**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| SHAWN WOOD,<br>Plaintiff and Appellant,<br>v.<br>SPARKS ENTERPRISES LP,<br>Defendant and Respondent. | G056181<br>(Super. Ct. No. 30-2016-00866123)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, Derek W. Hunt, Judge. Affirmed.

Law Office of Glenn E. Stern, Glenn E. Stern and Matthew P. Malczynski for Plaintiff and Appellant.

Law Offices of Muhar, Garber, Av and Duncan, George Muhar; Greines, Martin, Stein & Richland, Robert A. Olson and Geoffrey B. Kehlmann for Defendant and Respondent.

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Shawn Wood appeals from the judgment entered in his personal injury lawsuit filed against Sparks Enterprises LP. Wood contends the judgment must be reversed because the trial court abused its discretion by (1) improperly conditioning its ruling on Wood's ex parte application for leave to supplement his expert witness designation; and (2) excluding from the evidence at trial a computer animation that purportedly depicts the circumstances of Wood's injury.

We find no error and affirm the judgment.

Wood's challenge to the ex parte ruling is based on the trial court's purported statement at the hearing that it would grant the ex parte if Wood agreed to move his case to a limited jurisdiction court followed by its prompt denial of relief when he refused to do so. Wood provides us with a detailed description of the circumstances surrounding the ruling, including the court's alleged statements, but he fails to include any supporting citations to the record. Moreover, while the record includes the complaint, it does not include the reporter's transcript or any other pretrial documents or rulings. Most critically, it includes no transcript or settled statement related to the ex parte proceeding. Given those deficiencies, Wood's challenge to the ruling is waived.

Wood's challenge to the evidentiary ruling likewise fails. Our review of the single record citation Wood provided reveals that he has mischaracterized the court's ruling. Wood's failure to accurately report the court's ruling means he has failed to demonstrate error.

## FACTS

Wood filed his complaint for damages in July 2016. He alleged that in July 2014 he sustained a personal injury when he walked into a pole located in a shopping center owned by Sparks. Wood further alleged that Sparks was liable for his injury because it (1) failed to maintain the shopping center premises in a reasonably safe

condition; (2) installed and allowed a dangerous object to remain on the premises; and (3) failed to routinely inspect the premises.

In February 2018, the court entered judgment against Wood, after a jury found he had failed to establish Sparks was negligent.

Wood thereafter moved for a new trial, arguing the court erred by refusing to allow him to present expert testimony "regarding violations and citations issued against [Sparks] . . . as well as the standard of care . . ." and by "refusing to permit [him] to provide demonstrative evidence of an animation of the incident scene."

Sparks opposed the motion for new trial, and the court denied it. Wood now appeals.

## DISCUSSION

1. *Denial of Ex Parte Application*

Wood first contends the court erred by denying his ex parte application for leave to supplement his expert witness designation. In connection with that argument, he provides us with a "procedural summary" detailing the facts and circumstances surrounding both that ex parte application and his subsequent effort to disqualify the trial judge from the case. According to Wood, the trial court told his counsel off the record that "he would grant the motion on the condition that [Wood] immediately stipulate to take the case to limited jurisdiction." (Bold, underlining and initial capitalization omitted.) When Wood refused the court purportedly "stated, 'Motion[] denied' and walked away."

Woods contends that the court's conditional offer to grant his ex parte motion if he agreed to stipulate to remove the case to a limited jurisdiction court was "capricious" and "pure whimsy," and thus amounted to an abuse of discretion.

Wood's procedural summary is not supported by any citations to the record. "It is the duty of a party to support the arguments in its briefs by appropriate reference to

the record, which includes providing exact page citations." (*Bernard v. Hartford Fire Ins. Co*. (1991) 226 Cal.App.3d 1203, 1205.) "If a party fails to support an argument with the necessary citations to the record, . . . the argument [will be] deemed to have been waived." (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.) And so it is here.

It is improper for an appellant to base an argument on facts that are not included in the record. (Cal. Rules of Court, rule 8.204(a)(2)(C) [appellant's opening brief must "[p]rovide a summary of the significant facts limited to matters in the record"].) Here, Wood concedes there was no court reporter present at the ex parte hearing, and thus no transcript was created to memorialize what was said by the court or anyone else. Absent that record or a settled statement concerning the facts, Wood cannot seek and, we cannot grant, any relief based on the trial court's purported statements. When it comes to appellate practice, "if it is not in the record, it did not happen." (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364.)[1]

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[1] In his reply brief, Wood contends for the first time that evidence of what transpired at the ex parte hearing can be found in the trial judge's own verified answer to his motion to disqualify the judge—a copy of which was attached to Wood's motion for new trial. Even if we were inclined to consider evidence pointed out for the first time in a reply brief, that evidence does not support Wood's version of what occurred at the hearing. According to the trial judge, he denied Wood's ex parte application, and only then told Wood's counsel that had the case been brought to his attention earlier, he would have "referred [it] to the limited jurisdiction court . . ." as authorized by Code of Civil Procedure section 403.040. The judge pointed out that such a referral "would necessarily mean a new trial date and hence the opportunity for [Wood] to bring a *noticed* motion" for leave to supplement his expert witness designation. The judge then asked counsel if Wood would like to stipulate to the referral as a means of gaining that opportunity for a noticed motion. When counsel declined that option, the discussion ended.

As Wood points out, the judge's verified answer "admits that the discussion of taking this case to limited jurisdiction did in fact occur." However, as Wood implicitly concedes, the answer does not admit that the court conditioned its ex parte ruling on whether Wood agreed to move his case to a limited jurisdiction court. To the contrary, the judge's answer describes the discussion as having occurred after the court denied the ex parte application.

"The appellate court is not required to search the record on its own seeking error." (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768.) But even if we were inclined to do so, we would be stymied in evaluating any other potential abuse of discretion in connection with the ex parte ruling. Wood has failed to include any pretrial documents (other than the complaint itself) in our record, and thus we are unable to fully assess the facts and circumstances surrounding the ex parte ruling. "An abuse of discretion occurs only if the reviewing court, considering the applicable law *and all of the relevant circumstances*, concludes that the trial court's decision exceeds the bounds of reason and results in a miscarriage of justice." (*Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 911, italics added.) We may reverse only if the trial court's decision "'exceeds the bounds of reason, all of the circumstances before it being considered.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

The only information we have pertaining to the ex parte application is found in declarations filed by both sides in connection with Wood's motion for new trial.[2] Those declarations appear to present argumentative and selective descriptions of events, and their intended audience was the trial court which was not only familiar with the relevant circumstances but also had the entire trial record at its disposal. Those post-hoc descriptions of what occurred cannot substitute for a comprehensive appellate record as a means of establishing the relevant circumstances surrounding Wood's ex parte motion.

2. *The Refusal to Admit the Animation into Evidence*

Wood next argues the court abused its discretion by excluding from evidence a computer animation depicting the circumstances of his injury. He points out that "[a] computer animation is admissible if "'it is a fair and accurate representation of

[2] Sparks relies on its own counsel's declaration as support for facts stated in its appellate brief.

the evidence to which it relates,"'" (citing *People v. Duenas* (2012) 55 Cal.4th 1, 20) and that the animation "is not required to be exact, but only substantially similar and helpful to the jury."

Wood tells us only two things about the proffered animation.[3] First, his "counsel sought to have [him] testify as to an animation depicting the scene of the incident." And second, "[t]he animation had been shown to defense counsel." He cites three pages of the reporter's transcript in support of those facts.

But those three pages of transcript clarify that the court did not exclude the animation from evidence as Wood suggests. Instead, the court indicated its belief that admission required an appropriate foundation. With that in mind, the court asked Wood's counsel, "[w]ho prepared this animation?" Counsel responded that it had been prepared by a company by the name of MotionLit, based on "the deposition."

The court then explained that computer animations are sometimes admitted into evidence at trial, "but usually the animator comes in here and subjects himself to cross-examination about 'how did you decide to come up with this particular animation?' [¶] That's the reason there's an objection here. We don't have the opportunity to cross-examine the guy who did it." Wood's counsel responded, "[w]ell, with your permission then, we'll ask to bring him in perhaps tomorrow." In response, the court agreed, "[t]hat's fine." Counsel then affirmed, "We'll try to get him in tomorrow." However, the evidentiary portion of the trial concluded that same day, and the transcript reflects no further effort by Wood to produce a witness from MotionLit to provide foundation for the animation.

The court's ruling on the subject was that before the animation could be admitted into evidence Wood was required to lay an appropriate foundation through the testimony of its creator. Wood understood and agreed to that ruling. He asked the court

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[3] The animation itself is not included in our record.

for leave to produce the witness—which was granted—but Wood later abandoned the effort by failing to call that witness. Wood therefore waived his claim that the court erred in its ruling. (*Allin v. Internat. etc. Stage Employes* (1952) 113 Cal.App.2d 135, 138 ["One who by his conduct accepts a ruling of the court under circumstances amounting to acquiescence therein, may not complain of it on appeal"].)

Even assuming Wood did not acquiesce, the fact remains that the court's only ruling was that he was required to lay a foundation for the animation through the testimony of its creator. The trial court has broad discretion in determining the admissibility of evidence. (*People v. Williams* (1997) 16 Cal.4th 153, 196.) The burden is on Wood to show the court abused its discretion in making that specific ruling. (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 80.) Wood failed to meet his burden. We consequently find no error.

**DISPOSITION**

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

GOETHALS, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

THOMPSON, J.