CASENOTE

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Evidence that Defendant was not injured in minor automobile accident was relevant and admissible and opinions of an accident reconstruction expert that Plaintiff's claim of injuries was not caused by this minor accident was not a medical opinion but was based on an analytical opinion of forces involved in the accident. NOTE: *Case is unpublished and is being provided for informational purposes only.*

Filed 4/2/12 Summers v. Freistat CA4/3

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

MICHAEL SUMMERS et al.,
Plaintiffs and Appellants,

v.

SUSAN FREISTAT,
Defendant and Respondent.

G045014

(Super. Ct. No. 30-2009-00124560)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kirk H. Nakamura, Judge. Affirmed. The Law Office of George L. de la Flor, George L. de la Flor; Wroten & Associates and Darryl A. Ross for Plaintiffs and Appellants.

Michael Maguire & Associates, Paul Kevin Wood and Kevin R. Jolly for Defendant and Respondent.

INTRODUCTION

Defendant Susan Freistat was driving her car at about 25 miles per hour in stopandgo traffic on a residential street, when she saw a car, driven by then 87yearold Melvin Lifson, stopped in front of her. Lifson had stopped at a light behind a car containing plaintiffs Michael Summers and Ector Sepulveda. (We refer to Summers and Sepulveda collectively as plaintiffs.) Although defendant tried to avoid hitting Lifson's car by slamming on her brakes and veering to the right, the left front bumper of her car collided with the right rear bumper of Lifson's car. Lifson's car, in turn, bumped into the car containing plaintiffs.

Neither defendant nor Lifson were injured in the accident. Plaintiffs, both in their late 30's, sued defendant, claiming they suffered significant physical injuries as a result of the accident. A jury found plaintiffs' claimed injuries were not caused by the accident. The trial court denied plaintiffs' motion for a new trial.

We affirm. Far more than substantial evidence, which included photographs of the damage caused to the vehicles involved in the accident, supported the jury's findings. The trial court did not err by admitting evidence that the accident did not cause Lifson any injury. The court also did not err by allowing defendant's expert witness, an accident reconstruction expert and biomechanical engineer, to offer his opinion that the forces generated by the accident were inconsistent with the injuries claimed by plaintiffs. Finally, the record does not show defendant's counsel engaged in any misconduct in closing argument. Even if defendant's counsel had engaged in misconduct, it was harmless.

FACTS

On June 16, 2007, defendant was travelling in the third lane of a residential street in "stopandgo traffic." She was travelling about 25 miles an hour behind Lifson's car when "abruptly, everything stopped." In an effort to avoid a collision with Lifson's car, defendant slammed on the brakes and veered to the right. Her car's left side clipped the rear bumper of Lifson's car. Unbeknownst to defendant, Lifson's car bumped into Summers's car which was being driven by Sepulveda; Summers was sitting in the front passenger seat.[1] Defendant admitted the accident was her fault. A police officer who took a report at the scene of the accident described the damage to the center of the rear bumper of Summers's car as "[m]inor."

Neither defendant nor Lifson was injured in the accident. Summers, who was 42 years old at the time of trial in 2010, and Sepulveda, who was 39 at the time of trial, testified in detail about the serious injuries each claimed to have suffered as a result of the accident. Summers testified about the various sports he participated in, which included playing baseball "just about every day." Sepulveda testified that before the accident, he had played softball four nights a week.

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[1] There were two other passengers in Summers's car. Although one of them was a named plaintiff in the complaint, she was no longer in the case at the time of trial.

After the accident, they testified that the pain they had suffered (and continued to suffer) caused them to significantly limit their physical activities.[2] Summers testified he worked less because of the accident. Sepulveda testified he was out of work on disability for six months as a result of the accident.

Two chiropractors and a neurosurgeon testified about plaintiffs' medical conditions. Defendant's expert witness, Judson Welcher, an accident reconstruction expert and a biomechanical engineer, testified, inter alia, that Lifson's car bumped into Summers's car at a speed of four to seven miles per hour, resulting in a change in velocity ("delta v") to Summers's car of no more than two to four miles per hour. He expressed the opinion that the forces involved in the accident had not been shown to cause injuries and were inconsistent with plaintiffs' claimed injuries.

BACKGROUND

Plaintiffs filed a form complaint against defendant and Lifson, in which plaintiffs asserted claims for motor vehicle negligence and general negligence. The complaint alleged: "Defendant FREISTAT operated a vehicle in such a negligent and/or grossly negligent manner, as to cause said vehicle to collide with a vehicle driven by Defendant LIFS[ON], causing that vehicle in turn to careen into the vehicle occupied by Plaintiff[]s causing injury to Plaintiffs' persons, including causing Plaintiffs to incur medical expenses, causing pain and suffering, loss of earnings, loss of earning capacity, all as heretofore alleged. Plaintiff[s] allege[], on information and belief, that Defendant LIFS[ON] failed to exercise due care to avoid the collision with Plaintiff[s'] vehicle and had the last clear chance to avoid the second collision." Before trial, defendant's counsel informed the trial court that Lifson was "not a party" in the case, without further explanation.

The trial court denied plaintiffs' motion in limine which sought to exclude evidence that the accident did not cause Lifson injury. The court also denied another of plaintiffs' motions in limine to the extent it sought to exclude from trial Welcher's testimony. The court granted that motion in limine to the extent plaintiffs requested therein that defendant's counsel lay a proper foundation for Welcher's testimony, and also ruled that Welcher was not to testify about medical conclusions.

The jury returned a special verdict finding that the accident was not "a substantial factor in causing harm to" plaintiffs. Judgment was entered in defendant's favor against plaintiffs.

Plaintiffs filed a motion for a new trial, in which they argued insufficient evidence supported the jury's findings, the court erred in ruling on plaintiffs' motions in limine, the court erroneously allowed Welcher to render medical opinions, and defendant's counsel engaged in misconduct during closing argument. The trial court denied the new trial motion.

Plaintiffs appealed.

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[2] Although Summers had had spinal surgery in November or December 2005 and a plate was put in the back of his neck "to do a fusion," he testified he had completely healed as of the time of the accident.

DISCUSSION

I.

SUBSTANTIAL EVIDENCE SUPPORTED THE JURY'S FINDINGS.

Plaintiffs contend insufficient evidence supports the jury's finding that the collision did not cause them any injury. Plaintiffs' argument is without merit.

Substantial evidence showed the impact of Lifson's car bumping into Summers's car was minimal. Both cars were stopped at an intersection when defendant's car, which had been travelling 25 miles per hour before she applied the brakes and swerved to avoid a collision, clipped the rear bumper of Lifson's car. Neither Lifson, who suffered two separate collisions during the accident, nor defendant was injured as a result of the accident.

The police officer, who wrote the report on the accident, stated that the damage to Summers's vehicle appeared "[m]inor" to him. The minor nature of the damage to Summers's car is shown in photographs, taken of the vehicles involved in the accident, which were admitted into evidence.

Welcher testified that, in his expert opinion, the impact speed of Lifson's car bumping into Summers's car was four to seven miles per hour and the change in velocity to Summers's car was two to four miles per hour. Welcher testified that forces of the type involved in this accident "have not been shown to cause injuries whatsoever." He stated that playing softball or baseball induces forces greater than the impact involved in the accident. Welcher also testified that Summers's and Sepulveda's prior physical activities would "put them on the good side of the higher tolerance" for such an impact, as compared with Lifson, who was elderly.

Welcher testified that it takes a change in velocity of 2.5 or higher to generate enough force to cause the head of a car's occupant to hit a head restraint. Summers and Sepulveda each testified that they did not strike anything inside the car. Welcher further noted that the average walking speed is 3.3 miles per hour, Canadian bumper car impacts permit a change in velocity of up to five miles an hour, and German bumper car impacts have a change in velocity of up to seven miles per hour.

Substantial evidence therefore supported the jury's finding plaintiffs' claimed injuries were not caused by the accident.

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING PLAINTIFFS' MOTIONS IN LIMINE NOS. 1 AND 6.

Plaintiffs contend the trial court erred by denying their motions in limine Nos. 1 and 6. We review the denial of each motion in limine, *post*, for an abuse of discretion. (*Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 456.)

A.

Plaintiffs' Motion in Limine No. 1

Plaintiffs' motion in limine No. 1 requested that the trial court exclude evidence that anyone involved in the accident had not been injured. In the moving papers, plaintiffs

argued such evidence would be irrelevant and inadmissible under Evidence Code section 352. Defendant opposed the motion.

At the hearing on the motion, plaintiffs' counsel argued as to Lifson's lack of injury, "I can't say it's not relevant; it's part of the accident." He nevertheless argued that evidence lacked probative value. The trial court denied the motion.

In their opening brief, plaintiffs' entire argument challenging the trial court's denial of motion in limine No. 1 is, as follows: "As expected, the defendant played up the absence of injury to Melvin Lifson, which has no relevance to injuries sustained by [plaintiffs] in the collision. The warnings of the Motion in Limine came to pass. The testimony came in. . . . Admission of this testimony was prejudicial and in part contributed to depriving [plaintiffs] of a fair trial. [¶] This prejudicial error was an abuse of discretion and warrants a review of the denial of the New Trial Motion and reversal of the Judgment."

Plaintiffs' argument is without merit. Relevant evidence is defined in Evidence Code section 210 as that evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

That 87yearold Lifson was not injured after the collisions with defendant's car and with Summers's car is certainly relevant to assess whether Summers's and Sepulveda's claimed injuries were caused by the latter collision only—the central issue in this case. It is therefore understandable plaintiffs' counsel conceded the relevance of that evidence at the hearing on the motion in limine.

B.

Plaintiffs' Motion in Limine No. 6

Plaintiffs' motion in limine No. 6 sought to (1) require a proper foundation before defendant's accident reconstruction expert witness, Judson Welcher, was permitted to testify; (2) exclude any testimony by Welcher as to medical conclusions; and (3) to exclude any expert opinion by Welcher, regarding the probability that the accident might cause injuries. Defendant opposed the motion.

At the hearing on motion in limine No. 6, the trial court ruled that Welcher would not be permitted to testify as to the standard of care for doctors. The court told plaintiffs' counsel that if he wished, the court would hold an Evidence Code section 402 hearing as to Welcher's testimony.

In their opening brief, plaintiffs argue the trial court erred by allowing Welcher to testify that "any doctor that disagreed with him was wrong." Plaintiffs also argue that even though Welcher had stated in his deposition he would not be offering a medical opinion and the court excluded medical opinion testimony from Welcher, "defense counsel asked perhaps the most direct medical causation question asked of any witness" in the following colloquy:

"Q And in any of those MRI reports, did you see the term 'herniation' used?

"A No, I did not.

"Q And when you read MRI reports, when you're doing an analysis, is there a significance to you, doing analysis, whether a report uses the term 'disc bulge' to—

"The Court: Well, we're going beyond his assumptions for his analysis here. You're getting into medical testimony. So I'm not going to allow him to testify further on that issue.

"[Defendant's counsel]: All right.

"Q And in your opinion, doing your analysis here, did the auto accident of June 16, 2007, cause any disc herniations to Mr. Sepulveda?

"A No, it did not.

"[Plaintiffs' counsel]: Objection, Your Honor. That's purely medical opinion. Beyond the witness's designation and beyond the witness's expertise.

"The witness: No, it—

"The Court: Overruled.

"The witness: No, it did not. The forces are not consistent. There's no epidemiological evidence that a crash like this would do that.

"Q By [defendant's counsel]: Is that consistent with what you reviewed in the records?

"A That's consistent with what I've seen, but that's also consistent with quite a large number of studies that I gave at my deposition as well, from cadaver tests to real-world studies to human volunteer studies that I've done and human volunteer studies done the world over."

Plaintiffs argue the trial court erred by overruling their counsel's objections to this testimony. The cited testimony, however, does not reflect a medical opinion. Instead, Welcher expressly testified that in his opinion Sepulveda's hernia was not caused by the accident was based on a force analysis, not a medical analysis. Even if we were to assume the trial court erred by permitting this testimony, plaintiffs have failed to analyze how the admission of that testimony constituted prejudicial error.

We find no error.

III.

THE TRIAL COURT DID NOT ERR BY DENYING PLAINTIFFS' MOTION FOR A NEW TRIAL.

Plaintiffs argued in their motion for a new trial that insufficient evidence supported the jury's verdict, the trial court erred in denying their motion in limine No. 1 and only partially granting their motion in limine No. 6, and defendant's counsel made unwarranted attacks on plaintiffs' counsel. An order denying a new trial is not directly appealable but is reviewable on appeal from the underlying judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 18.)

The trial court denied the motion for a new trial, stating: "The court finds that all the grounds raised by plaintiffs are without merit. [¶] In particular, the trial of this matter took several days longer than most straightforward auto accident cases are required to get to the jury. The court allowed for a long trial estimate and was quite permissive in allowing extended and often duplicative examination. In view of this, the suggestion by plaintiff counsel that this case was rushed to judgment by the court is incomprehensible. Any evidentiary violation of an *in limine* motion was inconsequential and could have been cured by a motion to strike or curative instruction if one had been requested by plaintiff counsel. [¶] The court finds it particularly

ironic that plaintiff counsel, who engaged in a dramatic display of personalization, e.g. 'I am a son of immigrants! Shame on you!' would now object to the same type of arguments in defense counsel's closing."

As discussed *ante*, far more than substantial evidence supported the jury's findings and the trial court did not err in ruling on plaintiffs' motions in limine or in overruling plaintiffs' counsel's objections to the expert witness's testimony. Plaintiffs contend a new trial was warranted because of defendant's counsel's misconduct in presenting his closing statement. In their opening brief, plaintiffs argue: "Without evidence and with nothing but conjecture, defense counsel proceeded to advance a theory, which is actually contrary to the evidence, that plaintiffs' counsel had referred the plaintiffs to their doctors, had micro-managed and had concocted and schemed in order to create a fraudulent case. . . . [¶] Defense counsel accused plaintiffs' counsel of sleazy practices without a scintilla of evidence or support for such a position. Plaintiffs' counsel objected that the arguments were improper vilification of counsel."

We have reviewed defendant's counsel's argument and note that plaintiffs' counsel did not object to defendant's counsel's argument on the ground it was an improper vilification of counsel. After defendant's counsel argued about plaintiffs negotiating for long-term chiropractic care and already planning a number of visits, plaintiffs' counsel objected on the ground, "[t]here's no evidence." The trial court overruled that objection on the ground it was argument.

Plaintiffs' counsel later objected after defendant's counsel argued: "This is the casebuilding process. It shows you, when you combine the lack of damage to the Infiniti [(Summers's car)], what you're dealing with is an attorneyproppedup, frivolous lawsuit." Plaintiffs' counsel stated, "these kinds of comments by counsel are entirely inappropriate." The trial court responded, "[a]ll right. It's argument. I'll allow it." Plaintiffs' counsel did not move to strike any of defendant's counsel's argument or request a curative instruction.

Plaintiffs' counsel's rebuttal began, as follows: "Insult, not evidence. I stood before you a little while ago and sincerely told you how I, as an immigrant whose parents put me through law school, am proud and chilled to be here, participating in this legal system, that I take it seriously, and that, yeah, there's probably some sleazy lawyers out there, but one of them is not in front of you right now. [¶] And I will stand up next to [defendant's counsel] all day long and ask each one of you one at a time, 'who's the truth teller here, and who's going to insult people?' [¶] And who can't do any better than insulting people? And insulting an attorney, a profession that he is a member of—I take offense. [¶] I take offense at the insinuation—without evidence and without proof—that I am the puppeteer of some kind of racket to make these people rich. There is no evidence of that and there is no truth to that. [¶] And shame on you. [¶] I don't even know what else to tell you from there."

Defendant's counsel objected to plaintiffs' counsel's argument on the ground "[i]t's an inappropriate argument, inappropriate rebuttal." The trial court overruled defendant's counsel's objection and instructed plaintiffs' counsel to "[g]o ahead."

Plaintiffs have failed to demonstrate attorney misconduct. Counsel has wide latitude in closing argument to discuss the merits of the case to express counsel's views on what the evidence shows, and to state the conclusions to be fairly drawn from that evidence. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 795.) Furthermore, plaintiffs have failed to

demonstrate how they were prejudiced by defendant's counsel's remarks. The test for prejudice caused by attorney misconduct is the "reasonably probable" standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th at pp. 800802.) Even assuming that there was attorney misconduct—which there was not—we must determine "whether it is reasonably probable [plaintiffs] would have achieved a more favorable result in the absence of that portion of [defendant's counsel]'s closing argument now challenged." (*Id.* at p. 802.) After reviewing the record before us, including the evidence, and the entirety of both parties' closing argument, we readily conclude the challenged portion of defendant's counsel's argument, if misconduct, was harmless. The trial court did not err by failing to grant the motion for a new trial.

DISPOSITION

The judgment is affirmed. Respondent shall recover costs on appeal.