

**MELVIN BILLUPS, Plaintiff and Appellant, v. LOS ANGELES
COUNTY METROPOLITAN TRANSIT AUTHORITY, Defendant
and Respondent.**

B197017

**COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE
DISTRICT, DIVISION FIVE**

2008 Cal. App. Unpub. LEXIS 4970

June 19, 2008, Filed

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PRIOR HISTORY: [*1]

APPEAL from a judgment of the Superior Court of Los Angeles County, No. BC333994. Paul Gutman, Judge.

DISPOSITION: Affirmed.

COUNSEL: Frances M. Campbell, a Professional Corporation, and France M. Campbell for Plaintiff and Appellant.

O'Reilly & McDermott, Paul O'Reilly; Greines, Martin, Stein & Richland LLP, Martin Stein and Carolyn Oill for Defendant and Respondent.

JUDGES: KRIEGLER, J.; TURNER, P. J., ARMSTRONG, J. concurred.

OPINION BY: KRIEGLER

OPINION

In this action for personal injuries arising from a fall on a bus, plaintiff and appellant Melvin Billups appeals from a judgment following a jury trial in favor of defendant and respondent Los Angeles County Metropolitan Transit Authority (MTA). Billups contends the trial court prejudicially erred in admitting the opinion of the MTA's neurologist, Dr. Edwin Amos, regarding what might have caused Billups to fall. Billups further contends the opinion was irrelevant and lacked foundation. The MTA argues the judgment must be affirmed because Billups failed to show prejudicial error by an adequate record, in that the record does not contain the jury instructions. We con-

clude the testimony was properly admitted and further conclude that the record is inadequate to demonstrate prejudicial [*2] error.

PROCEDURAL AND FACTUAL HISTORY

On May 25, 2005, Billups filed a complaint for damages against the MTA based on negligence. Billups alleged that on April 8, 2005, he was a passenger on an MTA bus when "the driver of the bus slammed on his brakes, causing Billups to fall and hit his head." He alleged he suffered head, neck, and back injuries.

A. Billups's Case

1. The Bus Driver's Testimony

The bus driver, Dexter Jennings, was called to testify under Evidence Code section 776. Jennings was driving an MTA bus on Western Avenue approaching a busy bus stop across Santa Monica Boulevard, when a passenger told him that another passenger was on the floor of the bus. The bus was traveling at 15 to 20 miles per hour, and Jennings had not made a sudden stop to cause Billups to fall. Other passengers were on their feet, moving toward the exits. Jennings looked back, saw Billups on the floor, and stopped the bus. There was no one else on the floor. Jennings called the dispatcher to send an ambulance. Billups did not answer when Jennings questioned him, but Billups was breathing, crying, and shaking a little, which led Jennings to think Billups had had a seizure or had passed out. Billups's eyes [*3] were open at times and shut at times. At least one of his legs was shaking. Jennings had three or four passengers have seizures on his bus, and the way Billups was acting, "he had some symptoms of a person having a seizure." Jennings did not use the word "seizure" in his report of the incident or in his communication with the dispatcher.

The jury heard a recording of Jennings's telephone call requesting an ambulance. On the recording, the dispatcher asked Jennings how Billups fell, and he answered, "I just came to a stop and he fell." Jennings testified he did not remember saying that, but he was excited when he was talking to the dispatcher. He also told the dispatcher that Billups was sitting when he fell, because that is what he assumed. The paramedics, who arrived in ten minutes, were able to communicate with Billups. After one hour, they put him on a gurney and took him to the emergency room.

The MTA did not find Jennings negligent or responsible for the incident.

2. Dr. Les Zackler's Testimony

Dr. Zackler, a psychiatrist specializing in neuropsychiatry, treated Billups for injuries from this accident. Billups was 64 years old. He suffered a concussion, which caused anosmia (loss [*4] of smell), and developed persistent post-concussion syndrome. The injuries cause him to be severely depressed and anxious. The concussion and anosmia indicate an injury to the brain and the structures associated with it. There was no evidence of malingering or an intent to exaggerate.

Dr. Zacker ruled out the possibility that Billups had suffered a seizure. "No loss of urine, no biting of the lip, no objective evidence of tonic-clonic movements. He has no prior history of seizure disorder. It's incredibly rare to find the nuance of seizure in someone without a brain tumor. If there was a seizure, it could have occurred as a result of a brain injury from the fall, but there's really no reason to believe he had a seizure."

3. Billups's Testimony

Billups testified Jennings was driving fast. Billups stood up as the bus was moving and walked toward the rear door to exit. He heard a squeaking noise as Jennings suddenly put on the brakes. Billups must have lost consciousness, because he did not remember what happened after that until the paramedics questioned him.

Billups had never been sick before.

4. Dr. Samuel Whitaker's Testimony

Dr. Whitaker, an otolaryngologist and neurologist, treated Billups. [*5] Billups had no specific memory after he fell and hit his head, until he woke up on a gurney in a hospital. He was diagnosed in the hospital emergency room with a closed head injury. He suffers from headaches, neck and back pain, feelings of unsteadiness, problems with concentration and hearing, loss of sense of taste, ringing in the ear, and other problems.

Dr. Whitaker concluded Billups had a closed head injury from his fall, which resulted in concussions to the cerebral part of the brain and the inner ear. These injuries caused endolymphatic hydrops (damage to the ear that causes vertigo, equilibrium, tinnitus, and progressive hearing loss), an auditory processing dysfunction and temporal mandibular joint dysfunction, severe micro-anosmia, and severe depression. Billups did not have a sinus disease. An MRI of his brain revealed loss of fibers anteriorly and posteriorly, which is a hallmark of trauma and not caused by age.

Dr. Whitaker ruled out seizure. "Typically with a seizure you have defecation or loss of urine. . . . All the orifices just kind of relax and they open. And he has no history of seizures There's no subsequent workup that was involved to rule out or rule in [*6] a seizure. The emergency room physicians that saw him didn't feel that he had a seizure. The emergency room records of the people that saw him at the time weren't concerned that he had a seizure." "[T]here [are] very specific things that you look for because you'd like to know whether or not you thought it was a seizure. And I don't think there has [ever] been any physician [to] exam[ine] him [who] felt at the time of the examination there was evidence that he had a seizure."

B. MTA's Case

1. Benjamin Rossell's Testimony

Benjamin Rossell, a paramedic employed by the Los Angeles City Fire Department, responded to the call for medical assistance and assessed Billups on the bus. There were no visible signs of trauma. Billups walked to the gurney. He was alert and oriented, and his pulse, respiration, pupils, and blood sugar were normal. His blood pressure was 190 over 134 and 50 minutes later, 174 over 122. The normal signs of loss of consciousness were not present. Billups did not cooperate in responding to certain questions. Billups stated he was sitting and fell to the ground, but did not lose consciousness. Billups complained of head, neck, and back pain. Rossell did not suspect that [*7] Billups had a seizure.

2. Dr. Edwin Amos's Testimony

Dr. Amos, a neurologist, examined Billups for the MTA. He testified Billups fell to the ground because he had a seizure or other medical event.

"The question has arisen as to whether or not there was an accident or some hard braking that caused [Billups] to fall out of his seat. That's the story the patient gave me that I recorded in my note. It appears, also, that may not be the case. But yet we do know from what we've heard that this

patient was on the floor of that bus. Somehow we have to explain that. [P] As a doctor and a neurologist, what I'm trying to do is understand what may have happened to him. The fact that he had some shaking movements, the fact that he had some trouble expressing himself after the event, the fact that he had some confusion, some trouble with his recollection or memory as to what happened, those all, to me, sounded very much like what we call a seizure, an epileptic seizure. [P] He has had, he believes, some sort of bump to his head, although I found in the records no evidence that he had any kind of injury to his head. And so the question has come up, did he have concussion, or did some other event occur [*8] that caused him to be -- we know he was on the floor of the bus. But no one else was on the floor of the bus. [P] There were no other reports of injuries or other problems. It's something which, as a neurologist, makes me think about those possibilities. He may have bumped his head, even if he had had a seizure, and had a mild concussion. I think it's a possibility. [P] But I think . . . it's impossible to know with certainty exactly what happened to him. And I think that he probably, as most patients do, tried to reconstruct what happened to him, when he's asked about why were you on the floor, how are you doing. We see this with people who have had seizures. We know from his MRI scan . . . that [there] was evidence of small strokes in his brain that are there. And I think that is a risk for seizures. [P] This is a man [who] has high blood pressure and is on blood pressure medicine. He could have had a small symptom of an incipient stroke. These are all things that, as a neurologist, that I think about. . . . I think these are important considerations." The [*9] trial court overruled Billups's objection that the testimony lacked foundation and was not corroborated by the witness's deposition.

Dr. Amos was "not sure [if Billups sustained a seizure on the bus]. I think it's a possibility, just as it's a possibility that he may have had a fall and concussion. I don't think we know with probability or with certainty." "[A] seizure can be something as simple as staring like that (indicating) and then asking what happened to me just now, 20 seconds ago. That can be a small seizure. . . . [P] Someone can have a loss of consciousness, have some stiffening of their body, maybe some movement. They may not bite their tongue. They may not lose their urine or their bowel movement. And so seizures are -- there's a spectrum of clinical phenomena that occur with seizures. [P] The term 'seizure' is a general term that means there was a discharge of brain cells that shouldn't have happened. . . . [P] . . . [P] . . . [W]hen we say a person had a generalized seizure, that means they have an alteration in . . . their level of consciousness. It may be brief, two seconds. It may be half a minute. If you have partial seizure, a person can be awake through that, appearing [*10] to even talk or do some activity, but not completely collapse or lose consciousness. [P] So there is a spectrum."

An MRI report indicated evidence of small strokes. One can have small strokes and not realize it. TIA, or transient ischemic attack, is almost a stroke, but the symptoms resolve within 24 hours. People on blood pressure medication or people who sit for prolonged periods of time can experience lightheadedness or almost fainting when they stand up. Lack of sleep and fasting are common provocative factors for seizures.

Dr. Amos concluded there were a number of different medical reasons why Billups ended up on the floor of the bus. Billups's body twitching and difficulty expressing himself are characteristics of a seizure or TIA. That Billups did not realize he had lost consciousness is consistent with someone who had a seizure. The hospital records where he was taken by the paramedics did not indicate a head or brain injury; Billups was able to talk to people. This is consistent with his having had a seizure.

"I think that the best way to understand what happened or probably happened to him is how I outlined it. I think I have mentioned these are possibilities. I wasn't there. [*11] No one was right there to tell us exactly what happened. [P] . . . [P] . . . I've tried to look at it as carefully as I can." "If [Billups was knocked unconscious by a blow to the head, he would have had a significant headache, unsteadiness on his feet, and would not have been able] to walk off the bus a few minutes later." Concerning Billups's problems with his sense of smell, Dr. Amos found evidence of sinus disease at the time of the accident. Billups's complaint of trouble with his sense of smell and taste do not indicate he had a head injury. The loss of Billups's sense of smell was not caused by trauma occurring during the incident. Billups had a collection of small strokes deep in the brain. ¹ "I think it's possible that he had a seizure or another event that caused him to fall to the floor of the bus."

1 Billups objected to this testimony on relevancy grounds, among others, and made a motion to strike. The objections were overruled.

Dr. Amos testified to a reasonable medical probability that "something medical did cause [Billups] to be on the floor" of the bus. He could not state the specific medical condition that caused Billups to fall. He could not testify to a reasonable [*12] degree of medical probability that Billups sustained a seizure, stroke, or TIA. "I don't know to a degree of medical probability why he was on the floor." In Dr. Amos's opinion, loss of hearing and smell experienced by Billups were not due to this incident even if there was a head injury. Dr. Amos did not think there was a head injury.

C. Rebuttal

Dr. Bodena Wrobel, a physician, testified that the hospital records indicated the back of Billups's head was tender.

D. Argument

Billups argued to the jury that he fell because the bus was going too fast and made an abrupt stop. The bus driver's testimony that he did not put on the brake suddenly was not credible. Billups was a credible witness. Billups belittled Dr. Amos's testimony that Billups could have fallen because of a medical event as "nonsense" and speculative. "Now, there is a legal standard for the expert testimony that could be considered or should be considered. Anything below that is garbage. A reasonable degree of medical probability. If they cannot tell you based on that -- and what that means is based on facts and reason, according to the skill and training of the physician. [P] So the only thing that Dr. Amos testified to a [*13] reasonable degree of medical probability was back and neck sprain."

The MTA argued Jennings was credible and Billups was not credible. The MTA argued that braking a bus, in and of itself, is not negligence. There was no proof Jennings was negligent. Dr. Amos testified about how Billups might have come to fall on the floor of the bus. "[A]ll of a sudden you have this man on the floor. And what we're trying to do is analyze how did he get there That's what [Dr. Amos] said he was trying to do." The MTA argued, "So you're on the bus, you're 65 years old. Now, I don't know what happened, whether he didn't get enough sleep the night before, whether he didn't have enough to eat, whether he's tired, whether his blood pressure medication was taken."

In closing argument, Billups argued the MTA was negligent because Jennings made an abrupt stop without paying attention to the moving passengers in the cabin. "All Dr. Amos could testify to

a reasonable degree of medical probability [was] the man has head and neck sprain and strain. Any other alternative that he tried to come up with: seizures, stroke, T.I.A., you name it, I mean, there's nothing in the book of neurology that the man didn't [*14] come up with. [P] But none of those opinions were testified to, to a reasonable degree of medical probability. That's the golden standard. If anything's under that, you should not consider it, because that's not the law. The law says the expert must, must testify to a reasonable degree of medical probability. And Dr. Amos sat there and could not do that. When I cross-examined him, he said no, he couldn't. Seizures, no, he couldn't. Strokes, couldn't. TIA, couldn't. Nothing."

E. Verdict

On October 26, 2006, the jury returned a verdict finding the MTA not negligent. On November 22, 2006, the trial court rendered judgment in favor of the MTA and against Billups.²

2 Defendant filed a motion for new trial, contending that ten of the jurors refused to deliberate. The new trial motion was denied on February 28, 2007.

Billups timely appealed.

DISCUSSION

A. Dr. Amos's Opinion as to Why Billups Fell was Relevant

Billups contends that Dr. Amos's testimony that Billups might have fallen not by the braking of the bus, but by a stroke, seizure, or TIA was irrelevant. We conclude the trial court did not abuse its discretion in finding the evidence was relevant.

""Only relevant evidence is admissible [*15] [citations], and all relevant evidence is admissible unless excluded under the federal or California Constitution or by statute. [Citations.] Relevant evidence is defined in Evidence Code section 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the evidence tends "'logically, naturally, and by reasonable inference' to establish material facts" [Citation.] The trial court has broad discretion in determining the relevance of evidence" [Citation.]" (*People v. Richardson* (May 22, 2008, S029588) 43 Cal.4th 959 [2008 Cal.Lexis 6208, *73].)

Billups contends the testimony is irrelevant because it does not bear on the issue of whether the bus stopped abruptly. However, Dr. Amos testified that seizures, strokes, and TIA can cause balance problems, vertigo, loss of consciousness, and collapse. Thus, the testimony that Billups may have suffered a seizure, stroke, or TIA was clearly relevant to the issue of how Billups ended up on the floor of the bus.

Billups contends the testimony he may have suffered a seizure, stroke, or TIA is irrelevant because Dr. [*16] Amos did not testify to a reasonable degree of medical probability which medical condition caused Billups to fall. Dr. Amos did, however, testify to a reasonable degree of medical probability that the fall was caused by some medical condition.³ Evidence regarding the medical events that could possibly have occurred is relevant,⁴ because such evidence tended to prove the disputed fact that Billups collapsed because of a medical condition rather than because of the manner of the operation of the bus.

- 3 Billups does not assign a claim of error to the admission of this testimony.
- 4 As will be shown below, Dr. Amos's opinion that Billups might have suffered a seizure, stroke, or TIA is not without foundation.

To the extent Billups argues that the MTA had the burden of proof of causation of his fall because the MTA's theory of causation was a de facto affirmative defense, Billups is mistaken. "What constitutes new matter which must be pled as an affirmative defense in order to be considered at trial was set forth in the early case of *Goddard v. Fulton* [(1863)] 21 Cal. 430, 436, where the court stated: 'If the answer, either directly or by necessary implication, admits the truth of all the [*17] essential allegations of the complaint which show a cause of action, but sets forth facts from which it results that, notwithstanding the truth of the allegations of the complaint, no cause of action existed in the plaintiff at the time the action was brought, those facts are new matter. But if those facts only show that some essential allegation of the complaint is not true, then such facts are not new matter, but only a traverse.'" (*Lever v. Garoogian* (1974) 41 Cal.App.3d 37, 39.) The MTA's theory of causation did not admit the truth of the allegation of the complaint that Billups fell because the driver slammed on the brakes. Instead, the MTA took the position that this allegation was not true. Therefore, the MTA's theory was not a de facto affirmative defense.

As the MTA did not have the burden of proof of causation, the cases cited by Billups for the proposition that mere medical possibility is not sufficient to prove causation of injury are inapposite, since those authorities speak to the sufficiency of the evidence to satisfy a plaintiff's burden of proof of causation. (E.g., *Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1384-1385 [personal injury plaintiffs must prove [*18] causation of the injury to a degree of reasonable medical probability; mere medical possibility is not enough].)

B. Dr. Amos's Opinion was Based on a Sufficient Foundation

To the extent that Billups contends Dr. Amos's opinion that Billups may have suffered a stroke, seizure, or TIA was without foundation, the trial court could find to the contrary pursuant to its considerable discretion in such matters.

There was evidence Billups's leg was shaking while he was on the floor of the bus, he could not answer certain questions, and he had difficulty remembering what happened. Twitching and difficulty expressing oneself is characteristic of an event such as a seizure or TIA. There was evidence that Billups did not realize he had lost consciousness and was able to talk to people, and that the hospital records did not indicate a brain injury. These facts are consistent with having a seizure. That Billups did not have a significant headache and was able to walk off the bus indicates he had not been knocked unconscious by a blow to the head. An MRI scan revealed evidence of small strokes in his brain, which is a risk for seizures. There was evidence Billups had high blood pressure and was on blood [*19] pressure medication, suggesting he could have had a small symptom of an incipient stroke. Other passengers were standing up heading toward the exits, but only Billups fell to the floor. Dr. Amos testified that these facts indicated Billups may have suffered a seizure, stroke, or TIA. Given this record, the trial court did not abuse its discretion in finding that the necessary evidentiary foundation existed for Dr. Amos's opinion.

C. Failure to Demonstrate Prejudice Due to an Inadequate Record

The MTA argues Billups has failed to demonstrate prejudice, because the appellate record does not contain the jury instructions, which may have rendered any evidentiary error harmless. Billups

did not respond to this contention in his reply brief, nor did he file a motion to augment the record with the jury instructions. Under settled law, the record is inadequate to demonstrate prejudicial error, which serves as an independent basis for affirming the judgment.

"It is well settled, of course, that a party challenging a judgment has the burden of showing reversible error by an adequate record." (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; see also *Davenport v. Unemployment Ins. Appeals Bd.* (1994) 24 Cal.App.4th 1695, 1700.) [*20] In the absence of a proper record on appeal, the judgment is presumed correct and must be affirmed. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.)

"A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [P] . . . [P] (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice." (Evid. Code, § 353.)

"Our state Constitution provides that '[n]o judgment shall be set aside, or new trial granted, in any cause, . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13.) 'The effect of this provision is to eliminate any presumption of injury from error, and to require that the appellate court examine the evidence to determine whether the error did in fact prejudice the defendant. Thus, reversible error is [*21] a relative concept, and whether a slight or gross error is ground for reversal depends on the circumstances in each case.' (6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 1, p. 443.) [P] The phrase 'miscarriage of justice' has a settled meaning in our law, having been explained in the seminal case of *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). Thus, 'a "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' (*Id.* at p. 836.) 'We have made clear that a "probability" in this context does not mean more likely than not, but merely a reasonable chance, more than an *abstract possibility*.' [Citation.]" (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.)

Even if error were established, we could not reverse the judgment on this record, because a miscarriage of justice may not be declared without an examination of the entire record. The entire record in this appeal includes the jury instructions. It is possible the jury instructions [*22] may have cured any asserted evidentiary error; their absence precludes reversal.

DISPOSITION

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

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.