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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MARIA ABARCA, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES et al., Defendants and Respondents.	B260756 (Los Angeles County Super. Ct. No. MC023375)

APPEAL from a judgment of the Superior Court of Los Angeles County, Randolph A. Rogers, Judge. Affirmed.

Samuel O. Ogbogu for Plaintiff and Appellant.

Collins Collins Muir + Stewart, Michael L. Wroniak, Christian E. Foy Nagy and Erin R. Dunkerly for Defendants and Respondents.

Appellant Maria Abarca brought suit against respondents, the County of Los Angeles (LA County) and LA County Sheriff's Department Deputy Scott Andrew Peterson, for injuries allegedly suffered in an automobile accident. The trial court granted respondents' motion for summary judgment, finding Deputy Peterson immune from suit because he had been responding to an emergency at the time of the incident, and finding no evidence of negligence to support the claim against LA County. Appellant concedes that Deputy Peterson is immune, but contends she presented sufficient evidence of negligence to maintain her claim against LA County. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Complaint*

Appellant allegedly suffered injury as a result of a December 21, 2010 traffic accident in which vehicles driven by Deputy Peterson and nonparty Sarah Warner collided, causing Warner's car to crash into appellant's.[1] Appellant's complaint and first amended complaint contained two causes of action: for motor vehicle negligence and for general negligence. Appellant alleged that LA County was the owner of the patrol car driven by Deputy Peterson, and that the deputy was "at all relevant times, an employee of [LA county] and was within the course and scope of his employment with [LA County] . . . ."

B. *Respondents' Motion for Summary Judgment*

Two years after the complaint was filed, respondents moved for summary judgment. According to their statement of undisputed facts, just prior to the accident, Deputy Peterson was in a marked patrol traveling south on Challenger

[1] Appellant settled with Warner.

Way in the number one lane (the lane closest to the center of the road). He was responding to an emergency call, and had activated his emergency lights and siren.[2] When he arrived at the intersection of Challenger Way and Avenue K, the stoplight facing him was red. Appellant was facing north on Challenger Way, waiting in the left turn lane to make a turn onto westbound Avenue K. Deputy Peterson came to a stop, and slowly proceeded across Avenue K once traffic in the westbound lanes cleared.[3] His car cleared the first two eastbound lanes, where other vehicles had stopped to let him pass. Sarah Warner, travelling eastbound on Avenue K in the number three lane (the lane closest to the curb) at approximately 40 to 45 miles per hour (mph), struck the deputy's car and then veered into appellant's car. Prior to the collision, Deputy Peterson did not see Warner's vehicle. Deputy Peterson estimated he was traveling approximately two mph at the time of the collision.

Attached to the moving papers were excerpts from the depositions of appellant and Warner. Appellant testified she did not see the deputy's patrol car or its flashing red lights or hear a siren or prior to the collision, but admitted she was

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[2] In an attached declaration, Deputy Peterson said he had received "a radio transmission that another deputy was involved in a shooting and required deputy assistance at an[] address in Quartz Hill," and "immediately activated [his] lights and siren" before proceeding southbound on Challenger Way. In his deposition, he testified he was one mile from the scene of the collision when he heard the transmission, and reached speeds of 70 miles per hour prior to arriving at the intersection where the accident occurred.

The deputy also stated in his declaration that prior to the start of his shift he had conducted a mandatory vehicle check and had activated his lights and sirens to confirm they were functioning properly.

[3] Deputy Peterson testified at his deposition that he had been trained to proceed cautiously when traveling through intersections during an emergency response. Generally, he ensured other drivers were aware of his presence by observing their vehicles stop or by making eye contact with the drivers. He did this "lane by lane at a slow pace . . . clearing each lane."

"distracted" and was focused on the stoplight, waiting for it to change. Warner, who was listening to the radio with the windows rolled up, did not initially see the patrol car or hear the siren, but did see the vehicles next to her in the number one and two lanes come to a stop, resting slightly past the crosswalk in the intersection. She was traveling between 45 and 50 mph, and "tried to begin to slow down" just before colliding with Deputy Peterson's car. She believed she had managed to reduce her speed slightly, to between 40 and 45 mph. Warner heard the siren and observed the patrol car's flashing red light as the vehicles collided.[4]

At her deposition, Warner was asked a series of questions about the deputy's speed and whether she could estimate it. In response to the first questions, she testified she did not know how fast the deputy's vehicle was going as she had not seen it until they collided. She specifically said: "[W]hen I first saw it [the deputy's vehicle], it hit me, so I don't know how fast it was going prior to that . . . ."[5] As the questioning continued, she stated that the deputy's car was moving

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[4] The deposition testimony of appellant and Warner was confirmed by statements they made to the investigator who prepared an accident report at the time of the collision. Appellant told the investigator she "was not really paying attention out the front window of her vehicle just prior to the collision" and "only heard a crash." The report summarized Warner's statement as follows: "[A]s she entered the intersection, she noticed vehicles next to her in the number two lane had stopped. At [that] moment . . . she heard the siren and right before she collided with [the deputy], she saw the red light of the patrol vehicle . . . [but] had no time to apply her brakes prior to the collision." The accident report was appended to respondents' moving papers and referenced in its statement of facts as additional support for some of the facts respondents contended were undisputed. Appellant objected to all references to the police report as inadmissible hearsay. The trial court did not rule on the objection, but does not appear to have relied on the report in making its ruling. In any event, the statements in the report add little to the deposition testimony properly admitted.

[5] Respondents presented evidence that Warner's vehicle collided with the right front passenger side of the patrol car. Appellant disputed that fact based on Warner's testimony. In her brief on appeal, she concedes Warner's vehicle struck the patrol car when it entered the path of her vehicle.

fast "when [she] first saw it, [when] it hit [her]," but she did not know how fast it was going "prior to that" and could not provide an exact speed. Asked whether the car was going more or less than 15 mph and more or less than 30 mph, she answered "more" to both questions. Finally, asked whether it was her "best estimate that the car was traveling between 30 to 45 miles per hour," she responded "[a]s far as I can tell, yes," and indicated she based that estimate on the way the deputy's car "pushed [her] car into another lane." Moments later, she reconfirmed that she had not seen the patrol car when her car entered the intersection because the vehicles stopped in the number one and two lanes were blocking her view.[6]

C. *Appellant's Opposition*

In her opposition, appellant contended there were triable issues of fact whether Deputy Peterson had activated his emergency lights and siren prior to the collision and whether he was operating his vehicle with due regard for the rights and safety of the public. Appellant based her contention that the emergency warnings were not activated on the evidence that Warner did not hear the siren or see flashing lights until the collision, and on appellant's testimony that she had not heard or seen anything before the crash. With respect to whether Deputy Peterson operated his vehicle with due care, appellant contended the deputy's assertion that he stopped at the red light before entering the intersection and waited for traffic to clear before proceeding through each lane was contradicted by Warner's testimony that his patrol car was travelling at 30 to 45 mph at the time of the collision. Appellant did not dispute that Warner was travelling approximately 40 to 45 mph

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[6] Respondents objected to the introduction of the portion of Warner's testimony in which she estimated the deputy's speed on the grounds of lack of personal knowledge, lack of foundation, and for expressing an expert opinion without expert qualification. The trial court did not specifically rule on the objection, but as will be seen, it found Warner's testimony as to the deputy's speed insufficient to raise a triable issue of fact.

at the time. Appellant included as an additional fact that it was dark and raining and the road was wet, contending this required the deputy to be even more cautious.[7]

D. *Trial Court's Ruling*

The court granted the motion for summary judgment. With respect to Deputy Peterson, the court found that Vehicle Code section 17004 absolved him from liability for injuries that occurred while he was responding to an emergency call, even if he drove negligently and failed to activate his flashing red lights and siren.[8]

The court recognized that LA County, as the deputy's employer, would be liable for any negligence on his part. However, the court found that the undisputed evidence established the deputy had not been negligent. First, the court stated that "[v]iewing the testimony [of appellant and Warner] in a fair light," appellant had failed to present evidence sufficient to raise a dispute whether the deputy had activated his lights and siren. "[W]hile it is true that [appellant] did not

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[7] Appellant and Warner testified that the accident occurred after dark, while it was raining.

[8] Vehicle Code section 17004 provides that a public employee such as Deputy Patterson "is not liable for civil damages on account of personal injury to or death of any person or damage to property resulting from the operation, in the line of duty, of an authorized emergency vehicle while responding to an emergency call . . . ." This statutory immunity cannot be lost "due to the officer's negligent or intentional conduct during the pursuit, including his supposedly negligent failure to activate lights or sirens." (*Cruz v. Briseno* (2000) 22 Cal.4th 568, 572.) In the court below, appellant contended there was a disputed issue of fact whether Deputy Peterson was actually responding to an emergency at the time of the collision, casting his immunity from liability into doubt. In her opening brief on appeal, appellant conceded there was no disputed issue of fact whether the deputy was responding to an emergency, but contended the deputy's motion for summary judgment should have been denied for other reasons. In her reply brief, appellant conceded Deputy Peterson is immune from liability under Vehicle Code section 17004.

see or hear the sirens, [her deposition] testimony makes clear that she would not have known the status of the warnings regardless of whether they were on or off" because she was "distracted at the time of the collision." The court reached a similar conclusion with respect to Warner's testimony: "It is true that Warner testifie[d] that she neither heard a siren nor saw any flashing red lights before she entered the intersection. However, . . . at the time of the collision, Warner saw a red light and heard the siren [citation]." This evidence combined with the deputy's testimony and the evidence that the cars alongside Warner had stopped rendered any inference that the deputy had not activated his lights or siren or activated them at the last second prior to the collision "plainly unreasonable."

With respect to the contention that Deputy Peterson failed to exhibit due care by traveling at an unsafe speed, the court observed: "This contention [was] rooted in Warner's testimony that she estimated the car to be travelling between 30 and 45 miles per hour. [Citation.] However, as pointed out . . .[by respondents], . . . this testimony is purely speculative, coming only after Warner . . . repeatedly stated that she did not know how fast the vehicle was moving. [Citation.] Moreover, the testimony suggests that Warner lacks a proper basis upon which to give her opinion that [the deputy's] vehicle was travelling fast. . . . Warner testified that the first time she saw [his] vehicle was at the moment of collision. Her opinion of how fast [his] vehicle was going, therefore, could not have been rationally based upon her perceptions of the vehicles. Indeed, Warner stated that part of her opinion [was] based on . . . how far her car was pushed in to another lane. [Citation.]" Accordingly, the trial court concluded appellant had "not produced evidence to indicate that [Deputy] Peterson's vehicle was operated without due regard for the safety of all persons using the highway," and both he and LA County were entitled to summary judgment.

Following issuance of the order granting respondents' summary judgment motion, judgment was entered. This appeal followed.

DISCUSSION

A. *Standard of Review*

"Summary judgment is granted when a moving party establishes the right to the entry of judgment as a matter of law. [Citations.] '"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute."' [Citation.] 'A defendant moving for summary judgment meets its burden of showing there is no merit to a cause of action if that party has shown that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. [Citation.] Once the defendant has made such a showing, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. [Citation.]'" (*DuBeck v. California Physicians' Service* (2015) 234 Cal.App.4th 1254, 1263-1264, quoting *Mitchell v. United National Ins. Co*. (2005) 127 Cal.App.4th 457, 467.) '"On appeal from a summary judgment, an appellate court makes "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law."'" (*Dubeck, supra,* 234 Cal.App.4th at p. 1264.)

In our review, we consider "all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) . . . ." (*Merrill v. Navegar, Inc*. (2001) 26 Cal.4th 465, 476.) The evidence presented by the party opposing summary judgment and the reasonable inferences therefrom are

accepted as true. (*Villacres v. ABM Industries, Inc*. (2010) 189 Cal.App.4th 562, 575.) But it is "not enough [for the opposing party] to produce just some evidence"; the evidence must be "of sufficient quality to allow [a] trier of fact to find the underlying fact in favor of the party opposing the motion for summary judgment." (*McGonnell v. Kaiser Gypsum Co*. (2002) 98 Cal.App.4th 1098, 1105; accord, *Casey v. Perini Corp*. (2012) 206 Cal.App.4th 1222, 1239; *Whitmire v. Ingersoll-Rand Co*. (2010) 184 Cal.App.4th 1078, 1093.) Inferences are not reasonable where they are "'rebutted by clear, positive and uncontradicted evidence'" that is "'not subject to doubt in the minds of reasonable men.'" (*Beck Development Co. v. Southern Pacific Transportation Co*. (1996) 44 Cal.App.4th 1160, 1204; accord, *McRae v. Department of Corrections and Rehabilitation* (2006) 142 Cal.App.4th 377, 389-390.) The testimony of a witness may be rejected if it is "physically impossible or inherently improbable and such inherent improbability plainly appears." (*Beck Development Co. v. Southern Pacific Transportation Co*., *supra*, 44 Cal.App.4th at p. 1204.) "'"The trier of the facts may not believe impossibilities." [Citations.]'" (*McRae v. Department of Corrections and Rehabilitation*, *supra*, 142 Cal.App.4th at p. 390.)

B. *Liability Premised on Failure to Activate Warning Lights and Siren*

As the trial court ruled, notwithstanding Deputy Peterson's personal immunity for any negligent driving in responding to the emergency, LA County's potential liability must be considered under Vehicle Code section 17001, which applies where the plaintiff's injuries were "proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee . . . within the scope of his employment." (Veh. Code, § 17001; see *Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 519.) Vehicle Code section 17001 "makes a public entity liable for its employee's negligence in the operation of a motor

vehicle," even where the public employee is responding to an emergency. (*Brummett v. County of Sacramento* (1978) 21 Cal.3d 880, 883.)

There is no dispute that Deputy Peterson crossed Avenue K against a red light. However, section 21055 of the Vehicle Code permits the driver of an authorized emergency vehicle engaged in specified functions to violate highway safety rules and regulations, including those governing speed, right of way and compliance with traffic signals, and avoid the presumption of negligence that would ordinarily arise. (*City of Sacramento v. Superior Court* (1982) 131 Cal.App.3d 395, 403; see *Torres v. City of Los Angeles* (1962) 58 Cal.2d 35, 44.) In order for emergency vehicle drivers to be exempt from the rules of the road under Vehicle Code section 21055, (1) "they must be responding to an emergency call," (2) "they must sound a siren as may be reasonably necessary," and (3) "their vehicle must display a lighted red lamp visible from the front as a warning." (*Monroy v. City of Los Angeles* (2008) 164 Cal.App.4th 248, 257; accord, *Grant v. Petronella* (1975) 50 Cal.App.3d 281, 286 ["If the driver of an authorized emergency vehicle is responding to an emergency call and gives the prescribed warnings by red light and siren, a charge of negligence . . . may not be predicated on his violation of the designated Vehicle Code sections."].)

Deputy Peterson testified that he turned his emergency lights and siren on as soon as he commenced the emergency response, a mile from the intersection at Challenger Way and Avenue K. Appellant attempted to raise a dispute concerning whether he had done so. However, the evidence presented by appellant was insufficient to create a disputed issue of fact. Warner testified she did not see lights or hear a siren prior to the collision, but her perceptions were admittedly obscured by the vehicles stopped in the adjacent lanes, her closed windows and the sound of the radio. The evidence was uncontradicted that she perceived both lights and siren at the moment she first observed the patrol car -- when she collided with

it. Thus, Warner's testimony supports that the lights and siren had been activated as Deputy Peterson stated.

Appellant points to her own testimony that she perceived neither emergency lights nor siren as she was waiting at the stoplight on Challenger Way. In some circumstances, a witness's testimony that he or she heard no siren and saw no emergency lights may suffice to raise an inference that no such warnings were given. (See, e.g., *Thompson v. Los Angeles etc. Ry. Co*. (1913) 165 Cal. 748, 752 [if witnesses were situated so as to have been able to hear a bell or whistle, "their failure to hear is some evidence that no such signal was given"]; *Raynor v. City of Arcata* (1938) 11 Cal.2d 113, 116 [testimony of plaintiff and driver of car immediately following his that they heard no siren sufficient to create a conflict in the evidence as to whether warning siren was in fact sounded].) Here, however, appellant admitted she was distracted, focusing on the stoplight, and not paying attention to what was happening in front of her. In view of the testimony of both Deputy Peterson and Warner that the lights and signal were activated and the undisputed evidence that the cars in the two lanes adjacent to Warner's had stopped to give Deputy Peterson the right of way, no reasonable inference can arise from appellant's failure to hear or observe the emergency warnings, and nothing supported the existence of a disputed fact sufficient to preclude the grant of summary judgment.

C. *Liability Premised on Failure to Drive with Due Regard for the Safety of Other Persons Using the Roadway*

The fact that Deputy Peterson had activated the patrol car's emergency lights and siren does not entirely foreclose the possibility of liability on the part of LA County. The entity employing an emergency driver may be liable for the driver's negligence even where the vehicle's emergency lights and siren were activated.

(See Veh. Code, § 21056 ["Section 21055 does not relieve the driver of [an emergency] vehicle from the duty to drive with due regard for the safety of all persons using the highway, nor protect him from the consequences of an arbitrary exercise of the privileges granted in that section."]; Veh. Code, § 21807 ["The provisions of Section 21806 [requiring drivers to yield the right of way to emergency vehicles sounding a siren and exhibiting a red light] shall not operate to relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons and property"]; *Brummett v. County of Sacramento, supra*, 21 Cal.3d at pp. 885-886 ["'[T]he law does not permit the police to drive with impunity from the moment they activate their sirens and flashing lights.'"]; *Torres v. City of Los Angeles, supra*, 58 Cal.2d at p. 47 ["We can attribute to the legislative intent, in addition to the requirement of an adequate warning to others using the highway, the further requirement that the driver of an emergency vehicle exercise that degree of care which, under all the circumstances, would not impose upon others an unreasonable risk of harm."]; *Peerless Laundry Serv. v. City of L.A.* (1952) 109 Cal.App.2d 703, 706 ["The vehicular regulations from which exemption is granted relate to speed, right of way, pedestrian duties, street cars and safety zones, stopping, standing and parking. . . . [I]f the harm caused results from negligence not based upon an exempt restriction, [former Vehicle Code] section 454 [now section 21055] is inapplicable and the city must be held responsible by virtue of [former Vehicle Code] section 400 [now section 17001]."].)

The requirement that the drivers of emergency vehicles must act with due regard for the safety of all persons using the highway "does not impose the same quantum of care upon the driver of an emergency vehicle as upon motorists generally, for in that event the requirement would have the absurd result of practically nullifying the traffic exemptions expressly granted . . . ." (*Reed v.*

Simpson (1948) 32 Cal.2d 444, 449.) "The question to be asked is what would a reasonable, prudent emergency driver do under all of the circumstances, including that of the emergency." (*Torres v. City of Los Angeles*, *supra*, 58 Cal.2d at p. 51; see *Duff v. Schaefer Ambulance Service, Inc.* (1955) 132 Cal.App.2d 655, 685 [due regard requirement "is essentially satisfied (1) when the driver of the emergency vehicle has, by suitable warning, given the users of the highway an opportunity to yield the right of way, and (2) if, having discovered the peril in which another has unknowingly or negligently become involved despite the operation of the required warning devices, the driver reasonably exercises any last clear chance to avoid the accident."].)

Appellant contends there was evidence that Deputy Peterson was driving negligently, pointing to Warner's estimate of his speed. However, as the trial court observed, that testimony was "purely speculative" and "could not have been rationally based upon her perceptions of the vehicle," as Warner consistently stated she did not see the patrol car prior to the collision and repeatedly said she did not know how fast the vehicle was moving. While the rate of speed at which a vehicle may be traveling is generally considered "purely a matter of judgment and one which it is competent for any person to give testimony upon" (*Kramm v. Stockton E.R. Co.* (1913) 22 Cal.App. 737, 755), Warner's testimony was clearly based on the force of the impact -- "how [the deputy's car] pushed [her] car into another lane" -- rather than personal observation and represented sheer speculation or an attempt to provide an expert opinion she was not qualified to give. In the absence of any creditable evidence that Deputy Peterson was traveling faster than he stated, the trial court was obliged to rely on his testimony that he was carefully traveling one or two mph when he began to cross Warner's traffic lane.

Appellant contends Deputy Peterson may have been negligent despite his careful driving and slow speed, citing a number of provisions of the LA County

Sheriff Driving Policy and *Dillenbeck v. City of Los Angeles* (1968) 69 Cal.2d 472, which held that police department bulletins setting out how police officers were to operate their motor vehicles when responding to an emergency should have been admitted to assist the plaintiff in establishing negligence. (*Dillenbeck, supra*, 69 Cal.2d at pp. 475-484.) The majority of the provisions of the Sheriff Driving Policy quoted in appellant's brief merely track the statutes already discussed, providing that a deputy responding to an emergency must drive with "due regard for the safety of all persons using the highway," and that emergency vehicle exemption statutes "do not relieve a peace officer from the duty of exercising 'due regard' for the safety of others." (LA County Sheriff Driving Policy Nos. 5-09/200.00, 5-09/200.05, 5-09/200.15 & 5-09/200.20.)

Appellant also quotes provisions stating that even in emergency operations, "vehicle speed should not exceed that which is reasonable and prudent and within the restrictions imposed by section 22350 [of the] California Vehicle Code, 'Basic Speed Law'" and that "during all Code 3 operations including pursuits, Deputy personnel shall slow and, if necessary, stop at all intersections when faced with a red traffic signal light or stop sign" and then "proceed with extreme caution[,] . . . driv[ing] slowly" and "clear[ing] the intersection 'lane-by-lane' and, if necessary stop[ping] at each lane before proceeding." (LA County Sheriff Driving Policy Nos. 5-09/200/30 & 5-09/200.35.) Appellant provided no evidence showing Deputy Peterson failed to comply with any of these policy requirements. The deputy testified that he stopped at the intersection and proceeded with extreme caution through the lanes.

Similarly, appellant seeks to rely on case authority for the proposition that even a driver with the right of way must proceed cautiously and is under an obligation to exercise due care to avoid obvious dangers from oncoming traffic. (See *Stafford v. Alexander* (1960) 182 Cal.App.2d 301, 310; *Uhi v. Baldwin* (1956)

145 Cal.App.2d 547, 552.) Appellant presented no evidence that Deputy Peterson failed to proceed cautiously or otherwise failed to exercise due care. Because vehicles in the eastbound number one and two lanes had stopped, it was reasonable for Deputy Peterson to proceed slowly southbound into the number one lane. Indeed, it is difficult to discern what else he could have done. His failure to anticipate that Warner -- aware that other drivers in adjacent lanes had stopped -- would not do so herself, is not evidence of negligent driving. The trial court properly granted summary judgment.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.