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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

BOBBY HOLLEY, Plaintiff and Appellant, v. SOUTHERN CALIFORNIA GAS COMPANY, Defendant and Respondent.	B270317 (Los Angeles County Super. Ct. No. BC525135)

APPEAL from judgment of the Superior Court of Los Angeles County, David Sotelo, Judge. Reversed.

L. Bishop Austin & Associates, L. Bishop Austin and Travis Poteat, for Plaintiff and Appellant.

Cranston J. Williams, for Defendant and Respondent.

Plaintiff Bobby Holley filed a negligence action against Southern California Gas Company alleging that he sustained injuries after his bicycle struck a pothole that was formed by a sunken gas valve cover. Southern California Gas filed a motion for summary judgment arguing that Holley's deposition testimony conclusively established that he did not hit the pothole. The trial court granted the motion, and entered a judgment against Holley. We reverse.

FACTUAL BACKGROUND

*A. **Summary of the Complaint***

On November 15, 2013, Bobby Holley filed a negligence action against the City of Huntington Park alleging that he had sustained serious injuries after his bicycle struck a large pothole. On February 14, 2014, Holley filed a "Doe" amendment (see Code Civ. Proc., § 474) alleging that the pothole was caused by a sunken gas valve cover that Southern California Gas Company (SCG) had installed in the street.

On September 11, 2015, SCG filed a motion for summary judgment arguing that Holley could not prove the causation element of his negligence claim because the undisputed evidence showed he had not hit the pothole. According to SCG, the evidence conclusively established that the pothole was located more than ten feet from where Holley had fallen, and therefore could not have caused the accident. In support of its motion, SCG submitted declarations from Huntington Park police officer Cliff Lohner, who had investigated the accident, and Huntington Park public works supervisor Juan Preciado. SCG also provided excerpts from Holley's deposition testimony.

Lohner's declaration stated that on June 11, 2012, he was dispatched to the intersection of Slauson Avenue and Regent Street in response to a report that a bicyclist had fallen. Lohner's declaration included a police report he had prepared regarding the incident. According to the report, Holley told Lohner he had been riding his bicycle eastward on Slauson, in the number two lane (the lane closest to the curb of the street). As Holley approached Regent Street, he felt "something thr[o]w him off the bicycle. After falling to the roadway, [Holley] noticed that he had rode his bicycle into a pothole in the roadway." Lohner estimated that the pothole was one foot in diameter. Paramedics who examined Holley informed Lohner that he appeared to have dislocated or broken his clavicle.

Lohner's declaration stated that he had used a laser measurer to determine that that the pothole was located approximately 16 feet from the south curb of Slauson Avenue. Lohner also took several photographs that showed the pothole was near the middle of the number two lane, just west of the intersection with Regent Street. A photograph that Lohner took from behind the pothole, facing eastward toward Regent Street, showed that the east curb of Regent Street protruded farther north into Slauson Avenue than the west curb of the street, causing the east side of Slauson to narrow at the intersection.

Juan Preciado's declaration stated that he had used a tape measurer to determine that the center of the pothole was located approximately 15 feet from the south curb of Slauson Avenue. The declaration also stated that Preciado had taken several photographs of the pothole. Consistent with the images Lohner had provided, Preciado's photographs showed the pothole was located near the middle of the number two lane, just west of the

intersection with Regent Street, and that the east side of Regent Street extended further north into Slauson Avenue than the west side of the street.

In the deposition excerpts that SCG filed in support of its motion, Holley testified he was riding his bicycle in the number two lane of Slauson, traveling eastward, approximately three feet from the south curb. Holley stated that as he was approaching Regent Street, he hit a six-inch deep pothole that caused him to flip over the handlebars. When opposing counsel asked Holley to clarify where he was positioned at the time of the accident, he stated that he was "close to the curb," and "a ways away" from the middle of the number two lane. Holley further clarified, however, that as he approached Regent Street, he had been forced to "swing out" left because "the curb cuts off and this new curb over here starts out. So you would hit the curb if you don't swing out."

Later in the deposition, opposing counsel asked Holley to confirm that he was three feet from the south curb of Slauson when the accident occurred. In response, Holley stated: "Well, that's a funny statement, because . . . you have to swing out away from the curb. But before the accident I was in [a] normal bike . . . path. If I would have stayed in that path, I would have hit the curb [on the east side of Regent Street]." When opposing counsel asked Holley how far left he had swerved, he stated, "Enough to hit that hole, I know that. I would say give me another foot." The following exchange then occurred:

COUNSEL: So when you hit the hole, you were about four feet from the curb?

HOLLEY: Yes, I'm going to assume.

COUNSEL:	Is it possible that when you swerved to the left, you swerved into the middle of the lane?
HOLLEY:	Like the first lane going east?
COUNSEL:	Yes.
HOLLEY:	I don't – that means I'd have to go and come back. No, I don't believe so. No.

SCG argued that Holley's statements "unequivocally" established that he was only three or four feet from the curb when he fell, and therefore could not have hit the pothole, which Lohner and Preciado had measured to be at least 15 feet from the curb.

In his opposition, Holley argued that his deposition testimony showed there was a triable issue of fact whether he had hit the pothole. Holley noted that he had specifically testified that he did hit the pothole, which caused him to go over the handlebars. Holley argued that although he had estimated that he was three or four feet from the curb when he fell, he had also testified that the configuration of the Slauson/Regent intersection had caused him to swing out into Slauson Avenue. Holley contended that the photographs SCG submitted in support of its motion confirmed that the "curb of Slauson Avenue protrudes to the left" at Regent Street, and that the pothole was positioned only "a few feet" north of where the Slauson curb lay east of Regent Street.

In support of his opposition, Holley provided a declaration asserting that his prior statements that he was three or four feet from the curb when he fell were intended to convey his location in relation to the position of the Slauson curb east of Regent Street, not west of Regent: "When I testified that I was not in the middle of the number two lane but close to the curb when the accident

happened, . . . I intended to convey that I was close to the northern curb of Slauson Avenue that I was approaching when the accident happened. When I answered the question at . . . my deposition as to how close the middle of the number two lane I was when the accident happened, I envisioned my position compared to the position of the northern curb of Slauson Avenue if it had extended south where the depression was located. I tried to explain this during my deposition . . . but I don't clear I was clear enough [sic] in my explanation. The present declaration is an attempt to make an explanation clearer."[1]

SCG filed an objection to Holley's declaration on the ground that it "contradicted his sworn deposition testimony." SCG also filed a reply arguing that under the rule set forth in *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, Holley could not defeat the motion for summary judgment based on declaration statements that contradicted his prior deposition testimony. SCG contended that because Holley had previously testified that he was three to four feet from the curb of Slauson at the time of the accident, and the undisputed evidence showed the pothole was at least 15 feet from that curb, SCG was entitled to judgment as a matter of law.

After a hearing, the court entered an order sustaining SCG's objection to Holley's declaration, and granting the motion for summary judgment. In its written ruling, the court explained that Holley's declaration "contradict[ed] (without substantial justification) [his] . . . sworn testimony" that he was "no more than 3-4 feet" from the south curb of Slauson Avenue at the time

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[1] As SCG acknowledged in the trial court, Holley's use of the term "northern curb of Slauson Avenue" appears to refer to the portion of curb laying east of Regent Street.

he fell. The court further explained that Holley's additional testimony that "he had to swing away from the southernmost curb at the time of the accident . . . [did] not create a dispute because he testified that at the point of his swinging out he was about 4 feet from the curb and that he did not enter the middle of the #2 lane. All of those facts remain undisputed. Plaintiff somehow purports to dispute that the pothole was 15-16 feet away from the [curb] by arguing that the [pothole] was actually three feet from the curb across [the intersection with Regent]. But it is undisputed that the only [pothole] . . . [wa]s actually located 15-16 feet away from the curb. There is no evidence that any pothole . . . exists or existed within 4 feet of the curb. [¶] In the end, [Holley] does not refute the fact that he testified that at no time before the accident he was near . . . 15-16 feet from the curb."

On January 25, 2016, the court entered a judgment dismissing Holley's claims against SCG.

DISCUSSION

*A. **Standard of Review***

"A motion for summary judgment is properly granted . . . when 'all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' [Citation.] We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. [Citation.]" (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1301 (*Chavez*).)

"Where, as here, a defendant moves for summary judgment and the plaintiff bears the burden of proof by a preponderance of the evidence at trial on the issues that are the subject of the

motion, the defendant initially 'must present evidence that would require a reasonable trier of fact *not* to find any underlying material fact more likely than not. . . . [Citation.] More specifically, a moving defendant must make a prima facie showing that the plaintiff does not possess, and cannot reasonably obtain, sufficient evidence to establish at least one element of plaintiff's cause of action." (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 506-507 [emphasis in the original] [citing and quoting *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851-852 (*Aguilar*)]; see also *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003.) "A defendant can satisfy its initial burden to show an absence of evidence through 'admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing' [citation], or through discovery responses that are factually devoid.' [Citation.]" (*Chavez, supra,* 207 Cal.App.4th at p. 1302.)

"Only after the defendant's initial burden has been met does the burden shift to the plaintiff to demonstrate, by reference to specific facts, not just allegations in the pleadings, there is a triable issue of material fact as to the cause of action. [Citations]." (*Chavez, supra,* 207 Cal.App.4th at p. 1302.)

"'In reviewing the evidence, we strictly construe the moving party's evidence and liberally construe the opposing party's and accept as undisputed only those portions of the moving party's evidence that are uncontradicted.' [Citation.]" (*Scalf v. D.B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1519 (*Scalf*).) "Only when the inferences are indisputable may the court decide the issues as a matter of law. If the evidence is in conflict, the factual issues must be resolved by trial. 'Any doubts about the propriety of summary judgment . . . are generally resolved

against granting the motion, because that allows the future development of the case and avoids errors. [Citation.]" (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 839; see also *Katz v. Chevron Corp*. (1994) 22 Cal.App.4th 1352, 1365 ["doubts as to the propriety of granting the motion should be resolved in favor of the opposing party"].)

B. SCG Failed to Make a Prima Facie Evidentiary Showing that Holley Cannot Prove His Claim

Holley contends SCG failed to satisfy its initial burden to present evidence that would require the trier of fact to find he did not strike the pothole, thus negating the element of causation. (See *Aguilar, supra,* 25 Cal.4th at p. 851 [defendant moving for summary judgment has an initial burden to "present evidence that would require a reasonable trier of fact" to find that plaintiff cannot establish an element of his or her claim]; *Castellon v. U.S. Bancorp* (2013) 220 Cal.App.4th 994, 998 ["elements of a negligence cause of action are the existence of a legal duty of care, breach of that duty, and proximate cause resulting in injury"].)

As summarized above, SCG provided two general categories of evidence in support of its motion: (1) declarations from Huntington Park officials stating that the pothole was located approximately 15 to 16 feet from the nearest point of the southern curb of Slauson Avenue; (2) Holley's deposition testimony, which included statements that he was riding his bicycle approximately three to four feet from the curb at the time he fell. SCG asserts that Holley's statements about where he was located at the time of the accident qualify as binding admissions that would preclude the trier of fact from finding he struck a pothole located 15 to 16 feet from the curb. Holley disagrees,

contending that other statements he made during his deposition show there is a triable issue of fact whether he hit the pothole.

"'Where . . . there is a clear and unequivocal admission by the plaintiff . . . in his deposition[,] . . . there is no substantial evidence of the existence of a triable issue of fact.'" (*D'Amico, supra,* 11 Cal.3d at p. 21.) "A summary judgment[, however], should not be based on tacit admissions or fragmentary and equivocal concessions, which are contradicted by other credible evidence." (*Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 482 [overruled on other grounds, *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1182]; *Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 459-460; *Scalf, supra,* 128 Cal.App.4th at pp. 1522-1523.) In assessing whether a plaintiff's prior statement regarding a material fact at issue qualifies as an unequivocal admission, we do not consider the statement in isolation, but rather must consider it within context of the entire evidentiary record. (*Mason v. Marriage & Family Center* (1991) 228 Cal.App.3d 537, 546 ["We do not interpret [*D'Amico*] . . . as saying that admissions should be shielded from careful examination in light of the entire record"]; see also *Ahn v. Kumho Tire U.S.A., Inc.* (2014) 223 Cal.App.4th 133, 145 ["the *D'Amico* rule . . . does not countenance ignoring other credible evidence that contradicts or explains that party's answers or otherwise demonstrates there are genuine issues of factual dispute'"].)

Considered as a whole, the evidence SCG submitted in support of its motion would not preclude the trier of fact from finding that Holley struck the pothole. At his deposition, Holley specifically testified that the front tire of his bicycle hit a six-inch deep pothole that caused him to eject forward over his

handlebars. Although Holley approximated that he was three feet from the curb when he fell, he also asserted that the configuration of the Slauson/Regent intersection forced him to "swerve left" shortly before the accident occurred. When asked how far he had swerved, Holley unequivocally stated, "Enough to hit that hole, I know that." He then estimated that he had swerved one foot left, but clarified he was just making an "assum[ption]."

The photographs SCG submitted show that the east curb of Regent Street extends further north into Slauson Avenue than the west curb of the street. Consistent with Holley's testimony, the photographs suggest that a bicyclist traveling east along the south curb of Slauson Avenue would be required to move leftward, toward the middle of the number two lane of Slauson, to avoid hitting the curb on the east side of Regent. The photographs also show the pothole was located in the middle of the number two lane of Slauson, just west of the intersection with Regent Street.

Finally, the manner in which Holley fell—ejected over the handlebars–suggests that his front wheel experienced a sudden decrease in speed, which is consistent with hitting a large, deep pothole. SCG's evidence failed to identify any other possible cause of the accident, or raise any alternative theory about what could have caused him to go over the handlebars.

Based on Holley's testimony, the configuration of the Slauson/Regent intersection and the manner of the fall, a trier of fact could reasonably conclude that Holley hit the pothole while maneuvering leftward as he approached the Regent intersection. Holley's statements approximating how far he was from the curb when he fell would not preclude the trier of fact from making

such a finding. "[T]he weight to be accorded to [a witness's] . . . distance estimates" is generally an issue for "the jury to determine." (*Sills v. Los Angeles Transit Lines* (1953) 40 Cal.2d 630, 636.) As our Supreme Court has previously observed, "estimates of distance are rarely accurate," particularly when the witness is "testifying from memory as to a fact observed many years before." (*Mercantile Trusto. of San Francisco v. All Persons Claiming* (1920) 183 Cal. 369, 375; see also *Swatzell v. Pacific Greyhound Lines* (1958) 161 Cal.App.2d 544, 546 ["testimony of a witness concerning . . . distance, particularly when the case involves moving vehicles . . . are only estimates and can never be exact"].)

In this case, the trier of fact court could reasonably infer that Holley had simply inaccurately estimated or remembered how far he was from the curb at the time he fell. Holley's deposition was taken more than two years after the accident occurred, and he was never asked how certain he was about his distance estimates. His statements, take as a whole, were equivocal except as to one fact: that he hit the pothole. Moreover, during his deposition, Holley was never given a context in which to estimate distance by being told the pothole was actually located 15 or 16 feet from the south curb of Slauson, nor was he asked whether he could have been that far from the curb when he fell. Nothing in SCG's evidence would compel the trier of fact to find that Holley's recollections as to how far he was from the curb were accurate.

Because the evidence that SCG submitted in support of its motion for summary judgment would not have required a jury to

find that Holley did not hit the pothole, we reverse the judgment.[2]

DISPOSITION

The trial court's judgment is reversed. Holley shall recover his costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.

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[2] In his appellate brief, Holley argues that the trial court erred in excluding a declaration he filed in support of his opposition to the motion for summary judgment. The trial court concluded that the declaration, which attempted to clarify the distance estimates Holley had provided at his deposition, was inadmissible because it directly conflicted with his prior sworn testimony. (See generally, *D'Amico, supra*, 11 Cal.3d at p. 21; *Ahn*, *supra*, 223 Cal.App.4th at p. 136 ["a trial court [may] disregard declarations by a party which contradict his or her own discovery responses [] absent a reasonable explanation of the discrepancy[]"].) Because we conclude SCG failed to make a prima facie evidentiary showing that there was no triable issue of fact whether Holley struck the pothole, we need not address this issue.