CASENOTE

LAWATYOURFINGERTIPS

CHP OFFICER WHO LOSES INFORMATION ESSENTIAL TO IDENTIFYING PERSON INVOLVED IN ACCIDENT AFTER AGREEING TO PRESERVE IT MAY NOT BE SUED FOR SPOLIATION OF EVIDENCE AS HIS CONDUCT IS SUBJECT TO GOVERNMENTAL IMMUNITY:

1. **Special Relationship**

The State contends that the verdict for Strong on his cause of action for negligence based upon a special relationship must be reversed. The State maintains that no special relationship was formed between Officer Swanberg and Strong and, as such, the officer did not owe Strong a duty to collect and retain the second driver's identifying information.[1]

The trial court rejected Officer Swanberg's version of the events and credited Strong's and Ribis's versions. We will not disturb this credibility determination. (*People v. Loker* (2008) 44 Cal.4th 691, 749.) Accordingly, in resolving the issues on appeal, we presume that Officer Swanberg arrived on the scene before emergency medical personnel transported Strong to the hospital, spoke to Strong and, in response to Strong's request for the identity of the second driver, assured Strong that the information would be included in his accident report.

"A 'special relationship' exists if and only if an injured person demonstrates the public officer 'assumed a duty toward [him] greater than the duty owed to another member of the public.' (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 206[].)" (*Walker v. County of Los Angeles*, *supra*, 192 Cal.App.3d at p. 1398.)

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1 These facts come from the recent unpublished decision in Strong v. State of California 11/30/11. In Strong, Defendant State of California (the State), acting by and through the Department of California Highway Patrol (CHP), appeals from a judgment entered in favor of plaintiff Ronald Strong (Strong) following a court trial. The court determined that CHP Officer Christopher Swanberg negligently lost or destroyed the identifying information of the individual involved in an accident during which Strong was injured and that the governmental immunity afforded by Government Code section 821.6 did not insulate the State from liability for the officer's negligence. On appeal, the State seeks reversal of the judgment on the grounds, among others, that Officer Swanberg did not owe Strong a duty of due care, that California law bars tort-based causes of action for spoliation of evidence, and that the immunity conferred by section 821.6 applies in this case. We reverse the judgment with directions.

A special relationship has been found to arise when a public employee expressly or impliedly promises to undertake a special duty on a plaintiff's behalf (*Hartzler v. City of San Jose* (1975) 46 Cal.App.3d 6) or when a public employee causes an injured and dependent person to rely on the public employee to his detriment (*Mann v. State of California* (1977) 70 Cal.App.3d 773, 780). (*Walker*, *supra*, at p. 1399.)

In *Clemente v. State of California* (1980) 101 Cal.App.3d 374 (*Clemente I*), disapproved in part in *Williams v. State of California* (1983) 34 Cal.3d 18, 28, footnote 9, Clemente was struck by a motorcycle while crossing a Los Angeles city street and was seriously injured. CHP Officer Loxsom came upon the scene of the accident and saw Clemente crawling in the crosswalk in an attempt to reach safety. Officer Loxsom also observed a man pushing a motorcycle and directed him to place the motorcycle on the curb. (*Clemente I*, *supra*, at p. 376.)

After clearing the accident site of traffic, Officer Loxsom talked to the witnesses who were present. The unidentified driver of a van informed Officer Loxsom that he had stopped his van to permit Clemente to cross the street. The driver of a motorcycle did not, however, and hit Clemente. The driver of the motorcycle told the officer that he had not seen the victim and confirmed that he had struck him with his motorcycle. (*Clemente I*, *supra*, 101 Cal.App.3d at p. 376.)

Officer Loxsom called for an ambulance and asked his dispatch to contact the Los Angeles Police Department (LAPD) and ask it to send out a traffic unit at once. Officer Loxsom left the scene before the LAPD arrived and without ascertaining the identity of motorcyclist, who also left the scene before the LAPD arrived. (*Clemente I*, *supra*, 101 Cal.App.3d at p. 377.) Without the identity of the motorcycle driver, Clemente, whose injuries left him in a semi-comatose and incompetent condition, was unable to sue the motorcyclist for damages. (*Ibid*.)

Clemente sued the State and Officer Loxsom for negligence. The trial court dismissed Clemente's third amended complaint after sustaining the defendants' demurrer without leave to amend. (*Clemente I*, *supra*, 101 Cal.App.3d at p. 376.) The trial court concluded that the State and the CHP officer were immune from liability since the officer's negligence in failing to ascertain the motorcycle driver's identity before leaving the scene "merely constituted a failure to enforce a statute, presumably Vehicle Code section 20003." (*Clemente I*, *supra*, at p. 377, fn. omitted.)

After citing section 818.2, which immunizes a public entity for injuries caused by "failing to enforce any law," and section 821, which immunizes a public employee for injuries caused by "failure to enforce an enactment" (*Clemente I*, *supra*, 101 Cal.App.3d at p. 377), the court in *Clemente I* noted that the trial court's "conclusion is premised on the assumption that an investigation of a traffic accident by a highway patrol officer, pursuant to Vehicle Code section 2412, constitutes law enforcement within the meaning of the Governmental Tort Liability Act."

Vehicle Code section 20003, subdivision (a) states that "[t]he driver of any vehicle involved in an accident resulting in injury to or death of any person shall also give his or her name, current residence address, the names and current residence addresses of any occupant of the driver's vehicle injured in the accident, the registration number of the vehicle he or she is driving, and the name and current residence address of the owner to the person struck or the driver or occupants of any vehicle collided with, and shall give the information to any traffic or police officer at the scene of the accident. . . ."

(*Clemente I*, *supra*, at p. 377, fn. omitted.) The court concluded it was not. (*Id*. at p. 378.)

It explained that "[b]roadly speaking, of course, an investigation by a highway patrol officer of a traffic accident, resulting in injury or death, to determine whether any violation of law contributed to the happening of the accident, is a law enforcement activity. It is a necessary preliminary step to the subsequent actual enforcement of the law that is found to have been violated. But to enforce a law normally means to compel obedience to the law by actual force, such as involuntary detention, arrest or punishment. [Citations.] An investigation, without a detention of significant duration, is a noncoercive activity and therefore is not, in our view, itself law enforcement." (*Ibid*., fn. omitted.)

In the *Clemente I* court's view, Officer Loxsom's decision to exercise his discretion to stop at the accident scene was not at issue. What was at issue was "his negligence in his conduct of the discretionary investigation" which he undertook. The court concluded that neither the discretionary immunity conferred by section 820.2 nor the immunity for failure to enforce a law or enactment conferred by sections 818.2 and 821 immunized the State and Officer Loxsom from the consequences of the officer's negligence. (*Clemente I*, *supra*, 101 Cal.App.3d at p. 379.) The court concluded that "the completely disabled and apparently incompetent plaintiff was . . . completely dependent on Officer Loxsom following the traffic accident" resulting in the formation of a special relationship between the officer and Clemente. (*Id*. at p. 380.) It reversed the judgment of dismissal and remanded for further proceedings. (*Ibid*.)

In *Williams v. State of California*, *supra*, 34 Cal.3d 18, the issue was "whether the mere fact that a highway patrolman comes to the aid of an injured or stranded motorist creates an affirmative duty to secure information or preserve evidence for civil litigation between the motorist and third parties." The court concluded that "stopping to aid a motorist does not, in itself, create a special relationship which would give rise to such a duty." (*Id*. at p. 21.)

While riding as a passenger in a car, a piece of a heated brake drum from a passing truck was propelled through the windshield and hit Williams in the face before coming to rest in the car's back seat. In her complaint against the State and numerous Doe defendants, Williams alleged that defendants "'arrived within minutes of the accident and assumed the responsibility of investigating the accident, and the accident of two other vehicles which were damaged and stopped at the scene to determine causes thereof, and said defendants so negligently and carelessly investigated the accident as to virtually destroy any opportunity on plaintiff's part to obtain compensation for the severe injuries and damages she suffered from any other defendants or any other persons who concurred in causing them. Included amongst said acts of negligence was the failure to investigate the brake drum part to determine it was still hot, failure to identify other witnesses at the scene or even the other motorists damaged by brake drums, and failure to attempt any investigation or pursuit of the owner or operator of the truck whose brake drum broke and cause plaintiff's injuries.'" (*Williams v. State of California*, *supra*, 34 Cal.3d at pp. 21-22, fn. omitted.)

Vehicle Code section 2412 provides that "[a]ll members of the California Highway Patrol may investigate accidents resulting in personal injuries or death and gather evidence for the purpose of prosecuting the person or persons guilty of any violation of the law contributing to the happening of such accident."

The State moved for judgment on the pleadings, asserting that it had immunity from liability under sections 818.2, 821, 845, 846 and for discretionary acts pursuant to sections 820.2 and 820.25.

The trial court granted the State's motion, finding it immune under sections 820.2 and 820.25. The trial court refused to apply "the 'special relationship exception' to statutory immunity." (*Williams v. State of California*, *supra*, 34 Cal.3d at p. 22, fn. omitted.)

Noting that "the immunity cart has been placed before the duty horse," the Supreme Court observed: "'Conceptually, the question of the applicability of a statutory immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity. . . .'" (*Williams v. State of California*, *supra*, 34 Cal.3d at p. 22.) Turning to the question of duty, the *Williams* court concluded that the plaintiff had failed to allege facts sufficient to establish a duty of due care owed by the State. It observed that "[t]he officers did not create the peril in which plaintiff found herself; they took no affirmative action which contributed to, increased, or changed the risk which would have otherwise existed; there is no indication that they voluntarily assumed any responsibility to protect plaintiff's prospects for recovery by civil litigation; and there are no allegations of the requisite factors to [support] a finding of special relationship, namely detrimental reliance by the plaintiff on the officers' conduct, statements made by them which induced a false sense of security and thereby worsened her position." (*Id*. at pp. 27-28, fn. omitted.) The court nevertheless concluded that plaintiff should be given an opportunity to amend her complaint. (*Id*. at p. 28.) Finally, the *Williams* court disapproved *Clemente I*, *supra*, to the extent it was inconsistent with the views stated in *Williams*. (*Id*. at p. 28, fn. 9.)

Before *Williams* was decided, the parties in *Clemente I* went to trial. The evidence at trial revealed that CHP Officer Loxsom was en route to freeway patrol when a passing motorist hailed him down and directed him to the scene of the accident in which Clemente had been hit by a motorcycle. Officer Loxsom called for an ambulance and spoke to witnesses, including the motorcycle driver who hit Clemente and the driver of a van who witnessed the collision. Officer Loxsom did not talk to Clemente to see if he was injured seriously. Officer Loxsom called LAPD and told the motorcycle driver not to leave and to wait for the LAPD. The officer then left the scene before the ambulance or LAPD arrived and without obtaining the name or license of the motorcyclist, the license plate number of the motorcycle or the personal information of the van driver who witnessed the accident. By the time the LAPD arrived, both the motorcyclist and van driver had left the scene. They were never located. (*Clemente II*, *supra*, 40 Cal.3d at pp. 209-210.) The accident left Clemente with severe brain damage and paralysis, making him dependent upon others for his daily care. (*Id*. at p. 210.) At trial, Clemente prevailed and obtained a judgment in excess of $2 million. (*Id*. at p. 209.) *Clemente II* is the appeal from that judgment.

Citing *Williams*, the defendants argued that *Clemente I* had been improperly decided and that Officer Loxsom did not owe Clemente a duty of due care in conducting an investigation of the accident. The Supreme Court concluded that its decision in *Clemente I* "is law of the case, establishing Loxsom's duty to exercise due care." (*Clemente II*, *supra*, 40 Cal.3d at p. 210.) While noting that the doctrine of law of the case would "not be adhered to where its application will result in an unjust decision" and that "[t]he principal ground for making an exception to the doctrine of law of the case is an intervening or contemporaneous change in the law" (*id.* at p. 212), the court concluded that application of the doctrine would not result in an unjust decision (*id*. at

p. 213). The state high court noted that "the parties went to trial prior to *Williams* and presented evidence with the understanding that the officer's liability would be governed by the standard set forth in *Clemente I*. Secondly, *Clemente I* did not misapply prior law in a way which resulted in 'substantial injustice.'

Although *Williams* served to clarify what the duties of a highway patrol officer were under a given set of circumstances, our opinion in that case recognized the possibility that such an officer might owe a member of the public a duty of care based on conduct like that shown here." (*Clemente II*, *supra*, 40 Cal.3d at p. 213.)

In reliance on *Clemente II*, Strong contends that a special relationship was formed in this case. While we conclude that a special relationship was formed in this case, we reach this conclusion not because of *Clemente II*, but because the particular facts of this case warrant it.

When a CHP officer conducts an accident investigation, the intended beneficiary of that investigation is the prosecuting agency charged with the responsibility of instituting criminal cases, not private parties contemplating civil action. (*Catsouras v. Department of California Highway Patrol*, *supra*, 181 Cal.App.4th at p. 879, citing *Williams v. State of California*, *supra*, 34 Cal.3d at p. 24, fn. 4.) Here, however, Strong expressly asked Officer Swanberg for the identity of the driver who pulled out in front of his motorcycle, and the officer, in turn, agreed to provide that information to Strong in the traffic collision report. Strong, who was on the ground injured, relied to his detriment on the officer's representation and made no efforts to obtain the desired information independently.

Inasmuch as Strong demonstrated that Officer Swanberg "'assumed a duty toward [him] greater than the duty owed to another member of the public'" (*Davidson v. City of Westminster*, *supra*, 32 Cal.3d at p. 206) and promised to undertake a special duty on Strong's behalf (*Walker v. County of Los Angeles*, *supra*, 192 Cal.App.3d at p. 1399), we conclude that a special relationship was formed between Strong and Officer Swanberg. As a result, Officer Swanberg owed Strong a duty of due care to collect, retain and communicate the requested information.

Duty, however, "'is only a threshold issue, beyond which remain the immunity barriers.'" (*Davidson v. City of Westminster*, *supra*, 32 Cal.3d at p. 202, quoting *Whitcombe v. County of Yolo* (1977) 73 Cal.App.3d 698, 706.) Stated otherwise, "immunity hurdles are not overcome by the existence of a special relationship." (*Davidson*, *supra*, at p. 202.) That hurdle will be discussed below.

C. *Spoliation of Evidence*

Spoliation occurs when evidence is destroyed or significantly altered or when there is a failure to preserve property for another's use as evidence in current or future litigation. (*Hernandez v. Garcetti* (1998) 68 Cal.App.4th 675, 680.) First party spoliation occurs when the spoliator is a party to the lawsuit. Third party spoliation occurs when the spoliator is not a party to the action. (*Lueter v. State of California*, *supra*, 94 Cal.App.4th at p. 1293.)

In *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, a first-party intentional spoliation case, the California Supreme Court held "that there is no tort remedy for the intentional spoliation of evidence by a party to the cause of action to which the spoliated evidence is relevant, in cases in which . . . the spoliation victim

knows or should have known of the alleged spoliation before the trial or other decision on the merits of the underlying action." (*Id*. at pp. 17-18, fn. omitted.)

The following year, in *Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464, the Supreme Court held that "no tort cause of action will lie for intentional third party spoliation of evidence."[4] (*Id*. at p. 466.)

Although the state's high court has not had the occasion to rule on the viability of the tort of negligent spoliation of evidence, appellate courts have concluded, in reliance on *Cedars-Sinai Medical Center v. Superior Court*, *supra*, 18 Cal.4th 1 and *Temple Community Hospital v. Superior Court*, *supra*, 20 Cal.4th 464, that the tort of negligent spoliation, whether of the first-party or third-party variety, is no longer viable. (*Lueter v. State of California*, *supra*, 94 Cal.App.4th at pp. 1289, 1293-1301; *Coprich v. Superior Court* (2000) 80 Cal.App.4th 1081, 1083, 1088-1090; *Farmers Ins. Exchange v. Superior Court* (2000) 79 Cal.App.4th 1400, 1401-1402, 1407.) We agree with the reasoning of these cases and note, as did the court in *Coprich*, *supra*, at page 1089, that "it would be anomalous to impose liability for negligence with respect to conduct that would not give rise to liability if committed intentionally."[5]

Lueter v. State of California, *supra*, 94 Cal.App.4th 1285 is instructive. A motorist who was injured when an oil tanker blew a tire and crashed successfully sued the driver and owner of the tanker. The driver and the owner wanted to use part of its tire tread as evidence. A piece of tire tread had been taken from the scene of the accident by the employees of the CHP that investigated the accident. The tire tread was later discarded. A jury awarded the driver and owner damages for negligent spoliation of evidence. (*Id.* at pp. 1289-1292.)

On appeal, the Court of Appeal reversed, concluding there is no tort cause of action for negligent spoliation of evidence. (*Lueter v. State of California*, *supra*, 94 Cal.App.4th at pp. 1289, 1299.) It explained: "Government Code section 815 specifies that, except as otherwise provided by statute, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person. Government Code section 815.2, subdivision (a) provides that a public entity is liable for injury proximately caused by an act or omission of an employee within the scope of employment if the act or omission would give rise to a

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[4] Justice Joyce L. Kennard, who authored the majority opinion in *Cedars-Sinai Medical Center v. Superior Court*, *supra*, 18 Cal.4th 1, dissented in *Temple Community Hospital v. Superior Court*, *supra*, 20 Cal.4th 464. Justice Kennard stated she "would recognize a narrowly crafted tort remedy for intentional third party spoliation of evidence, limited to cases in which the spoliator destroys the evidence with the intent of harming the spoliation victim's ability to bring or defend against a legal claim." (*Id*. at p. 489.) Justices Stanley Mosk and Kathryn M. Werdegar concurred in Justice Kennard's dissent.

[5] We note, however, that "decisional authorities do not foreclose an action in contract where the defendant is under a contractual obligation to preserve evidence. [Citations.]" (*Lueter v. State of California*, *supra*, 94 Cal.App.4th at p. 1299, fn. 3.)

cause of action against the employee. Government Code section 820, subdivision (a) specifies that, except as otherwise provided by statute, a public employee is liable for injury to the same extent as a private person.

"Together these statutes establish two principles: (1) unless they are granted specific statutory immunity, a public entity and its employees are liable in tort for the same causes of action that could be brought against a private person; and (2) absent a statute specifically imposing liability, a public entity and its employees are not liable for causes of action in tort that could not be pursued against a private party.

"For the reasons stated above, the tort of negligent spoliation of evidence cannot be recognized against a private party. It follows that any liability for spoliation against a public entity and its employees must be created statutorily rather than judicially.

"In order to find a statutorily based cause of action for negligent spoliation, it is not enough to find that the public entity had a legal duty with respect to property. Even though a person may have a duty to preserve evidence, countervailing considerations dictate against an expansive, speculative tort of spoliation. [Citations.] Instead, a duty to preserve evidence should be addressed through other means [citation], such as effective sanctions devised by the Legislature or by regulatory bodies. [Citation.] It follows that in order to establish a tort for spoliation of evidence, a statute must expressly impose a spoliation remedy." (*Lueter v. State of California*, *supra*, 94 Cal.App.4th at pp. 1299-1300.)

That Officer Swanberg told Strong he would provide him with the identifying information of the second driver does not compel a contrary conclusion. As the court in *Lueter* observed, "*Temple Community* concluded that it would be anomalous to impose tort liability upon third party spoliators when, in *Cedars-Sinai*, the court had refused to impose tort liability on litigants who had engaged in such behavior to secure an advantage in their own litigation. [Citation.] Certainly, it would be even more anomalous to impose tort liability upon a negligent spoliator whose conduct is not near so egregious as that of an intentional spoliator. In this case, for example, if defendants had testified that they knew the tire tread might have significance in a civil action and deliberately threw it away in order to avoid being embroiled in civil litigation, out of animus toward a party, or for other similar reasons, they could not be responsible for spoliation damages. But since their conduct was, at most, mere negligence, they were essentially forced to become retroactive insurers of plaintiffs. As recognized in *Farmers Ins. Exchange*, *supra*, 79 Cal.App.4th at page 1407, this created an absurdity." (*Lueter v. State of California*, *supra*, 94 Cal.App.4th at pp. 1295-1296.)

Without expressly disagreeing with the reasoning of *Leuter*, Strong insists this is not a spoliation case, arguing the identity of the second driver is not "evidence" and his claim is not for destruction of evidence but breach of the duty Officer Swanberg assumed to provide him with the information he would need to pursue a legal claim against the party who had injured him. The State responds, citing to case law discussing the sufficiency of the evidence of the identity of a defendant in a criminal case, that identifying information is, in fact, evidence. Moreover, Strong's claim is based on Officer Swanberg's loss or destruction of his investigative notes, not his failure to obtain the second driver's identity after promising to do so.

We are inclined to agree the loss or destruction of Officer Swanberg's notes sufficiently parallels the discarded tire tread in *Leuter* to fall within the rule against a tort for spoliation of evidence. However, we need not resolve that issue here; for even if Strong has established an otherwise actionable breach of duty by Officer Swanberg, his

actions as part of the investigation of the traffic accident fall within the scope of the governmental immunity conferred by section 821.6.

D. *Governmental Immunity*

Section 821.6 provides that "[a] public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." This immunity provision is to be construed broadly so as to further "its purpose to protect public employees in the performance of their prosecutorial duties from the threat of harassment through civil suits." (*Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1048; accord, *Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1293.)

For purposes of this immunity provision, investigations are deemed to be part of judicial and administrative proceedings. (*Paterson v. City of Los Angeles* (2009) 174 Cal.App.4th 1393, 1405; *Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE)*, *supra*, 157 Cal.App.4th at p. 1062; *Amylou R. v. County of Riverside* (1994) 28 Cal.App.4th 1205, 1209-1210.)

The California Supreme Court has observed that although "'section 821.6 has primarily been applied to immunize prosecuting attorneys and other similar individuals, this section is not restricted to legally trained personnel but applies to all employees of a public entity. [Citation.]' [Citation.] Section 821.6 'applies to police officers as well as public prosecutors since both are public employees within the meaning of the Government Code.' [Citation.]" (*Asgari v. City of Los Angeles* (1997) 15 Cal.4th 744, 756-757.)

The State maintains on appeal, as it did below, that since Officer Swanberg lost or destroyed the second driver's identifying information during the course of an official CHP investigation, he is cloaked with the immunity of section 821.6. We agree. Since Officer Swanberg is immune, so too is the State. (§ 815.2, subd. (b).) *Clemente II* upon which the trial court relied to conclude otherwise is inapposite, in that the applicability of section 821.6 was not an issue in *Clemente II*. It is a well established principle of appellate law that a decision is only authority for the points actually involved and decided. (*Golden Gateway Center v. Golden Gateway Tenants Assn.* (2001) 26 Cal.4th 1013, 1029; *Santisas v. Goodin* (1998) 17 Cal.4th 599, 620.)

For the foregoing reasons, we conclude that the judgment in favor of Strong must be reversed and a new judgment entered in favor of the State.