted Michael had been deposed but Hua's

attorney did not have a copy of the transcript. Because there is no evidence to what, if anything, Michael testified, the trial court could reasonably conclude the prior consistent statement exception did not apply. Without the transcript, the trial court could not know if Michael's statements were consistent, inconsistent, or if he gave any answers relevant to the length of time the bollard was on the ground.

Hua asserts the prior consistent statement exception applies because Michael's hearsay statement was consistent with Hua's August 2015 deposition statements. (Evid. Code, § 1236.) The statute provides, "Evidence of a statement previously made by *a witness* is not made inadmissible by the hearsay rule if the statement is consistent with *his* testimony at the hearing." (Evid. Code, § 1236, italics added.) The plain language of the statute provides that the hearsay statement has to be consistent with the testimony of the same person who made the hearsay statement. Thus, the assertion that Michael's hearsay statement is consistent with Hua's August 2015 deposition testimony does not cause the prior consistent statement exception to be applicable.

Moreover, Michael's statement is not entirely consistent with Hua's statement. Hua testified that the bollard was upright, leaning against a second bollard, and the bollard fell onto Hua's foot when a person walking in front of Hua bumped the bollard. In contrast, Michael stated that the loose bollard was lying on the ground at 7:30 a.m. and 10:30 a.m. Thus, the statements are not entirely consistent concerning the position of the loose bollard.

2. *HOMECOMING EVIDENCE*

a) Procedural History

The University objected to Hua's use of (1) the printed UCR advertisement concerning homecoming events; and (2) the newspaper article, taken from a UCR webpage, describing homecoming events that were scheduled to occur. The University objected on the basis of (a) hearsay, and (b) that evidence of future plans could not provide proof that an event occurred.

At the hearing, Hua's counsel argued the homecoming evidence fell within the party admission exception to the hearsay rule. The University's counsel explained that its objection was based upon the evidence predicting future activities. The court sustained the objection. It is unclear on what basis the trial court sustained the objection.[3]

b) Analysis

Hua contends the trial court erred by sustaining the University's objections to Hua's evidence concerning the homecoming events. We treated the homecoming evidence as admissible in our discussion *ante*. We address the merits of this issue for the purpose of explaining why the evidence is admissible. Because we have treated the evidence as admissible, the resolution of this issue will not change our conclusion, *ante*, that the trial court properly granted the summary judgment motion.

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[3] We review the trial court's ruling, not its reasoning. (*United Pacific Ins. Co. v. Hanover Ins. Co.* (1990) 217 Cal.App.3d 925, 933.)

"Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity." (Evid. Code, § 1220.)

The advertisement was published by the UCR Office of Alumni and Constituent Relations and is available on UCR's website. The newspaper article was published by the UCR faculty newspaper and is available on UCR's website. Because the advertisement and article were created and published by the University, and they are being offered against the University, they are admissible as party admissions.

The University offered no law in support of its argument that the article and advertisement are inadmissible because they reflected a schedule of upcoming activities. They do not renew the argument on appeal. We interpret the objection as a general relevance objection, in that the schedule of upcoming events failed to directly prove that homecoming activities actually occurred. Although the advertisement and article fail to directly show that vendors arrived at campus and fail to directly show the homecoming events occurred, we see no reason why they are inadmissible. They are circumstantial evidence that the events occurred. (See *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 775 [facts can be proven by circumstantial evidence].) Accordingly, we conclude the trial court erred by sustaining the University's objection to the homecoming advertisement and article.

We addressed this issue to explain why we treated the evidence as admissible in our discussion *ante* concerning the summary judgment motion. Because we treated the

homecoming evidence as admissible, there is no change to our conclusion, *ante*, that the trial court properly granted the University's motion for summary judgment.

DISPOSITION

The judgment is affirmed. The respondent, Regents of the University of California, is awarded its costs on appeal.

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MILLER
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.