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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

MARIE DUGAN, Plaintiff and Appellant, v. FLORENCE TUCKER, Defendant and Respondent.	B286010 (Los Angeles County Super. Ct. No. BC620252)

APPEAL from a judgment of the Superior Court of Los Angeles County, Patricia Nieto, Judge. Reversed.

Allred, Maroko & Goldberg and John S. West, Chudacoff, Simon, Cherin & Friedman and Douglas Friedman for Plaintiff and Appellant.

Doherty & Catlow, James T. Catlow and Susan Rousier, for Defendant and Respondent.

INTRODUCTION

Marie Dugan appeals from a judgment after the trial court granted a motion by Florence Tucker for judgment on the pleadings on Dugan's complaint for personal injuries. Because the trial court erred in taking judicial notice of facts outside the pleadings, used the wrong legal standard, and then applied that standard incorrectly, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

On May 12, 2016 Dugan initiated this action against Evelyn Cruz (Cruz), Eduardo Cruz, and Does 1 to 100 by filing a complaint on a form approved by the Judicial Council asserting general and motor vehicle negligence causes of action. Dugan alleged that on May 20, 2014 Cruz negligently operated the motor vehicle that caused Dugan's injuries. Dugan also alleged Cruz, Eduardo Cruz, and Does 1 to 100 owned and entrusted the motor vehicle to Cruz, employed the persons who operated the motor vehicle in the course of their employment, and were the agents and employees of other defendants and acted within the scope of the agency. Dugan also alleged the Cruzes and Does 1 to 100 "so negligently, carelessly, recklessly, unskillfully, unlawfully, tortiously, wantonly, and wrongfully, entrusted, permitted, managed, service[d], repaired, inspected, maintained, operated, controlled and drove their said vehicle so as to proximately cause the collision between [Dugan's] vehicle and [the Cruzes'] vehicle and thereby proximately caused the injuries and damages herein alleged." Dugan alleged that the true names of the defendants sued as Doe defendants were unknown to her.

On April 21, 2017, more than two years after the date of the accident, Dugan filed an amendment to the complaint substituting Tucker as Doe 1. Dugan alleged that, upon filing the complaint, she was ignorant of Doe 1 and that she had discovered her true name was Tucker.

On July 19, 2017 Tucker filed a motion for judgment on the pleadings, arguing Dugan's complaint against her was barred by the statute of limitations because the amendment adding Tucker as a Doe defendant did not relate back to the original complaint under Code of Civil Procedure section 474.[1] Tucker asserted that a California Highway Patrol traffic collision report of the accident, of which Tucker asked the court to take judicial notice, revealed Tucker was a passenger in the vehicle Cruz had been driving and provided Tucker's name, address, and date of birth. Tucker also stated in her motion, without citing to any allegation in the complaint or any supporting evidence, that at the time of the accident Cruz "was employed as a caregiver by" Tucker and was driving Tucker from her home "to a senior citizens' center in Culver City." Tucker argued Dugan was not ignorant of Tucker's identity when Dugan filed her complaint in May 2016 because the police report showed Tucker was a passenger in the car. Tucker argued: "The fact that [Tucker] was in the vehicle at the time of the accident was sufficient knowledge of her identity and possible involvement whether it be in the form of distracting the driver, interfering with the operation of the vehicle, or based on vicarious liability. Accordingly, [Dugan] cannot add [Tucker] as a 'Doe' defendant after the expiration of the statute of limitations." Tucker supported her motion with a declaration by her attorney,

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1 Statutory references are to the Code of Civil Procedure.

which stated that she was attaching a true and correct copy of the police report and that the report "was obtained by defendants' investigators and it is presumed that [Dugan] has a copy of the report."[2]

Dugan opposed the motion for judgment on the pleadings, arguing, among other things, she was actually ignorant Tucker was Cruz's employer and Cruz was driving in the course and scope of her employment at the time of the accident. Dugan argued a plaintiff is ignorant of a Doe defendant even if she knows the defendant's identity but is "ignorant of the facts giving rise to a cause of action against the person." Dugan also argued, as an "additional ground for denying" the motion, that her attorney "exercised due diligence to determine the relationship between Tucker and the Cruzes and that she was entitled to rely on the representations of the claims adjuster and . . . the sworn statements of the Cruzes" that Cruz was not acting in the course and scope of her employment at the time of the accident, "representations that the Defendants now admit were false."

Counsel for Dugan and a paralegal at his law firm submitted declarations describing and attaching communications with Cruz's insurer and attorney, as well as a declaration from Cruz stating she was not acting in the course and scope of her employment with Tucker at the time of the accident. These documents reflected that from May 2016 to early 2017 counsel for Dugan made efforts to discover the relationship between Cruz and Tucker and that in a December 2016 declaration Cruz stated she "was not in the course and scope of any business or employment" nor was she "acting as an agent for any person or

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[2] Counsel for Tucker also attached a copy of Tucker's answer, which did not include a statute of limitations affirmative defense.

entity or company." Attorneys for Cruz also represented in writing that Cruz was not acting in the course and scope of employment at the time of the accident.

The trial court granted Tucker's request for judicial notice and granted the motion for judgment on the pleadings. The court ruled: "[Dugan] complains that she had no actual knowledge that [Tucker] was [Cruz's] employer and that [Cruz] was driving in the course and scope of that employment at the time of the accident until shortly before the Doe Amendment was filed. [Dugan], however, knew, based on the Traffic Collision Report that [Cruz] had an elderly passenger in her vehicle, 87-year old [Tucker]. This fact would lead one to suspect that there was some kind of relationship between [Cruz] and [Tucker], such as that of caregiver. In fact, [Dugan] actually suspected just this relationship before filing her complaint." Citing to one of the letters from the paralegal asking about the relationship between Cruz and Tucker, the trial court ruled: "This letter constitutes substantial evidence that [Dugan] not only knew [Tucker's] identity when she filed her lawsuit, but that she was also aware of facts which indicate she knew or should have known of [Tucker's] potential involvement."

The trial court entered judgment in favor of Tucker. Dugan appealed.

DISCUSSION

"Section 474 allows a plaintiff who is ignorant of a defendant's identity to designate the defendant in a complaint by a fictitious name (typically, as a 'Doe'), and to amend the pleading to state the defendant's true name when the plaintiff subsequently discovers it. When a defendant is properly named

under section 474, the amendment relates back to the filing date of the original complaint. [Citation.] Section 474 provides a method for adding defendants after the statute of limitations has expired, but this procedure is available only when the plaintiff is actually ignorant of the facts establishing a cause of action against the party to be substituted for a Doe defendant." (*McClatchy v. Coblentz, Patch, Duffy & Bass, LLP* (2016) 247 Cal.App.4th 368, 371-372 (*McClatchy*).)

Under section 474, "'[t]he plaintiff is deemed "ignorant of the name" [of the defendant] if he knew the identity of the person but was ignorant of the facts giving him a cause of action against the person [citations], or knew the name and all the facts but was unaware the law gave him a cause of action against the fictitiously named defendant and discovered that right by reason of decisions rendered after the commencement of the action.'" (*Marasco v. Wadsworth* (1978) 21 Cal.3d 82, 88.) "Section 474 has long been liberally construed to accomplish the purpose of enabling a plaintiff to substitute a named defendant for a fictitiously named defendant where the defendant's name was known, but the facts giving rise to a cause of action were not." (*McClatchy*, *supra*, 247 Cal.App.4th at p. 377.) "In keeping with [the] liberal interpretation of section 474, it is now well established that even though the plaintiff knows of the existence of the defendant sued by a fictitious name, and even though the plaintiff knows the defendant's actual identity (that is, his name), the plaintiff is 'ignorant' within the meaning of the statute if he lacks knowledge of that person's connection with the case or with his injuries." (*General Motors Corp. v. Superior Court* (1996) 48 Cal.App.4th 580, 593-594; see *Miller v. Thomas* (1981) 121 Cal.App.3d 440, 444-445 ["[e]ven a person whose identity was

known to the plaintiff when the action was filed may be brought in under section 474 as a 'Doe' defendant if the plaintiff was initially unaware of that person's true relationship to the injuries upon which the action was based"].)

Did the trial court err in ruling Tucker was entitled to judgment on the pleadings because statements in the police report would lead one to suspect Tucker was Cruz's employer?[3] In more ways than one.

First, the trial court erred in granting Tucker's request for judicial notice of the traffic collision report and taking judicial notice of the truth of facts contained in the report. Neither police reports nor statements contained in such reports are subject to judicial notice. (See *People v. Jones* (1997) 15 Cal.4th 119, 171, fn. 17 ["we decline to take judicial notice of the truth or accuracy of an entry in a police report, because such a report is reasonably subject to dispute"] disapproved on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *Petricka v. Department of Motor Vehicles* (2001) 89 Cal.App.4th 1341, 1345, fn. 1 ["it would

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[3] "A motion for judgment on the pleadings presents the question of whether 'the plaintiff's complaint state[s] facts sufficient to constitute a cause of action against the defendant.' [Citation.] The trial court generally considers only the allegations of the complaint, but may also consider matters that are subject to judicial notice. [Citation.] '"Moreover, the allegations must be liberally construed with a view to attaining substantial justice among the parties." [Citation.] "Our primary task is to determine whether the facts alleged provide the basis for a cause of action against defendants under any theory."' [Citation.] 'An appellate court independently reviews a trial court's order on such a motion.'" (*Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 272.)

have been improper for the court to take judicial notice of the police report and, a fortiori, its attachments"].) Nor was the police report authenticated; it was attached to the declaration of one of Tucker's attorneys, who did not have personal knowledge to authenticate it and who could only "presume" Dugan had a copy of it. (Cf. *East Bay Asian Local Development Corp. v. State of California* (2000) 24 Cal.4th 693, 711, fn. 5 [court may take judicial notice of letters in legislative history if authenticated].) And even when a court can take judicial notice of a public record, the court can only take judicial notice of the existence of the record, not the truth of the matters stated in it. (See *Coyne v. City and County of San Francisco* (2017) 9 Cal.App.5th 1215, 1223, fn. 3.; *Licudine v. Cedars-Sinai Medical Center* (2016) 3 Cal.App.5th 881, 902; *Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1360, fn. 6.)[4]

Second, even if the court could have taken judicial notice of the police report and its contents, the court applied the wrong legal standard. Contrary to the court's ruling, a plaintiff claiming actual ignorance for purposes of section 474 does not have a duty to investigate. (*Camarillo v. Vaage* (2003) 105 Cal.App.4th 552, 564; *Fuller v. Tucker* (2000) 84 Cal.App.4th

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[4] Tucker argues "[t]he official records exception to the hearsay rule, Evidence Code § 1280, permits admission of the fact of the police report, time and date it was made, nature of the investigation, and names of witnesses." Perhaps. (See *Coe v. San Diego* (2016) 3 Cal.App.5th 772, 786-788; *Rupf v. Yan* (2000) 85 Cal.App.4th 411, 430.) But Evidence Code section 1280 concerns admissibility of evidence, not judicial notice. And counsel for Tucker's declaration did not satisfy the foundational requirements for admissibility under that statute. (See *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 317.)

1163, 1170-1171.) The test is whether the plaintiff was "'actually ignorant of a certain fact, not when [the plaintiff] might by the use of reasonable diligence have discovered it." (*Fuller v. Tucker*, at p. 1170; see *General Motors Corp. v. Superior Court*, *supra*, 48 Cal.App.4th at p. 594 ["[t]he fact that the plaintiff had the means to obtain knowledge is irrelevant"]; *Balon v. Drost* (1993) 20 Cal.App.4th 483, 488 ["California law clearly states that . . . 'constructive or legal knowledge will not deprive [appellant] of the [section 474] remedy'"].) "'In short, section 474 does not impose upon the plaintiff a duty to go in search of facts she does not actually have at the time she files her original pleading.'" (*McOwen v. Grossman* (2007) 153 Cal.App.4th 937, 944.)

The police report indicated Tucker was a passenger and was elderly, which the court ruled would "lead one to suspect" Cruz was Tucker's caregiver or had some kind of employment relationship with Tucker. As noted, however, the test is whether Dugan was actually ignorant Cruz was Tucker's caregiver, employee, or agent, not whether Dugan reasonably should have suspected Cruz might be. On a motion for judgment on the pleadings, the trial court, rather than finding there was "substantial evidence" Dugan was aware of facts indicating she "knew or should have known" of Tucker's "potential involvement," should have assumed the Doe allegations in Dugan's complaint were true (see *SP Investment Fund I LLC v. Cattell* (2017) 18 Cal.App.5th 898, 900, fn. 1; *Payne v. Anaheim Memorial Medical Center, Inc.* (2005) 130 Cal.App.4th 729, 733) and determined whether Dugan was actually ignorant of Tucker's involvement.[5]

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[5] In *Woo v. Superior Court* (1999) 75 Cal.App.4th 169, cited by Tucker, the court held that "when the plaintiff ha[s] actual

Third, even if the court could have taken judicial notice of the police report and the legal standard the court applied were correct, the court still erred in granting the motion. "'"[J]udgment on the pleadings must be denied where there are material factual issues that require evidentiary resolution."'" (*SP Investment Fund I LLC v. Cattell*, *supra*, 18 Cal.App.5th at p. 905; accord, *Bezirdjian v. O'Reilly* (2010) 183 Cal.App.4th 316, 322). Whether the information in the police report identifying Tucker as an 87-year-old female passenger was enough to put Dugan on constructive notice that Cruz employed Tucker was, at a minimum, a factual issue. (See *Alexander v. Exxon Mobil* (2013) 219 Cal.App.4th 1236, 1250 [whether notices plaintiffs received "were sufficient to put them on inquiry notice of their personal injury claims is a question of fact that may not

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knowledge of the defendant's identity prior to filing a complaint, but has forgotten the defendant's identity at the time of filing the complaint, the plaintiff must review readily available information that discloses the defendant's identity to invoke the section 474 relation-back doctrine; otherwise, the plaintiff is not in good faith using section 474. A requirement of reviewing readily available information is not a significant burden, is not inconsistent with the cases that impose no duty of inquiry on plaintiffs who never knew the defendant's identity, and assures the good faith of plaintiffs who seek to use the section 474 relation-back doctrine." (*Woo v. Superior Court,* at p. 180.) Unlike the plaintiff in *Woo*, Dugan did not know and forget Tucker's identity and relationship to Cruz. In addition, because the plaintiff in *Woo* "had the records containing the name of the defendant in his possession," he "was not 'genuinely ignorant' of defendant's identity." (Turner & Banke, Cal. Practice Guide: Civil Procedure Before Trial Statutes of Limitation (The Rutter Group 2017) ¶ 8:67, p. 8-8.) And *Woo* was a summary judgment case.

be resolved on demurrer"].) Indeed, the trial court's inference from Tucker's age to Cruz's employment as her caregiver was highly questionable. Elderly people frequently ride in cars with drivers they do not employ. The police report provided no information about Cruz and Tucker other than their ages, (different) addresses, injuries, (same) insurer, and what appear to be the names of their personal physicians. Neither of the witness statements disclosed anything about the relationship between Cruz and Tucker. Whether Dugan had actual knowledge from the police report that Cruz was Tucker's caregiver was, at most, a factual issue for the jury (although Tucker will have to amend her answer to add the defense of statute of limitations to present that issue to a jury).

The trial court also cited correspondence between Dugan's attorneys and Tucker's attorneys and insurer. For example, on May 9, 2016 a paralegal at counsel for Dugan's law firm wrote to Cruz's insurer asking about the relationship between Cruz and Tucker, whether Cruz was a "caretaker" for Tucker, and whether Cruz was driving in the course and scope of her employment. Cruz's insurer and attorney responded on October 27, 2016 that Cruz was not acting in the course and scope of her employment. On October 31, 2016 counsel for Dugan again asked about the relationship between Cruz and Tucker, and on December 28, 2016 Cruz and her husband signed declarations under penalty of perjury stating Cruz was "not in the course and scope of any business or employment" and "was not acting as an agent for any person or Entity or company."

Putting aside that these letters were also not subject to judicial notice (see *Sanchez v. Kern Emergency Medical Transportation Corporation* (2017) 8 Cal.App.5th 146, 154

[attorney correspondence not subject to judicial notice]; *Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 835 [letters from insurer not subject to judicial notice]), the correspondence and the declarations did little more than create a factual issue regarding Dugan's (or her attorneys') knowledge of the relationship between Cruz and Tucker. Tucker did not even ask the court to take judicial notice of these letters, nor did Tucker argue in her motion that the letters showed Dugan was actually ignorant of Tucker's relationship to Cruz. It was Dugan, in fact, who submitted these documents to show that, despite her reasonable efforts, she had no knowledge Tucker was Cruz's employer, that Tucker and her representatives had falsely stated Tucker was not Cruz's employer, and that the Cruzes had falsely stated under oath Cruz was not acting in the course and scope of her employment. The court's ruling allowed Tucker and her representatives to conceal the truth about the relationship between Tucker and Cruz, and then obtain judgment on the pleadings by arguing Dugan should have discovered the truth about the relationship between Tucker and Cruz.

Nor is Tucker's attempt to justify the trial court's ruling persuasive. She argues in her respondent's brief Dugan should have ignored the false statements by Tucker's attorneys because attorneys don't always tell the truth: "'It is axiomatic that unsworn statements of counsel are not evidence.'" As with the police report, however, the meaning of the communications among the attorneys and insurers and whether the various inquiries and denials about the relationship between Cruz and Tucker gave Dugan and her attorneys actual knowledge of

Tucker's potential liability were, at most, factual issues for the jury.

DISPOSITION

The judgment is reversed. Dugan is to recover her costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.