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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

GOLI G. BASAMAH, Plaintiff and Appellant, v. LOS ANGELES COUNTY METROPOLITAN TRANSIT AUTHORITY, Defendant and Respondent.	B291022 (Los Angeles County Super. Ct. No. BC516213)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mitchell L. Beckloff, Judge. Affirmed.

Goli G. Basamah, in pro. per., for Plaintiff and Appellant.

Law Offices of York & Wainfeld, Gabriel H. Wainfeld; Greines, Martin, Stein & Richland, Edward L. Xanders and Geoffrey B. Kehlmann for Defendant and Respondent.

INTRODUCTION

Appellant Goli G. Basamah's teenage son, Mohammad (Mo), was hit by a car and fatally injured while trying to cross the street after getting off a bus operated by respondent Los Angeles County Metropolitan Transportation Authority (MTA). Appellant sued MTA, claiming that the agency had negligently caused her son's death. Among other things, she alleged that the MTA driver ejected Mo and his younger brother, Ahmad, from the bus at an unsafe location following an altercation between the two boys. MTA claimed, however, that the boys left the bus voluntarily, at a designated bus stop, after refusing the driver's offer of assistance. Following a trial at which appellant was represented by counsel, the jury found that MTA had not been negligent in the incident, and the trial court denied appellant's post-trial motions.

In her propria persona appeal, appellant contends: (1) the evidence at trial did not support the jury's verdict; (2) the trial court committed instructional error by (a) waiting until the end of trial to instruct the jury about the weight of deposition testimony, and (b) refusing to give a special instruction on the relevance of public entities' policies to the

standard of care; (3) one of the jurors should not have been allowed on the jury because appellant recognized him; (4) the jury committed misconduct in various ways; (5) MTA failed to provide her with certain evidence; and (6) the court did not provide her with certain records following the trial. Finding no error, we affirm.

BACKGROUND

A. The Incident and Appellant's Complaint

In 2013, appellant's two sons, Mo (who was 15 years old) and Ahmad (who was 12), boarded an MTA bus on their way to Universal Studios. (RT 51, 52, 55, 58, 313-314, 354-355)~ Shortly after they boarded, the two began arguing, and Mo hit Ahmad on the head with a cellphone, causing him to bleed. The bus driver, Robert Howze, stopped the bus shortly thereafter and questioned the boys as to what had happened. What occurred during this questioning was hotly disputed at trial, but at its conclusion, the boys got off the bus and separated. At some point, Mo attempted to cross the street, but was hit by a car and later died of his injuries. Appellant then filed this action against MTA, alleging that the agency had negligently caused Mo's death.

B. The Trial and the Jury's Verdict

At trial, the parties presented conflicting evidence as to what had occurred on the bus after Mo struck Ahmad. Appellant presented evidence that there was no bus stop where Howze had stopped the bus, that he had not offered

the boys help but instead threatened to call the police, and that he ultimately ejected them from the bus. These contentions were supported by, inter alia, the testimonies of Ahmad and appellant (who was on the phone with Ahmad at the time of the boys' interaction with Howze), and the videotaped deposition of Keneesha Canas (a friend of the boys, who claimed she had boarded the bus after the boys got off).[1] Appellant also presented the testimony of Augustine Zemba, an expert witness, who opined that Howze had been negligent, relying in part on an MTA rulebook detailing the agency's policies. Among other things, Zemba testified that after stopping the bus, Howze should have kept the doors closed in order to keep the boys on it.

MTA, on the other hand, contended that Howze had stopped at a bus stop, that he had offered the boys help but was rebuffed, and that the boys left the bus voluntarily. Howze testified that after noticing an incident in the back of the bus, he pulled over at the nearest bus stop and opened the bus doors, asked the boys what had happened, and then asked Ahmad if he wanted him to call the police or paramedics. Ahmad responded that Howze could not keep him on the bus, and the boys left the bus. After the boys got off, Howze called MTA's dispatch to report the incident. A recording of this conversation was played to the jury. During the call, Howze reported that the boys "got off the

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[1] Canas claimed Howze had told her that he had kicked two boys off the bus.

bus and ran," and "disappeared." Additionally, Vincent Franco, an MTA training manager, testified regarding MTA's policies, based in part on the MTA rulebook. Among other things, Franco testified that in case of an incident on an MTA bus, the driver must stop at the first available safe location and must keep the doors open so that passengers who want to get off the bus may do so.

After the close of evidence, the trial court instructed the jury on MTA's duty as a common carrier to use "the highest care and the vigilance of a very cautious person." Following deliberations, the jury returned a special verdict finding that MTA and Howze had not been negligent in the incident. Appellant then filed a motion for judgment notwithstanding the verdict or, in the alternative, a motion for new trial. Among other things, appellant contended the jury had committed misconduct in various ways, relying on a declaration by Juror D. Alvarado. After a hearing, the trial court denied appellant's motions, concluding, as relevant here, that no misconduct had occurred. Appellant timely appealed.

DISCUSSION

On appeal, appellant claims: (1) the evidence presented at trial did not support the jury's verdict; (2) the trial court committed instructional error by (a) reserving its instruction on the weight of deposition testimony for the end of trial, and (b) refusing to give a special instruction on the relevance of public entities' policies to the standard of care;

(3) one of the jurors should not have been allowed on the jury because appellant recognized him; (4) the jury committed misconduct in various ways; (5) MTA failed to provide her with certain evidence; and (6) the court did not provide her with certain records following the trial. We address her contentions in turn.

A. Sufficiency of the Evidence

Appellant contends the evidence was insufficient to support the jury's verdict. "Our review of the evidence 'begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the [jury's] determination.'" (*Moran v. Foster Wheeler Energy Corp.* (2016) 246 Cal.App.4th 500, 517.) "In making that determination, we '"view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor."'" (*Ibid.*) Because appellant challenges an adverse finding on a matter she had the burden to prove -- MTA's alleged negligence -- she must establish that the evidence compelled a finding in her favor as a matter of law. (*Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 838 (*Dreyer's*).) Thus, appellant must show that her evidence was '"'uncontradicted and unimpeached'"' and '"'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding'"' of negligence. (*Ibid.*)

Appellant's evidence did not compel a finding that MTA was negligent. Howze testified that after noticing an incident in the back of the bus, he pulled over at the nearest bus stop, opened the doors, and asked Ahmad if he wanted the police or paramedics. According to Howze, Ahmad refused his offer to call for help, telling Howze that he could not keep him on the bus, and the boys then got off the bus. Howze's testimony was partially corroborated by the recording of his conversation with dispatch, during which he stated that the boys "got off the bus and ran" and "disappeared." Finally, the testimony of Franco, an MTA training manager, suggested that Howze's actions were consistent with MTA's policies. Franko testified that in case of an incident on an MTA bus, the driver must stop at the first available safe location, and must keep the doors open in order to permit any passenger who wishes to get off the bus to do so. Nothing precluded the jury from crediting this evidence and concluding that Howze had acted reasonably in responding to the incident on the bus.

While appellant points to evidence tending to show that there was no bus stop where Howze had stopped the bus, and that he had ejected Mo and Ahmad without ever offering them help, this evidence was contradicted by the evidence discussed above. Faced with the parties' conflicting evidence, the jury was not bound to accept the evidence favorable to appellant. (See *Dreyer's*, *supra,* 218 Cal.App.4th at 838.)

B. Claims of Instructional Error

1. *Timing of Jury Instruction about Deposition Testimony*

a. Background

Canas's videotaped deposition was played for the jury because she was unavailable to testify in court. Before her testimony was presented, the court and counsel discussed whether the court should, at that time, instruct the jury under CACI No. 208, to consider deposition testimony "in the same way as [it] consider[ed] testimony given in court." After MTA's counsel objected that doing so would improperly highlight the instruction, the court decided to reserve the instruction for the end of trial.

b. Analysis

Appellant claims the trial court erred in failing to instruct the jury under CACI No. 208 before Canas's deposition was presented, rather than at the end of trial. However, "trial courts are vested with wide discretion as to when to instruct the jury" (*People v. Smith* (2008) 168 Cal.App.4th 7, 14), and courts have recognized that "'[i]nstruction at the conclusion of trial,'" as was done here, "'tends to ensure emphasis and prevent confusion'" (*id.* at 18). Appellant points to no authority requiring a trial court to instruct the jury on the weight of deposition testimony before that testimony is presented; nor does she suggest that any unique facts compelled the court to do so in this case. Thus, we conclude the court did not abuse its discretion in

deciding to give the relevant instruction only at the end of trial.

2. *Failure to Give Special Instruction*

a. Background

At trial, both parties presented evidence regarding MTA's rulebook, offering opposing positions on whether Howze's actions were consistent with the agency's policies. In discussing jury instructions, appellant asked the court to instruct the jury on her proposed special instruction No. 2, which read: "A public entity employee's violation of a public entity's policies . . . is evidence of the public entity's negligence. [¶] When the public entity has enacted policies . . . on how its employees are expected to conduct themselves[,] that establishes a public entity employee's standard of care. [¶] A public entity employee's failure to follow . . . such policies . . . constitutes a breach of that duty." The court denied appellant's request, reasoning that the proposed instruction improperly suggested that violating a public entity's policies constituted negligence per se, and that the instruction was otherwise unnecessary.

b. Analysis

For the first time in her reply brief, appellant claims the court erred in failing to give her requested special instruction. Appellant has forfeited any contention in this regard by failing to raise it in her opening brief. (See *Christoff v. Union Pacific Railroad Co.* (2005) 134

Cal.App.4th 118, 125 (*Christoff*) ["an appellant's failure to discuss an issue in its opening brief forfeits the issue on appeal"].)

Moreover, the court did not err in refusing to grant the requested instruction. We review the propriety of jury instructions de novo. (*D.Z. v. Los Angeles Unified School Dist.* (2019) 35 Cal.App.5th 210, 232.) "'It is elementary that a court may refuse a party's request for a jury instruction that misstates the law. "A trial court has no duty to modify or edit an instruction offered by either side in a civil case."'" (*Olive v. General Nutrition Centers, Inc.* (2018) 30 Cal.App.5th 804, 813.) Recognizing the relevance of MTA's policies to the jury's determination whether Howze (and thus MTA) was negligent, the court properly admitted evidence on the subject. It also instructed the jury on MTA's duty as a common carrier to use "the highest care and vigilance of a very cautious person." Appellant's proposed instruction, however, suggested that a violation of a public entity's policies constituted negligence per se, stating that the entity's policies "establish[]" its employees' standard of care and that failure to follow its policies constitutes a breach of its duty of care. As the trial court properly concluded, this was a misstatement of the law. (See *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 720 [under Evid. Code, § 669.1, agency's manual cannot establish standard of care].) Accordingly. the court did not err in declining to give the instruction.

C. Failure to Strike a Prospective Juror

1. *Background*

During trial, after three witnesses had already testified, appellant told the trial court that she recognized two jurors, including Juror No. 2, from having run into them in the community. She claimed she had notified both her counsel and the courtroom clerk about the issue before the jury had been empaneled. In response to appellant's remarks, the court and counsel for both parties agreed that no objection to the relevant jurors had been brought to the court's attention during jury selection, and the court concluded there was no cause to "do anything about the jury."

2. *Analysis*

Appellant contends that the trial court should have stricken Juror No. 2 for cause during jury selection because appellant recognized him. However, appellant forfeited any challenge to the selection of this juror by failing to challenge him during voir dire. (See Wegner et al., Cal. Practice Guide: Civil Trials & Evidence (The Rutter Group 2021 update) ¶ 5:505, citing *Estate of Jones* (1913) 166 Cal. 108, 118 ["[G]rounds for juror disqualification that could have been discovered on voir dire are waived if not raised before the jury is impaneled" (italics omitted)].) While appellant claims she asked the court not to allow Juror No. 2 to serve on the jury, the record reveals no complaint addressed to the court regarding this juror until well into the trial. Moreover,

forfeiture aside, appellant's objection -- that she recognized Juror No. 2 -- provides no ground for disqualification. (See Code Civ. Proc., § 229 [listing exclusive grounds for challenges alleging implied bias].)

In her reply brief, appellant asserts Juror No. 2 gave her and Ahmad "horrible and displeased looks." She has forfeited any claim in this regard by failing to raise it in her opening brief. (See *Christoff*, *supra,* 134 Cal.App.4th at 125.) Moreover, the record provides no support for her contention regarding the conduct of Juror No. 2. Accordingly, nothing required the trial court to strike this juror.

D. Jury Misconduct

1. *Background*

In her motion for a new trial, appellant asserted jury misconduct, relying on a declaration from Juror Alvarado. Among other things, Alvarado's declaration stated: (1) after entering the jury room, the jurors "quickly took a vote without any deliberations"; (2) jurors showed "a general unwillingness to have a substantive dialogue"; (3) one juror reviewed the jury instruction on negligence, but "did not read it aloud or initiate a conversation regarding the definition of negligence," and "[a]fter some discussion," changed his vote to favor MTA; (4) three jurors "wanted to leave as quickly as possible with no regard for actually deliberating"; (5) one juror "expressed dissatisfaction with the amount the jury was to be compensated for their service"; and (6) the jury played the recording of the dispatch

call and had "general discussions" on various issues, including whether Howze's mentioning of the police to the boys was a threat or an offer of assistance. The trial court denied appellant's motion, finding no misconduct.

2. *Analysis*

Appellant appears to challenge the trial court's denial of her motion for a new trial, renewing several of her claims of jury misconduct. """On appeal from denial of a motion for new trial on grounds of juror misconduct, the appellate court, 'has a constitutional obligation [citation] to review the entire record, including the evidence, and to determine independently whether the act of misconduct, if it occurred, prevented the complaining party from having a fair trial.'"""" (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 817-818.)

Relying in part on Alvarado's declaration, appellant complains that: (1) one of the jurors changed his initial vote without additional discussion; (2) the same juror did not understand the meaning of negligence; (3) the same juror expressed dissatisfaction with the compensation the jurors received;[2] (4) the jury took a preliminary vote before any deliberation; and (5) there was a general unwillingness to deliberate among the jurors, and a few of them "just wanted out." None of appellant's contentions establish misconduct.

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[2] According to appellant, the culprit in all three of these instances was Juror No. 2, whom she had asked the court to remove.

First, appellant's contention that a juror changed his vote without additional discussion is refuted by Alvarado's declaration, which stated that the juror changed his vote "[a]fter some discussion . . . ." To the extent appellant complains that the juror did not explain his changed vote to the other jurors, she points to no authority requiring such an explanation, and we are aware of none. (Cf. *People v. Engelman* (2002) 28 Cal.4th 436, 446 ["it is not always easy for a juror to articulate the exact basis for disagreement after a complicated trial, nor is it necessary that a juror do so. As we have stated, it is not required that jurors deliberate well or skillfully"].)

Second, the record does not support appellant's assertion that one of the jurors failed to understand the meaning of negligence at the time he cast his vote. We presume that the jury understood and followed the court's instructions (*People v. Yeoman* (2003) 31 Cal.4th 93, 139), including its instruction on negligence. Appellant offers nothing that could rebut this presumption. That the relevant juror might have read that instruction during deliberations would not tend to rebut that presumption. Instead, it would show diligence on his part. Appellant claims that during deliberations, her trial counsel was called to the courtroom and later told her that one of the jurors "did not know the definition of negligence." But even assuming counsel made this statement -- which appears nowhere in the record -- appellant discloses no basis for counsel's assertion.

Third, appellant cites no authority suggesting that a juror's dissatisfaction with the jurors' compensation constitutes misconduct, and we are aware of none. Nor is there any reason to assume that such dissatisfaction -- which may not be uncommon, given the jurors' nominal pay rate -- led the juror to shirk his or her duties.

Fourth, that the jury may have taken a straw vote prior to any discussion of the evidence would not constitute misconduct. (Cf. *Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 912 [taking straw vote without any discussion and rendering verdict based on that vote was permissible].)

Finally, Alvarado's declaration that there was a general unwillingness to deliberate and that a few of the jurors "wanted to leave as quickly as possible" is both inadmissible and irrelevant under Evidence Code section 1150, as these statements pertain to the jurors' alleged mental states, rather than to objectively ascertainable acts.[3] (See *Krouse v. Graham* (1977) 19 Cal.3d 59, 80 [under Evid. Code, § 1150, evidence regarding jury's deliberations is admissible only if it constitutes "'proof of overt acts, objectively ascertainable,'" that are "'open to sight, hearing,

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[3] While MTA did not object to this evidence under Evidence Code section 1150 in the trial court, its failure to do so did not constitute forfeiture. (See *People v. Johnson* (2013) 222 Cal.App.4th 486, 494 [party need not raise objection under Evid. Code, § 1150 below, as evidence that violates the statute is irrelevant, rather than merely inadmissible].)

and the other senses'"]; *People v. Johnson*, *supra,* 222 Cal.App.4th at 494 ["evidence that violates Evidence Code section 1150 is not merely inadmissible; it is irrelevant -- 'of no jural consequence'"].) And as noted, Alvarado's declaration established that the jurors did deliberate. Accordingly, appellant fails to demonstrate jury misconduct.

E. MTA's Failure to Provide Appellant with Certain Evidence

1. *Background*

During trial, appellant presented evidence that the bus her sons had boarded had a camera system, but that following the incident, MTA saved footage from the wrong bus. By the time the issue was discovered, the footage from the correct bus had been overwritten. A few years after the incident, MTA sold the bus because it reached the end of its lifespan. The jury also heard testimony about an unproduced MTA incident report, generated after Howze's call to dispatch.

At appellant's request, the court instructed the jury under CACI No. 204, which states that if the jury finds that a party intentionally concealed or destroyed evidence, it may decide that the evidence would have been unfavorable to that party. During closing argument, appellant's counsel urged the jury to apply this instruction to MTA's production failures and find that the unproduced evidence would have been unfavorable to MTA.

2. *Analysis*

Appellant claims that MTA failed to provide her with any evidence beyond the recording of Howze's dispatch call. She complains about MTA's sale of the bus and about MTA's failure to obtain and preserve the video of the incident. However, appellant presents no argument as to why MTA's failure to produce certain evidence warrants reversal. She has therefore forfeited any such argument. (See *Sviridov v. City of San Diego* (2017) 14 Cal.App.5th 514, 521 (*Sviridov*) [failure to present reasoned argument constitutes forfeiture].)

Moreover, the jury learned of MTA's failure to provide the relevant evidence, including the video of the incident. The court instructed the jury on its power to find that any willfully suppressed evidence would have been unfavorable to the suppressing party, and appellant asked the jury to make this finding as to evidence MTA had failed to provide. In rendering a verdict for MTA, the jury presumably declined to make this finding. Appellant suggests no additional action the trial court should have taken in this regard, and she therefore establishes no error.

F. The Trial Court's Alleged Failure to Provide Appellant with Certain Records After Trial

Appellant asserts that after the trial, she attempted to obtain a question the jury had submitted to the court and a copy of a certain document, but the clerk of the superior court told her that the jury's notes had been destroyed and

that she could not receive a copy of the other document she requested. Again, appellant presents no argument related to these assertions, and we therefore need not address them. (See *Sviridov*, *supra,* 14 Cal.App.5th at 521.) We note, however, that the jury's questions to the court were included in the reporter's transcript of the trial. And while appellant does not specify what records she was unable to copy, there is no indication she did not receive the materials requested in her record designations.

DISPOSITION

The judgment is affirmed. Each party shall bear its own costs on appeal.

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MANELLA, P. J.

We concur:

COLLINS, J.

CURREY, J.