Filed 6/2/04

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

KENT KILROY et al.,	C044877
Plaintiffs and Appellants,	(Super.Ct.No. 68176)
v.	
STATE OF CALIFORNIA et al.,	
Defendants and Respondents.	

APPEAL from a judgment of the Superior Court of Nevada County, No. 68176, Leighton Hatch, Judge. (Retired Judge of the Sacramento Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Law Offices of R. Ellis Harper and R. Ellis Harper for Plaintiffs and Appellants.

Bill Lockyer, Attorney General, James M. Schiavenza, Senior Assistant Attorney General, Darryl L. Doke and Thomas D. McCrackin, Supervising Deputy Attorneys General, and Scott H. Wyckoff, Deputy Attorney General, for Defendants and Respondents.

Plaintiffs Kent and Kim Kilroy, doing business as Kilroy's Towing, initiated this action against defendants State of

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II, III, IV, V and VI of the Discussion.

California and Dave Paulus, a California Highway Patrol (CHP) officer, alleging violation of their civil rights and related torts. Plaintiffs allege that Paulus wrongly omitted material facts from an affidavit used to obtain a warrant to search their business. The search turned up firearms that Kent Kilroy was not permitted to possess and led to his prosecution in federal court. That prosecution was later dismissed after the court granted defendant's motion to suppress.

In this matter, the trial court denied plaintiffs' request for judicial notice of the federal court's suppression order and granted defendants' motion for summary judgment. The court concluded that defendants are entitled to immunity on the civil rights claims and that there is no evidence to support plaintiffs' other causes of action. Plaintiffs contend that the court erred in denying their request for judicial notice. They further contend that issues of fact remain as to whether there was probable cause for the search and whether defendants' are entitled to immunity. We affirm the judgment.

FACTS AND PROCEDURAL HISTORY

On review of an order granting summary judgment, we construe the evidence in the light most favorable to the opposing party. (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.) However, we consider only evidence relevant to the matter in dispute.

On March 1, 1999, Paulus, an 18-year veteran of the CHP, became the "tow coordination officer" for the Grass Valley area,

where plaintiffs conducted their business. As the tow coordination officer, Paulus was responsible for overseeing towing companies authorized to be part of the CHP's "tow rotation program," under which tow operators are dispatched on a rotating basis to assist the CHP with disabled or damaged vehicles. Paulus was also responsible for determining if operators are in compliance with CHP requirements for vehicles, drivers and insurance. Kilroy's Towing was included in the CHP's tow rotation program at the time.

On January 20, 2000, Ronald Hines complained to Paulus that his 1987 Chevrolet pickup truck, which was impounded on or about October 25, 1999, had been sold by Kilroy's Towing without Hines's prior approval or knowledge. Hines further indicated that Kent Kilroy had previously asked him for $2,150 to release the vehicle.

On January 25, 2000, Paulus spoke to Kent Kilroy about the sale of Hines's truck. Kilroy said the truck had been sold on January 17 or 18 and that he had attempted to contact Hines, but was unable to do so until after the sale. Kilroy gave Paulus a copy of a vehicle transfer form for the sale. It indicated that the truck had been sold to Carl Droivold for $300. Kilroy said he had no receipt for the sale. Paulus asked if Kilroy knew the purchaser, and Kilroy said he "did not really know Mr. Droivold."

Paulus next reviewed a CHP form 180 prepared by Officer Chris Garrison at the time the truck was taken to Kilroy's Towing. The form listed the value of the truck at $4,000, and

it Paulus determined to be consistent with the Kelly Blue Book value. However, there was another version of the form that listed the value of the truck at up to $2,500.

On February 24, 2000, Paulus went to Carl Droivold's residence and spoke to Droivold's wife. He saw the truck, which appeared to be in good condition. Mrs. Droivold said her husband paid "'way more' than $300" for it. Later that day, Paulus returned to the Droivold residence and spoke to Carl Droivold, who indicated he paid $1,500 for the truck. Carl Droivold also said he had known Kent Kilroy for many years, they were good friends and he had worked for Kilroy on occasion. However, two hours later, Paulus again spoke to Carl Droivold, who recanted his earlier statement about the purchase price and said he paid only $300. Droivold also said he did not pay cash but instead bartered for labor.

On February 25, 2000, Carl Droivold and Kent Kilroy filed citizen's complaints against Paulus. Around the same time, Paulus informed his supervisor, Lieutenant Paul Vinson, about the results of his investigation. Vinson instructed Paulus to prepare an affidavit to obtain a warrant to search for documents regarding the truck sale. Paulus was also told to seek assistance in preparing the affidavit from Officer Garrison, who had more experience in such matters. Because of the citizen complaints, Paulus was removed from further investigation of the matter. There have been no other citizen complaints filed against Paulus.

Paulus and Garrison prepared a search warrant affidavit. The affidavit generally recited the information obtained by Paulus during his investigation. However, it also indicated that Paulus estimated the value of the truck at $4,000 to $5,000 based on his observation of it at the Droivold residence. The affidavit failed to mention that Carl Droivold had recanted his earlier statement about what he paid for the truck or that Kilroy and Droivold had filed citizen complaints against Paulus. Paulus also did not include the fact that Hines owed $573 in registration fees on the truck, the price Hines paid for the truck, or the truck's mileage, matters which he had not investigated. He also did not include Droivold's claim that the truck was in poor condition and that Droivold had put $5,000 in parts and labor into it.

Paulus presented the affidavit to a magistrate on February 27, and a search warrant was issued. CHP officers other than Paulus executed the warrant at Kilroy's Towing. Paulus acted as the evidence officer for the materials retrieved from Kilroy's Towing.

Kent Kilroy was arrested for possession of firearms discovered in the search. Kilroy had an earlier felony conviction, rendering such possession unlawful. He was prosecuted in federal court, where Judge Lawrence Karlton granted Kilroy's motion to suppress, and the charges were dismissed.

On September 3, 2002, the Kilroy's initiated this action against the State of California and Paulus. The complaint

alleged six causes of action: (1) violation of civil rights (42 U.S.C. § 1983; Civ. Code, § 52.1), (2) intentional interference with business relations, (3) negligent interference with business relations, (4) negligent hiring and retention, (5) intentional infliction of emotional distress, and (6) negligent infliction of emotional distress. The defendants demurred and the court sustained the demurrers to the interference with business relations and infliction of emotional distress claims. The court also sustained the state's demurrer to the 42 United States Code section 1983 claim.

Defendants thereafter moved for summary judgment or, in the alternative, summary adjudication of issues. In opposition to the motion, plaintiffs requested judicial notice of Judge Karlton's order granting Kent Kilroy's motion to suppress. Defendants opposed the request and objected to various assertions in plaintiffs' separate statement of material facts.

The trial court denied judicial notice and sustained many of defendants' evidence objections. On the motion for summary judgment, the court concluded that Paulus is entitled to qualified immunity on the 42 United States Code section 1983 claim and both defendants are entitled to immunity in connection with the Civil Code section 52.1 claim. Finally, the court concluded that there is no factual basis for the negligent hiring and retention claim, because there is no evidence of prior complaints against Paulus. The court granted summary judgment to defendants, and judgment was entered.

DISCUSSION

I

Judicial Notice

Plaintiffs contend that the trial court erred in refusing to take judicial notice of Judge Karlton's order granting Kent Kilroy's motion to suppress. Plaintiffs argue that a court may take judicial notice of the records of any other court and of the truth of facts asserted in orders, findings of fact and judgments. Finally, plaintiffs argue that the court is required to take judicial notice of such matters if the proponent gives the adverse party sufficient notice of the request and furnishes the court with sufficient information to enable it to take judicial notice. (See Evid. Code, § 453.) We are not persuaded.

"'Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter.' [Citation.] The court may in its discretion take judicial notice of any court record in the United States. (Evid. Code, § 451.) This includes any orders, findings of facts and conclusions of law, and judgments within court records. [Citations.] However, while courts are free to take judicial notice of the existence of each document in a court file, including the truth of results reached, they may not take judicial notice of the truth of hearsay statements in decisions

and court files. [Citation.] Courts may not take judicial notice of allegations in affidavits, declarations and probation reports in court records because such matters are reasonably subject to dispute and therefore require formal proof." (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882.)

We agree with plaintiffs that it would have been proper for the trial court to take judicial notice of Judge Karlton's order, at least to prove the truth of the fact that such order was issued. However, plaintiffs sought much more from that order. Plaintiffs attempted to use it as evidence of the facts found and recited by Judge Karlton in the order, which facts led him to conclude that the search violated the Fourth Amendment.

In asserting that the trial court was required to take judicial notice not only of the fact of Judge Karlton's order but of the factual findings therein, plaintiffs rely heavily on the following statement by Justice Jefferson in the second edition of his treatise on evidence: "[A] court *cannot* take judicial notice of *hearsay allegations* as being true, just because they are part of a court record or file. A court may take judicial notice of the *existence* of each document in a court file, but can only take judicial notice of the *truth* of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments." (2 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) Judicial Notice, § 47.2 at p. 1757.)

In support of the foregoing rule, Jefferson cited, among others, *Weiner v. Mitchell, Silberberg & Knupp* (1980) 114

Cal.App.3d 39, where the Court of Appeal held that it was proper for the trial court to take judicial notice of facts stated in a federal appellate opinion affirming a criminal conviction. (*Id.* at pp. 45-46.) The Court of Appeal sought to justify its decision by explaining that "[t]he facts stated in an appellate opinion appear to us to possess generally an assurance of accuracy and reliability . . . ." (*Id.* at p. 46.) However, Jefferson disagreed with the *Weiner* approach, explaining: "The *Weiner* court's view of judicial notice indicates an erroneous concept of judicial notice and is clearly fallacious and indefensible. Judicial notice substitutes for formal proof only because the matters judicially noticed are not reasonably subject to dispute. It is not sufficient for judicial notice that facts sought to be made the subject of judicial notice possess 'generally' an assurance of accuracy. An appellate opinion is not a judgment of the appellate court, such as is the remittitur. An appellate opinion's recitation of facts is nothing more than the hearsay assertions of the judges who issued the opinion. An appellate opinion--insofar as it recites pertinent facts--is not to be classified in the same vein as orders, findings of fact and conclusions of law, and judgments." (2 Jefferson, Cal. Evidence Benchbook, *supra*, Judicial Notice, § 47.2 at p. 1757, italics omitted.)

In *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort*, *supra*, 91 Cal.App.4th 875, the court explained further that *Weiner* "appears to run counter to the well-established principle that courts may not take judicial notice of hearsay

allegations. An appellate court's description of facts is merely the hearsay assertions of the justices who delivered the opinion. Hearsay statements within the opinion are inadmissible unless they fall within an exception to the hearsay rule. Under section 1280 of the Evidence Code, appellate opinions do come within the exception to the hearsay rule for official records. (Evid. Code, § 1280.) However, an official record is '[e]vidence of a writing made as a record of an act, condition, or event . . . offered . . . to prove the act, condition or event . . . .' (*Ibid.*) Thus, while an official record of an appellate opinion can be admitted to prove the truth of the facts asserted, the most it may prove is that the appellate opinion was delivered and that the court made orders, factual findings, judgments and conclusions of law. Stated another way, what is being noticed is the *existence* of the act, not that what is asserted in the act is true. [Citation.] The truth of any factual matters that might be deduced from official records is not the proper subject of judicial notice." (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort*, *supra*, at p. 885.)

In the third edition of his treatise, Justice Jefferson has not included the statement relied on by plaintiffs. Rather on the question of judicial notice of facts recited in orders and judgments, the treatise states: "Can the court take judicial notice of the truth of the facts asserted in documents such as orders, findings of fact, conclusions of law, and judgments? By making an order establishing the law of the case, it seems that

the facts are no longer in dispute and can therefore be considered true as set forth in an order, findings of fact, or conclusions of law. (2 Jefferson, Cal. Evidence Benchbook (3d ed 2004) Judicial Notice, § 47.12, p. 1094.) Thus, only where the order or judgment establishes a fact for purposes of law of the case or, as we shall explain, res judicata or collateral estoppel, would the fact so determined be a proper subject of judicial notice.

In *Gilmore v. Superior Court* (1991) 230 Cal.App.3d 416, this court held that it was error to take judicial notice of factual statements from a prior appellate opinion involving the same defendant and the same facts. *Gilmore* was a wrongful death case, and in the prior action, we reversed the defendant's manslaughter conviction, concluding that the undisputed evidence established justifiable homicide as a matter of law. The trial court took judicial notice not only of the existence of the opinion and the result reached but of the "statement of the facts surrounding the homicide to establish the truth thereof." We indicated it would normally be error for a court to take judicial notice of statements of facts in an opinion. (*Id.* at p. 418.) However, we concluded that such error did not affect the outcome of the case. (*Id.* at p. 419.)

In *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, the Court of Appeal affirmed a trial court's refusal to take judicial notice of a judge's factual findings in a prior case. The *Sosinsky* court expressly refused to follow the language from the Jefferson treatise on which plaintiffs rely. The court

explained: "While we have no quarrel with the fact that a judge, after hearing a factual dispute between litigants A and B, may choose to believe A, and make a finding of fact in A's favor, and while we have no quarrel that at some subsequent time it may be proper to take judicial notice that the judge did in fact make that particular finding in favor of A, the taking of judicial notice that the judge made a particular factual finding is a far cry from the taking of judicial notice that the 'facts' found by the judge must necessarily be the true facts, i.e., must necessarily be 'the truth.' To state this a bit more simply, the taking of judicial notice that the judge believed A (i.e., that the judge ruled in favor of A on a particular factual dispute) is different from the taking of judicial notice that A's testimony must necessarily have been true simply because the judge believed A and not B. Indeed, if A's testimony consisted of 'facts . . . that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy' (Evid. Code, § 452, subd. (h)), there would have been no need for a trial on the dispute between A and B in the first place. The Jefferson text points out, quite correctly, that the assertion of a 'fact' in a document that appears in a court file does not necessarily mean that that 'fact' is a true 'fact.' Why this general rule changes for statements of 'fact' that are made by a judge in that judge's findings of fact, the text does not address." (*Sosinsky v. Grant*, *supra*, 6 Cal.App.4th at p. 1565, italics omitted.)

The *Sosinsky* court also took issue with cases asserting that judicial notice of factual findings in prior judicial orders, opinions or decisions is proper where the factual matter had been the subject of a contested adversary hearing. The court stated: "It appears to us, however, that neither a finding of fact made after a contested adversary hearing nor a finding of fact made after any other type of hearing can be indisputably deemed to have been a correct finding. As we have noted, '[u]nder the doctrine of judicial notice, certain matters are assumed to be indisputably true, and the introduction of evidence to prove them will not be required.' [Citation.] Taking judicial notice of the truth of a judge's factual finding would appear to us to be tantamount to taking judicial notice that the judge's factual finding must necessarily have been correct and that the judge is therefore infallible. We resist the temptation to do so." (*Id.* at p. 1568.)

We agree with the foregoing cases that factual findings in a prior judicial opinion are not a proper subject of judicial notice. However, that does not end our inquiry. "Whether a factual finding is true is a different question than whether the truth of that factual finding may or may not be subsequently litigated a second time. The doctrines of res judicata and collateral estoppel will, when they apply, serve to bar relitigation of a factual dispute even in those instances where the factual dispute was erroneously decided in favor of a party who did not testify truthfully." (*Sosinsky v. Grant*, *supra*, 6 Cal.App.4th at p. 1569.) In other words, even though a factual

finding in a prior judicial decision may not establish the truth of that fact for purposes of judicial notice, the finding itself may be a proper subject of judicial notice if it has a res judicata or collateral estoppel effect in a subsequent action.

Plaintiffs suggest, albeit obliquely, that the court was required to take judicial notice of Judge Karlton's order because it has collateral estoppel effect in this action. Plaintiffs point out that both Paulus and Kent Kilroy testified in the federal court proceeding, arguments were raised on both sides, and probable cause was found lacking. According to plaintiffs, "[t]he findings by Judge Karlton went directly to the issues of concealment and misstatements by the affiant, misdirection to a magistrate, and a reckless or deliberate disregard of truth by affiant Paulus."

In the court below, plaintiffs did not raise collateral estoppel as a basis for taking judicial notice of Judge Karlton's order. At the hearing on defendants' motion, counsel for plaintiffs indicated their argument was not that the court should adopt everything Judge Karlton said, but rather should consider the facts recited therein as a basis for denying summary judgment. Generally, a party may not raise issues for the first time on appeal. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394, p. 444; see *Johanson Transportation Service* v. *Rich Pik'd Rite, Inc.* (1985) 164 Cal.App.3d 583, 588.)

At any rate, collateral estoppel is not appropriate here. "[A] party will be collaterally estopped from relitigating an issue only if (1) the issue decided in a prior adjudication is

identical with that presented in the action in question; and (2) there was a final judgment on the merits; and (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication." (*Clemmer* v. *Hartford Insurance Co.* (1978) 22 Cal.3d 865, 874, italics omitted.) In addition to being a party or in privity with a party to the prior action, "the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication." (*Id.* at p. 875.)

The issue decided in the federal proceeding (whether evidence must be suppressed because of deliberate and material omissions) is not identical to the issue to be decided here (whether Paulus is entitled to qualified immunity because his conduct was objectively reasonable). (See *Lombardi v. City of El Cajon* (9th Cir. 1997) 117 F.3d 1117, 1121.) Furthermore, neither Paulus nor the state was a party to the federal court proceeding. That case was brought on behalf of the United States against Kent Kilroy.

In this matter, the trial court properly could have taken judicial notice that on January 16, 2001, Judge Karlton issued an order suppressing the evidence obtained in the search of Kilroy's Towing. However, the fact of such ruling has no bearing on this matter and is not what plaintiffs sought. Plaintiffs attempted to present the factual findings of Judge Karlton as evidence of those facts. This was not a proper use of judicial notice, and the trial court correctly denied plaintiffs' request.

II

Summary Judgment Standards

Plaintiffs contend that even without judicial notice of Judge Karlton's order, summary judgment was improper because issues of fact exist on each of the remaining causes of action of the complaint.

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

"[I]n moving for summary judgment, a 'defendant . . . has met' his 'burden of showing that a cause of action has no merit if' he 'has shown 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. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff . . . may not rely upon the mere allegations or denials' of his 'pleadings to show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.'" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.)

III

42 U.S.C. Section 1983

The trial court concluded that Paulus is entitled to qualified immunity on plaintiffs' 42 United States Code section 1983 claim. Plaintiffs argue that immunity is not available to Paulus "because of his bad faith and malice." However, this contention is premised on the findings made by Judge Karlton. Plaintiffs presented no independent evidence of bad faith or malice. They relied solely on the omissions from the search warrant affidavit. However, as we will explain, those omissions were not material.

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (*Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818 [73 L.Ed.2d 396, 410].) Under this standard, if an officer seeking a warrant "'submitted an affidavit that contained statements he knew to be false or would have known were false had he not recklessly disregarded the truth and no accurate information sufficient to constitute probable cause attended the false statements, . . . he cannot be said to have acted in an objectively reasonable manner,' and the shield of qualified immunity is lost." (*Branch v. Tunnell* (9th Cir. 1991) 937 F.2d 1382, 1387.)

Although adopted in a criminal context, the standard of *Franks v. Delaware* (1978) 438 U.S. 154 [57 L.Ed.2d 667] is used to determine the scope of qualified immunity in a civil rights action. (*Branch v. Tunnell*, *supra*, 937 F.2d at p. 1387.) To survive a motion for summary judgment based on a claim of qualified immunity, the plaintiff must establish that after excluding false information from the affidavit and including omitted information, "the remaining information in the affidavit is insufficient to establish probable cause." (*Lombardi v. City of El Cajon*, *supra*, 117 F.3d at pp. 1123-1124.) We review de novo the trial court's findings in this regard. (*U.S. v. Hernandez* (9th Cir. 1996) 80 F.3d 1253, 1260, disapproved on other grounds in *U.S. v. Foster* (9th Cir. 1999) 165 F.3d 689, 692, fn. 5.)

The affidavit here failed to include that Carl Droivold recanted his statement that he paid $1,500 for the truck; that citizen complaints were filed against Paulus; that registration fees were owed by Hines; the price Hines paid for the truck; the truck's mileage; and that Droivold claimed that the truck was in poor condition and that he put $5,000 of parts and labor into it. Although the affidavit also did not mention that there were two versions of the CHP form 180, there is no evidence that Paulus was aware of this fact.

Plaintiffs argue that this case "presents a complicated factual situation, in which the issues that are likely to prove dispositive are hotly disputed." We disagree. Assuming plaintiffs can establish that Paulus knowingly or recklessly

excluded any of the foregoing information from the affidavit, that information had little or no bearing on the issue of probable cause. Kilroy's Towing was being investigated for making a false statement on a Department of Motor Vehicles form for the sale of Hines's truck. The important facts were that the form listed the sale price at $300, but Carl Droivold and his wife said that Carl paid much more for it. Hines said that Kent Kilroy had demanded $2,150 from him for release of the truck, and Kent Kilroy downplayed his relationship with Carl Droivold, thereby hiding a motive for minimizing the sale price. This information suggested an attempt to reduce the taxes owed on the sale and to conceal possible fraud committed against the owner of the truck. The information excluded by Paulus went primarily to the actual value of the truck, which, while minimally relevant to whether Carl Droivold paid $1,500, does not negate the differing claims of the price paid. Nor does Carl Droivold's attempted recantation or the fact that citizen complaints were filed against Paulus have any bearing on the question of probable cause. Because probable cause existed even if the omitted information had been considered, Paulus was entitled to qualified immunity. Hence, the trial court properly granted summary judgment on the federal civil rights claim.

Before leaving this issue, we note that plaintiffs assert in their reply that it was incumbent on the trial court to consider the finding of Judge Karlton that probable cause was lacking. According to plaintiffs, "[t]he only reason for the contrary ruling of the trial court stems from the trial court's

lack of familiarity with 1983-type actions, or the desire to cleanse its docket of a difficult case." Plaintiffs do not assist their case by personal attacks on the trial court.

IV

Civil Code section 52.1

On plaintiffs' state civil rights claim, the trial court concluded that defendants are entitled to immunity under Government Code sections 821.6 and 815.2. The court explained that there was probable cause for the warrant and there was no evidence that Paulus acted outside his official duties as a CHP officer. Plaintiffs argue that issues of fact exist as to whether Paulus was acting outside the scope of his authority and whether his actions were malicious. We disagree.

Government Code section 821.6 reads: "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 extends beyond acts of prosecuting a criminal action to include conduct during the investigation of a crime. (*Amylou R. v. County of Riverside* (1994) 28 Cal.App.4th 1205, 1209-1210.) Where the public employee is immune, so too is his government employer. (Gov. Code, § 815.2, subd. (b).)

Plaintiffs argue that whether a public employee was acting within the scope of his employment is ordinarily a question of fact. However, that is true only where the evidence is in conflict. Plaintiffs have provided no evidence to suggest that

Paulus was not acting within the scope of his employment as a CHP officer. They rely instead on an allegation to this effect in their complaint. A party may not rely on allegations or denials in the pleadings to establish a triable issue of facts. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 849.) Regardless of whether Paulus may have harbored ill will toward plaintiffs, the facts show that he received information from a third party suggesting a crime had been committed by Kilroy's Towing, he investigated the matter, he presented his findings to his CHP superior, and the superior directed that an arrest warrant be obtained. Paulus then prepared the affidavit, leaving out only information that we have concluded was not material to the offense being investigated.

As to plaintiffs' contention that an issue of fact exists on the element of malice, Government Code section 821.6, by its plain language, provides immunity even if Paulus acted maliciously and without probable cause.

Finally, plaintiffs cite *McKay v. County of San Diego* (1980) 111 Cal.App.3d 251, where the court held that "there is no false arrest governmental immunity for a public employee who maliciously arrests and imprisons another by personally serving an arrest warrant issued solely on information deliberately falsified by the arresting officer himself." (*Id.* at p. 253.) In *Harden v. San Francisco Bay Area Rapid Transit Dist.* (1989) 215 Cal.App.3d 7, 15-16, the court held that *McKay* applies even where the officer did not personally make the arrest, as long as he took an active role in it.

Plaintiffs assert that while Paulus may be immune from liability for malicious prosecution, he is not immune from false arrest. However, the facts show that Paulus did not assist in the search of Kilroy's Towing or the arrest of Kent Kilroy. Paulus investigated and prepared an affidavit concerning the sale of a truck. Kent Kilroy was arrested on weapons charges. Although it is true the arrest would not have occurred but for Paulus's work, he nevertheless did not take an active role in the arrest. Summary judgment was properly granted on plaintiffs' Civil Code section 52.1 claim.

V

Negligent Hiring and Retention

Plaintiffs contend that the trial court erred in granting summary judgment on their negligent hiring and retention claim. Plaintiffs argue that "triable issues exist as to whether or not the state negligently discharged its duties in terms of hiring, training, supervision, and retention of defendant Paulus." According to plaintiffs, once Paulus was removed from the case by the CHP, it was improper for him to prepare the search warrant affidavit and assist in the execution of the warrant as the evidence officer.

"'An employer may be liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit.'" (*Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, 1213.) Plaintiffs' contention is premised on an assertion that the CHP was required to remove Paulus from the

investigation of Kilroy's Towing once Kent Kilroy and Carl Droivold submitted citizen complaints against him. This assertion is not well founded.

First, the record does not contain the citizen complaints. Thus, we have no idea what connection they have to the investigation or how plaintiffs might have been harmed by the continued involvement of Paulus in the case. Furthermore, whether Paulus was to be removed from the investigation was a matter of internal CHP procedures. Plaintiffs cite nothing to suggest the CHP was *required* to remove Paulus from the case. Government Code section 820.2 provides that a public employee is not liable for an injury resulting from a discretionary act, even where that discretion is abused. Here, Lieutenant Vinson exercised discretion in deciding to allow Paulus to continue to be involved in the case against Kilroy's Towing.

At any rate, the CHP did remove Paulus from further investigation of the truck sale. Although Paulus was directed to prepare the search warrant affidavit, this is because he was the only person with the pertinent information. Plaintiffs' assertion that Paulus could not prepare the affidavit once a complaint was filed against him leads to the absurd conclusion that once an investigating officer obtains sufficient information to seek a warrant, all a suspect need do is file a citizen complaint against that officer, thereby preventing the officer from presenting the information to a magistrate. As to Paulus acting as the evidence officer, there is nothing in the record to suggest this was anything more than a ministerial

function. Paulus did not participate in the search at Kilroy's Towing, the selection of the items to be seized or the arrest of Kent Kilroy.

VI

Conclusion

Based on the evidence presented in connection with defendants' motion for summary judgment, and excluding the findings of Judge Karlton, the trial court properly granted defendants' motion. Judge Karlton's conclusions appear to have been based primarily on his assessment of the credibility of the CHP officers involved in the investigation. However, credibility is not an issue on summary judgment. The question is whether defendants have presented evidence sufficient to entitle them to judgment and whether plaintiffs have presented contradicting evidence. As explained earlier, defendants have presented sufficient evidence to support their motion. In particular, defendants relied on Paulus's declaration that the vehicle transfer form indicated the truck was sold for $300, but Carl Droivold and his wife stated the truck cost them much more. In response, plaintiffs relied almost exclusively on the findings of Judge Karlton. They did not even present declarations from the Droivold's disputing Paulus's assertions. Thus, there is nothing in the record with which to question Paulus's credibility. Based on the totality of the evidence presented, defendants were entitled to summary judgment.

DISPOSITION

The judgment is affirmed. **(CERTIFIED FOR PARTIAL PUBLICATION.)**

HULL, J.

We concur:

RAYE, Acting P.J.

MORRISON, J.