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Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

McDonald Plaintiff/Petitioner(s) VS. City of Oakland Defendant/Respondent(s) (Abbreviated Title)	No. RG18931020 Order Motion for Summary Judgment Granted

The Motion for Summary Judgment filed for City of Oakland was set for hearing on 06/26/2020 at 09:00 AM in Department 25 before the Honorable James Reilly. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The Motion for Summary Judgment by Defendant City of Oakland ("the City") is GRANTED.

Plaintiff Lynne McDonald alleges a single cause of action against the City, for dangerous condition of public property, arising from a bicycle accident occurring on Grizzly Peak Boulevard on May 12, 2018; McDonald's husband David Barr alleges a claim for loss of consortium. McDonald alleges that she crashed her bike after either hitting a pothole, or swerving to avoid it.

In order to prevail on a claim against a public entity for a dangerous condition of property, a plaintiff must establish that the dangerous condition that caused her injury was either created by the public entity, or that the public entity had actual or constructive notice of the dangerous condition a sufficient time prior to the plaintiff's injury to have taken measures to prevent it. (See Government Code § 835 and § 835.2.)

Plaintiffs first argue that the City created the pothole that caused McDonald's crash, such that the City is liable for that condition pursuant to Government Code § 835(a). However, a public entity is liable for creating a dangerous condition only where it "actively" created that condition. (See, e.g., Brown v. Poway Unified School District (1993) 4 Cal.4th 820, 837.) Plaintiffs present no evidence that the City actively created the pothole that caused McDonald's accident (hereinafter, "the 2018 pothole"). Instead, they present evidence that (1) a pothole had developed in 2017 ("the 2017 pothole") in a location approximately three feet from the 2018 pothole (which did not yet exist), and the City filled it; and (2) the asphalt surface below the 2018 pothole, which became exposed only after the 2018 pothole developed, appears to be eroded. This evidence does not suggest that the City actively created the 2018 pothole. Even assuming that the City could be liable under Government Code § 835(a) for negligently failing to inspect or repair a pothole that already exists (see Brown, supra, 4 Cal.4th 820, 837 n. 1), Plaintiffs present no evidence that the 2018 pothole existed for a sufficient time prior to McDonald's accident that the City could have noticed it and inspected or repaired it.

Instead, Plaintiffs argue that the City is liable for a dangerous condition of public property because it negligently failed to properly repair other conditions of Grizzly Peak (i.e., the alleged underlying

subsurface failure, or the surface defect (i.e., "alligatoring") allegedly present in 2017), and if it had done so the 2018 pothole may not have later developed. But McDonald's accident did not occur because her bicycle hit an underlying subsurface failure or "alligatoring" on Grizzly Peak; it occurred because her bicycle either hit or swerved to avoid the 2018 pothole, which did not exist at the time of the City's prior repairs to Grizzly Peak. Plaintiffs' theory of the case is essentially that the City is liable because in 2017 it had constructive notice that a dangerous condition could develop at a different location of Grizzly Peak at some point in the future, and that the future (but not yet existent) dangerous condition eventually caused McDonald's accident. Plaintiffs fail to cite any legal authority for the proposition that a public entity can be liable for failure to predict and prevent dangerous conditions that do not yet exist. Nothing in Brown v. Poway, supra, 4 Cal.4th 820 (ruling that a public entity was not liable under theory of res ipsa loquitur after plaintiff slipped on some lunchmeat on the floor of a public building) supports holding a public entity liable under the circumstances involved in this case.

In any event, the only evidence of any actual, visually apparent defect on Grizzly Peak in the area of McDonald's accident prior to May 2018 is the 2017 pothole, which the City filled and which did not cause McDonald's accident. Indeed, Plaintiffs admit that after March 2017, the City received no complaints regarding potholes in the area of McDonald's accident until after her accident, and that at the time of her accident, the condition of the pavement on Grizzly Peak was good, apart from the 2018 pothole. (See the City's Separate Statement of Facts ("SSF") Nos. 14-15 and Plaintiffs' response.)

Plaintiffs contend that the City should have noticed "alligatoring" near the 2017 pothole at the time it was repaired, which would have put the City on notice that Grizzly Peak was deteriorating over time and arguably needed subsurface repairs. But Plaintiffs present no competent evidence that there was in fact any "alligatoring" in that location at that time. The statement by Plaintiff's expert witness Russ Scheibley about "the highly likely presence of 'alligatoring'" in that location in May 2017 (see his declaration at paragraphs 11 and 14) is speculation, and is contradicted by the testimony of Plaintiff David Barr that he noticed no "alligatoring" in that location prior to McDonald's accident. (See Barr's deposition at pages 119-120.) Indeed, prior to the day of McDonald's accident, Barr frequently rode his bike on Grizzly Peak and did not notice any cracks or other road defects significant enough to notify either the City or McDonald. (See Barr's deposition at pages 60-65.) Barr did not notice the 2018 pothole until the day of McDonald's accident. (See Barr's deposition at pages 59-60.) Likewise, Scheibley's statement that the 2018 pothole had previously emerged on two separate occasions is speculation not supported by any competent evidence.

Plaintiffs' contention that the City had either actual or constructive notice of the 2018 pothole that caused McDonald's accident fails for similar reasons. As discussed above, the only competent evidence of any defects in the area of McDonald's accident prior to May 2018 is the 2017 pothole, which the City filled and which did not cause McDonald's accident. The City's evidence establishes that it had no actual notice of the 2018 pothole, and no reason to have discovered it prior to McDonald's accident. (See SSF Nos. 9-15, Plaintiffs' response, and the evidence cited in support.)

Because Lynne McDonald's claim for dangerous condition of public property fails, David Barr's claim for loss of consortium also fails. (See Hahn v. Mirda (2007) 147 Cal.App.4th 740, 746.)

Because the undisputed facts fail to establish that the City either created the condition that caused McDonald's accident or had actual or constructive notice of it, the Court does not need to reach the issue of whether the City is immune from liability pursuant to Government Code § 835.4 or § 831.7, or under the doctrine of assumption or risk.

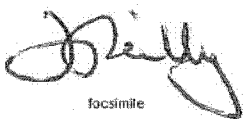
The Court rules as follows on the City's Objections to Evidence:

Objections Nos. 1-2 are SUSTAINED as to speculation. No witness has provided any evidence that there was "alligatoring" on Grizzly Peak at or near the location of "Pothole 1" in May 2017; Mr. Scheibley's statement concerning "the highly likely presence of 'alligatoring'" is mere speculation. Absent any competent evidence of "alligatoring" in that location, the City would have no reason to know of any alleged failed base layer there and no reason to address that issue.

Objection No. 3 is SUSTAINED as lacking foundation as to whether the City had filled potholes at the location of "Pothole 2" on two prior occasions. Although the boldfaced header prior to paragraph 18 of Mr. Scheibley's declaration states that "Pothole 2" had been filled on at least two occasions, nothing in the text of Mr. Scheibley's declaration states that or provides any factual support for that conclusion.

Plaintiffs' First Amended Complaint, as against Defendant City of Oakland, is DISMISSED.

Dated: 07/17/2020



Judge James Reilly

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