Filed 10/31/19 Dao v. The Bicycle Casino, LP CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CATHY DAO, Plaintiff and Appellant, v. THE BICYCLE CASINO, LP, Defendant and Respondent.	B293679 (Los Angeles County Super. Ct. No. BC625504)

APPEAL from a judgment of the Superior Court of Los Angeles County, Cary H. Nishimoto, Judge. Affirmed.

Liddy Law Firm, Donald G. Liddy, Brynna D. Popka; Killackey Law Offices and Michael A. Killackey for Plaintiff and Appellant.

Murchison & Cumming and Edmund G. Farrell for Defendant and Respondent.

Plaintiff and appellant Cathy Dao contends that the trial court presiding over the jury trial of her unsuccessful personal injury lawsuit against The Bicycle Casino, LP (TBC) abused its discretion by excluding references to an evidence preservation letter that Dao's attorneys sent to TBC after she fell in a TBC restroom. After receiving that letter—but pursuant to plans predating Dao's accident by over two years—TBC demolished the bathroom in which Dao fell as part of a large renovation project, and failed to retain digital negatives for photos TBC security took of the accident scene. Dao argues that the preservation letter is thus relevant to show TBC chose not to preserve the strongest evidence regarding the condition of the flooring in the subject restroom despite knowing litigation was likely. According to Dao, had the jury known about the preservation letter, the jury more likely would have "distrust[ed]" the "weaker" evidence TBC presented instead. (See Evid. Code,[1] § 412 ["If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."].) This "weaker" evidence included (1) an "exemplar" tile similar to the tile in the subject restroom, and (2) results from testing performed in an unrelated investigation on the subject restroom flooring before it was demolished. Dao further argues that the court incorrectly applied section 1151, which addresses evidence of subsequent remedial measures, to exclude testimony comparing the safety of the tiles in the renovated subject restroom and other renovated restrooms in the casino.

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[1] All future statutory references in text and citation refer to the Evidence Code.

In light of the other evidence in the record, we conclude it is not reasonably probable that, absent the errors alleged, Dao would have prevailed at trial. Thus, even assuming Dao is correct that the trial court abused its discretion, we find no reversible error.

Accordingly, we affirm.

FACTUAL BACKGROUND

A. *Dao's Injury*

On July 4, 2014, Dao visited TBC with friends. Shortly before midnight, Dao used the restroom facilities. After washing her hands at the restroom sink, she stepped around another patron to exit the restroom, and fell to the floor. She did not notice anything on the floor in the restroom, but testified the ground felt "slippery" and that she slipped when she fell. TBC security took photographs of Dao in the restroom after her fall. Dao was taken to the hospital and treated for her injuries, including multiple fractures in her left arm.

B. *Evidence Preservation Letter*

Approximately a week after the incident, Dao retained an attorney, who sent a letter to TBC instructing it to preserve certain materials. Specifically, this July 11, 2014 letter states that Dao's counsel has been "retained to represent [Dao] for personal injuries and damages resulting from an incident that took place at [TBC] on July 5, 2014. This letter will serve as a formal demand that you preserve any and all evidence documenting or relating to the above referenced incident. This evidence specifically includes, but is not limited to, all photographs and video recordings taken in any area of the casino on the date of the incident and the week prior to the incident. Ms. Dao slipped and fell in a restroom on your premises. We believe that a casino employee took photographs of the incident

location prior to the time that Ms. Dao was taken to the hospital. These materials are considered evidence in a pending/anticipated claim and/or litigation resulting from the incident." The letter further specifically requests that TBC preserve "electronically stored information potentially relevant to the issues in this case," and states that it constitutes "formal notice that [TBC] must not alter, change, modify, tamper with, cause, or otherwise allow destruction of the evidence listed above, and that you must store the items listed above in a safe and secure location. Furthermore, you must take appropriate and necessary action to secure these items from alteration, modification, tampering, destruction, or change by any other person. If you are unable to do so, you are formally instructed to contact my office immediately so appropriate action may be taken for preservation of this crucial evidence."

C. *TBC's Demolition of Subject Restroom*

Less than two weeks after Dao's accident, TBC began work on a renovation project that involved demolition of, among other areas, the restroom in which Dao had fallen. This project had been in the works for approximately two years before Dao's accident. Specifically, TBC worked with an architect and prepared the project documents between 2012 and 2013, submitted three rounds of plans and revised plans to the city between 2013 and 2014, received the necessary permits in December 2013, and issued full notice to proceed to the general contractor in April 2014. The project was finished and approved by the city in January 2016.

D. *Dao's Motion to Compel Production of Digital Negatives for Incident Photographs*

Dao sued TBC in June 2016, approximately six months after the incident. Dao's complaint asserted premises liability, general negligence, and loss of consortium causes of action, alleging permanent injury and damages from her fall at TBC on July 5, 2014.

In January 2018, Dao moved to compel certain discovery, including the digital negatives for the photographs TBC security personnel took the night of the incident, photocopies of which TBC had produced during discovery. Dao's motion argued that the blurry photocopies TBC had produced "depict[] [Dao] laying on the floor while manufactured yellow arrows highlight a section of the floor," and that TBC refused to produce digital negatives or original versions of the photographs without the yellow notations. Following briefing and a hearing, Dao's motion was denied without prejudice. She never renewed the motion.

E. *Defendant's Spoliation Motion in Limine*

Prior to trial, the court ruled on several motions in limine, including a defense motion to preclude reference to or evidence of any alleged spoliation of the subject restroom. TBC's motion argued that there could be no spoliation of evidence, absent an obligation to preserve it, and that the vague preservation letter from Dao's counsel—which did not specify the restroom in which the accident occurred—was insufficient to create a duty that TBC postpone its longstanding renovation plans. TBC further noted that it had provided photographs of the subject restroom and had made a "piece of exemplar granite in use within the main women's [r]estroom [as of 2017]" available to Dao's counsel for testing during discovery. The record suggests, though it is not entirely clear, that

Dao's counsel did not test or inspect the tile TBC made available during discovery.

The day of the hearing on TBC's motion regarding spoliation of the restroom, Dao filed a "bench brief re: spoliation of evidence" (capitalization omitted), which suggested TBC had destroyed not only the subject restroom, but also digital negatives of the security photographs, providing instead "blurry photocopies of photographs with yellow boxes and arrows." On these bases, Dao's brief requested a jury instruction under section 413, permitting the jury to draw an adverse inference from a party's willful suppression of evidence.

At the hearing the court heard argument primarily regarding the alleged spoliation of the restroom. Dao's counsel also noted that Dao had requested digital negatives of the security photographs and "been told that they no longer exist," but did not make any argument as to what adverse inferences could be drawn from this, were the court to permit the requested instruction. In discussing this motion and whether the jury should be given an instruction on spoliation, the court ruled as follows: "I think its fair game to say that seven months after the incident, the bathroom was modified pursuant to a 2012 construction plan to add a hotel to the casino. But there are instructions, pursuant to Evidence Code [sections] 413 and 412, 'a failure to produce better evidence or the failure to explain or deny contrary evidence.' But, spoliation, I don't think is appropriate under the circumstances."

E. *Trial*

At trial, Dao argued that the tiles in the restroom at the time of Dao's accident were not slip-resistant, and that such tile is inherently unsafe to use in bathroom flooring, because it is dangerously slippery when wet. TBC argued that the tiles were

safe, that there was no history of any safety concerns or accidents involving wet or slippery restroom tiles, and that Dao did not slip, but rather misstepped while wearing shoes with insufficient tread, causing her to fall.

1. *Expert testimony regarding safety of tile*

Both Dao and TBC presented expert testimony bearing on the safety of the tile in the subject restroom, and whether it was slippery when wet. In connection with this testimony, both experts tested, among other things, an "exemplar tile from the bathroom in question" post-remodel. This was a 12-inch by 12-inch "smoothly polished" granite tile provided by defense counsel at trial. TBC's counsel represented to the court that this exemplar tile is the same exemplar of tiles in the main women's restroom as of 2017 that TBC made available to Dao's counsel during discovery. After both experts testified regarding their testing of the exemplar tile, it was entered into evidence over TBC's objection.

As discussed below, however, the expert testimony offered at trial involved not only testing of the exemplar tile, but testing of other tiles and the experts' general knowledge about certain types of tiles as well.

a. *Plaintiff's expert*

Dao offered the expert testimony of Brad Avrit, a "construction management and safety engineering" consultant. Avrit testified regarding the results of testing he conducted on the exemplar tile the day of his testimony—once at the courthouse before testifying and once in a demonstration for the jury. He also testified regarding his general knowledge about "this type of tile"—that is, smoothly polished tile without "a slip-resistant treatment." He concluded that the coefficient of friction on the exemplar tile was below the safety threshold, and comparable to the coefficient of ice.

He further concluded that "this type of tile" was safe to walk on when dry, but "becomes extremely dangerous when it's wet in a bathroom environment." He opined that using "this type of tile" for bathroom flooring that could get wet would be "unsafe and really irresponsible," and that the exemplar tile was "patently unsafe" and "dangerous" when wet, regardless of the shoes those who walk on it are wearing. He testified that the exemplar tile was similar to the tile in photographs depicting the subject restroom on the day of the incident, and ultimately concluded that the "unsafe nature of [the] floor [in the subject TBC restroom] is what caused [the] incident."

Avrit testified that slip-resistant granite tile—that is, tile that has not been polished to remove the surface disparities, or tile that has been treated to be slip-resistant—is commercially available and does not present any risk of "somebody slipping and falling on it as soon [as the] surface gets wet." He further testified that polished tile, such as the exemplar, "easily" can be treated to make it slip-resistant and safe to walk on when wet. Avrit testified that he has recommended similar "simple engineering solutions," such as "floor-etching" and "floor-coating" to institutions, including Stanford University and the University of California San Diego, who hired him to help improve the safety of buildings "where they had terrazzo tile or ceramic tile [and] where they [were] having slipping problems." He noted that covering the flooring tile with an "absorbent mat" is "another solution" that would prevent falls on flooring that is "slippery when it's wet."

Avrit also testified to having tested tile currently in use at a bathroom at TBC, which he considered similar to the exemplar tile and the tile in photographs depicting the subject restroom on the day of the incident. Such testing yielded a coefficient of friction similar to that of the exemplar tile.

The court struck Avrit's testimony that "the slip resistance was higher" in other restrooms at TBC that didn't have polished stone tile similar to the exemplar.

b. *Defense expert*

TBC offered the testimony of "accident reconstructionist" John Muse. Muse testified that what coefficient of friction of a given surface is safe depends on the size of the individual walking on it, as well as the type of footwear the individual is wearing. Muse employed a different methodology and utilized different testing equipment than did Avrit, and criticized the method and instrument Avrit employed as unreliable and prone to inaccurate, exaggeratedly low measurements.

The shoes Dao was wearing during the incident—flip flop sandals with heels measuring approximately one and one-half inches. with an approximately one and one-half inch heel— were admitted into evidence. Muse testified to measuring the coefficient of friction of those shoes on two different tiles. First, he measured the coefficient of friction of Dao's shoes on a tile he had procured (not the exemplar tile) and considered to be similar to the tile in the subject restroom at the time of the incident. Muse no longer had this tile because it had since broken. Second, he measured the coefficient of friction of Dao's shoes on the exemplar tile presented at trial. In both tests, Muse calculated a coefficient of friction that "was down below what would be desired with [Dao's] shoes in a wet condition," which he attributed in part to the lack of tread on her shoes.

Muse acknowledged that he could not test Dao's shoes on the tiles actually involved in the accident, because the bathroom had been destroyed as part of a renovation project, and acknowledged that testing on a tile that was only similar was not "ideal."

Finally, Muse testified that, in connection with a separate investigation in October 2014 *not* involving Dao, Muse had occasion to and did test the actual tile that existed in the subject restroom at the time of the incident. In that unrelated investigation, he concluded that the subject restroom tile had a coefficient of friction that would be safe for an individual Dao's size while wearing rubber athletic shoes, even when the floors were wet.

Although this earlier testing did not involve the same shoes as Dao was wearing during the incident, Muse considered it in reaching his ultimate opinion that the flooring in the subject restroom was generally safe even when wet, and that Dao fell as a result of her "misstepping" in shoes with no tread, not because the floor was slippery. Muse further opined that, given the lack of tread on the edges of Dao's shoes, a misstep likely would have felt to her like slipping.

2. *Other witness testimony relevant to the safety of the tile*

Other witnesses offered testimony potentially relevant to assessing the safety of the tile in the restroom where Dao fell, and whether it caused her accident. For example, Dao herself testified that she did not see water on the floor in the restroom, but that when she fell, it felt like she was slipping. TBC's housekeeping supervisor, Mary Ibarra, testified that housekeeping staff checked the restrooms every hour, and dry mopped the floors whenever they noticed "sprinkles from when [patrons] wash their hands," the frequency of which each day "depend[ed] on how many customers come in, so maybe 10 times, 15." Dao's counsel also elicited testimony from several TBC witnesses regarding whether they were aware of other instances of patrons or employees slipping in the restrooms, and if so, how many.

3. *Limitation on trial testimony based on pretrial spoliation ruling*

During the testimony of various witnesses, plaintiff's counsel attempted to ask questions regarding the preservation letter and TBC's general evidence preservation protocols. Consistent with its pretrial ruling, the court sustained objections to and did not permit such testimony. Also consistent with the pretrial ruling, the court permitted testimony from several witnesses referencing the renovation and resulting destruction and unavailability of tile from the subject restroom. It further permitted plaintiff's counsel to argue in closing that TBC's failure to produce tiles or facilitate testing of tiles present in the subject restroom during the incident permitted the jury to view "with distrust" the evidence TBC offered instead. (See § 412; CACI No. 203.)

In addition, the court prevented and struck testimony by Avrit regarding the safety of other restrooms in the renovated casino, citing both the court's "prior ruling" and Evidence Code section 1151's prohibition on evidence of subsequent remedial measures to prove negligence. Nevertheless, the court permitted Hashem Minaiy, TBC's chief executive officer (CEO), to testify that, when TBC renovated the casino, it sealed the tiles in the lobby "to make them less slippery."

F. *Verdict and Appeal*

The jury ultimately found for defendant, determining in a special jury form that TBC had not been "negligent in the use or management of the property." Dao timely appealed.

DISCUSSION

A. *References to Evidence Preservation Letter and Protocols*

Dao first argues the court abused its discretion in excluding testimony regarding the preservation letter and TBC's evidence preservation procedures. Dao does not do so based on a challenge to the court's motion in limine ruling precluding references to spoliation of the restroom. Rather, she contends that by refusing to permit witnesses to testify regarding evidence preservation and the preservation letter, the court improperly "expanded" its ruling on TBC's spoliation motion, thereby precluding evidence that is relevant and admissible under the court's own ruling and section 412.

Section 412 provides that, "[i]f weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." The trial court gave a jury instruction with this same language. (CACI No. 203.) Dao argues that permitting testimony regarding the preservation letter would have "allowed the jury to more fairly consider the evidence in light of CACI No. 203," because it would have established the casino was on notice of a possible lawsuit, yet chose not to preserve any tile from the demolished restroom, and instead chose to present weaker evidence: the exemplar tile (rather than the tile involved in the accident) and Muse's testing of athletic shoes on the subject restroom tile (rather than testing of Dao's very different shoes on that surface). During side bars and objection colloquies at trial, the trial court characterized counsel's attempts to argue that evidence preservation testimony is relevant as "re-argu[ing]" the prior ruling on the spoliation motion. But Dao's argument makes

sense and is entirely consistent with the court's prior ruling. Namely, unless the jury knew about the preservation letter, the evidence at trial reflected only that TBC *could have* preserved and presented stronger evidence—not that there was any reason TBC should have realized the need to preserve such evidence. Put differently, the preservation letter showed TBC was on notice that Dao might sue TBC, and thus that the tile in the subject restroom would be very important evidence of liability. Thus, without the context the preservation letter provides, it was far less likely that the jury would "distrust" the "weaker evidence" TBC offered instead. Evidence regarding TBC's evidence preservation procedures might likewise have helped establish TBC had a reason to preserve tiles from the subject restroom after Dao's accident, even though she had not yet filed suit.

An erroneous evidentiary ruling warrants reversal of a judgment only if it is reasonably probable that, in the absence of the error, the appealing party could have obtained a more favorable outcome below. (*Scott v. Rayhrer* (2010) 185 Cal.App.4th 1535, 1540 (*Scott*); see Cal. Const., art. VI, § 13.) This is not the case here. We acknowledge that, had Dao been able to provide the context in which TBC chose not to preserve better evidence of the condition of the tile in the subject restroom, this might have increased the likelihood that the jury, as permitted by section 412 and CACI No. 203, would "distrust" the "weaker" evidence TBC offered instead. But the record already provides an ample basis for the jury to "distrust" the exemplar tile and Muse's unscrutinized testing of a rubber-soled athletic shoe as evidence that the tile involved in the accident was safe and did not cause Dao to fall. First, Avrit offered extensive expert testimony that the exemplar tile is dangerously slippery when wet. Second, Muse opined that the slipperiness of a surface depends on the footwear the person is

wearing, yet tested the safety of walking on the tile in the subject restroom at the time of the accident while wearing rubber-soled athletic shoes, rather than Dao's high-heeled flip-flip sandals. Third, and perhaps most importantly, the jury heard Avrit's testimony that the tile involved in the accident did not appear to be slip-resistant, and that all non-slip-resistant tile is slippery when wet and unsafe for restroom flooring.

On this record, it is not reasonably probable that, if presented with the preservation letter, the jury would have "distrust[ed]" the exemplar tile and Muse's expert testimony to such an *additional* extent that the jury would have concluded the tiles were dangerously slippery when wet and proximately caused Dao's injury. This is particularly true given that whether and to what extent the jury chose to believe Avrit and/or Muse's testimony depends on several factors that the challenged exclusions do not logically affect. For example, both Avrit and Muse were vigorously cross-examined regarding each expert's potential bias and the soundness of his respective measurement methodologies. Thus, even assuming the court abused its discretion, it is not reasonably probable that, had the jury heard testimony regarding evidence preservation, Dao would have prevailed at trial.

B. *Subsequent Remedial Measures*

Dao next argues that the court erred when it prevented Dao's expert from testifying that "when he inspected the casino [post-renovation,] he found other bathrooms that have tiles that were more slip resistant than the tile in the subject bathroom." Dao argues the court erroneously excluded such testimony as prohibited subsequent remedial measures offered to prove negligence. As a preliminary matter, we note that the court sustained objections to some of this testimony based on relevance, not subsequent remedial

measures. Still, the court did refer to a non-existent prior ruling on subsequent remedial measures and admonished counsel for asking questions that violated the Evidence Code sections on subsequent remedial measures. Dao is correct that these questions do not clearly request testimony regarding subsequent remedial measures. (See § 1151 ["When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event."].) We also agree with Dao that, through the challenged questions, counsel may have been properly seeking subsequent remedial measure testimony to establish feasibility of repair or TBC's knowledge of the tile's condition, rather than negligence. (*Baldwin Contracting Co. v. Winston Steel Works, Inc.* (1965) 236 Cal.App.2d 565, 573 [subsequent remedial conduct "is relevant and admissible" on the issues of feasibility of eliminating the cause of the accident]; *Alpert v. Villa Romano Homeowners Assn.* (2000) 81 Cal.App.4th 1320, 1341 [in action arising from plaintiff's fall on sidewalk adjacent to condominium complex, record of defendant's post-accident board meeting discussing bids to repair sidewalk was admissible to show defendant was aware of sidewalk's condition]; see also *Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1169.)

Again, however, even if the court erred in preventing such testimony, such error cannot have prejudiced Dao, and thus does not constitute a basis for reversal. (See *Scott, supra,* 185 Cal.App.4th at p. 1540.) Avrit testified to the ubiquity of slip-resistant tile as a safe alternative to the tile used in the subject restroom, as well as the ease with which non-slip-resistant tile can be treated to prevent slipperiness. He also testified regarding how other institutions have employed such methods to

reduce the slipperiness of their tile. Finally, TBC's CEO testified that TBC sealed the tiles in its lobby in 2015 "to make them less slippery." Thus, the jury was presented with evidence regarding the feasibility of improving the slip-resistance of tile flooring, as well as some evidence possibly suggesting TBC's knowledge that its tiles could be slippery. It is not reasonably probable that additional testimony regarding the level of slip-resistance or the coefficient of friction of tile in the renovated restrooms would have led to a more favorable result for Dao.

C. *Digital Negatives of Security Photographs*

Although Dao's briefing references that TBC did not retain the digital negatives or originals of the incident photographs, it does not challenge or even identify any evidentiary rulings regarding the photographs. Nor does Dao's briefing challenge the court's failure to give a spoliation instruction to the jury on this (or any other) basis. Nevertheless, at the hearing in this appeal, Dao's counsel implied that the court's treatment of the photographs and failure to instruct on spoliation reflected reversible error, because better versions of the photographs could have shown whether the restroom floor was wet when Dao fell.

Dao abandoned any argument regarding the photographs by failing to raise it in her briefing. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6 ["[i]ssues not raised in an appellant's brief are deemed waived or abandoned"]; *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1554, fn. 9 ["We do not consider arguments that are raised for the first time at oral argument."].) Simply reciting a fact does not constitute argument. And even if we were inclined to address the comments made by Dao's counsel at the hearing, we do not have a sufficient basis to do so, as counsel did not identify any specific

evidentiary ruling he claimed was erroneous, legal authority for that claim, or prejudice resulting therefrom. (See *Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 685 ["An appellant must affirmatively demonstrate error through reasoned argument, citation to the appellate record, and discussion of legal authority."]; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 710–711 ["Nor is an appellate court required to consider alleged error where the appellant merely complains of it without pertinent argument."].) "Since [Dao] does not address the issue, we treat it as abandoned and comment no further." (*Ibid.*)

D. *Trial Court Bias Against Counsel*

Finally, Dao's briefing notes in passing that "[t]he remarks by the trial court both on and off the record show significant bias by the [c]ourt against [p]laintiff or at least [p]laintiff's counsel." We acknowledge that the trial court did not seem to have much patience for Dao's counsel's efforts to explore what appear to have been legitimate arguments and requests for clarification regarding a pretrial ruling the court itself was not consistently implementing. But none of these remarks or actions rise to such a level as to reflect judicial bias warranting relief, even if Dao had clearly raised such an argument on appeal. (See *People v. Woodruff* (2018) 5 Cal.5th 697, 769 [judicial misconduct warrants reversal if it is " ' "so prejudicial that [it] denied [the] [defendant] a fair, as opposed to a perfect, trial" ' "]; see also *T.P. v. T.W.* (2011) 191 Cal.App.4th 1428, 1440, fn. 12 ["We decline to consider this argument, since it is not stated under a separate heading, is not sufficiently developed, and is unsupported by citation to authority."].)

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

WEINGART, J.*

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