Filed 11/14/17 Duarte-Garcia v. City of Santa Maria CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

HERMALINDA DUARTE-GARCIA et al., Plaintiffs and Appellants, v. CITY OF SANTA MARIA, Defendant and Respondent.	2d Civil No.B278418 (Super. Ct. No. 1456748) (Santa Barbara County)

A criminal suspect attacked a city police officer and stole his car. During the pursuit by police, the suspect collided with another vehicle, injuring Hermalinda Duarte-Garcia. Plaintiffs Duarte-Garcia and Juan Jose Velazquez (collectively "Duarte-Garcia") sued the City of Santa Maria (City), alleging the officer was negligent in allowing the suspect to drive away with the police car. The City requested that the trial court hold a hearing pursuant to Evidence Code section 402 to determine the question of causation. The court granted the request. After the hearing,

the court granted the City the equivalent of a judgment of nonsuit.

We affirm. The police officer was not negligent. Even if he were, the City is immune from liability under Vehicle Code, section 17004.7, granting immunity for damages caused by a collision during a police pursuit.

FACTS

In the early afternoon of August 11, 2012, Santa Maria Police Officer Robert Prescott[1] was in the station when he heard a radio call that there had been a robbery at the Chase Bank at North Broadway and Grant Street. The radio call described the robber as a white male adult, wearing a blue jacket. He was last seen jumping into the bed of a red pickup truck heading southbound on North Broadway.

Prescott got into a police cruiser and drove north on North Broadway looking for a red pickup truck. When Prescott stopped at a stop sign, a citizen told him there was a fight and pointed east. Prescott looked east and saw a Jeep Cherokee moving toward him. The Jeep was being driven by a woman at about 20 to 25 miles per hour. A white adult male was hanging outside the Jeep by holding onto a partially open driver's side window with both hands.

Prescott believed he was witnessing a domestic dispute. He did not recognize the man hanging onto the Jeep as the bank robber. The bank robber was last seen in the bed of a red pickup truck and was wearing a blue jacket. The man on the Jeep was

---

[1] Prescott did not testify at the Evidence Code section 402 hearing (hereafter "402 hearing"). Nevertheless, both parties in their statement of facts on appeal cite to Prescott's deposition testimony submitted by the City in an unsuccessful motion for summary judgment.

wearing a white shirt. Prescott did not realize that he was witnessing an attempted carjacking.

The Jeep came to a stop at the intersection where Prescott was stopped. The man fell off the Jeep, got to his feet and began walking toward Prescott in a fast, determined and angry manner with his fists clenched. Prescott thought this odd. Most people involved in a domestic dispute flee from the police.

Prescott got out of his cruiser to confront the man. He left the engine running. Prescott could tell from the man's aggressive manner that the man wanted to fight. It was only a matter of seconds from the time the man fell from the Jeep until he was within an arm's length of Prescott and the cruiser. By the time Prescott got out of the cruiser, the man was at the car door.

Prescott and the man backed up four or five feet. Prescott tried to use his taser, but the safety was on. Prescott removed the safety and deployed the taser, but only one of the two darts hit the man. The man fell to the ground and started to get back up. Prescott kicked the man twice in the face to no apparent effect.

In no more than two seconds from being kicked, the man was at the door of the cruiser. Prescott was immediately behind the man attempting to strike him with his baton. As the man sat in the driver's seat, Prescott attempted to get in with him on the driver's side, still attempting to hit him with his baton.

As the man started to drive away, Prescott's feet were still outside the cruiser. Prescott was dragged for a short distance. After Prescott let go of the cruiser, the man accelerated rapidly away.

Prescott called dispatch and reported that a man had taken his cruiser and was headed westbound on West Donovan Road.

As the police units arrived, Prescott motioned for them to go westbound.

A short time later, the man ran through a red light at a high rate of speed and collided with another car. The other car struck Duarte-Garcia, a pedestrian.

It was the bank robber, Philip Bailey, who took the cruiser.

Plaintiffs' Expert

David Dusenbury testified as an expert in police procedures. Dusenbury testified that when Bailey came towards Prescott in an aggressive manner, Prescott should have realized Bailey was a threat. Prescott should have called for emergency backup. Prescott also should have locked his door to give himself some time. Once Prescott got out of the cruiser, he should have removed the key and placed it where Bailey was unlikely to have access to it.

When asked on direct examination whether it is unusual for a suspect to approach an officer in an aggressive manner while the officer is sitting in his police car, Dusenbury replied: "This was a very unique, unusual event. Depending upon the circumstances, there are suspects who move aggressively toward police officers, but I have never heard of, or had any case similar to, this one at all."

Dusenbury said in the "most common" circumstances in which a police car is stolen, the suspect is placed in the back seat in handcuffs. The engine is idling. While the officer is away from the car, doing something else, the suspect manages to move his handcuffs from his back to his front. He climbs over the front seat and drives away.

Ruling

The trial court gave judgment to the City, finding that the collision was not reasonably foreseeable. In so finding, the court

cited Dusenbury's testimony that the circumstances in which Prescott's police car was stolen constitutes "a very unique, unusual event."

DISCUSSION

I

The City contends Duarte-Garcia's appeal is untimely.

The 402 hearing was held on October 26, 2015. The trial court's minute order for that date states, "Court orders judgment for the Defendant."

The City filed and served a document captioned "Notice of Judgment" on December 22, 2015. The notice does not include the words "entry of." A formal judgment was signed by the trial court and filed on September 16, 2016.

Duarte-Garcia filed a "Notice of Entry of Judgment" on September 22, 2016. The notice attaches the "Judgment By Court," filed September 16, 2016.

Duarte-Garcia filed a notice of appeal on October 19, 2016.

The City moved to correct the judgment filed on September 16, 2016, to reflect that the judgment was entered on October 26, 2015, the date of the minute order. The trial court denied the motion.

The City does not argue that the "Notice of Judgment" it filed and served was sufficient to start the 60-day period for filing a notice of appeal. Instead, the City argues that the minute order constitutes the judgment, and more than 180 days passed between the "entry of judgment" by the minute order and the filing of the notice of appeal. (Cal. Rules of Court, rule 8.104(a)(1)(C).)

California Rules of Court rule 8.104(c)(1) provides in part: "The entry date of a judgment is the date the judgment is filed under Code of Civil Procedure section 668.5 . . . ." Code of Civil

Procedure section 668.5 provides in part: "[T]he date of filing the judgment with the clerk shall constitute the date of its entry."

A minute order is not filed with the clerk, but it is always a part of the court record. Under Code of Civil Procedure section 668.5, "a judgment's date of filing, as shown on a file stamp, is the judgment's date of entry." (*Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265, 1268, fn. 2.) Minute orders are "virtually never file stamped." (*In re Marriage of Taschen* (2005) 134 Cal.App.4th 681, 686.) Duarte-Garcia's appeal is timely.

II

Duarte-Garcia contends a hearing pursuant to Evidence Code section 402 is not the proper procedure for obtaining a judgment.

The trial court denied the City's motion for summary judgment. Prior to trial, the court granted the City's motion for a 402 hearing to determine the issue of causation.

Evidence Code section 402 provides that when the existence of a "preliminary fact" is in dispute, the court may hear and determine the question of admissibility of evidence out of the presence or hearing of the jury.

Causation is not a preliminary fact. It is an element of a cause of action for negligence. (6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 835, p. 52.) Proximate cause is generally a question of fact for the jury. (*Id.*, § 1184, p. 551.) On undisputed facts, however, the question is one of law. (*Id.* at p. 552.)

Although Evidence Code section 402 is not a precise fit for the hearing that occurred here, such a procedure has been employed under similar circumstances. Thus in *Tan v. Arnel Management Co.* (2009) 170 Cal.App.4th 1087, 1094-1095 (*Tan*), the trial court granted judgment to the defendant on the question

of duty based on evidence adduced at a 402 hearing held in limine. The Court of Appeal said the proceeding was the functional equivalent of a motion and order for nonsuit.

In reviewing a judgment of nonsuit, we must view the facts in a light most favorable to the plaintiffs. (*Tan*, *supra*, 170 Cal.App.4th at p. 1095.) We may not weigh the evidence or consider the credibility of witnesses. (*Ibid.*) We must draw every reasonable inference from the evidence in plaintiffs' favor. (*Ibid.*)

Tan reversed the judgment on substantive grounds. But the appellate court had no quarrel with the procedure used by the trial court. Indeed, where the evidence is viewed most favorably for the plaintiff or the undisputed evidence shows the plaintiff cannot prevail, there is no reason to take the matter to trial. The need to preserve judicial resources provides a compelling reason not to.

Here, the trial court invited Duarte-Garcia to submit whatever evidence she wanted at the 402 hearing. Except for the testimony of Dusenbury and an accident reconstruction expert, she declined.

Duarte-Garcia points out that the trial court denied the City's motion for summary judgment. But she cites no authority that bars the trial court from declaring what is tantamount to a nonsuit after denying the defendant's motion for summary judgment.

In fact, both parties rely on evidence submitted in the City's summary judgment motion in addition to the evidence admitted at the 402 hearing. This provides an adequate record to decide this appeal despite the unusual procedural posture.

III

(a) Liability

Duarte-Garcia contends the trial court erred in finding that Bailey's conduct was a superseding cause of her injury.

In a negligence action, the plaintiff has the burden of showing that the defendant owed the plaintiff a legal duty, that the defendant breached that duty, and that the breach was the proximate cause of injuries suffered by the plaintiff. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673, overruled on other grounds by *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527.)

Causation has two elements. One element is cause in fact. The plaintiff must show the defendant's breach of duty was a substantial factor in causing the harm. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 968-969.) The other element is proximate cause. Proximate cause concerns considerations of policy that limit an actor's responsibility for the consequences of his conduct. (*PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 316.) "[W]here there is an independent intervening act that is not reasonably foreseeable, the defendant's conduct is not deemed the 'legal' or proximate cause." (6 Witkin, Summary of Cal. Law, *supra*, Torts, § 1186, p. 553.)

Here, the trial court found the collision was not reasonably foreseeable. Duarte-Garcia argues the trial court misconstrued the meaning of reasonably foreseeable. On this point, we agree with Duarte-Garcia. This is not the *Palsgraf* case. (*Palsgraf v. Long Island R. Co.* (N.Y. Ct.App. 1928) 162 N.E. 99.)

Duarte-Garcia relies on *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49 (*Bigbee*). In *Bigbee*, plaintiff was standing in a public telephone booth in the parking lot of a liquor store. An intoxicated driver veered off the street and into the parking lot.

Plaintiff saw the driver coming toward him and tried to leave the booth, but the door was stuck. The car crashed into the booth injuring plaintiff. Plaintiff alleged he could have escaped but for the booth having a defective door. Plaintiff sued the maker of the booth alleging a defective design, manufacture and installation of the booth. The defendant claimed the intoxicated driver was a superseding cause and that plaintiff's injury was not reasonably foreseeable. The court rejected this theory. It relied on foreseeability.

Our Supreme Court said: "[I]t is well to remember that 'foreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct.' [Citation.] One may be held accountable for creating even "'the risk of a slight possibility of injury if a reasonably prudent [person] would not do so."' [Citations.] Moreover, it is settled that what is required to be foreseeable is the general character of the event or harm – e.g., being struck by a car while standing in a phone booth – not its precise nature or manner of occurrence." (*Bigbee*, *supra*, 34 Cal.3d at pp. 57-58.)

When a criminal suspect obtains control of a police car in an attempt to flee, it is reasonably foreseeable that an innocent person may be harmed in the ensuing chase. Like the facts in *Bigbee*, the facts here have nothing to do with a "superseding cause." This case is simply a question of breach of duty in allowing a criminal suspect to obtain control of the police car in the first place.

Duarte-Garcia relies principally on *Duarte v. City of San Jose* (1980) 100 Cal.App.3d 648 (*Duarte*). In *Duarte*, a police officer arrested a driver for driving under the influence. He

placed the driver in the back of a police car without handcuffs. The officer left the motor running and stepped away from the police car to help another officer move the driver's car. While the officer was away, the driver got into the front seat of the police car and sped off. The resulting high speed chase ended when the driver lost control and struck plaintiff with the police car.

The trial court granted the defendant city summary judgment. The Court of Appeal reversed. The Court of Appeal determined the police officer had "a duty not to leave the motor running in an unattended police vehicle occupied by a possibly intoxicated person." (*Duarte*, *supra*, 100 Cal.App.3d at p. 659.) The appellate court stated, "The reasonable likelihood that an arrested drunk driver might, in his inebriated state of mind, try to flee is precisely the hazard that makes giving him easy access to a vehicle negligent." (*Ibid*.)

Here Prescott did not place Bailey in a police vehicle and did not leave the vehicle unattended with an arrested person inside. Prescott's action of kicking Bailey in the face, tasing him, and hitting him with a baton cannot reasonably be described as giving Bailey "easy access" to the police car. The circumstances under which the police vehicle was taken in *Duarte* are similar to those described by Dusenbury as "most common." The circumstances here were described by Dusenbury as "very unique" and occurred in a matter of seconds.

Dusenbury testified that Prescott should have locked himself in the car and called for backup. When Prescott left the car, he should have put the keys where Bailey could not obtain them.

But an officer locking himself in his car in the face of an imminent public danger is not what the public expects of its police. Nor is there evidence to suggest backup would have

arrived on time to be of assistance. Prescott had only seconds to react before Bailey confronted him. He had no time to remove the keys. Stripped of Dusenbury's advantage of hindsight, there is nothing to suggest Prescott acted unreasonably in this "very unique" circumstance.

(b) Immunity

Even if the City has some liability, it has immunity under section 17004.7.[2]

Section 17004.7 subdivision (b)(1) provides: "A public agency employing peace officers that adopts and promulgates a written policy on, and provides regular and periodic training on an annual basis for, vehicular pursuits complying with subdivisions (c) and (d) is immune from liability for civil damages for personal injury to or death of any person or damage to property resulting from the collision of a vehicle being operated by an actual or suspected violator of the law who is being, has been, or believes he or she is being or has been, pursued in a motor vehicle by a peace officer employed by the public entity."

Duarte-Garcia does not dispute that the City has adopted and promulgated the required written policy in compliance with Section 17004.7, subdivision (c), and provides regular and periodic training in compliance with Section 17004.7, subdivision (d).

Duarte-Garcia claims, however, that there was never a vehicle pursuit of Bailey. She points out that Prescott testified in his deposition that he did not hear of a vehicle pursuit by the City until his deposition. The City police watch commander testified that there was no vehicle pursuit, and that if there had been one, he would have been involved in that decision.

---

[2] All further statutory references are to the Vehicle Code.

Duarte-Garcia's argument is unavailing for two reasons. First, section 17004.7 does not require any formalities to constitute a vehicle pursuit. The uncontradicted evidence is that, as police units arrived, Prescott motioned for them to go westbound, following his stolen police car. That constituted a vehicle pursuit whether the police recognized it as such. Second, section 17004.7 does not require an actual vehicle pursuit. It only requires that the suspect "believes he or she is being or has been, pursued in a motor vehicle by a peace officer employed by the public entity." (*Id.*, subd. (b)(1).)

The undisputed evidence is that Bailey left the scene at a high rate of speed and was still going at a high rate of speed at the time of the collision. Bailey had just stolen a police car directly from an officer. There is no reasonable doubt he believed he was being pursued.

Duarte-Garcia argues that section 17004.7 does not provide immunity for negligence that occurs prior to the police pursuit. She relies on section 17001, which states: "A public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his employment."

But section 17001 is a general liability statute. Section 17004.7 provides an exception to the general liability imposed by section 17001. Section 17004.7 provides immunity for all "damages" resulting from a collision of a vehicle being operated by a suspect during a police pursuit. It is not concerned with when the police were negligent. If the Legislature had intended to provide immunity only for police negligence that occurs during a pursuit, we presume it would have said so.

In an attempt to convince us that section 17004.7 does not mean what it plainly says, Duarte-Garcia requests that we take judicial notice of its legislative history. We decline. Where, as here, the meaning of a statute is clear, there is no need to resort to legislative history. (*California School Employees Assn., Tustin Chapter No. 450 v. Tustin Unified School Dist.* (2007) 148 Cal.App.4th 510, 517.) Our concern is what the Legislature said, not what it may have had in mind.

Finally *Duarte* is of no help to Duarte-Garcia on the question of immunity. Section 17004.7 was enacted after *Duarte* was decided. (Added by Stats. 1987, ch. 1205, § 1.)

The judgment is affirmed. Costs are awarded to respondent.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

James F. Rigali, Judge

Superior Court County of Santa Barbara

Law Offices of John T. Schreiber, John T. Schreiber; Law Offices of Carl L. Brown, Carl L. Brown for Plaintiffs and Appellants.

Hall, Hieatt & Connely LLP, Jay A. Hieatt, Molly E. Thurmond for Defendant and Respondent.