Filed 12/1/17 Martinez v. The Decurion Corp. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CAROLYN MARTINEZ, Plaintiff and Appellant, v. THE DECURION CORPORATION, Defendant and Respondent.	B270616 (Los Angeles County Super. Ct. No. BC524239)

APPEAL from a judgment of the Superior Court of Los Angeles County. William G. Willett, Judge. Affirmed.

The Lions Law Office, Michael A. Stone-Molloy for Plaintiff and Appellant.

Greines, Martin, Stein & Richland, Robert A. Olson, Alana H. Rotter for Defendant and Respondent.

Carolyn Martinez (Martinez) appeals from a judgment entered in favor of respondents The Decurion Corporation, Decurion Management Co., and Pacific Theaters Exhibition Corp. (collectively, Respondents) following a jury trial. In May 2012, Martinez suffered personal injuries when she tripped and fell over a bench on Respondents' premises. On appeal, Martinez contends the trial court erred in denying her motion in limine to bar testimony by Respondents' expert on his interpretation of the California Fire Code (Fire Code).[1] Because the trial court's ruling on the in limine motion was tentative, in order to preserve the issue for appellate review, Martinez was required to renew her objection at trial, but failed to do so. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 25, 2012, Martinez and her daughter went to see a movie at one of the several theaters located on Respondents' premises in Chatsworth, California. Martinez testified that at approximately 9:15 p.m. that evening, about an hour after the movie began, the lights came on in the theater and an automated voice stated: "Fire. Fire alarm. This is not a test. Exit the building." The manager of the movie theater testified that the fire alarm was triggered as a result of burnt popcorn and that approximately 1,200 to 1,300 moviegoers evacuated the building that night.

Martinez and her daughter left their seats and "went along with the crowd," exiting the theater through the doors they had entered, which placed them in the interior hallway of the building. From the hallway, they walked with the crowd through an exit on the north side of the building, which led to

---

[1] The Fire Code is part of the California Code of Regulations, title 24, part 9, the California Building Standards Code. (*Barclay v. Jesse M. Lange Distributor, Inc.* (2005) 129 Cal.App.4th 281, 287, fn. 4.) The parties agree that it is the 2010 version of the Fire Code that is at issue in this case.

an outdoor walkway that bordered the building and separated it from an open-air parking lot. No one was running. Martinez decided she would return to her car. To do that, she turned to her right and went along with the crowd to the northeast corner of the building, and then south, walking on a sidewalk along the east side of the building. The sidewalk in that area is more than 20 feet wide. It was dark, except for lighting on the exterior of the building. She could not see what was going on because "the crowd was all tightly compressed," she is five feet four inches in height, and many of the other people around her were taller.

The crowd became "tighter and tighter" and started to move left (south across the front of the building) because there were stanchions located to the right (north) in front of the main entrance of the theater complex. Martinez noticed a "large guy" in front of her pass to her left; she decided to move forward. She then fell over an "object," which she later discovered was a bench. Martinez did not see the bench because "it was below [her] field of vision." As a result of the fall, she suffered a fractured elbow.

Martinez filed suit against Respondents for damages.[2] Each party designated an expert witness to address Martinez's theory that Respondents violated the Fire Code by placing stanchions near the location of her fall. Martinez argued the stanchions were located in the "exit discharge"[3] area of

---

[2] The complaint is not in the record on appeal. From the jury instructions, we discern Martinez sought damages based on three related theories: (1) negligence per se (for violation of the Fire Code), (2) general negligence and (3) premises liability.

[3] Fire Code section 1002.1 defined "Exit Discharge" as: "That portion of a means of egress system between the termination of an exit and a public way."

the building, which, she argued, violated the Fire Code because that area was required to be free from "obstructions."[4] Respondents disagreed, arguing the stanchions did not violate the Fire Code because Martinez fell in the "public way,"[5] which was outside the "exit discharge" area of the building.

Prior to trial, Martinez filed a motion in limine to exclude Respondents' expert, Robert Rowe, from testifying that she fell in the "public way," contending not only was it a "forced misinterpretation" of the Fire Code, but whether her fall took place in the "public way" was a question of law for determination by the trial court. Respondents opposed the motion, contending the interpretation of the Fire Code presented a mixed question of fact and law that must be addressed by the jury, and Rowe should be allowed to testify because he had updated his testimony on key points following his deposition, including replacing the term "public way" with "public accessible sidewalk." The trial court denied the in limine motion without prejudice, advising Martinez that the court would "revisit the situation once [it] hear[d] the testimony."

At trial, Martinez called her expert, James McCullen, in her case-in-chief. McCullen testified the "public way" on Respondents' premises was the "city sidewalk leading to city streets," concluding that Martinez was injured in the "exit discharge" area of the building. In their case-in-chief,

---

[4] Fire Code section 1030.3, entitled "Obstructions," provided: "A means of egress shall be free from obstructions that would prevent its use, including the accumulation of snow and ice."

[5] Fire Code section 1002.1 defined "Public Way" as: "A street, alley or other parcel of land open to the outside air leading to a street, that has been deeded, dedicated or otherwise permanently appropriated to the public for public use and which has a clear width and height of not less than 10 feet (3048 mm)."

Respondents called Rowe, who testified, without objection, the "public way" on Respondents' premises was the "roadway that's directly out in front of the building" and the "parking lot," thereby suggesting Martinez's fall had occurred in the "public way" and not in the "exit discharge" area. Martinez's counsel cross-examined Rowe and did not move to strike his testimony.

At the close of evidence, Martinez moved for a directed verdict on the issue of liability, arguing whether the stanchions were placed in the "exit discharge" area was a question of law, and that "the stanchions, according to all admitted facts, were a barrier placed within that zone." She also reiterated her argument that Rowe's interpretation of the Fire Code was "a tortured interpretation of the law" that was "not correct." The trial court denied the motion, ruling that whether the placement of the stanchions was an "obstruction" was a matter for the jury which "[could] decide which expert they want[ed] to believe, if either one of them."

The court instructed the jury on negligence per se, negligence and premises liability. The jury returned a verdict that Respondents were negligent in the use or maintenance of the property, but that their negligence was not a substantial factor in causing injury or harm to Martinez.[6] On December 4, 2015, the trial court entered judgment on the jury verdict in favor of Respondents.[7] Martinez filed a timely notice of appeal.

CONTENTIONS

Martinez contends the trial court's denial of her motion in limine to preclude Respondents' expert from presenting his opinion on the

---

[6] The jury's vote on negligence was 10-2; the vote on causation was 1-11.

[7] Martinez also filed a motion for new trial, which was denied. Martinez did not appeal from that ruling.

interpretation of the Fire Code to the jury was error requiring reversal because whether she fell in the "exit discharge" area or "public way" was a question of law for the trial court to decide. By allowing Rowe's testimony, Martinez contends the jury was confused and unable to determine whether Respondents violated the Fire Code.[8] Respondents contend the judgment must be affirmed because (1) Martinez forfeited the issue of whether the trial court should have excluded expert Rowe's testimony by failing to object at trial to his testimony, and (2) she has not presented on appeal any argument that the trial court's ruling allowing Rowe's testimony resulted in prejudice to her.

DISCUSSION

I. Standard of Review

"A trial court's determination that expert testimony is admissible is reviewed for an abuse of discretion." (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1168.) "'Under that standard, we determine "whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered." [Citation.] We presume an order is correct and

---

[8] Martinez contends the jury "took the easier option" and found Respondents were negligent in burning popcorn. Her argument relies on citations from the reporter's transcript on the motion for new trial, which in turn contains references to excerpts of a juror declaration. We decline to consider any arguments related to the juror declaration because: (1) evidence of a juror's thought process is inadmissible (*Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1125 ["juror declarations are inadmissible to the extent that they purport to describe the jurors' understanding of the instructions or how they arrived at their verdict"]) and (2) that declaration is not part of the record on appeal (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574 ["a party challenging a judgment has the burden of showing reversible error by an adequate record"]).

imply findings necessary to support the judgment. [Citation.] An abuse of discretion must be clearly established to merit reversal on appeal. [Citation.] To the degree resolution of the appeal requires statutory interpretation, we undertake that review de novo. [Citation.]'" (*Hupp v. Solera Oak Valley Greens Assn.* (2017) 12 Cal.App.5th 1300, 1309-1310.)

II. Martinez Waived Any Error by Failing to Object to Rowe's Testimony at Trial

Evidence Code section 353 provides that reversal for erroneous admission of evidence is precluded unless: "There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated to make clear the specific ground of the objection or motion." (Evid. Code, § 353, subd. (a).)

"A motion *in limine* to exclude evidence is normally sufficient to preserve an issue for review without the necessity for defendant to renew an objection at the time the evidence was offered. [Citation.]" (*Summers A.L. Gilbert Co.*, *supra*, 69 Cal.App.4th at p. 1184.) However, "[w]hen a court has not finally ruled on an in limine motion . . . Evidence Code section 353 requires a timely objection during presentation of the evidence at trial to preserve the issue on appeal." (*Christ v. Schwartz* (2016) 2 Cal.App.5th 440, 452; see also *People v. Morris* (1991) 53 Cal.3d 152, 190, disapproved on another ground in *People v. Stansbury* (1995), 9 Cal.4th 824, 830, fn. 1.)

The ruling in *Christ v. Schwartz, supra,* 2 Cal.App.5th 440, is instructive. In that case, plaintiff sued defendant for personal injuries suffered in an automobile accident. (*Id.* at p. 443.) In the same lawsuit, plaintiff's husband alleged a loss of consortium. (*Ibid.*) Prior to trial, plaintiff filed a motion in limine to exclude evidence of her husband's extra marital affair. (*Id.* at p. 450.) The trial court ruled the evidence would be

admissible, but that all motions in limine were "'subject to being revisited at any time during the trial as the evidence [ ] developed.'" (*Id.* at p. 451.) During trial, when defense counsel asked plaintiff about the affair, plaintiff's counsel did not renew her objection, and the evidence was allowed. (*Ibid.*) On appeal, plaintiff argued the trial court had committed reversible error in allowing evidence of the affair. (*Id.* at p. 452.) The Court of Appeal affirmed the judgment, ruling plaintiff "failed to preserve the issue for review on appeal." (*Id.* at pp. 452-453.) It explained: "When a court has not finally ruled on an in limine motion, as in this case, Evidence Code section 353 requires a timely objection during presentation of the evidence at trial to preserve the issue on appeal." (*Id.* at p. 452.)

Here, as in *Christ v. Schwartz*, the trial court's ruling on the in limine motion was tentative. At the hearing, the trial court advised Martinez it would "revisit this situation once [it] hear[d] the testimony," explaining: "I think we're going to have to hear what [Rowe] actually testifies to or, at least, I'm going to have to hear what his actual testimony is going to be; and sometimes witnesses testify a little bit differently than they did in their deposition." Immediately thereafter, Martinez's counsel requested a hearing under Evidence Code section 402[9] "[b]ecause my concern is not, as they say, you know, ring the bell in their presence, only to have to try to unring it later." Following an objection by Respondents' counsel, the trial judge stated, "Well, I guess we'll cross that bridge when we get to it. I don't need to make that determination at this time." Martinez then stated: "So I guess I'll renew

---

9 When a party requests a hearing under Evidence Code section 402, "[t]he court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury." (Evid. Code, § 402, subd. (b).)

the request then, when it comes time for [Rowe] to testify on that day." We take this statement by Martinez's counsel to be a recognition that the trial court's ruling was not final and that Martinez intended to raise the issue to exclude Rowe's testimony again at the appropriate point during the trial.

Based on these proceedings, and especially given the circumstance that the trial court's ruling was tentative, we conclude it was the obligation of Martinez to raise the issue to exclude Rowe's testimony during trial by: (1) seeking the Evidence Code section 402 hearing the trial court had specifically deferred ("I don't need to make that ruling at this time"), or (2) to object (out of the presence of the jury) to the calling of Rowe as a witness when Respondents called him to the stand, or (3) to object to particular questions as they were posed by Respondents' counsel. (*Christ v. Schwartz, supra*, 2 Cal.App.5th at pp. 452-453.) Martinez did none of these things; instead, she chose to extensively cross-exam Rowe with respect to his opinions. Accordingly, we conclude Martinez failed to preserve the issue for appeal.[10]

Assuming arguendo that the issue has been preserved for appeal, Martinez has not demonstrated the trial court's ruling resulted in error requiring reversal.[11] "Claims of evidentiary error under California law are

---

[10] We also note Martinez called McMullen in her case-in-chief to testify on the same issues of law about which she attempted to exclude Rowe from testifying.

[11] We agree with Martinez that the interpretation of the Fire Code presented questions of law that should have been decided by the trial court. (*Summers v. A.L. Gilbert Co., supra*, 60 Cal.App.4th 1155, 1179-1180 [collecting cases]; *Ferreira v. Workmen's Comp. Appeals Bd.* (1974) 38 Cal.App.3d 120, 126 ["The manner in which the law should apply to particular facts is a legal question and is not subject to expert opinion."].) As we discuss in this opinion, however, whether the error in admitting the challenged testimony was harmless must be considered.

reviewed for prejudice applying the 'miscarriage of justice' or 'reasonably probable' harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, that is embodied in article VI, section 13 of the California Constitution. Under the *Watson* harmless error standard, it is the burden of appellants to show that it is reasonably probable that they would have received a more favorable result at trial had the error not occurred. (*People v. Watson*, at p. 836; Code Civ. Proc., § 475.)" (*Christ v. Schwartz, supra*, 2 Cal.App.5th at p. 447.)

Martinez contends Rowe's interpretations of the Fire Code were "errors of law [which] led directly to the jury's confusion in its deliberations and its completely avoiding the issue of whether [Respondents] had violated the Fire Code, despite the [t]rial [c]ourt having expressly instructed the jury in Instruction 418 to decide this very issue." This argument lacks merit because it acknowledges that the trial court instructed the jury on the relevant provisions of the Fire Code, as Martinez had proposed.[12] She also fails to develop any argument that Rowe's testimony so affected the jury's deliberations that they ignored the court's instructions.

---

[12] Martinez cites Judicial Council of California Civil Jury Instruction (CACI) No. 418. That instruction is indicated as having been proposed by Martinez, as modified. It sets out several provisions of the Fire Code and then tells the jury: "If you decide [] [t]hat [Respondents] violated this law and [] [t]hat the violation was a substantial factor in bringing about the harm, then you must find that [Respondents were] negligent." The next instruction given was CACI No. 430, which states: "A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm. Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct." By a vote of 11 to 1, the jury found that Respondents' negligence was not a substantial factor in causing injury to Martinez.

Nor is her contention supported by the verdict. "On appeal, we are required to draw all inferences in favor of the judgment, ruling, order or verdict." (*Jonkey v. Carignan Construction Co.* (2006) 139 Cal.App.4th 20, 25.) As Respondents point out, the jury found them "negligent, without identifying under which theory or theories, but also found the negligence was not a substantial factor in causing plaintiff's injury. The jury must be presumed to have reached the Fire Code theory." The court in *Jonkey* explained, "Where . . . there is no special finding on what negligence is found by the jury, the jury's finding is tantamount to a general verdict." (*Jonkey,* at p. 25.) Because we draw all reasonable inferences in favor of the verdict, including inferences regarding the basis for the jury's negligence finding and the breadth of the jury's "no substantial factor" finding, we agree with Respondents that the inference supporting the verdict in this case is that the jury determined that none of Martinez's negligence theories was a substantial factor in causing her injury. And, the element of causation was the same for each of Martinez's negligence theories. Thus, wherever the stanchions were located, the jury determined they were not a substantial factor in causing Martinez to fall and be injured.

We therefore conclude that, if error, admission of Rowe's testimony was nevertheless harmless: There was no causation under any theory of the case.

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

CHAVEZ, J.

---

* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.