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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

B.H., a minor, etc.,

Plaintiff and Appellant,

v.

COUNTY OF SAN BERNARDINO et al.,

Defendants and Respondents.

E054516

(Super.Ct.No. CIVDS913403)

OPINION

APPEAL from the Superior Court of San Bernardino County. Donald R. Alvarez, Judge. Affirmed.

The Keane Law Firm, Christopher J. Keane; Esner, Chang & Boyer, Stuart B. Esner and Andrew N. Chang for Plaintiff and Appellant.

Lynberg & Watkins, Norman J. Watkins, Shannon L. Gustafson and Pancy Lin Misa for Defendants and Respondents.

In September 2008, when B.H. was two years old, his mother, L.H., noticed bruises on B.H.'s face and body when he returned from visitation with L.S. (father).

L.H.'s former foster mother¹ reported the injuries to the San Bernardino County Sheriff's Department. A sheriff's deputy examined the child, determined there was an ongoing custody dispute, and concluded there was no need for further investigation. A month later, B.H. received a devastating head injury while in the care of his father which will permanently disable him.

L.H., as guardian ad litem, filed a lawsuit against the County of San Bernardino, the City of Yucaipa, Deputy Sheriff Kimberly Swanson, and her supervisor, Sergeant Jeff Bohner,² for violation of the Child Abuse and Neglect Reporting Act (CANRA), for not cross-reporting his injuries to the Department of Children and Family Services (DCFS). The trial court granted summary judgment in favor of the public entities and employees (the County defendants); plaintiff appealed.

On appeal, plaintiff claims (1) there were triable issues of material fact as to whether the sheriff's deputy had a mandatory duty to cross-report suspected child abuse to DCFS, and (2) the court erred in ruling that the county and the sheriff's deputy were immune from liability for their discretionary functions.

¹ Mother had no formal foster parent-child relationship with C.K., but referred to her as her mother, or adoptive mother. C.K. was a friend of mother's father who "wrote over custody [of mother] to her," when mother was 13. For convenience and lack of a better term, we will refer to C.K. as mother's former foster mother.

² Father was also named in the suit for battery and child abuse, but he was not involved in the summary judgment motion or this appeal.

BACKGROUND

Plaintiff's complaint asserts two causes of action against the County defendants, and two causes of action against father, whose actions directly caused plaintiff's injuries. Our review is limited to those causes of action involving the liability of the County defendants, which were the subject of the summary judgment motion.

Plaintiff, B.H., was born in August 2006, and lived with his mother, L.H., in the home of L.H.'s former foster mother. In 2008, by an informal agreement, father had custody of plaintiff every weekend. On July 2, 2008, father reported to the County of San Bernardino Sheriff's Department that plaintiff arrived for a visit with unexplained bruises on his neck. A sheriff's deputy investigated the incident and determined the allegations were inconclusive. When the mother learned of this report the next morning, July 3, 2008, she contacted DCFS and informed the intake operator that her son had been abused by an unknown person. Mother also informed DCFS that father refused to return custody of plaintiff to her and that she was pursuing an ex parte order to regain custody.

On July 9, 2008, a DCFS social worker responded to mother's July 3d report, interviewing mother at her residence, and visiting father at his. The social worker facilitated a meeting between mother, father, and B.H. on July 22, 2008. At that meeting, the parents agreed that father would relinquish B.H. to mother that day, and then resume his regular weekend visits until a further court hearing, which was scheduled for August 6, 2008. The social worker concluded that the situation was a custody battle and the allegations of physical abuse were unfounded.

On September 17, 2008, a formal court order was made, providing that father would have custody every weekend, plus one two-hour visit midweek. On September 22, 2008, mother picked up plaintiff from a visit with his father and noticed bruises on his face. When mother got home, she talked to her former foster mother and they took pictures of the bruises on B.H. Then mother left to go to an evening class, and after class, she went to a party until 2:30 or 3:00 a.m. Mother suspected child abuse, but wanted to speak with father before making any report.

While mother was out, the former foster mother contacted the sheriff's department and reported that plaintiff had come home from a visit with his father with bruises on his forehead. The dispatcher asked if the child required medical attention, but the former foster mother declined because the child had a doctor's appointment the next day. The former foster mother informed the dispatcher that she was making the report because she was instructed to do so.

Sheriff's Deputy Kimberly Swanson responded to the residence while mother was gone and plaintiff was in the care of mother's former foster mother. When Deputy Swanson arrived, plaintiff was asleep, so the former foster mother woke him and brought him to the deputy to observe. Deputy Swanson examined plaintiff's head, face, upper body, and arms. Deputy Swanson observed that plaintiff had a scratch and bruising near his right eye and temple, and a small older bruise on his right arm, which possibly occurred during a fall. Deputy Swanson did not see any bruises on the child's forehead or torso when she examined him.

Deputy Swanson went out to her patrol vehicle and ran a computer record check on the parents. In the meantime, the former foster mother had put plaintiff back to bed. When Deputy Swanson returned to the house, she left her card with mother's former foster mother and requested that plaintiff's mother call her when she returned home.

Deputy Swanson filled out a report in which she recounted that father had informed the former foster mother that plaintiff had fallen and bumped his head while at Wienerschnitzel. The report concluded that there was an ongoing custody dispute between the parents, that the former foster mother requested documentation of the incident and that the case was "for information only at this time and forward to station files." Deputy Swanson left a card for mother to contact her when she returned home, but mother never did. The deputy cleared the case, and her report was reviewed and approved by her supervisor, Sergeant Jeff Bohner.

After September 22, 2008, mother did not allow plaintiff to visit with his father. However, on October 11, 2008, mother allowed a visit. On October 18, 2008, father called his live-in girlfriend at work to report that plaintiff had fallen, hit his head, and would not wake up. Father's girlfriend rushed home. When she got home, the girlfriend noticed plaintiff was stiff and asked the father whether he had called the mother or 911 yet. Father then called 911, and subsequently the girlfriend called mother to report the injury.

Emergency personnel responded to father's residence and transported plaintiff to Loma Linda University Hospital where plaintiff was treated for severe head trauma.

Plaintiff suffered seizures and was still unconscious upon arrival at the hospital, where a craniectomy was performed, removing a portion of the child's skull to relieve pressure in the brain from swelling. Plaintiff suffered subdural hematoma, cerebral edema, and subfalcine herniation³ caused by intracranial pressure. A consulting forensic pediatrician determined that the injuries were inflicted, the result of child abuse. The pediatrician concluded that father's explanation that the child was knocked backwards from a standing position onto a carpeted floor by a 16-month old half-sibling was not credible.

On September 11, 2009, plaintiff, through mother, as his guardian ad litem, filed a complaint against the County of San Bernardino, the City of Yucaipa, Deputy Swanson, Sergeant Bohner, and father. The causes of action against the county, city, and sheriff's department personnel alleged breach of mandatory duty to report child abuse, pursuant to Government Code section 815.6 (first cause of action), and negligence, under theories of res ipsa loquitur and negligence per se, pursuant to Government Code section 815.2 (second cause of action).

Defendant made a general appearance by way of answer and general denial on November 20, 2009, asserting several affirmative defenses, including governmental immunities. On November 10, 2010, defendant filed a motion for summary judgment.

³ Subfalcine herniation is the most common cerebral herniation pattern, characterized by displacement of the brain beneath the free edge of the falx cerebri due to raised intracranial pressure. (http://radiopaedia.org/articles/subfalcine_herniation [as of 5/1/2013]; Laine, Shedden, Dunn, Ghatak, *Acquired Intracranial Herniations: MR Imaging Findings*, 165 *Amer. Journal of Roentgenology* 967 (1995).)

The motion was heard on May 12, 2011, and the court orally ruled in favor of granting the motion. A formal order granting the motion was filed on July 14, 2011. On August 11, 2011, judgment was entered in favor of defendants County of San Bernardino, City of Yucaipa, Sergeant Jeff Bohner, and Deputy Kimberly Swanson. On September 8, 2011, plaintiff timely appealed.

DISCUSSION

Plaintiff argues on appeal that there were triable issues of fact as to whether defendants' failure to cross-report the child abuse report of September 22, 2008, violated their mandatory reporting duties under CANRA, precluding entry of summary judgment. As such, plaintiff asserts the trial court erroneously concluded defendants were immune from liability. We disagree.

a. Standard of Review

Summary judgment is properly granted when there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1250; Code Civ. Proc., § 437c, subds. (b), (o).) A defendant meets his burden of showing that a cause of action lacks merit if he shows that one or more elements of the cause of action cannot be established, or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Ortega v. Sacramento County Dept. of Health & Human Services* (2008) 161 Cal.App.4th 713, 716.) The purpose of a motion for summary judgment is to discover whether the parties possess evidence which requires the fact-weighting procedures of a

trial. (*Soto v. County of Riverside* (2008) 162 Cal.App.4th 492, 496, quoting *City of Oceanside v. Superior Court* (2000) 81 Cal.App.4th 269, 273.)

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. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476, citing *Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612.) Because we review independently, or de novo, the trial court's stated reasons for granting summary judgment are not binding on us; we review the ruling, not the rationale. (*Soto v. County of Riverside, supra*, 162 Cal.App.4th at p. 496; *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.)

b. Whether Defendants Breached the Mandatory Reporting Duty by Failing to Cross-Report.

Penal Code section 11166, subdivision (a), requires a mandated reporter to make a report to a police department or sheriff's department, among other agencies, "whenever the mandated reporter, in his or her professional capacity or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect."

A mandated reporter has "reasonable suspicion" within the meaning of the act, when it is objectively reasonable for a person to entertain a suspicion, based upon facts that could cause a reasonable person in a like position, drawing, when appropriate, on his or her training and experience, to suspect child abuse or neglect. (Pen. Code, § 11166,

subd. (a)(1).) Penal Code section 11165.9 provides that reports of suspected child abuse or neglect shall be made by mandated reporters to any police department or sheriff's department. Peace officers and social workers are mandated reporters. (Pen. Code, § 11165.7, subds. (a)(15), (19).)

Plaintiff asserts that Penal Code section 11166, subdivision (a), imposes two mandatory duties on a police officer who receives an account of child abuse: (a) the duty to investigate, and (b) the duty to take further action when an objectively reasonable person in the same situation would suspect child abuse. (*Alejo v. City of Alhambra* (1999) 75 Cal.App.4th 1180, 1186.) However, while the language of the statute does require a mandated reporter to send a followup report where the mandated reporter knows or reasonably suspects a child has been the victim of child abuse or neglect, it does not create a general mandatory duty "to take further action" where child abuse is *not* suspected.

The statement from *Alejo*, upon which plaintiff bases his argument, is at odds with the accepted notion that where a statute calls for the exercise of judgment, expertise, and discretion, it does not create a mandatory duty within the meaning of Government Code section 815.6. (*Jacqueline T. v. Alameda County Child Protective Services* (2007) 155 Cal.App.4th 456, 477.)

Here, it is undisputed that Deputy Swanson investigated the report of suspected abuse. The decision to not cross-report was tantamount to a decision to not prosecute, where it was the product of an investigation. The decision was grounded on the

judgment, expertise and discretion of the investigating sheriff's deputy. Penal Code section 11166, subdivision (a), limits the mandatory duty to take further action to situations in which "an objectively reasonable person in the same situation would suspect child abuse." (See *Alejo v. City of Alhambra*, *supra*, 75 Cal.App.4th at p. 1186.) Having investigated the incident, it was objectively reasonable for Deputy Swanson to conclude the situation did not involve child abuse, even if that conclusion, in the exercise of Deputy Swanson's judgment, was in error. (*Jacqueline T. v. Alameda County Child Protective Services*, *supra*, 155 Cal.App.4th at pp. 476-477.)

Plaintiff's extensive reliance on the holding of *Alejo v. City of Alhambra*, *supra*, 75 Cal.App.4th 1180, in arguing that Deputy Swanson's failure to cross-report constituted a violation of the mandatory duty to cross-report to CFS, is misplaced. That case did not involve a failure to follow up, so it is inapposite. An appellate decision is not authority for everything said in the court's opinion, but only for the points actually involved and actually decided. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620; see also *People v. Knoller* (2007) 41 Cal.4th 139, 154-155.)

In *Alejo*, the father of a child became concerned when he observed severe facial bruising to and surrounding the child's eye. The child's mother's explanations did not dispel his concern. (*Alejo v. City of Alhambra*, *supra*, 75 Cal.App.4th at p. 1183.) Three days later, a neighbor informed the father that mother and her boyfriend were using drugs and abusing the child, prompting father to call the police. (*Ibid.*) Despite the report, the police did not conduct any investigation into whether the child was being abused. Six

weeks later, the child was severely beaten, resulting in permanent disability. (*Id.* at p. 1184.) The *Alejo* case involved a total failure to investigate, in violation of Penal Code section 11166, subdivision (a). It did not involve a situation in which a deputy conducted an investigation but concluded there was no child abuse.

The present case is more on point with *Ortega v. Sacramento County Dept. of Health & Human Services*, *supra*, 161 Cal.App.4th 713. In *Ortega*, a child sued the social services agency for returning her to the custody of her father following an incident in which the father had abused phencyclidine (PCP) and had been arrested following a disturbance. (*Id.* at p. 717.) The father had a history of domestic violence and drug use, and he had previously lost custody of the child a few years earlier when he was arrested on outstanding warrants in the child's presence. (*Ibid.*)

After investigating the incident, and learning that the father had taken the PCP in the child's presence, as well as learning of his violent and unstable history, the social services agency returned the child to the father's custody. A few days later, the father savagely attacked the child, stabbing her in the heart and lung, causing enormous physical and emotional injuries. (*Ortega v. Sacramento County Dept. of Health & Human Services*, *supra*, 161 Cal.App.4th at p. 718.) The child sued the county social services agency for breach of the mandatory duty to fully and adequately investigate, but the court granted summary judgment in favor of the defendant.

On appeal, the Third District Court of Appeal concluded the defendants complied with the mandatory duties by conducting an investigation, although it was characterized

as “lousy,” and by making a determination about potential risk to the child, although it was the wrong one. (*Ortega v. Sacramento County Dept. of Health & Human Services, supra*, 161 Cal.App.4th at p. 728.) Similarly, in the present case, it is undisputed that Deputy Swanson investigated the report, concluding that there was no child abuse after learning the report was being made for informational purposes in an ongoing child custody battle.

There are strong policy reasons to follow *Ortega* and to disregard the dicta of *Alejo*. If no discretion is to be involved in the decision to prefer charges or cross-report to CFS, any report of child abuse would inevitably result in someone’s arrest and prosecution, with possible loss of child custody, as the exercise of a ministerial duty. This would have far-reaching implications for an already overburdened child welfare system and an equally overburdened judicial system. The decision to cross-report, like the decision to arrest, is an inherently discretionary decision by an officer exercising judgment and expertise.

Penal Code section 11166, subdivision (a), does not create an express duty to cross-report so the County defendants did not violate a mandatory duty.

At oral argument, plaintiff argued that a separate and independent duty to cross-report is imposed by Penal Code section 11166, subdivision (k), an argument not presented in the trial court and not raised in the opening or reply briefs. Ordinarily, a new theory may not be presented for the first time at oral argument. (*AmeriGas Propane, L.P. v. Landstar Ranger, Inc.* (2010) 184 Cal.App.4th 981, 1001 [Fourth Dist., Div.

Two].) Nevertheless, we have considered the issue and find it does not affect our analysis.

Penal Code section 11166, subdivision (k), provides that “[a] law enforcement agency shall immediately, or as soon as practicably possible, report by telephone, fax, or electronic transmission to the agency given responsibility for investigation of cases under Section 300 of the Welfare and Institutions Code and to the district attorney’s office *every known or suspected instance of child abuse or neglect reported to it*, except acts or omissions coming within subdivision (b) of Section 11165.2, which shall be reported only to the county welfare or probation department.” [Italics added.] The subsection goes on to require law enforcement agencies to “report to the county welfare or probation department every known or suspected instance of child abuse or neglect reported to it which is alleged to have occurred as a result of the action of a person responsible for the child’s welfare, or as the result of the failure of a person responsible for the child’s welfare to adequately protect the minor from abuse when the person responsible for the child’s welfare knew or reasonably should have known that the minor was in danger of abuse.”

Plaintiff argues that this subdivision imposed on the sheriff’s department dispatcher the mandatory duty to cross-report the allegation of abuse to DCFS, even before the dispatcher sent Deputy Swanson to investigate the allegations. We disagree. In *Jacqueline T. v. Alameda County Child Protective Services*, *supra*, 155 Cal.App.4th 456, the court rejected the notion that the decision to cross-report was a ministerial,

mandatory duty. (*Id.* at p. 466.) That court concluded that the failure to conduct a reasonable and diligent investigation and to timely cross-report to other agencies were incidental to the agency’s investigations, within the scope of their employment, and thus covered by immunity. (*Id.* at p. 468.)

The court in *Jacqueline T.* also distinguished the child welfare agency and law enforcement agencies from mandatory reporters covered by Penal Code section 11166, subdivision (a), explaining that the former were the alleged *receivers* of reports from mandated reporters, and not reporters themselves. As such they could not have breached a mandatory duty to report (or cross-report). (*Jacqueline T. v. Alameda County Child Protective Services, supra*, 155 Cal.App.4th at p. 473.) Finally, that case held that because the plaintiff could not, as a matter of law, establish that the failure to cross-report was a proximate cause of the plaintiff’s injuries, as required by Government Code section 815.6, the agency employees were immune, as was the agency. (*Jacqueline T.*, at pp. 469, 473.)

Although the language of Penal Code section 11166, subdivision (k), uses the word “shall” in requiring a law enforcement agency to cross-report, we do not interpret this to require mandatory agency action in the absence of investigation. The statutory language providing that the law enforcement agency “shall” cross-report “every known or suspected instance of child abuse reported to it,” implies that the duty to cross-report arises only after an investigation results in the determination that abuse is known or that it is objectively reasonable for a person to entertain a suspicion, based on facts that could

cause a reasonable person to suspect child abuse or neglect. (Pen. Code, § 11166, subd. (a)(1).) Such a reasonable suspicion could only arise in the mind of an employee of a law enforcement agency after an investigation of the reported abuse has been undertaken.

We disagree with the notion, not raised in the trial court or in the opening brief, that Penal Code section 11166, subdivision (k), creates a separate, independent, and mandatory duty to cross-report, the violation of which creates a separate basis of liability under Government Code section 815.6.

c. *Whether Defendants' Actions Are Entitled to Governmental Immunity.*

Government Code section 815.6 provides that where a public entity is under a mandatory duty, it is liable for an injury caused by his failure to discharge the duty unless it establishes it exercised reasonable diligence to discharge the duty. Government Code section 815.6's liability for breach of a mandatory duty applies to ministerial duties imposed by statutes and regulations. (*Ortega v. Sacramento County Dept. of Health & Human Services, supra*, 161 Cal.App.4th at p. 728; see also *Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 141.) To prove a violation under Government Code section 815.6, the plaintiff must plead the existence of a specific statutory duty. (*Jacqueline T. v. Alameda County Child Protective Services, supra*, 155 Cal.App.4th at p. 471.)

However, Government Code section 820.2 provides for immunity to a public employee for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not that discretion

was abused. Government Code section 821.6 expressly immunizes a public employee for injury caused by instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause.

Government Code section 821.6 is not limited to the act of filing a complaint; it also extends to actions taken in preparation for formal proceedings, including investigation. (*County of Los Angeles v. Superior Court* (2009) 181 Cal.App.4th 218, 229; *Amylou R. v. County of Riverside* (1994) 28 Cal.App.4th 1205, 1209-1210.) Investigation is an essential step toward the institution of formal proceedings, so it is cloaked with immunity. (*Amylou R.*, at p. 1210.)

Investigations are thus considered to be part of judicial and administrative proceedings for purposes of Government Code section 821.6 immunity. (*Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE)* (2007) 157 Cal.App.4th 1056, 1062, citing *Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1436-1437.) The immunity extends to investigations even if there is a later decision not to initiate a prosecution. (*Richardson-Tunnell*, at p. 1062, citing *Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1293; see also *Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1048.)

As discussed in the previous section, defendants complied with the mandatory reporting duty of investigating the child abuse report. The gravamen of plaintiff's claim is that the County defendants failed to follow up with a cross-report to CFS. However, as

we have shown, there is no specific statutory duty to cross-report where the investigation concludes there was no child abuse.

The present case is quite similar to *Ortega v. Sacramento County Dept. of Health & Human Services*, *supra*, 161 Cal.App.4th 713, where the court concluded that a claim of inadequate investigation was precluded by the statutory immunity. The court observed that claims of improper evaluation cannot divest a discretionary policy decision of its immunity. (*Id.* at p. 733, citing *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 983-984.) “[T]he collection and evaluation of information is an integral part of ‘the exercise of the discretion’ immunized by section 820.2.” (*Ortega*, at p. 733.)

Here, Deputy Swanson responded to the dispatch, examined the child, and determined there was no child abuse. Whether the investigation was adequate or not, and whether the deputy’s conclusion was incorrect, Deputy Swanson’s failure to cross-report is covered by the immunity provided by Government Code section 821.6. If the employee is immune, so, too, is the county. (*Jacqueline T. v. Alameda County Child Protective Services*, *supra*, 155 Cal.App.4th at pp. 468-469.)

Summary judgment was properly granted.

DISPOSITION

The judgment is affirmed. Respondents are entitled to costs on appeal.

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RAMIREZ
P. J.

We concur:

RICHLI
J.

MILLER
J.