ABRAHAM SANTANA, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES et. al, Defendants and Respondents.

B176525

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO

2006 Cal. App. Unpub. LEXIS 2414

March 23, 2006, Filed

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PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Los Angeles County, No. SC068137. Paul G. Flynn, Judge.

DISPOSITION: Affirmed.

COUNSEL: The Beck Law Firm and Thomas E. Beck for Plaintiff and Appellant.

Greines, Martin, Stein & Richland, Martin Stein, Carolyn Oill and Lillie Hsu for Defendants and Respondents County of Los Angeles and Brian Nelson.

Law Offices of William S. Loomis and William Scott Loomis for Defendant and Respondent Paul Thomas Dillon.

JUDGES: CHAVEZ, J.; DOI TODD, Acting P.J., ASHMANN-GERST, J. concurred.

OPINION BY: CHAVEZ

OPINION:

Appellant Abraham Santana appeals from a judgment entered after a jury trial on his claims for civil rights violations under *42 United States Code section 1983* and related state claims against respondents Paul Dillon (Dillon), the County of Los Angeles (the County) and Los Angeles County Deputy Sheriff **[*2]** Brian Nelson (Nelson) (collectively, respondents). The trial court granted Dillon's motion for a directed verdict and awarded Dillon attorney fees of $ 50,148. The trial court also directed a verdict in favor of the County on appellant's claims under *Monell v. New York Dept. of Social Services (1978) 436 U.S. 658, 56 L. Ed. 2d 611* (*Monell*).

The jury returned a verdict against appellant on the remaining claims, in favor of the County and Nelson. We affirm the judgment.

CONTENTIONS

Appellant contends the trial court: (1) denied him a fair trial by its biased and prejudicial conduct; (2) improperly excluded evidence; (3) improperly admitted evidence of "bad acts" committed

by appellant after the incident in question; (4) erred in granting Dillon's and the County's motions for a directed verdict; and (4) improperly awarded attorney fees to Dillon.

FACTS AND PROCEDURAL HISTORY

On July 3, 1999, appellant, Daniel Chaidez, and Juan Del Campo were driving in a Volkswagen bug. Jonathan Martinez, Ernie Florez, and appellant's brother Enrique, were following in a pickup truck. At midnight, Nelson pulled the pickup truck over on Sunset Boulevard because he **[*3]** noticed that the registration was expired. The truck stopped in front of Miyagi's, a restaurant owned by Dillon. When they could not produce the registration for the truck and he realized that two of the boys were violating curfew laws, Nelson asked the boys to exit the vehicle and place their hands on the hood of his car. Dillon came out of the restaurant to investigate the situation.

In the meantime, appellant returned and pulled up in the Volkswagen. Chaidez and appellant came out of the car. Chaidez approached Nelson and the boys, angry and cursing. Nelson put Chaidez into the patrol car. Appellant stayed 10 to 15 feet away from Nelson, asking what Nelson was doing with his brother and cursing. Del Campo then exited the Volkswagen, and Nelson told him to put his hands on the trunk of the police car. As appellant approached Nelson, the officer extended his arm and motioned him to come toward him. Appellant stated: "This is fucked up. I didn't do anything wrong," and asked for the deputy's name. Dillon testified that appellant struck at Nelson's outstretched hand and then ran into the crowd. Del Campo testified that appellant had a piece of paper in his hand, on which he was attempting **[*4]** to write Nelson's name, when Nelson covered up his name plate and attempted to grab the paper from him.

Appellant ran into the crowd, pursued by Nelson, who put his hand on appellant's shoulder. Appellant ran away, then tripped and fell, hitting his hands and knees and falling on his chest. Nelson fell with him, straddled him, and handcuffed him. Dillon testified that he saw appellant trip over a female bystander. Appellant was then arrested for obstructing a police officer in violation of *Penal Code section 148*.

Thereafter, Nelson's supervisor, Sergeant Ray Walker, arrived at the scene, unsuccessfully solicited witnesses from the crowd, and determined that Nelson's actions were appropriate. Appellant told Walker then, that he was not injured, and repeated that statement later at the police station.

Appellant was prosecuted for obstructing a police officer in two criminal trials, both of which resulted in hung juries. Appellant filed a complaint against the County, Nelson, and Dillon for civil rights violations under *42 United States Code section 83*, as well as related state claims. n1

n1 The causes of action were for: (1) violation of civil rights against all defendants (*42 U.S.C. § 1983*); (2) violation of civil rights against the County under *Monell* (*42 U.S.C. § 1983*); (3) violation of civil rights against all defendants (*42 U.S.C. § 1985(2)*); (4) violation of civil rights against all defendants (*42 U.S.C. § 1985(3)*); (5) assault and battery against the County and Nelson; (6) false arrest against the County and Nelson; (7) civil conspiracy against all defendants; (8) torts against all defendants; (9) intentional infliction of emotional distress against all defendants; (10) negligence against all defendants; (11) negligent employment and retention against the County; and (12) violation of civil rights under California law against all defendants.

[*5]

On June 2, 2002, the trial court granted Dillon's motion for judgment on the pleadings as to three causes of action. The trial court granted Dillon's motion for a directed verdict as to the cause of action for violation of civil rights under *42 United States Code section 1983*. Appellant then voluntarily dismissed the remaining four causes of action against Dillon. The trial court also directed a

verdict in favor of the County on appellant's negligent employment claim and his claim under *Monell.*

The jury returned a verdict in favor of Nelson and the County on the remaining claims for assault and battery; false arrest; and intentional infliction of emotional distress. It returned a verdict in favor of Nelson on the claim for violation of civil rights under *42 United States Code section 1983*.

On May 4, 2004, the trial court granted Dillon's motion for attorney fees made pursuant to *42 United States Code section 1988(b)*, in the amount of $ 50,148.

The trial court denied appellant's motion for new trial and judgment notwithstanding the verdict.

This appeal followed.

DISCUSSION

I. The trial court did [*6] not commit prejudicial misconduct

1. Standard of review

In order to obtain a reversal based on judicial misconduct, the appellant must show that the complained-of actions were prejudicial and resulted in a miscarriage of justice such that it is reasonably probable that in the absence of the asserted misconduct, a result more favorable to the appellant would have occurred. (*Newman v. First California Co. (1975) 47 Cal. App. 3d 60, 68, 120 Cal. Rptr. 494.)* Appellant complains that the trial court committed misconduct by: (1) making improper remarks outside the jury's presence concerning appellant's counsel's intention to try the case without his client present; (2) questioning witnesses on the stand; (3) attempting to expedite the trial; and (4) putting his feet on the bench.

We first note that appellant did not object at trial to these allegedly improper actions, and therefore has not preserved the issue of judicial misconduct for appeal. (*Horn v. Atchison T. & S. F. Ry. Co. (1964) 61 Cal.2d 602, 610, 39 Cal. Rptr. 721; People v. Hines (1977) 15 Cal.4th 997, 1041; People v. Raviart (2001) 93 Cal.App.4th 258, 269.)* **[*7]** Nevertheless, we have reviewed the complained-of incidents, and while we shall address the major complaints, we need not go into the details of every single instance here. Our review of the record compels us to conclude that the actions did not constitute misconduct; nor were they prejudicial to appellant.

2. The alleged misconduct

A. Remarks outside the presence of the jury

Appellant contends that the trial court committed misconduct by making remarks expressing his displeasure with appellant and his counsel Thomas Beck, outside the presence of the jury.

On appeal, appellant takes the trial court's remarks out of context, and when the remarks are read in their entirety, the trial court's comments are not inappropriate. For example, appellant urges that the trial court made disparaging comments about Beck's repeated request to use appellant's prior testimony, based on the claim that he was unavailable. *Evidence Code section 1291* n2 permits the use of former testimony in certain circumstances when the declarant is "unavailable as a witness." Here, appellant simply chose to stay in Mexico and not to testify at trial because there was a warrant **[*8]** for his arrest in the United States. We conclude that appellant was not unavailable to testify. The trial court's characterization of Beck's argument that appellant was not available, as "ridiculous," while unrestrained, is not misconduct. Moreover, the record reflects that the trial court insisted that the fact that appellant was a fugitive running from the law not be brought before the jury, thus showing that the trial court was not prejudiced against appellant based on his refusal to appear at trial. Appellant also complains that the trial court commented that Beck was wasting the court's time because Beck wanted to proceed to trial without appellant. First, even were we to read the comment as appellant argues, as a statement by the trial court that it did not believe appellant's

evidence, he has not shown that the trial court did not follow the law. (*People v. Rigney (1961) 55 Cal.2d 236, 242-244, 10 Cal. Rptr. 625* [it is immaterial if trial court did not believe evidence if it follows the law].) Further, because the statement was made outside the presence of the jurors, it could not have prejudiced them.

n2 All further statutory references are to the Evidence Code unless otherwise indicated.

[*9]

The trial court's exercise of discretion in granting, prior to opening statements, respondents' motion to shorten time to serve notice in lieu of a subpoena to compel appellant's attendance at trial under *Code of Civil Procedure section 1987,* subdivision (b), did not prejudice appellant as he contends, because the jury was unaware of the notice. Appellant's argument that respondents knew that appellant would not appear for trial, and therefore wanted to highlight appellant's absence for the jury, fails. The record shows that, prior to trial, appellant's counsel had informed the court that there was a possibility that appellant might appear at trial. Respondents' motion to shorten time to serve notice in lieu of a subpoena to compel his attendance was not unreasonable.

B. Questioning of witnesses

Appellant also contends that the trial court committed misconduct by questioning four witnesses on the witness stand in a biased manner. We conclude that the trial court did not commit misconduct because it attempted to clarify testimony and fully develop facts.

A court may control the mode of questioning and comment on the evidence and credibility of witnesses **[*10]** as required for the proper determination of the case. (*People v. Raviart, supra, 93 Cal.App.4th at p. 269.)* The court has a duty to bring out facts relevant to the jury's determination. (*Ibid.*) Thus, the court's question to Martinez as to whether he saw six deputies rush appellant; to Enrique as to what kind of physical injuries he had sustained in a clash with police officers in an earlier incident; to Del Campo as to whether he heard appellant say, "This is fucked up," properly were directed to clarification. Furthermore, when appellant's mother testified that appellant had trouble sleeping during his second criminal trial, the trial court's questioning of appellant's mother as to whether she actually had seen appellant get up in the middle of the night elicited an affirmative response, and resulted in the trial court overruling defense counsel's objection to the question. Nor did the trial court improperly admonish the jury to disregard appellant's mother's reference to appellant's "false imprisonment" because (1) appellant brought an action for false arrest, rather than false imprisonment; and (2) the validity of the claim for false arrest was under consideration **[*11]** by the jury.

Moreover, even if, as appellant contends, the trial court intimated that certain witnesses' testimony was not credible, the trial court instructed the jury that the jury was the trier of fact, only the witnesses' answers were evidence, and the jury was to determine the credibility of the witnesses. The jury is presumed to follow the court's instructions and any error was cured. (*People v. Krug (1935) 10 Cal. App. 2d 172,177.)*

C. Comments on lateness of counsel and expediting the trial

Appellant's complaints that the trial court committed misconduct by reprimanding appellant's counsel for being late and trying to move the trial forward are not well taken. The trial court has the power to exercise reasonable control over a trial, and our review of the record shows that the trial court acted reasonably and fairly in doing so. (*Code Civ. Proc., § 128*, subd. (a)(1-4).)

The record shows that Beck was 20 minutes late for the first day of trial because, he said, he encountered traffic on the 405 freeway. He represented to the trial court that he would not be late again. On the second day of trial, Beck was 40 minutes late and **[*12]** blamed it on "other courts,

other counties." The trial court's comment to the jury that it felt terrible about causing the jury to wait because Beck was late, is an allowable rebuke of unprofessional conduct. (*People v. Chong (1999) 76 Cal.App.4th 232, 243-244.)* The trial court's later comment that Beck's behavior was outrageous, was not improper in light of the fact that Beck had not informed the court that there was a possibility he would be late. Indeed, the court demonstrated its willingness to be flexible by telling Beck that if he had so advised the court, the jury could have been called an hour later. More importantly, the comment was made outside the presence of the jury.

Appellant's complaint that the trial court rushed Beck through voir dire, redirect examination of appellant's mother, and redirect examination of Dillon, does not avail him. Our review of the record shows that Beck's repeated questioning of a juror as to whether he would comply with an instruction given by a police officer was argumentative, and the trial court properly asked Beck to continue with another question. Moreover, appellant's mother testified on direct examination about her son's **[*13]** injuries, which were displayed in photographs on a monitor. On redirect examination, Beck again displayed the photographs and continued to question appellant's mother. Contrary to appellant's argument, the trial court was not attempting to minimize the damages issue, but was managing the trial by eliminating unnecessary repetition. Comments by the trial court that Beck was repeating himself, and asking him to "wind it up" were not improper in light of the extensive, repetitive examination by Beck of the witnesses.

Finally, the court's patience was challenged by counsel's repeated and drawn out questioning of witnesses. In response to Beck's statement that he would continue for at least an hour with Dillon after receiving several warnings to wrap up his questioning, the court stated: "Oh, shit. Wait a second, ladies and gentlemen. I apologize. Once in a while I lose my temper, and I say things, and I apologize. But this is really taking it to the extreme. Okay? And I don't know where you are going. But I will give you one hour, and then I am going to stop you." Although appellant now complains about the trial court's comments, the record shows that the next day, Beck acknowledged **[*14]** his inappropriate behavior and apologized "for going over the top yesterday with the court. And, you know, in the heat of battle, I suppose, things would not, otherwise, on reflection, be said."

As in *Germ v. City & County of San Francisco (1950) 99 Cal. App. 2d 404, 415-416* (*Germ*), "'Much of the trouble during the trial between the court and counsel for the defendant was occasioned by the manifest desire of the court on the one hand to expedite the trial of the defendant as much as possible, and by counsel on the other hand to gain delay. . . ." Beck was allowed to impeach Dillon, and the trial court's comments do not reflect a bias toward Dillon, but a desire to expedite the trial and control the proceedings. Indeed, the record shows that the trial court also moved the defense attorney along, commenting at one point, "All right. You just introduced your client. We don't need a life history. Thank you." As in *Germ,* the trial court's evenhandedness in moving the trial forward compels us to conclude that the trial court did not commit misconduct. Our review of the record as a whole shows that appellant was not deprived of a fair trial. He has not shown that **[*15]** absent the purported misconduct, the jury would have returned a verdict in his favor.

D. The trial court's leg position

Appellant argues that the trial judge showed its contempt for appellant by positioning his feet on the counter while appellant's witnesses were testifying. Apparently, appellant first brought this issue to the trial court's attention in a motion for new trial, at which time the trial judge indicated that he occasionally stretched his legs on the counter because of his knee problem, and tried to be discreet about it. The trial judge said that if he had been informed that it was offensive, he would have stopped. It is clear that this issue was never raised during the trial, which would have given the trial judge time to change his behavior, and we conclude that appellant has waived the issue on appeal. (*Horn v. Atchison T. & S. F. Ry. Co., supra, 61 Cal.2d at p. 610; People v. Hines, supra, 15 Cal.4th at pp. 1040-1041.)* In any event, appellant's argument that the trial court's leg position affected the jury is mere speculation.

We conclude that there was no evidence of judicial misconduct or that appellant was prejudiced by the **[*16]** trial court's leg position.

II. The trial court did not abuse its discretion in admitting evidence of appellant's postincident conduct to disprove his claims for damages

Appellant urges that the trial court abused its discretion in admitting evidence of appellant's subsequent arrests and treatment for alcohol and drug abuse, citing *Grudt v. City of Los Angeles (1970) 2 Cal.3d 575, 86 Cal. Rptr. 465,* for the proposition that a witness's credibility may not be attacked by showing prior arrests for misdemeanors or felonies or misdemeanor convictions. We disagree.

The trial court may admit relevant evidence. (§ 352.) We review the trial court's ruling on admissibility of evidence for abuse of discretion and reverse only when a prejudicial abuse of discretion has occurred. (*City of Ripon v. Sweetin (2002) 100 Cal.App.4th 887, 900; DePalma v. Westland Software House (1990) 225 Cal. App. 3d 1534, 1538, 276 Cal. Rptr. 214.)*

Under sections 786 n3 and 787, n4 evidence of character traits and specific instances of conduct, relevant to prove a character trait, are inadmissible to attack the credibility of a witness. Under section **[*17]** 780, n5 however, the trial court may admit evidence that may prove or disprove the truthfulness of the witnesses' testimony, including the existence or nonexistence of any fact testified to by him or her.

> n3 Section 786 provides: "Evidence of traits of his character other than honesty or veracity, or their opposites, is inadmissible to attack or support the credibility of a witness."

> n4 Section 787 provides: "Subject to Section 788, evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness."

> n5 Section 780 provides, in part: "Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: [P] . . . [P] (i) The existence or nonexistence of any fact testified to by him."

In **[*18]** *Rousseau v. West Coast House Movers (1967) 256 Cal. App. 2d 878, 64 Cal. Rptr. 655,* the defendant was properly allowed to introduce evidence of the plaintiff's arrest for drunkenness before and after an accident, where plaintiff claimed that head injuries he sustained changed him from a sober, reliable worker into a victim of traumatic epilepsy. The plaintiff also denied any past or present history of drunkenness. Thus, the evidence was admissible to refute his claims that his difficulties were recent and caused by the accident and to rebut his claim as to the cause of epilepsy, by showing it resulted from excessive drinking. (*Id. at p. 886.)*

Here, we find that the evidence was admissible to rebut appellant's mother's testimony regarding appellant's emotional distress which she claimed was incurred as a result of the current incident. The record shows that appellant's mother testified on direct examination that neither Enrique nor appellant had ever been in trouble. She also testified that as a result of the two criminal trials for obstructing a police officer, appellant became nervous, paranoid, stressed, and could not sleep. The trial court acted **[*19]** within its discretion when it allowed defense counsel to question appellant's mother as to whether appellant had been arrested since 1999 for possession of marijuana, for carrying firearms and ammunition, and for participating in a fight in which he was knocked unconscious and a car ran over his foot, in order to impeach her testimony. We note that the trial court did not

allow defense counsel to ask about subsequent arrests of Enrique. Also, defense counsel properly was allowed to question appellant's mother as to whether appellant became paranoid because of subsequent arrests. Her answer was that appellant became paranoid directly as a result of the instant incident. Furthermore, appellant's mother denied any drug use by appellant, and therefore the trial court properly allowed her to be impeached with questions about medical care appellant obtained for alcohol and drug use.

We conclude that the trial court did not abuse its discretion in admitting the challenged evidence.

III. The trial court did not abuse its discretion in excluding evidence of past complaints against Nelson

Appellant contends that the trial court abused its discretion in refusing to admit evidence regarding **[*20]** Nelson's misconduct toward members of the public, which appellant claims supported his negligent supervision and *Monell* claims against the County. We disagree.

Under section 352, the trial court has wide discretion in excluding evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (*Akers v. Miller (1998) 68 Cal.App.4th 1143, 1147.)*

The record shows that during pretrial discovery, appellant moved for disclosure of Nelson's personnel records under sections 1043 n6 and 1045. n7 The trial court granted the motion under *Pitchess v. Superior Court (1974) 11 Cal.3d 531, 113 Cal. Rptr. 897* and ordered disclosure of three complaints against Nelson, including one made by appellant following this incident, and his personal performance index (PPI). Appellant now complains that he acquired additional related discovery not contained in Nelson's personnel file, which the trial court erred in refusing to admit.

n6 Section 1043 allows a party to file a written motion for discovery of a peace officer's personnel records.

[*21]

n7 Section 1045, subdivision (b) sets forth restrictions on disclosure of certain records, including complaints concerning conduct occurring more than five years before the event that is the subject of litigation, and facts that are so remote as to make disclosure of little or no practical benefit.

We see no abuse of discretion. The trial court allowed appellant to examine Nelson concerning the three incidents that it deemed relevant to the complaints in the current matter. Appellant explained to the trial court that he also wanted to question Nelson regarding six or seven additional personnel complaints based on Nelson's testimony in the criminal trials. Appellant did not, as he now does on appeal, refer to specific witnesses, or to Nelson's PPI, and therefore his failure to make an offer of proof at trial waives his argument on appeal. (*In re Mark C. (1992) 7 Cal.App.4th 433, 444.)*

Nor has appellant attempted to show on appeal that the complaints concerning Nelson were valid or that the County inadequately investigated them, causing us to conclude that the trial court was **[*22]** correct in its finding that the purported evidence has no relevance to a *Monell* or negligent supervision claim against the County. Thus, the trial court acted properly in restricting counsel's cross-examination to the three incidents ruled on in the disclosure motions. Similarly, the episodes referenced in the PPI were not relevant to the charges made by appellant against Nelson. Sec-

tion 1045, subdivision (b)(3) prohibits the discovery of facts that are so remote as to make disclosure of little or no practical benefit. Here, the episodes involved a disorderly conduct suspension and operational vehicle investigations, which have no bearing on appellant's injury claims. Additionally, the PPI shows that there were also instances where Nelson used force and that claims were made, investigated, and did not result in discipline to Nelson.

We conclude that the trial court did not abuse its discretion in refusing to admit evidence of past personnel complaints against Nelson on the grounds that they were irrelevant.

IV. The evidence supports the trial court's granting of the County's motion for a directed verdict

On reviewing the trial court's grant of a motion for directed verdict, **[*23]** the appellate court views the evidence in the light most favorable to the appellant and will reverse the judgment if substantial evidence exists to support a judgment for the appellant. (*Colbough v. Hartline (1994) 29 Cal.App.4th 1516, 1521.)*

In order to prove a *Monell* claim, a plaintiff must show that a municipality's policies caused an employee to violate a person's constitutional rights. (*Monell, supra, 436 U.S. at pp. 690-692.)* The elements of a cause of action for negligence are (1) a legal duty to use reasonable care, (2) breach of that duty, and (3) proximate cause between the breach and the plaintiff's injury. (*Mendoza v. City of Los Angeles (1998) 66 Cal.App.4th 1333, 1339.)* "Liability for negligent hiring and supervision is based upon the reasoning that if an enterprise hires individuals with characteristics which might pose a danger to customers or other employees, the enterprise should bear the loss caused by the wrongdoing of its incompetent or unfit employees." (*Ibid.*)

Appellant contends that the trial court's grant of the County's motion for a directed verdict was the result of the trial court's wrongful exclusion **[*24]** of evidence of Nelson's acts of official dishonesty and abuse. First, as previously mentioned, the evidence was neither properly presented to the trial court nor improperly excluded. Even if the trial court had erred in failing to admit the complaints for the purpose of a negligent supervision or *Monell* claim against the County, since Nelson was found not liable by the jury, the County, as his employer is also not liable. (*City of Los Angeles v. Heller (1986) 475 U.S. 796, 799, 89 L. Ed. 2d 806* [city cannot be held liable under *42 U.S.C. § 1983* where jury has concluded that the officer complained of inflicted no constitutional harm]; *Mendoza v. City of Los Angeles, supra, 66 Cal.App.4th at p. 1339.)* Finally, appellant cannot show that the evidence would have shown that the County demonstrated deliberate indifference by adopting policies which failed to adequately train, discipline or investigate its officers. (*Monell, supra, 436 U.S. at pp. 690-691, 694.)* Rather, the evidence tended to show adequate investigations that resulted in Nelson not being disciplined. Thus, appellant has failed to show prejudice. **[*25]**

V. The evidence supports the trial court's grant of Dillon's motion for directed verdict

Appellant claims the trial court erred in directing a verdict in favor of Dillon on appellant's claim under *42 United States Code section 1983* for conspiracy to maliciously prosecute appellant.

In order to prove a cause of action for conspiracy, a plaintiff must show the formation and operation of the conspiracy, wrongful conduct in furtherance of the conspiracy, and damages arising from the wrongful conduct. (*Kidron v. Movie Acquisition Corp. (1995) 40 Cal.App.4th 1571, 1581-1582.)* Thus, the plaintiff must prove "that each member of the conspiracy acted in concert and came to a mutual understanding to accomplish a common and unlawful plan, and that one or more of them committed an overt act to further it." (*Choate v. County of Orange (2000) 86 Cal.App.4th 312, 333.)*

In order to prove and plead a cause of action for malicious prosecution, the plaintiff must show: (1) the arrest and prosecution of the plaintiff was initiated by or at the direction of the defendant; (2) the judicial process terminated in favor of the plaintiff; (3) **[*26]** the matter was brought without

probable cause; and (4) the proceeding was initiated with malice. (*Jaffe v. Stone (1941) 18 Cal.2d 146, 149.)*

With respect to the underlying action for malicious prosecution, appellant argues that the matter was brought without probable cause because his witnesses testified that Nelson reached out to snatch a piece of paper held by appellant as he tried to write down Nelson's name. He also claims that since his second criminal trial resulted in a hung jury, he showed the element of a favorable verdict. (*Minasian v. Sapse (1978) 80 Cal. App. 3d 823, 827, 145 Cal. Rptr. 829* [dismissal because of failure to prosecute is a termination favorable to the defendant].) At most, appellant's evidence only shows a conflict as to who appeared to grab whom. The evidence still shows that appellant cursed in front of Nelson when Nelson was trying to perform his duties, and evaded him when the officer began to chase him. Even assuming that the evidence, construed in favor of appellant, shows that the matter was brought without probable cause, he has not shown Dillon harbored malice or initiated the prosecution of appellant. Nor do **[*27]** we agree with appellant's conclusory claim that Dillon's corroboration of Nelson's account shows conspiracy. His disagreement with the truthful nature of the testimony given by Dillon and Nelson simply is not evidence that Dillon and Nelson had a mutual plan to wrongfully prosecute appellant.

We conclude the trial court did not err in granting Dillon's motion for a directed verdict.

VI. The trial court did not abuse its discretion in awarding attorney fees to Dillon

42 United States Code section 1988(b), provides that the court may award attorney fees to the prevailing party in an action under *42 United States Code section 1983*, among other actions. Attorney fees against the plaintiff may be awarded in civil rights matters if the trial court finds that the plaintiff's action was "'frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.'" (*Hughes v. Rowe (1980) 449 U.S. 5, 14, 66 L. Ed. 2d 163.)* We disagree with appellant that the award was an abuse of discretion. The record shows that the trial court concluded that the case against Dillon was groundless. The court stated **[*28]** that Dillon was only a percipient witness and should not have been a defendant. In light of our review of the record, and the lack of evidence of a conspiracy to commit malicious prosecution on Dillon's part, we conclude that the trial court did not abuse its discretion in awarding attorney fees to Dillon.

Although he did not bring this issue to the attention of the trial court, appellant now contends that the billing record and declaration of Dillon's counsel attached to his motion for attorney fees was insufficient. Our review of the declaration and billing record shows that Dillon's counsel's hourly rate is clearly set forth in the billing record, and that every item billed is described in detail. Appellant's claim that the trial court did not scrutinize the billing record is not supported by any citation to the record. Indeed, the transcript shows that the trial court stated that it had read all the papers, listened to the trial, and believed that the action against Dillon was groundless. The trial court noted that Dillon should not have been a party.

We find that the trial court did not abuse its discretion in awarding attorney fees to Dillon.

DISPOSITION

The judgment **[*29]** is affirmed. Respondents shall receive costs of appeal.

CHAVEZ, J.

We concur:

DOI TODD, Acting P.J.

ASHMANN-GERST, J.