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4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF CALIFORNIA
6

7 MARY G. LOPEZ, individually
8 and as Successor-in-Interest
9 on behalf of decedent,
10 SALVADOR V. LOPEZ, et al.,

11 Plaintiffs,

12 v.

13 BNSF RAILWAY COMPANY, et al.,

14 Defendants.
15

1:07-CV-01417-OWW-GSA

CORRECTED MEMORANDUM OF
DECISION GRANTING DEFENDANT
COUNTY OF KERN'S MOTION FOR
SUMMARY JUDGMENT (Doc. 67)

16 I. INTRODUCTION

17 Before the court for decision is Defendant County of Kern's
18 motion for summary judgment on Plaintiffs' first, second, and third
19 causes of action. County of Kern served the motion on Plaintiffs
20 on April 9, 2009. On May 28, 2009, Plaintiffs filed a statement of
21 non-opposition to County of Kern's motion for summary judgment.
22

23 II. FACTUAL BACKGROUND

24 This case arises out of a collision between a truck driven by
25 Salvador V. Lopez and an Amtrak train in an unincorporated area of
26 Kern County. On August 7, 2006, Lopez was driving northbound on
27 State Route 43, parallel with railroad tracks owned by Defendant
28

1 Burlington Northern Santa Fe Railroad ("BNSF"). (Defendant's
2 Statement of Undisputed Material Facts ("DSUMF") 1-2.) The
3 railroad tracks were located west of Route 43, or to Lopez's left.
4 (DSUMF 2.) From Route 43, Lopez turned west onto a fifty-foot
5 stretch of Peterson Road. (DSUMF 5.) Peterson Road and the
6 railroad tracks intersect approximately fifty-feet from the Route
7 43 and Peterson Road crossway. (DSUMF 3,5.) Kern County owns and
8 controls the fifty-foot stretch of Peterson Road, but does not own
9 the railroad crossing or the crossing's electronic devices. (DSUMF
10 4,6, 15.)

11 On August 7, 2006, the fifty-foot stretch of Peterson Road
12 consisted of a single lane in each direction separated by double
13 yellow lines. (DSUMF 14.) A railroad crossing sign was posted for
14 westbound traffic on the north shoulder of Peterson Road and a
15 limit line was painted on the pavement. (DSUMF 11.) The railroad
16 crossing was equipped with flashing lights, an electronic warning
17 bell, and a railroad crossing sign. (DSUMF 19.) The lights were
18 operating when Mr. Lopez approached the crossing and there were no
19 visual obstructions preventing Mr. Lopez from noticing a train
20 approaching from the south. (DSUMF 19-20.)

21 At around 7:50 a.m., Mr. Lopez approached the railroad
22 crossing, but did not stop for the train, which had been sounding
23 its horn. (DSUMF 21-22.) Mr. Lopez drove in front of the train,
24 was broad-sided and killed. (DSUMF 21.)

25 26 **III. PROCEDURAL BACKGROUND**

27 On August 24, 2007, Plaintiffs filed a complaint in the
28 Superior Court, County of Kern, against BNSF Railway Company, Kern

1 County, Amtrak, the State of California, California Department of
2 Transportation, and the Cities of Delano, McFarland, and Wasco.
3 Plaintiffs alleged defendants were liable under theories of
4 wrongful death (Count I), negligence (Count II), and dangerous
5 condition of public property (Count III).¹ On September 26, 2007,
6 the case was removed to federal court. (Doc 2.)

7 Defendant Kern County filed its answer to Plaintiffs'
8 complaint on January 11, 2008. (Doc. 25.)

9 On April 9, 2009, Kern County moved for summary judgment on
10 Plaintiffs' first, second, and third causes of action. (Doc. 67.)
11 Kern County argues they are entitled to summary judgment because:
12 1) Government Code § 815 prohibits Plaintiffs' wrongful death and
13 negligence claims; and 2) there was no dangerous condition at the
14 Peterson railroad crossing on August 7, 2006.

15 On May 29, 2009, Plaintiffs filed a statement of non-
16 opposition to Kern County's motion. (Doc. 69.)

17 18 **IV. SUMMARY JUDGMENT STANDARD**

19 Summary judgment is appropriate when "the pleadings, the
20 discovery and disclosure materials on file, and any affidavits show
21 that there is no genuine issue as to any material fact and that the
22 movant is entitled to judgment as a matter of law." Fed. R. Civ.
23 P. 56(c). A party moving for summary judgment "always bears the
24 initial responsibility of informing the district court of the basis
25 for its motion, and identifying those portions of the pleadings,
26

27 ¹ Defendants State of California and California Department
28 of Transportation were dismissed for lack of subject matter
jurisdiction on January 8, 2008. (Doc. 66.)

1 depositions, answers to interrogatories, and admissions on file,
2 together with the affidavits, if any, which it believes demonstrate
3 the absence of a genuine issue of material fact." *Celotex Corp. v.*
4 *Catrett*, 477 U.S. 317, 323 (1986) (internal quotation marks
5 omitted).

6 Where the movant will have the burden of proof on an issue at
7 trial, it must "affirmatively demonstrate that no reasonable trier
8 of fact could find other than for the moving party." *Soremekun v.*
9 *Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007); see also
10 *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir.
11 2003) (noting that a party moving for summary judgment on claim as
12 to which it will have the burden at trial "must establish beyond
13 controversy every essential element" of the claim) (internal
14 quotation marks omitted). When a motion for summary judgment is
15 properly made and supported, the non-movant cannot defeat the
16 motion by resting upon the allegations or denials of its own
17 pleading, rather the "non-moving party must set forth, by affidavit
18 or as otherwise provided in Rule 56, 'specific facts showing that
19 there is a genuine issue for trial.'" *Id.* (quoting *Anderson v.*
20 *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). "Conclusory,
21 speculative testimony in affidavits and moving papers is
22 insufficient to raise genuine issues of fact and defeat summary
23 judgment." *Id.*

24 To defeat a motion for summary judgment, the non-moving party
25 must show there exists a *genuine* dispute (or issue) of *material*
26 fact. A fact is "material" if it "might affect the outcome of the
27 suit under the governing law." *Anderson*, 477 U.S. at 248.
28 "[S]ummary judgment will not lie if [a] dispute about a material

1 fact is 'genuine,' that is, if the evidence is such that a
2 reasonable jury could return a verdict for the nonmoving party."
3 *Id.* at 248. In ruling on a motion for summary judgment, the
4 district court does not make credibility determinations; rather,
5 the "evidence of the non-movant is to be believed, and all
6 justifiable inferences are to be drawn in his favor." *Id.* at 255.

7
8 **V. DISCUSSION**

9 **A. Plaintiffs' First and Second Causes of Action**

10 Kern County argues that it is entitled to summary judgment as
11 to Plaintiffs' first and second causes of action because Plaintiffs
12 do not have a proper statutory basis for their claims.

13 The Government Claims Act (the "Act") governs the potential
14 liability of public entities and their employees and confines it to
15 "rigidly delineated circumstances." *Williams v. Horvath*, 16 Cal.3d
16 834, 838 (1976); accord, *State of California v. Superior Court*, 32
17 Cal.4th 1234, 1243 (2004). The Act distinguishes between public
18 entities, which are immune from liability except as provided by
19 statute (Gov. Code § 815), and public employees, who may be held
20 liable to the same extent as private persons (Gov. Code § 820).
21 Under the Act, a public entity may be held vicariously liable for
22 injuries caused by the acts and omissions of its employees acting
23 within the scope of their employment. Cal. Gov. Code, § 815.2(a);
24 *Hoff v. Vacaville Unified School Dist.*, 19 Cal.4th 925, 932 (1998).
25 A specific statutory basis is required, however, to hold a public

1 entity directly liable for its own conduct.² *Eastburn v. Regional*
2 *Fire Protection Authority* (2003) 31 Cal.4th 1175, 1183. Liability
3 under these principles is subject to specific immunities set out in
4 the Act and generally provided by statute, as well as the defenses
5 otherwise available to private persons. Cal. Gov. Code § 815(b).

6 Here, Plaintiffs cannot prevail directly against the County
7 for ordinary negligence or wrongful death, as no statutory basis
8 for such liability exists. Cal. Gov. Code § 815; *Eastburn*, 31
9 Cal.4th at 1183. Plaintiffs filed this action on August 27, 2007,
10 bringing wrongful death and negligence causes of action.
11 Plaintiffs allege that Kern County "owed a duty of care to Decedent
12 Salvadore and Plaintiffs to use reasonable care in the maintenance
13 and operation of the railroad crossing."³ (Pl.'s Compl. ¶ 66.)
14 However, Plaintiffs' complaint does not identify a statutory basis
15 for Kern County's liability, instead relying on general negligence
16 principles - which are insufficient to establish tort liability
17 against a county. Cal. Gov. Code § 815; *Eastburn*, 31 Cal.4th at
18 1183. Plaintiffs' discovery responses and subsequent court filings
19 are equally ineffectual to provide a proper statutory basis for
20 their tort claims.

21 A public entity like the County is not liable for an injury
22 arising out of an act or omission of the public entity except as
23 provided by statute. *Eastburn*, 31 Cal.4th at 1183. Plaintiffs

24
25 ² The sole statutory basis for imposing liability on public
26 entities as property owners is Government Code section 835.
Zelig v. County of Los Angeles (2002) 27 Cal.4th 1112, 1131-1132

27 ³ Plaintiffs then outline how Defendants breached the
28 standard of care and proximately caused Lopez's death. (Id. ¶¶
67-95.)

1 have not alleged a specific statutory duty to support their claims
2 and have not opposed summary judgment. Accordingly, Defendant
3 County of Kern is entitled to summary judgment dismissing
4 Plaintiffs' wrongful death and negligence causes of action.

5 Kern County's motion for summary judgment as to Plaintiffs'
6 first and second causes of action is GRANTED.

7
8 **B. Plaintiffs' Third Cause of Action.**

9 As explained above, a public entity like Kern County is not
10 liable for an injury arising out of an act or omission of the
11 public entity or its employees except as provided by statute. Cal.
12 Gov. Code § 815(a). The sole statutory basis for imposing
13 liability on public entities as property owners is Government Code
14 section 835. *Zelig v. County of Los Angeles*, 27 Cal.4th 1112,
15 1131-1132 (2002); *Brenner v. City of El Cajon* 113, Cal.App.4th
16 434, 438-439 (2003). Under that statute, a public entity is
17 "liable for injury caused by a dangerous condition of its property
18 if the plaintiff establishes that the property was in a dangerous
19 condition at the time of the injury, that the injury was
20 proximately caused by the dangerous condition, that the dangerous
21 condition created a reasonably foreseeable risk of the kind of
22 injury which was incurred, and that either: (a) A negligent or
23 wrongful act or omission of an employee of the public entity within
24 the scope of his employment created the dangerous condition; or (b)
25 The public entity had actual or constructive notice of the
26 dangerous condition ... a sufficient time prior to the injury to
27 have taken measures to protect against the dangerous condition."
28 Cal. Gov. Code § 835. The element at issue here is the existence

1 of a dangerous condition.

2
3 A. The County's Liability is Limited to Property it Owns or
4 Maintains

5 Government Code 835 imposes liability for injuries caused by
6 a dangerous condition owned or controlled by the County. Cal. Gov.
7 Code §§ 830(c), 835; *Tolan v. State of California*, 100 Cal. App. 3d
8 980, 982 (1979). Defendants argue that Kern County's prospective
9 liability under Plaintiffs' "dangerous condition" theory is limited
10 to fifty-foot stretch of Peterson Road between Route 43 and the
11 subject railroad crossing; that it did not own or control the
12 railroad tracks or the signal devices located at the crossing.
13 (Def's Mot. 4:8-4:26.)

14 Plaintiffs' admissions support Kern County's position.
15 Plaintiffs admit that Kern County did not "own, maintain, or
16 control any of the electronic signaling devices located at the
17 crossing." (See Jan. 12, 2009 Resp., Exh. C to Def.'s Mot.; DSUF
18 6.) Plaintiffs also admit that Kern County did not have authority
19 to install automatic crossing gates at the crossing (DSUMF 10) and
20 that the California Public Utility Commission has exclusive
21 authority to prescribe installation of automatic gates at the
22 crossing and to prescribe the installation, use, maintenance and
23 operation of safety devices at the crossing. (DSUMF 8-9)
24 Plaintiffs admit that the railroad is responsible for the
25 construction of additional warning devices at the crossing and any
26 changes in the existing warning devices at the crossing. (DSUMF
27 11-12.) In essence, Plaintiffs admit that Kern County did not own,
28 maintain, or control the railroad crossing or any affiliated device

1 or warning mechanism.

2 Plaintiffs' discovery admissions preclude a finding that Kern
3 County owned, operated, or maintained any property - real or
4 otherwise - beyond the fifty-foot stretch of Peterson Road. Even
5 taking the evidence in the light most favorable to Plaintiffs, this
6 remains the only reasonable inference.

7 Accordingly, analysis of Kern County's potential liability
8 under a "dangerous condition" theory is limited to the
9 aforementioned fifty-foot stretch of Peterson Road, between Route
10 43 and the railroad crossing.

11
12 B. Dangerous Condition

13 A "dangerous condition" is defined as "a condition of property
14 that creates a substantial (as distinguished from a minor, trivial
15 or insignificant) risk of injury when such property ... is used
16 with due care in a manner in which it is reasonably foreseeable
17 that it will be used." Cal. Gov. Code § 830(a). The existence of
18 a dangerous condition is ordinarily a question of fact but "can be
19 decided as a matter of law if reasonable minds can come to only one
20 conclusion." *Bonanno v. Central Contra Costa Transit Auth.*, 30
21 Cal.4th 139, 148 (2003). The California Legislature has specified
22 that "[a] condition is not dangerous ... if ... the risk created by
23 the condition was of such a minor, trivial or insignificant nature
24 in view of the surrounding circumstances that no reasonable person
25 would conclude that the condition created a substantial risk of
26 injury when such property ... was used with due care in a manner
27 which was reasonably foreseeable that it would be used." Cal. Gov.
28 Code § 830.2.

1 "[A] claim alleging a dangerous condition may not rely on
2 generalized allegations but must specify in what manner the
3 condition constituted a dangerous condition." *Brenner*, 113
4 Cal.App.4th at 439. A plaintiff's allegations, and ultimately the
5 evidence, must establish a physical deficiency in the property
6 itself. *Zelig*, 27 Cal.4th at 1135-1136; *Brenner*, 113 Cal. App. 4th
7 at 440-441. A dangerous condition exists when public property "is
8 physically damaged, deteriorated, or defective in such a way as to
9 foreseeably endanger those using the property itself," or possesses
10 physical characteristics in its design, location, features or
11 relationship to its surroundings that endanger users. *Bonanno*, 30
12 Cal.4th at 148-149.

13 Kern County argues that there is nothing about the subject
14 portion of Peterson Road that creates a substantial risk of injury.
15 This argument has merit.

16 The record indicates that Mr. Lopez traveled only on the
17 fifty-foot stretch of Peterson Road prior to the collision on
18 August 7th. (DSUMF 5.) As of August 7th, the road had two lanes
19 which were divided by double yellow lines, (DSUMF 14), and a limit
20 line for westbound traffic was painted on the pavement. (Decl. of
21 Fiddler ¶ 3; Exh. E.) There was a railroad crossing warning sign
22 posted for westbound traffic, (DSUMF 11), and westbound traffic
23 possessed an unobstructed view of the railroad tracks to the south
24 and any northbound train on the same tracks.⁴ (DSUMF 13.) There
25 had been no reported accidents at the Peterson Road crossing in the

26
27 ⁴ The lights owned, maintained and operated by the railroad
28 and adjacent to Peterson Road were operating at the time Mr.
Lopez approached the railroad tracks. (DSUMF 19)

1 ten years prior to the accident.⁵ (DSUMF 17.)

2 The evidence is sufficient to sustain Kern County's motion for
3 summary judgment.⁶ Kern County demonstrated that on August 7,
4 2006, the condition of the roadway was open and obvious, included
5 sufficient notification of the impending railroad crossing, and did
6 not have a history of traffic accidents. Plaintiffs have no any
7 evidence that Peterson Road was a "dangerous condition" or that
8 Kern County is otherwise liable under a "dangerous condition of
9 public property" theory.⁷ The evidence is clear: the fifty-foot
10 stretch of Peterson Road was not a dangerous condition on the
11 morning of August 7, 2006.

12 Defendants have met their Rule 56 burden and demonstrated, as
13 a matter of law, that the fifty-foot stretch of Peterson Road was
14 not a dangerous condition on August 7, 2006. There is no genuine
15 issue of material fact for trial.

16 Kern County's Motion for Summary Judgment as to Plaintiffs'
17 third case of action for "dangerous condition of public property"
18 is GRANTED.

19
20 ⁵ The estimated traffic volume in the area of the crossing
21 was 290 vehicles per day in 2003, 290 in 2004 and 250 in 2005
(DSUMF 18).

22 ⁶ The evidence also supports summary judgment because
23 Plaintiffs have not provided sufficient evidence to establish
24 proximate cause. Two contemporaneous witnesses to the collision
25 testified that the light signals at the crossing were working and
26 the train sounded its horn as it approached the intersection.
(DSUMF 19, 22.) Another witness to the collision reported that
Mr. Lopez did not stop before crossing the tracks. (DSUMF 21.)

27 ⁷ Plaintiffs' statement of non-opposition appears to
28 acknowledge that Kern County is not liable under a "dangerous
condition of public property" theory. (Doc. 69.)

1 **VI. CONCLUSION.**

2 For the foregoing reasons:

3 1. Defendants' motion for summary adjudication is GRANTED as
4 to Plaintiffs' wrongful death claim.

5 2. Defendants' motion for summary adjudication is GRANTED as
6 to Plaintiffs' negligence claim.

7 3. Defendants' motion for summary adjudication is GRANTED
8 as to Plaintiffs' "dangerous condition of public property" claim.

9
10 Defendant County of Kern shall submit a form of order
11 consistent with this memorandum of decision within five (5) days of
12 electronic service.

13
14 IT IS SO ORDERED.

15 Dated: July 9, 2009

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE