2d Civil No. B 113154

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

JESUS CABRAL,

Plaintiff and Appellant,

vs.

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, et al.

Defendants and Respondents.

Appeal from the Superior Court of Los Angeles County
Superior Court Case No. BC 157427
Honorable John Shook, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

Plaintiff Jesus Cabral, an uninsured motorist, parked his car on Olympic Boulevard and then opened the driver's side door, without first checking for oncoming traffic, and hit the rear wheel well of a passing bus. At the close of plaintiff's case in chief, the trial court granted the motion for nonsuit of defendant Los Angeles Metropolitan Transportation Authority ("MTA") on the ground that the undisputed evidence failed to establish that the defendant was negligent in any way and affirmatively established that the sole cause of the accident was the plaintiff's violation of Vehicle Code section 22517, which requires a motorist exiting a parked car on the side of traffic to ensure it is safe to do so before opening the door.

Plaintiff contends that the trial court erred in granting the nonsuit. Plaintiff also contends that the trial court erred in determining that Civil Code section 3333.4, which prohibits an uninsured driver, like plaintiff, from recovering noneconomic damages, applies to this case. As we will explain, neither contention has any merit. Accordingly, the judgment in favor of MTA should be affirmed.

STATEMENT OF THE CASE AND RELEVANT FACTS

Plaintiff filed the instant lawsuit against MTA on September 17, 1996, alleging injuries suffered as a result of a collision between plaintiff's car and MTA's bus in April 1996. (Appellant's Transcript in Lieu of Clerk's Transcript ["ATL"] 1-5.) Trial commenced on April 21, 1997. (ATL 51; Reporter's Transcript ["RT"] 1.) Plaintiff testified that he parked his car on Olympic Boulevard, turned off the engine and opened the driver's door, which collided with the rear wheel

well of MTA's passing bus. (RT 10, 13, 17, 56, 62.) Plaintiff was still wearing his seat belt when he opened the car door. (RT 13, 39.) Plaintiff further admitted he had seen the bus about a block behind him when he first stopped the car (RT 39-40), but failed to check for the position of the bus or other oncoming traffic before opening his car door (RT 42-43, 62). Plaintiff conceded he showed poor judgment in opening the door without checking for traffic first. (RT 70-71.)

At the close of plaintiff's case in chief, MTA moved for nonsuit on the ground that plaintiff failed to establish MTA was negligent and, in fact, proved that it was plaintiff's negligence that caused the accident. (RT 72-73.) Plaintiff opposed the motion, arguing that the bus had to be straddling the line between the second and third lanes of traffic at the time of the accident and that certain *defense witnesses* would prove this if they were allowed to testify. (RT 77:19-23.) Plaintiff also attempted to rely on the deposition testimony of a passenger on the bus who had *neither* witnessed the accident nor testified at trial. (RT 83-84.)

The trial court found that plaintiff's evidence showed a clear violation of Vehicle Code section 22517 by plaintiff (RT 79:19-26)[1/] and that if plaintiff had not opened his door, the accident would not have happened (RT 80:1-2). The court then asked plaintiff to point to any evidence submitted at trial that the bus was being operated improperly. (RT 80:7-12.) Plaintiff could not do so. (RT 83-85.)

The court granted the motion for nonsuit on April 23, 1997. (RT 87; ATL 53.) Plaintiff filed a notice of appeal on May 23, 1997, from the minute order granting the motion. (ATL 73.) Judgment was subsequently entered in favor of MTA on June 13, 1997. (ATL 69-71.)

1/ The full text of section 22517 is reproduced at page 7, below.

STATEMENT OF APPEALABILITY

Plaintiff has not included a statement of appealability in his opening brief, as required by California Rules of Court, rule 13. As it happens, the appeal is taken from a nonappealable order — the order granting MTA's motion for nonsuit. (Smith v. Roach (1975) 53 Cal.App.3d 893, 895, fn. 1.) Generally, an appeal from a nonappealable order should be dismissed. (See Walton v. Magno (1994) 25 Cal.App.4th 1237, 1238-1239.)

In this case, a judgment constituting a final determination of the rights of the parties was entered after the notice of appeal was filed. (ATL 69-71.) That judgment is appealable. (Code Civ. Proc., § 904.1.) Although plaintiff has not appealed from the judgment, we recognize that this court may, in its discretion, salvage the appeal by deeming it to be from the subsequently entered judgment. (Elene H. v. County of Los Angeles (1990) 220 Cal.App.3d 1445, 1448.)

LEGAL DISCUSSION

I.

NONSUIT WAS PROPER BECAUSE PLAINTIFF'S EVIDENCE DEMONSTRATES THAT HIS CONDUCT ALONE WAS THE CAUSE OF THE ACCIDENT.

Nonsuit is proper where, as a matter of law, "the evidence presented by plaintiff is insufficient to permit a jury to find in his favor." (Nally v. Grace Community Church (1988) 47 Cal.3d 278, 291.) In reviewing the trial court's decision, "only the evidence which was before the court at the time when the nonsuit was granted may be considered." (Carmichael v. Reitz (1971) 17 Cal.App.3d 958, 967.)

The trial court granted MTA's motion for nonsuit on the ground that the evidence showed it was plaintiff's conduct, and not anything MTA did or failed to do, that caused the accident. Plaintiff contends the trial court's ruling was procedurally and substantively incorrect. As we now explain, neither contention has any merit.

A. Plaintiff Has Provided An Inadequate Record For Review.

An appellant's burden of affirmatively demonstrating error includes providing the reviewing court with an adequate record for review. (Ballard v. Uribe (1986) 41 Cal.3d 564, 574; Baker v. Children's Hospital Medical Center (1989) 209 Cal.App.3d 1057, 1060.)

As noted above, in determining whether nonsuit was properly granted, the court should consider all of the evidence presented to the trier of fact. (Carmichael v. Reitz, supra, 17 Cal.App.3d at p. 967.) But here, plaintiff has provided the court with only a partial transcript of the trial proceedings: Although three witnesses testified on plaintiff's behalf (see ATL 51-53), the transcript on appeal includes plaintiff's own testimony only. (See RT, Index.) Plaintiff's failure to provide a complete transcript makes it impossible for this court to determine whether, in fact, there was error, let alone whether such error was prejudicial. (Robbins v. Los Angeles Unified School Dist. (1992) 3 Cal.App.4th 313, 318 ["'The burden is on the appellant, not alone to show error, but to show injury from the error'"]; Soule v. General Motors Corp. (1994) 8 Cal.4th 548, 576 [appellate court must review entire record to determine if error was prejudicial].) For this reason alone, the judgment should be affirmed.

Nevertheless, as we now demonstrate, plaintiff's admissions in his testimony demonstrate there was no error in the trial court's grant of nonsuit.

B. The Trial Court Properly Granted The Oral Motion For Nonsuit Without First Asking For Written Opposition.

Plaintiff contends the motion for nonsuit was procedurally defective because it was oral and he had no opportunity to brief the issue. (Appellant's Opening Brief ["AOB"] 7-8.) Nothing in Code of Civil Procedure section 581c, authorizing a motion for nonsuit at the close of plaintiff's opening statement or presentation of evidence at trial, requires the motion to be in writing. Indeed, the fact that such a motion

may be made after plaintiff's opening argument to the jury strongly implies that oral motions *are* anticipated. (See 3 Wegner, Fairbank & Epstein, Cal. Practice Guide: Civil Trial and Evidence (Rutter 1997) § 12:225, p. 12-44.)

Nor does section 581c require — or even anticipate — written opposition to a motion for nonsuit. Rather, when a defendant moves for nonsuit, it is up to the court to look at the opening statement or the evidence actually presented by the plaintiff and to determine whether judgment in plaintiff's favor is *possible* based on that evidence. If not, nonsuit is proper as a matter of law, and all the written argument in the world will not save the suit.

In this case, for example, plaintiff attempted orally to oppose the motion for nonsuit with the deposition testimony of a passenger on the bus (Mr. Candiotti) — a gentleman who not only did not witness the accident, but who *was not called to testify at trial.* (RT 83-84.)[2/] Mr. Candiotti's deposition testimony could not be considered by the court even if plaintiff had placed it in a written motion: The court may only consider the evidence actually produced at trial. (Carmichael v. Reitz, supra, 17 Cal.App.3d at p. 967.) Thus, the trial court properly disregarded this testimony. (RT 84-85.)

Moreover, plaintiff did not request an opportunity to file written opposition to the motion for nonsuit in the trial court. (See RT 77-78.) Thus, plaintiff waived any error in the court's "failure" to allow him to file written opposition. (Amato v. Mercury Casualty Co. (1993) 18 Cal.App.4th 1784, 1794 [issues not raised in the trial court are deemed waived on appeal].)

2/ Indeed, plaintiff filed a motion in limine to *prevent* Mr. Candiotti from offering an opinion at trial. (ATL 50.)

In sum, there was no procedural error in the motion for nonsuit that would have required the trial court to deny it.

C. The Undisputed Evidence Produced By Plaintiff At Trial Showed The Accident Was Caused Solely By Plaintiff's Violation Of Vehicle Code Section 22517.

Vehicle Code section 22517 provides as follows:

> "No person shall open the door of a vehicle on the side available to moving traffic unless it is reasonably safe to do so and can be done without interfering with the movement of such traffic, nor shall any person leave a door open on the side of a vehicle available to moving traffic for a period of time longer than necessary to load or unload passengers."

The testimony of plaintiff himself amply demonstrated that plaintiff violated this section. He testified not only that he failed to check for oncoming traffic before opening his door, but that he failed to check for the position of the bus before opening the door, notwithstanding the fact that he had seen the bus behind him moments before. Plaintiff admitted his conduct lacked good judgment; in fact, it violated section 22517.

Plaintiff contends that it was up to the trier of fact to determine whether he was negligent in opening his door into traffic without looking first. (AOB 9.) But violation of a statute — in this case, section 22517 — constitutes negligence *per se*, if the violation results in injury that the statute was intended to prevent. (Evid. Code, § 669.) It cannot be denied that section 22517 was intended to prevent the kind of accident

that happened in this case. Thus, plaintiff's violation of section 22517 is negligence *per se*, and the jury could not have found otherwise.

Plaintiff's reliance on Ketchum v. Pattee (1940) 37 Cal.App.2d 122, Christiansen v. Hollings (1941) 44 Cal.App.2d 332 and West v. House (1950) 99 Cal.App.2d 643 is misplaced: All three cases fell under the pre-statutory law. Plaintiff's reliance on Boynton v. McKales (1956) 139 Cal.App.2d 777 is also misplaced; in that case, there was no express finding that the statute had been violated by the plaintiff. (See id. at p. 786.)

Alternatively, plaintiff contends it was up to the trier of fact to determine whether his negligence or the negligence of the bus driver caused the accident. (AOB 10-13.) The flaw in this argument is that plaintiff never established that the bus driver was in any way negligent.

Plaintiff contends the bus driver violated Vehicle Code section 21658. (AOB 4.) Section 21658 provides as follows:

> "Whenever any roadway has been divided into two or more clearly marked lanes for traffic in one direction, the following rules apply:
>
> "(a) A vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from the lane until such movement can be made with reasonable safety. . . . "

Plaintiff contends the bus driver violated this section by moving from the second to the third lane at the time of the collision. He argues that he proved this with photographs taken some time after the accident and by the fact that there was glass from his car window in the third lane. (AOB 10-13.) But even assuming (without admitting), for purposes of this argument only, that plaintiff did establish the bus was changing

lanes, plaintiff has not established a violation of section 21658. Contrary to plaintiff's assertions, section 21658 does not prohibit changing lanes: It only requires that such movement be made "with reasonable safety." Plaintiff offered no evidence that it was unsafe for the bus driver to begin to move the bus into the third lane based on the information available to the driver when he began to move. Indeed, plaintiff's own testimony established that he did not begin to open his door until the bus was nearly three-quarters of the way past him. (See RT 79:27-80:1, 86:1-3.) Plaintiff has not explained — let alone introduced any evidence on — how the bus driver was supposed to have foreseen that plaintiff would open his door without looking for oncoming traffic. As the trial court aptly noted, if plaintiff had not opened his door, the bus would have passed him safely, whether it was fully in the second lane or straddling the line. (RT 80:1-2, 86-87.) Thus, plaintiff failed to establish that the bus was operated negligently.

Furthermore, plaintiff failed to establish that the bus in any way *caused* the accident. Again, the bus was nearly three-quarters of the way past plaintiff's car when plaintiff opened the door and hit the rear wheel well of the bus. If plaintiff had looked for oncoming traffic before opening his door, he certainly would have seen the bus and *not* opened the door. The accident was caused by plaintiff violating section 22517 and opening his door and not by the bus driver's decision to change lanes when it appeared safe to do so.

The two statutes — sections 22517 and 21658 — when read together, clearly put the burden on the person exiting a parked car on the traffic side to take steps to prevent the kind of accident that happened here. Section 21658 does not require the driver of a moving vehicle to look out for opening doors, and there is good reason for that: Just as happened here, the driver of the moving vehicle has no way to anticipate

that someone sitting in a parked car will suddenly open his or her door into moving traffic. On the other hand, the person exiting a parked car has ample opportunity to check out the moving traffic and determine whether or not it is safe to open his door on that side. Plaintiff's complete failure to do so in this case was the sole cause of the accident.

The trial court correctly concluded, based on the evidence presented by plaintiff at trial, that it was plaintiff's violation of section 22517 alone that caused the accident. Accordingly, nonsuit in favor of MTA was proper.

II.

THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OF PLAINTIFF'S PAIN AND SUFFERING.[3/]

Civil Code section 3333.4, which codifies Proposition 213, provides, in pertinent part, as follows, with exceptions not present in this case:

> "[I]n any action to recover damages arising out of the operation or use of a motor vehicle, a person shall not recover non-economic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages if any of the following applies:

3/ Inasmuch as nonsuit was properly granted in favor of MTA based on plaintiff's failure of proof at trial, this court need not reach the question of whether the trial court's pre-trial ruling on the extent of plaintiff's damages was proper. However, we address the issue here out of an abundance of caution.

> " . . . (2) The injured person was the owner of a vehicle involved in the accident and the vehicle was not insured as required by the financial responsibility laws of this state."

Plaintiff, who was uninsured at the time of the accident, filed a motion in limine prior to trial for a determination that section 3333.4 did not apply to this case and to allow plaintiff to introduce evidence of his pain and suffering at trial and to recover noneconomic damages. (ATL 10-27.) The trial court denied plaintiff's motion. (ATL 51; RT 6:10-7:2.) Plaintiff contends this was error for two reasons. First, he contends the statute does not apply to him because the injury did not arise "out of the operation or use of a motor vehicle" because he was not driving the car at the time of the accident. Second, he argues that the statute should not be applied retroactively to his claim because such application violates his due process rights by not giving him a reasonable amount of time after its enactment to bring his action to trial under the old law. (ATL 13, 16.)[4/] As we now explain, both of plaintiff's arguments must be rejected.

A. The Accident Arose "Out Of The Operation Or Use Of A Motor Vehicle" As That Term Is Used In Section 3333.4.

Plaintiff contends the injury did not "aris[e] out of the operation or use of a motor vehicle," within the meaning of section 3333.4 because the car was parked and the engine turned off when the accident occurred.

4/ The statute applies to "all actions in which the initial trial has not commenced prior to January 1, 1997." (Deerings Ann. Civ. Code (1997 Supp.) § 3333.4, 1996 Note, p. 57.)

(AOB 13, 15.) Put another way, it is plaintiff's contention that "operation" and "use" of a motor vehicle mean the same thing. But if that were true, then there would have been no reason for the Legislature to use both words in the statute. (Shoemaker v. Myers (1990) 52 Cal.3d 1, 22 ["We do not presume that the Legislature performs idle acts, nor do we construe statutory provisions so as to render them superfluous"].) Thus, "use" of an automobile must be different from "operation" of the automobile, even if the statute is narrowly construed, as plaintiff suggests.

Plaintiff's attempt to exit his vehicle after turning it off certainly constitutes "operation or use" of the vehicle within the meaning of section 3333.4. Getting into and getting out of the vehicle are necessary to operating it. And plaintiff was certainly using the car door to exit the car. It is simply ludicrous to suggest that the statute does not apply to this situation.

B. Section 3333.4 Was Properly Applied Retroactively To Plaintiff's Action.

Retroactive application of a statute is permissible if the legislative or voter intent that it apply retroactively is apparent and such application does not violate due process. (In re Marriage of Buol (1985) 39 Cal.3d 751, 756.)[5/] One of two kinds of retroactivity may apply. So-called "primary" retroactivity alters *past* legal consequences of past actions. (20th Century Ins. Co. v. Garamendi (1994) 8 Cal.4th 216, 281.) "A rule has [primary] retroactive effect if 'an act lawful at the time it was

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5/ Where an initiative measure is involved, the court must look to the intent of the voters. (Russell v. Superior Court (1986) 185 Cal.App.3d 810, 819.)

done' is 'rendered unlawful and the actor called to account for a completed, now-condemned deed in the halls of justice.'" (American Min. Congress v. U.S.E.P.A. (9th Cir. 1992) 965 F.2d 759, 769.) Plaintiff's action does not fall within this category. His conduct of not having insurance for his car *was illegal at the time of the accident.* (Veh. Code, § 16020; Anacker v. Sillas (1976) 65 Cal.App.3d 416, 421-422.)

Rather, this case involves "secondary" retroactivity, which affects only *future* legal consequences of past conduct. (20th Century Ins. Co. v. Garamendi, supra, 8 Cal.4th at p. 281.) "A rule with exclusively future effect, such as a change in the tax laws taxing future income from existing trusts, is not made retroactive by the fact that it will 'unquestionably *affect* past transactions (rendering [] previously established trusts less desirable in the future).'" (American Min. Congress v. U.S.E.P.A., supra, 965 F.2d at pp. 769-770.) Secondary retroactivity is "an entirely lawful consequence" of rulemaking and "does not by itself render a rule invalid." (20th Century Ins. Co. v. Garamendi, supra, 8 Cal.4th at pp. 281-282.) Indeed, the California Supreme Court has held that secondary retroactivity "does not itself offend any law, including the United States and California Constitutions and their respective due process clauses." (Id. at p. 282; accord, National Medical Enterprises, Inc. v. Sullivan (9th Cir. 1992) 957 F.2d 664, 671.)

As the Court of Appeal recently held in Yoshioka v. Superior Court (1997) 58 Cal.App.4th 972, 980-981, there can be no doubt that the voters intended section 3333.4 to apply retroactively. Proposition 213 provided that it shall apply "'to all actions in which the initial trial has not commenced prior to January 1, 1997.'" (Id. at p. 980, emphasis omitted.) The initiative further explained to voters that a yes vote on the

proposition would mean that uninsured drivers "'could no longer sue someone who was at fault for the accident for non-economic losses.'" (Id. at p. 981, emphasis omitted.) The Court of Appeal held that these sections read together evinced a clear intent to adopt the initiative retroactively. (Ibid.)

1. Retroactive Application Of The Statute Does Not Violate Plaintiff's Procedural Due Process Rights.

Procedural due process applies only to vested property rights — i.e., property rights that find their genesis in the Constitution. (Yoshioka v. Superior Court, supra, 58 Cal.App.4th at pp. 981-982.) The right to recover a specific type of damages is a creature of statute or common law and not of the Constitution. Consequently, such rights are *not vested property rights.* (Ibid.; Davis v. Commission On Judicial Qualifications (1977) 73 Cal.App.3d 818, 824.) Thus, the state or its people may alter such rights; and as long as the alteration is rationally related to a legitimate state interest, the statute will withstand scrutiny and be upheld. (See Werner v. Southern Cal. etc. Newspapers (1950) 35 Cal.2d 121, 125 [upholding statute that prohibited a plaintiff suing for libel or slander from recovering general damages against a newspaper].) Indeed, the Legislature can eliminate a cause of action *entirely* if it sees fit. (Id. at p. 126.) As the Supreme Court explained decades ago:

> "'Except as the Constitution otherwise provides, the Legislature has complete power to determine the rights of individuals. [Citation.] It may create new rights or provide that rights which have previously existed shall no longer arise, and it has full power to regulate and

> circumscribe the methods and means of enjoying those rights, so long as there is no interference with constitutional guaranties.' [Citation.]" (Id. at p. 125.)

The constitutionality of statutes affecting economic rights that are not vested property rights "does not depend on a judicial assessment of the justifications for the legislation or of the wisdom or fairness of the enactment (i.e., the 'adequacy' of the quid pro quo). So long as the measure is *rationally related to a legitimate state interest,*" the statute will *not* be struck down as unconstitutional. (Fein v. Permanente Medical Group (1985) 38 Cal.3d 137, 157-158, emphasis added; Quackenbush v. Superior Court (Dec. 24, 1997) ___ Cal.App.4th ___ [97 Daily Journal D.A.R. 15463, 15465].) The elimination of an element of damages is well within the state's power and does not violate due process unless the plaintiff is "deprived of *every reasonable method of securing just compensation.*" (Yoshioka v. Superior Court, supra, 58 Cal.App.4th at p. 982, emphasis in original; Fein v. Permanente Medical Group, supra, 38 Cal.3d at p. 158.) Significantly, section 3333.4 does not prohibit an uninsured motorist from suing for his injuries or from recovering for his actual, out-of-pocket expenses. Section 3333.4 only eliminates an element of damages from his recovery — an element that, though often significant, is "at best only imperfect compensation for . . . intangible injuries." (Fein v. Permanente Medical Group, supra, 38 Cal.3d at p. 159.)

There was no automatic right to compensation for emotional distress in the common law; our courts have created such a right, and only with great difficulty. (See, e.g., Dillon v. Legg (1968) 68 Cal.2d 728.) The elimination of noneconomic damages for uninsured motorists

does nothing to impair plaintiff's right to recover full compensation for his measurable, past and future, economic losses.

Plaintiff contends he was entitled to recover his "full remedy under the law as it existed at the time [of the injury]." (AOB 17.) But this has never been the law in California. Damages are generally determined by the law that exists *at the time of trial.* (See Parsons v. Tickner (1995) 31 Cal.App.4th 1513, 1523 ["There is no vested right in existing remedies and rules of procedure and evidence"].)

Plaintiff's reliance on In re Marriage of Buol, supra, 39 Cal.3d 751, and In re Marriage of Fabian (1986) 41 Cal.3d 440 (AOB 21, 25) is misplaced. Both cases involved vested property rights in community and/or separate property, the essential character of which was changed by law after the right had been vested. Plaintiff has no vested right in a particular remedy. (Parsons v. Tickner, supra, 31 Cal.App.4th at p. 1523 ["There is no vested right in existing remedies"].) Thus, the marriage dissolution cases have no impact on this case.

Plaintiff's reliance on Vegetable Oil Products Co. v. Superior Court (1963) 213 Cal.App.2d 252 (AOB 27) is also misplaced. In that case, petitioner Vegetable Oil Products was sued by the employee of one of its customers. At the time of the injury, petitioner had the substantive right to indemnity from the plaintiff's employer; it lost that right *entirely* after a new statute was enacted before the action went to trial: It could not proceed against the employer *at all.* The Court of Appeal held the rule was improperly applied retroactively to cut off the petitioner's vested indemnity rights. By contrast, of course, in this case, plaintiff has not lost his right to sue nor his right to seek compensation for all his economic losses. Vegetable Oil Products is inapposite.

2. Consideration Of The Factors In *In re Marriage Of Bouquet* Does Not Aid Plaintiff's Case.

Plaintiff contends instead of applying the vested property right analysis described above, the court should look to a variety of other factors, including "'the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions.'" (AOB 22, quoting from In re Marriage of Bouquet (1976) 16 Cal.3d 583, 592.) But, in fact, even a consideration of these factors establishes that retroactive application of the statute is proper. (See Yoshioka v. Superior Court, supra, 58 Cal.App.4th at pp. 983-986.)

First, there is very significant state interest in the statute: to lower insurance costs for its citizens and to restore balance to the legal system. (Yoshioka v. Superior Court, supra, 58 Cal.App.4th at p. 983.) Contrary to plaintiff's suggestion, section 3333.4 was *not* "designed to encourage motorists to obtain insurance so that others will not be forced to subsidize those who do not take personal financial responsibility for themselves." (AOB 22.) If it has that effect, all the better; but that was not the primary purpose of the legislation.

Second, retroactive application of the law is important to effect this interest. "For example, an automobile insurance underwriter, following the passage of Proposition 213, who is setting rates for 1997, could take into account the reduction in potential exposure for his/her company's insured in those cases in which Proposition 213 applies."

(Yoshioka v. Superior Court, supra, 58 Cal.App.4th at p. 985.) If the statute is not applied retroactively, however, the insurance companies will continue to face exposure for claims by uninsured plaintiffs and insurance rates would not be reduced for years. (Ibid.) Furthermore, immediate application of the statute will have an immediate effect on the court system, decreasing the number of lawsuits filed and judgments entered and increasing the likelihood that other cases will settle. (Ibid.) Thus, retroactive application of the statute is not only important, but *necessary*, to effect the state's interests.

Third, plaintiff's contention that retroactive application of the statute "only serves to punish uninsured motorists, without giving them notice and an opportunity to obtain insurance before the law became effective on November 5, 1996" (AOB 23) and, therefore, he reasonably relied on the former law that his injuries would be "fully compensated" (AOB 23) must be rejected. Since 1974, California has required its drivers to be financially responsible. (Veh. Code, § 16020; Anacker v. Sillas, supra, 65 Cal.App.3d at pp. 421-422.) The obligation to be financially responsible does not arise when the driver is involved in an accident; the accident "'merely provides the occasion for demonstrating that a preexisting obligation has been satisfied.'" (Yoshioka v. Superior Court, supra, 58 Cal.App.4th at p. 986.) Since insurance was always required, plaintiff cannot be heard to complain that he had no notice that driving without insurance had negative consequences.

In sum, retroactive application of section 3333.4 to plaintiff's action is proper and necessary and plaintiff has not shown otherwise.

CONCLUSION

Nonsuit in favor of MTA was proper based on plaintiff's failure to demonstrate any negligence on the part of the defendant caused the injuries, as well as on the fact that plaintiff's evidence established that the accident was caused solely by plaintiff's violation of Vehicle Code section 22517. Additionally, plaintiff has not shown any error in the trial court's order prohibiting plaintiff from seeking or recovering noneconomic damages based on Civil Code section 3333.4. Accordingly, the judgment in favor of MTA should be affirmed.

Date: January 13, 1998

Respectfully submitted,

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