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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JILL CARLTON et al., Plaintiffs and Appellants, v. CITY OF TORRANCE, Defendant and Respondent.	B233888 (Los Angeles County Super. Ct. No. YC061411)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dudley W. Gray, II, Judge. Affirmed.

Yukevich Calfo & Cavanaugh and James J. Yukevich for Plaintiffs and Appellants.

Woodruff, Spradlin & Smart and M. Lois Bobak for Defendant and Respondent.

Appellants appeal from the judgment entered after the court granted the motion for summary judgment filed by the City of Torrance. Carlton's appeal rests primarily on the assertion that the trial court improperly sustained objections to portions of the testimony of her expert witness, through whom she attempted to demonstrate that there were disputed issues of material fact with respect to her claims under Government Code section 835. Finding the trial court did not abuse its discretion in excluding the evidence proffered to establish the disputed issues, and that there are no disputed issues of material fact with respect to the City's liability, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL SUMMARY

Appellant Carlton was seriously injured in a broadside accident in the City of Torrance on December 4, 2008. Sharon Poon ran a red signal at the intersection of Torrance Boulevard and Van Ness-Cabrillo, and then stopped in the middle of that intersection. Carlton, entering the intersection on a green signal, could not avoid the collision.

Carlton and her husband Steven Carlton ("Carlton"), filed suit, naming Poon, the City of Torrance, and Sully-Miller Contracting Company, which was conducting work near the intersection.[1] The first amended complaint, filed on March 24, 2010, alleged, as to the City, negligence with respect to the work being performed by Sully-Miller (second cause of action), negligence under Government Code sections 835 and 830.6 (third cause of action), and loss of consortium (fourth cause of action).

On November 24, 2010, the City filed a motion for summary judgment, or in the alternative summary adjudication. In response, Carlton filed opposition papers, asserting the presence of disputed issues of material fact, and attaching the declaration of several individuals, including a traffic expert, Robert F. Douglas. In its reply papers, the City included formal evidentiary objections to much of Carlton's evidence, including significant portions of the Douglas declaration. Although his expertise was not contested,

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1 Only the claims against the City are at issue in this appeal.

his opinions were objected to as lacking foundation, and as improper expert testimony. The court sustained 17 of the objections, and overruled nine.

The trial court then granted the motion for summary judgment, finding that the City had met its burden as the moving party but that Carlton "failed to present any competent admissible evidence that the design of the subject intersection caused or contributed to the alleged accident." The trial court relied on Poon's testimony that she did not see the light because she was not paying attention as well as her testimony that her view of the light was not obstructed. The court also found that the Douglas declaration did not create a triable issue of material fact that the intersection was a dangerous condition of public property that was a substantial factor in causing the accident.

Carlton moved for reconsideration of the ruling; the trial court denied that motion on April 25, 2011.[2] The court entered judgment on May 31, 2011. Carlton timely appealed.

DISCUSSION

Carlton asserts that the court erred in sustaining objections to the Douglas declaration, and in relying on Poon's statements that she was not paying attention to the red light to grant the motion. While there can be a dangerous condition of public property notwithstanding the negligence of the driver in a particular case,[3] Carlton failed to demonstrate with admissible evidence that there was a disputed issue of material fact with respect to the City's notice of the alleged dangerous condition. As a result, we will affirm the judgment.

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2 No claim of error is asserted based on the denial of this motion.

3 See, e.g., *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 768; *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 718-719. We note that the record does not establish that any of the accidents relied on for the assertion that the intersection was a dangerous condition of public property occurred in the absence of driver negligence.

Standard of Review

We review the trial court's grant of summary judgment de novo. "A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .' [Citations.]" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477; see also *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855; *Katz v. Chevron Corp.* (1994) 22 Cal.App.4th 1352, 1363-1364.)

We review the evidentiary determinations of the trial court for abuse of discretion. (*Maatuk v. Guttman* (2009) 173 Cal.App.4th 1191, 1197.) In ruling on matters pertaining to opinions expressed by experts, the trial court has broad discretion in determining whether the foundation set forth for that opinion testimony is adequate. (*Id.* at p. 1197.)[4]

To establish liability under Government Code section 835, a plaintiff must prove a dangerous condition, a foreseeable risk arising from that condition of the kind of injury suffered by plaintiff, either negligence by the public entity in creating the condition or failure to correct it after notice, a causal relationship between the condition and the plaintiff's injuries, and compensable damages. (See, *e.g., Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 757-758.) We need not address any issue other than notice

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4 Prior to *Reid v. Google* (2010) 50 Cal.4th 512, 535, courts were in agreement that evidentiary rulings in summary judgment motions were reviewed for abuse of discretion. The Supreme Court declined to decide the issue; we will rely on existing case law. See also, *Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1114.

in this case, as the failure to establish a disputed issue of material fact concerning the City's notice renders it unnecessary to decide the other assertions of error.[5]

The Trial Court Did Not Abuse its Discretion in its Evidentiary Rulings

Over City's objection, the trial court admitted Douglas's declaration with respect to the number of accidents at the intersection, the number of broadside accidents, and his opinion that this represented a high rate of accidents. These paragraphs were submitted in support of Carlton's assertions that the City's Statement of Undisputed Facts No. 40,[6] No. 44[7], and 45[8] were disputed issues. Douglas's ultimate opinion that the City had timely notice of a dangerous condition, however, was not admitted.

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5 Pursuant to Code of Civil Procedure section 437c, subdivision (m)(2), we provided an opportunity for the parties to provide supplemental briefing on the issue of notice, although both parties briefed this issue in their initial briefing at this Court. Both parties provided supplemental briefing.

6 "In 2003 there were no intersection-related accidents at the subject intersection. Disputed: In 2003 there was at least one intersection-related accident occurring on February 11, 2003. In addition, the City of Torrance produced reports for accidents occurring within 50 feet of the subject intersection. Based on expert witness opinion, plaintiffs have an outstanding discovery request seeking all reports for accidents occurring within 250 feet of the subject intersection to which the City of Torrance has not yet responded and this may form the basis for a dispute of this alleged material fact. (See Douglas Decl., pars. 22-23.)"

7 "In 2007 there were five intersection-related accidents at the subject intersection. Disputed: The City of Torrance produced reports for accidents occurring within 50 feet of the subject intersection. Based on expert witness opinion, plaintiffs have an outstanding discovery request seeking all reports for accidents occurring within 250 feet of the subject intersection to which the City of Torrance has not responded and this may form the basis for a dispute of this alleged material fact. (See Douglas Decl., pars. 24, 29.)"

8 "Prior to December 4, 2008 there were four intersection-related accidents in 2008. Disputed. The City of Torrance produced reports for accidents occurring within 50 feet of the subject intersection. Based on expert witness opinion, plaintiffs have an outstanding discovery request seeking all reports for accidents occurring within 250 feet of the subject intersection to which the City of Torrance has not yet responded and this

Expert testimony must rest on facts rather than assumptions and speculation, and has no evidentiary value unless there is a reasoned explanation connecting the factual predicates to the conclusions drawn. (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117; *Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 530; *Dee v. PCS Property Management, Inc.* (2009) 174 Cal.App.4th 390, 404 [expert does not have "carte blanche" to express any opinion within his area of expertise].)

The factual basis for Douglas's conclusions in the disputed paragraphs is thin, at best. He refers to several sources for the number of accidents at the intersection, but attaches only one: the SWITERS reports. Unfortunately, the numbers he cites do not match the SWITERS reports[9] More significantly, he gives no details of the accidents to establish similarity; he does not analyze: the type of accident (car v. car; car v. bicycle, rear-end v. sideswipe); the distance from the intersection; whether the red signal was an issue or some other factor was found to be causative. As a result, those statements that were admitted over the City's objection are not factually sufficient to create a disputed issue of material fact.

As to the opinions drawn from those statements, particularly the bare conclusion that the City had notice, the trial court did not abuse its discretion in finding them to be without foundation and excluding them. While it is true that an expert's declaration in opposition to a motion for summary judgment can be more liberally construed than one in support of summary judgment (see, e.g. *Jennifer C. v. Los Angeles Unified School District* (2009) 168 Cal.App.4th 1320, 1332-1333), there must still be some showing of similarity of accidents, even if modest, to demonstrate that the public entity had the notice required under section 835. The previous incidents must "be such as to attract the

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may form the basis for a dispute of this alleged material fact. (See Douglas Decl., pars. 24, 29.)"

9 The SWITERS report shows one accident in 2005, two in 2007 and one prior to the accident at issue in 2008. In contrast, Douglas asserts there were 10 accidents in 2007 through 2008, and discusses none in 2005.

defendant's attention to the dangerous situation which resulted in the litigated accident." (*Laird v. T. W. Mather, Inc.* (1958) 51 Cal.2d 210, 220; *Hilts v. County of Solana* (1968) 265 Cal.App.2d 161, 168-169.) Here, there was no showing at all attempted; instead Douglas merely asserts that accidents occurred in or close to the intersection, and does not either describe the nature of the accidents or identity any as being related to the timing or location of the signal. He asserts that there were a number of broadside accidents, but an examination of the SWITERS reports on which he purports to rely shows that, of the eleven accidents prior to this one, three were indicated as broadsides; of those, only one indicated that the traffic signal was an issue in any way. His declaration is silent as to the undisputed fact that there had been no claims filed against the City with respect to this intersection prior to the accident. In short, nothing in his declaration supports his excluded conclusion that there was notice to the City of a dangerous condition. Nothing in the declaration, whether excluded or admitted, purports to explain how the conclusion relates to the facts on which Douglas relied.

The declaration in this case should be compared to that in *Salas v. California Department of Transportation* (2011) 198 Cal.App.4th 1058. In *Salas*, which also arose from a summary judgment motion in an accident case, defendants shifted the burden to plaintiff to demonstrate a disputed issue of material fact with respect to liability under Government Code section 835. Plaintiffs submitted a declaration from their traffic expert, Robert Douglas. In his declaration, as described in the court's opinion, he detailed the studies he made at the intersection, and the results he obtained. He examined and discussed 24 accident reports for the intersection. Defendants objected to much of his declaration and, as here, the trial court sustained the majority of the objections. (*Salas, supra*, 198 Cal.App.4th at pp.1065-1066.) Holding that a stricter degree of similarity of other accident evidence is required when offered, as it was in that case to show a dangerous condition of public property, the court made clear that "there must be substantial similarity to offer other accident evidence for any purpose . . . ." (*Id.* at p. 1072.) The court found no abuse of discretion in the exclusion of the evidence because the accidents were not substantially similar. Unlike this case, the description of the

accidents was sufficient to draw that conclusion; here the declaration does not provide sufficient detail to do so.

Even were the descriptions of the accidents sufficient, Carlton's showing would still be lacking. To demonstrate that a governmental entity is on notice by virtue of accidents, there must be a showing that the rate of accidents "was statistically aberrant, i.e., unusual or excessive in some respect." (*Compton v. City of Santee* (1993) 12 Cal.App.4th 591, 599.) The City asserted, in its Statement of Undisputed Facts, Numbers 46 to 47, that the calculated rate of accidents at this intersection was less than that expected based on published data. Douglas did not address the calculated rate in any manner; there is no evidence cited by Carlton that creates a disputed issue with respect to this rate.

Finally, in the supplemental briefing, Carlton asserted for the first time that notice is irrelevant, as there is a disputed issue of material fact as to whether a negligent act of a City employee created the dangerous condition. (§ 835, subd. (a).) Because the City controls the traffic signal clearing times at the intersection, and because her expert included in his declaration his opinion that the clearing times were insufficient, creating a dangerous condition of public property, Carlton asserts summary judgment is improper. However, this argument neglects the fact that the City's objections to these opinions were sustained by the trial court. The Douglas declaration set forth no facts supporting his conclusions with respect to inadequate clearance times other than the accident history at the intersection. As discussed above, that history, as he described it, was inadequate to draw a conclusion as to the nature, number, or cause of the accidents at the intersection. The trial court did not abuse its discretion in excluding those opinions.

Summary Judgment Was Proper Based on the Admissible Evidence

There was no basis for the opposition on the grounds of notice other than the Douglas declaration; accordingly, Carlton failed to meet her burden and summary judgment was properly granted. An expert declaration is insufficient to defeat summary judgment if it relies on self-serving declarations devoid of factual basis, explanation or

reasoning. (*Nardizzi v. Harbor Chrysler Plymouth Sales, Inc.* (2006) 136 Cal.App.4th 1409, 1415.) The "ipse dixit of the most profound expert proves nothing except it finds support upon some adequate foundation." (*Estate of Teed* (1952) 112 Cal.App.2d 638, 646.)

DISPOSITION

The judgment is affirmed. Defendant is to recover its costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.