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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

RICHARD GREGORY MIKAELI, Plaintiff and Appellant, v. JAMES JOSEPH KILLMOND, Defendant and Respondent.	B265689 (Los Angeles County Super. Ct. No. BC522512)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura Ellison, Judge. Affirmed.

Neil C. Newson & Associates, Neil C. Newson and Isaac H. Braddock for Plaintiff and Appellant.

Niddrie Addams Fuller and John S. Addams; Law Offices of Keevil L. Markham and Keevil L. Markham for Defendant and Respondent.

In the underlying action, appellant Richard Gregory Mikaeli asserted claims for negligence against respondent James Joseph Killmond arising from a motor vehicle accident. After a jury returned a special verdict finding Killmond was not negligent, the trial court entered a judgment against Mikaeli on his claims and denied his motion for a partial judgment notwithstanding the verdict. Mikaeli challenges that ruling, contending there is insufficient evidence to support the jury's special verdict. We reject his contention and affirm.

RELEVANT PROCEDURAL BACKGROUND

In September 2013, Mikaeli initiated the underlying action against Killmond, asserting claims for negligence and personal injury, alleging that he suffered injuries when his motorcycle collided with a car driven by Killmond.[1] At trial, the special verdict form requested findings from the jury on several issues. The first question on the form asked whether Killmond was "negligent"; if the jury answered "No," it was directed to make no further findings The jury returned a "No" answer to the first question and rendered no other special verdicts.

Mikaeli filed motions for a new trial and a partial judgment notwithstanding the verdict, seeking, inter alia, a judgment in his favor on the issue of Killmond's negligence, as posed in the first question on the special verdict form, and a trial on the remaining issues. After entering a judgment in favor of Killmond and against Mikaeli on the basis of the special verdict, the trial court denied the motions. This appeal followed.

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[1] Also named as a defendant was Michele Killmond, who was not a party at trial and is not involved in this appeal.

DISCUSSION

Mikaeli challenges the denial of his motion for a partial judgment notwithstanding the verdict, contending the evidence compels a determination that Killmond was negligent. For the reasons set forth below, we reject that contention.

A. *Standard of Review*

Motions for judgment notwithstanding the verdict permit a party to prevail when the evidence is legally insufficient to support the verdict. (*Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 751.) As the rules governing them are "strict" (*id*. at p. 743), the trial court's discretion to grant any such motion is "severely limited." (*Teitel v. First Los Angeles Bank* (1991) 231 Cal.App.3d 1593, 1603). ""'If the evidence is conflicting or if several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied. [Citations.] 'A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied.' [Citation.]"'" (*Id*. at p. 1603, quoting *Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 877-878.) In reviewing the trial court's ruling, we also examine the record for substantial evidence to support the verdict. (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 845.)

Here, Mikaeli sought a partial judgment notwithstanding the verdict, arguing that there was insufficient evidence to support the jury's "No" answer to the first question on the special verdict form. Generally, "[a] party is entitled to a

partial judgment notwithstanding the verdict if there is no substantial evidence to support the verdict on a particular issue and the evidence compels a judgment for the moving party on that issue as a matter of law." (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 746.) The trial court may examine the jury's special verdicts in assessing whether the requested partial judgment is properly granted. (*Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 540-547; *Falls v. Superior Court* (1987) 194 Cal.App.3d 851, 855; see *McCoy v. Gustafson* (2009) 180 Cal.App.4th 56, 83-90.) When required to interpret a special verdict, the trial court is obliged to construe "'"its language considered in connection with the pleadings, evidence and instructions."'" (*Orthopedic Systems, Inc. v. Schlein, supra*, 202 Cal.App.4th at p. 542, quoting *Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456-457; accord, *Shapiro v. Prudential Property & Casualty Co.* (1997) 52 Cal.App.4th 722, 729-730.)[2]

B. *Governing Principles*

As noted, in response to the first question on the special verdict form asking whether Killmond was negligent, the jury responded, "No." In moving for a partial judgment notwithstanding the verdict, Mikaeli argued, "[T]here is essentially no evidence to support this finding. That is, the evidence was all one way." For the reasons discussed above (see pt. A. of the Discussion, *ante*), Mikaeli was entitled to a favorable ruling on his motion only if the evidence compelled a finding that Killmond was negligent as a matter of law. (*Jach v.*

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[2] Although the record does not disclose the trial court's rationale for denying the requested partial judgment notwithstanding the verdict, we may affirm that ruling on any proper basis established by the record. (*Stillwell v. The Salvation Army* (2008) 167 Cal.App.4th 360, 377.)

Edson (1967) 255 Cal.App.2d 96, 100.) We therefore examine the applicable legal principles.

At trial, Mikaeli offered theories of negligence and negligence per se. "Under general negligence principles, . . . a person ordinarily is obligated to exercise due care in his or her own actions so as to not to create an unreasonable risk of injury to others, and this legal duty generally is owed to the class of persons who it is reasonably foreseeable may be injured as the result of the actor's conduct. [Citations.]" (*Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 716.) Here, "[t]he formulation of the standard of care is a question of law for the court. [Citations.] Once the court has formulated the standard, its application to the facts of the case is a task for the trier of fact if reasonable minds might differ as to whether the defendant's conduct has conformed to the standard. [Citations]." (*Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 546 (*Ramirez*).)

In most contexts, the standard of care applicable to the duty of care is "that of a reasonably prudent person under like circumstances." (*Ramirez, supra*, 6 Cal.4th at p. 546.) At Mikaeli's request, the jury was instructed regarding that basic standard of care with CACI No. 401, which states: "A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation."

At Mikaeli's request, the jury also was instructed with CACI No. 700, which sets forth "the basic standard of care for driving a vehicle." (*Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1318.) That instruction states: "A person must use reasonable care in driving a vehicle. Drivers must keep a lookout for pedestrians, obstacles and other vehicles. They must also control the speed and movement of their vehicles. The failure to use reasonable care in driving a vehicle is negligence."

Mikaeli also requested instructions under the doctrine of negligence per se, which may establish a more precise standard of care. (*Ramirez, supra*, 6 Cal.4th at p. 547.) That doctrine "'is not a separate cause of action, but creates an evidentiary presumption that affects the standard of care in a cause of action for negligence.' [Citation.]" (*Johnson v. Honeywell Internat. Inc.* (2009) 179 Cal.App.4th 549, 555, quoting *Millard v. Biosources, Inc.* (2007) 156 Cal.App.4th 1338, 1353, fn. 2.)

Under the doctrine, "for a statute or ordinance . . . to be relevant to a determination of negligence, not only must the injury be a proximate result of the violation, but the plaintiff must be a member of the class of persons the statute or order was designed to protect, and the harm must have been one the statute or order was designed to prevent." (*Stafford v. United Farm Workers* (1983) 33 Cal.3d 319, 324.) The doctrine is codified in Evidence Code section 669, which provides that a presumption of negligence is established when a defendant "(1) . . . violated a statute, ordinance, or regulation of a public entity; [¶] (2) [t]he violation proximately caused death or injury to person or property; [¶] (3) [t]he death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and [¶] (4) [t]he person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted." (*Ibid*.) Of these elements, the first two are questions of fact for the jury, while the remaining elements present questions of law for the court. (*Galvez v. Frields* (2001) 88 Cal.App.4th 1410, 1420.) Generally, the doctrine supports refined standards of care for drivers predicated on provisions of the Vehicle Code. (*Satterlee v. Orange Glenn School Dist.* (1947) 29 Cal.2d 581, 587-588, disapproved on another ground in *Alarid v. Vanier* (1958) 50 Cal.2d 617, 623-624.)

At Mikaeli's request, the jury received negligence per se instructions based on sections 22107 and 21658 of the Vehicle Code. Section 22107 states: "No person shall turn a vehicle from a direct course or move right or left upon a roadway until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided in this chapter in the event any other vehicle may be affected by the movement." Subdivision (a) of section 21658 further provides: "A vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from the lane until such movement can be made with reasonable safety."

Viewed independently of the duty and standards of care applicable to negligence claims, the statutory duties imposed by these statutes are subject to "reasonable care" criteria. Vehicle Code section 22107 "permits the making of a turn only when it can be made with reasonable safety and after giving an appropriate signal. This provision does not require the driver to know that a turn can be made with safety but only that he must exercise reasonable care, and whether such care has been exercised is normally a question of fact." (*Butigan v. Yellow Cab Co.* (1958) 49 Cal.2d 652, 656, quoting former Veh. Code § 544 (*Butigan*).) A similar criterion is applicable to subdivision (a) of Vehicle Code section 21658, insofar as it regulates lane changes. (*Nevarov v. Caldwell* (1958) 161 Cal.App.2d 762, 778 (*Nevarov*) ["One who changes lanes must use reasonable care to ascertain that it can be done safely. [Citations]. It is not necessary that he be absolutely ascertain that the movement can be successfully executed . . . ."].)

At Mikaeli's request, the jury was instructed with CACI No. 705, which reflects these statutory duties. (*Lewis v. Franklin* (1958) 161 Cal.App.2d 177, 184.) That instruction states: "A driver must use reasonable care when turning or moving to the right or to the left." Furthermore, at Mikaeli's request, the jury received two negligence per se instructions in accordance with CACI No. 418,

based on the provisions of the Vehicle Code described above. Each instruction set forth the terms of one of the provisions and stated: "If you decide [¶] 1. That [Killmond] violated this law and [¶] 2. That the violation was a substantial factor in bringing about the harm, then you must find that [Killmond] was negligent. [¶] If you find that [Killmond] did not violate this law or that the violation was not a substantial factor in bringing about the harm, then you must still decide whether [Killmond] was negligent in light of the other instructions."

C. *Underlying Proceedings*

At trial, the principal witnesses to the underlying incident were Ramon Artiega, Mikaeli, and Killmond. Ramon Artiega testified that on October 24, 2011, at around 8:00 a.m., he was driving south on the 110 Freeway, approximately one-quarter of a mile from the Stadium Way exit. Although five lanes wide, the freeway was crowded with cars moving in a "stop and go" fashion at five to 10 miles an hour. Artiega drove in the fifth lane, that is, the lane farthest to the right, which eventually splits away from the freeway at the Stadium Way exit. Killmond's Toyota was ahead of Artiega's vehicle and in the same lane, separated from Artiega by one or two cars.

As Artiega approached the Stadium Way exit, Mikaeli drove past him on a motorcycle. Mikaeli was in the fourth lane, moving very slowly. After passing the car in front of Artiega, Mikaeli moved forward on the "blind side" of Killmond's Toyota. According to Artiega, Mikaeli was "right on . . . Killmond's left-hand side." Killmond's Toyota then moved into the fourth lane, striking Mikaeli's motorcycle. The impact threw Mikaeli onto another vehicle. Because Artiega's view was obstructed by the car in front of him, he did not see whether Killmond looked over his shoulder or made a left-turn signal before changing lanes. Artiega estimated that during the incident, Mikaeli never drove faster than

10 miles per hour.

Mikaeli testified that on the day of the accident, he drove his motorcycle south on the 5 Freeway and transitioned to the 110 Freeway via a ramp whose two lanes become the fourth and fifth lanes of that freeway. After "splitting" those lanes for an interval, Mikaeli saw an opening in the fourth lane and entered it. Mikaeli was then travelling 10 to 15 miles per hour. As Mikaeli was passing Killmond's car, the car ahead of Mikaeli in the fourth lane stopped moving. At approximately the same time, Killmond began to move into the fourth lane. Although Mikaeli tried to alert Killmond by tapping a window on his car, Killmond's car contacted Mikaeli's motorcycle. Mikaeli hit the car ahead of him in the fourth lane and fell to the ground. According to Mikaeli, he saw no turn signal on Killmond's car prior to the accident. Mikaeli also acknowledged that he may have been in Killmond's blind spot for 10 to 15 seconds as he prepared to pass Killmond.

Killmond testified that prior to the accident, he was travelling between 5 and 10 miles per hour in the fifth lane. Before initiating the change to the fourth lane, Killmond looked over his shoulder through the left window and checked his left side mirror. He neither saw nor heard Mikaeli. Believing the fourth lane was "safe and clear," Killmond directed his car into that lane. According to Killmond, he was unaware of Mikaeli's motorcycle until it contacted the left front side of his car. Killmond was not asked whether he signaled before changing lanes.

In addition to these witnesses, Alvin Lowi, a forensic accident expert, testified on behalf of Killmond. According to Lowi's reconstruction of the incident, 6.2 seconds before the accident, Mikaeli's motorcycle had already passed Artiega's car, and was "hugging" the dividing line between the fourth and fifth lanes. Killmond's car was then in the fifth lane, travelling at approximately 10 miles per hour. Killmond saw an empty space in the fourth lane, checked for

vehicles behind him, and 3.6 seconds before the accident, began to maneuver toward the fourth lane. Lowi opined that as Mikaeli passed Killmond's car, Mikaeli planned to drive through a gap between the vehicle ahead of him in the fourth lane and the front of Killmond's car. Killmond's car crossed the line between the lanes 1.3 seconds before the accident. Mikaeli's motorcycle then hit the front left side of Killmond's car.[3]

Following the presentation of evidence, the parties agreed on the special verdict form. In pertinent part, the form stated: "1. Was . . . Killmond negligent? [¶] _____ Yes _____ No [¶] If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form."

During closing arguments, Mikaeli's counsel pointed to the negligence per se instructions based on Vehicle Code sections 22107 and 21658, argued that Killmond had violated those provisions, and asked the jury to enter a "Yes" answer to question No. 1 on the basis of the alleged violations. As noted above, each negligence per se instruction directed the jury to find that Killmond "was negligent" if (1) he violated the pertinent law and (2) the violation was a substantial factor in the causation of the harm. The instructions further stated: "If you find that [Killmond] did not violate this law *or that the violation was not a substantial factor in bringing about the harm*, then you must still decide whether [Killmond] was negligent *in light of the other instructions*." (Italics added.)

The jury answered "No" to question No. 1 and made no further findings.

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3 In addition to this testimony, the parties submitted conflicting evidence regarding the amount of Mikaeli's damages.

D. *Analysis*

Mikaeli contends he was entitled to a partial judgment notwithstanding the verdict with respect to the issue presented by the first question on the special verdict form, arguing that the evidence unequivocally demonstrates Killmond's negligence. We disagree. Mikaeli's theories of negligence per se and negligence at trial incorporated "reasonable care" criteria whose application constituted questions of fact consigned to the jury (see pt. B. of the Discussion, *ante*). As explained below, the record discloses substantial evidence sufficient to support the jury's determinations that Killmond complied with those criteria.

Mikaeli's theories of negligence per se relied on Vehicle Code sections 22107 and 21658, which require reasonable care of drivers attempting lane changes, but do not oblige them to know that such maneuvers are safe. (*Butigan, supra*, 49 Cal.2d at p. 656; *Nevarov*, *supra*, 161 Cal.App.2d at p. 778.) At trial, Killmond testified that while driving in the freeway's fifth lane at between 5 and 10 miles per hour, he looked over his shoulder through the left window, checked his left side mirror, and neither saw nor heard Mikaeli. Killmond then initiated a lane change in the belief that the fourth lane was "safe and clear." In view of that testimony, the jury reasonably could have concluded that Killmond exercised the care required under the statutes.

The theories of negligence incorporated similar "reasonable care" criteria in the basic standard of care and the standard of care applicable to drivers. The jury instructions regarding those standards directed the jury to assess whether Killmond acted as "a reasonably careful person" (CACI No. 401) and "use[d] reasonable care in driving [his] vehicle" with respect to "keep[ing] a lookout for . . . other vehicles." (CACI No. 700.) Killmond's testimony was thus sufficient to support the jury's determinations under the basic standard of care and the standard of care applicable to drivers. (*Fava v. Pfahnl* (1958) 158 Cal.App.2d 795, 798

[driver who looked in mirror and over shoulder before commencing lane change was not negligent, even though he initially failed to see vehicle in his blind spot travelling in the pertinent lane].)

Mikaeli contends the record establishes Killmond's negligence because there is no evidence that Killmond signaled his lane change, as required by Vehicle Code section 22107. As Mikaeli observes, he and Artiega testified that they saw no signal, and Killmond provided no testimony whether he signaled. Mikaeli argues (1) that Killmond had the burden of proof whether he gave the requisite signal, and (2) that Killmond's failure to submit evidence establishing that fact compels a determination that Killmond was "negligent," within the meaning of the special verdict form's first question.

Mikaeli's contention fails. For purposes of the negligence per se theory based on Vehicle Code section 22107, Mikaeli had the burden of proof with respect to whether Killmond violated that statute and, if so, whether such violation was a substantial factor in the causation of the accident. As explained in *National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc.* (2003) 107 Cal.App.4th 1336, 1347, "[i]n negligence per se actions, the plaintiff must produce evidence of a violation of a statute and a substantial probability that the plaintiff's injury was caused by the violation of the statute before the burden of proof shifts to the defendant to prove the violation of the statute did not cause the plaintiff's injury. [Citation.]"

Mikaeli's testimony that he did not see Killmond make a turn signal did not conclusively establish that none was given. By his own admission, Mikaeli was traveling "very slowly" while passing Killmond's car, was immediately adjacent to it when it began to change lanes, and could have been in Killmond's blind spot for up to 15 seconds. On these facts, the jury reasonably could have concluded that Mikaeli was in no position to see whether a signal was given. The same is true of

Artiega: he testified that he was unable to see whether Killmond signaled, due to the presence of an intervening car.

Moreover, assuming arguendo that the jury concluded Killmond did not signal, that fact did not compel a finding of negligence. The jury was instructed, under Mikaeli's theories of negligence per se, that it could find Killmond negligent if it determined both "[t]hat [he] violated [the relevant Vehicle Code provisions] and [¶] . . . [t]hat the violation was a substantial factor in bringing about the harm . . . ." If the jury found that Killmond did not violate this law "or that the violation was not a substantial factor in bringing about the harm," it was instructed to determine whether Killmond was negligent "in light of the other instructions." Thus, the jury's determination either that Killmond did not fail to signal, or that any failure to signal was not a substantial factor in bringing about the accident, left it free to conclude Killmond was not negligent under Mikaeli's theory of negligence per se. Substantial evidence supports the reasonable inference that a timely signal would not have averted the accident. Furthermore, as discussed above, there is sufficient evidence to support a determination under the other instructions that Killmond was not otherwise negligent.

Mikaeli suggests that Lowi's testimony compelled the jury to find that Killmond exercised insufficient care in changing lanes and failed to signal. He relies on Lowi's testimony that 3.6 seconds before the accident, when Killmond began to maneuver his car into the fourth lane, Mikaeli's motorcycle was moving at 10 to 15 miles per hour faster than Killmond's car. In view of that testimony, Mikaeli argues that Killmond had ample opportunity to notice Mikaeli and give a signal visible to him.

Mikaeli's argument misapprehends our role as an appellate court. Review for substantial evidence is not trial de novo. (*OCM Principal Opportunities Fund, L.P., supra,* 157 Cal.App.4th at p. 866.) In examining the record for substantial

evidence, we neither reweigh the evidence (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1650) nor substitute our own judgment for that of the jury if the evidence supports conflicting inferences (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874). The jury was not obliged to accept the entirety of Lowi's reconstruction of the accident in view of the other testimony. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 632.) As explained above, there is sufficient evidence to support the jury's special verdict. In sum, the trial court did not err in denying his motion for a partial judgment notwithstanding the verdict.

DISPOSITION

The judgment is affirmed. Respondent is awarded his costs on appeal.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.