Filed 1/13/20 Alcala v. City of Los Angeles 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

MARIA ALCALA, Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Respondent.	B275387 (Los Angeles County Super. Ct. No. PC054102)

APPEAL from a judgment of the Superior Court of Los Angeles County, Melvin D. Sandvig, Judge. Affirmed.

Daniels, Fine, Israel, Schonbuch & Lebovits, Moses Lebovits and Parham Nikfarjam for Plaintiff and Appellant.

Michael N. Feuer, City Attorney, Blithe S. Bock, Assistant City Attorney, and Sara Ugaz, Deputy City Attorney, for Defendant and Respondent.

Plaintiff Maria Alcala was severely injured while crossing the street in a crosswalk, when she was hit by a truck driven by an unlicensed driver who had recently consumed alcohol. She sued the driver, defendant Gerardo Jacquez Murga, as well as the individual who owned the truck. She also sued the City of Los Angeles (City), claiming the crosswalk constituted a dangerous condition for which the City was liable. Before trial, Alcala settled with Murga and the truck's owner. Following a two-and-a-half week trial, a jury returned a special verdict finding the crosswalk was not in a dangerous condition at the time of the accident. Judgment was therefore entered in favor of the City.

On appeal, Alcala contends the trial court abused its discretion in admitting evidence of Murga's intoxication. She also contends the trial court erred in denying her motion for a new trial based on the City's untimely production of evidence during trial. We find any error in the admission of intoxication evidence harmless as the jury never reached issues of causation or Murga's contributory negligence. There was strong evidence the crosswalk was not in a dangerous condition at the time of the accident, and there is no reasonable likelihood the jury's determination of that issue was improperly influenced by the intoxication evidence. With regard to the City's discovery violation, Alcala expressly elected not to request a mistrial and instead to ask for exclusion of the late-produced evidence, a remedy the court ordered. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Accident

At the time of the accident, Alcala was a student at California State University Northridge (CSUN). At about 9:00

p.m. on September 9, 2012, Alcala and her roommate, Peter Hy, were waiting to cross Reseda Boulevard at Dearborn Street, just west of the CSUN campus.[1] Alcala and Hy were on nonmotorized scooters. They were at the southeast corner of the intersection, which had a marked crosswalk but no traffic signal. They waited until all three lanes of northbound traffic on Reseda Boulevard stopped for them, and began to cross Reseda Boulevard heading west. Two other people were in the crosswalk, heading east toward Hy and Alcala.

Alcala entered the crosswalk first. She looked to her left, at the cars in the northbound lanes. Alcala stopped briefly before crossing the three southbound lanes; she looked to her right towards the oncoming traffic. Hy also looked to his right; he did not see any vehicles coming toward them in the three southbound lanes. Alcala then moved forward. As Hy moved forward, he saw a truck coming toward Alcala in the southbound lanes. The truck hit Alcala, and she flew up in the air.

Murga, who was driving the truck that hit Alcala, had taken his 11-year-old son to the store to buy school supplies. Murga did not have a driver's license at the time of the accident, and testified one was never issued to him. After leaving the store, he turned south onto Reseda Boulevard. He was in the number two lane, driving about 35 to 37 miles per hour. As he approached the Dearborn Street intersection, he did not see anyone crossing the street. He explained: "[O]nce I got to the intersection, there was a car in front of me but it was in lane No. 1." After that car passed through the intersection, he saw

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[1] Alcala did not remember anything about the accident. Hy testified as to what occurred.

Alcala on the scooter, "[b]ut she was turned facing forward, not towards where I was coming from." Murga tried to swerve to avoid hitting Alcala, but struck her with the left front part of the truck.

As a result of the accident, Alcala suffered severe traumatic brain injury. In addition, her skull, spine, and pelvis were fractured.

B. Murga's Arrest and Conviction

After hitting Alcala, Murga did not stop to aid her or give anyone his information. He instead drove away, taking a circuitous route home through a nearby parking lot because he saw a car was following him. Murga tried to justify his actions, testifying that "since I had something to drink and I knew that I was going to be detained," he wanted to get his son home first. He claimed that he planned to go back after he dropped his son off at home, but he did not in fact do so. Murga could smell alcohol on his own breath right before the accident, but said he "felt fine" to drive.

Los Angeles Police Department officers arrested Murga at his home about an hour after the accident. He admitted to the arresting officers he drank three 12-ounce beers and one 24-ounce beer at about 6:00 p.m., and hit someone with the truck he was driving.[2] Officers observed that Murga smelled of alcohol and swayed as he spoke to them. The officers gave him a field sobriety test, which he failed, and a breathalyzer test, which indicated the presence of alcohol. The officers took Murga to the

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[2] Murga testified at trial he drank one 24-ounce beer, and not four beers.

police station, where additional tests showed Murga's blood alcohol level to be .10 percent, above the legal limit.

Murga was charged with three criminal counts arising out of the accident. He pleaded no contest to driving under the influence, was ordered to make restitution to Alcala, and served time in jail.

C. Alcala's Lawsuit

Alcala filed a lawsuit against Murga, the truck's owner Efren Martinez Quinones, and the City. Alcala alleged Murga and Quinones were liable for negligence arising from their operation and ownership of the truck that struck her. She further alleged that after the accident, Murga's blood alcohol level was greater than .08 percent.

Alcala alleged the City was liable for a dangerous condition of public property. She alleged the crosswalk in which Murga struck her was in a dangerous condition, because drivers heading southbound on Reseda Boulevard could not see the crosswalk, or pedestrians in the crosswalk, until they were too close to the crosswalk to stop. She asserted there were inadequate signals, signs, or lights to indicate the location of the crosswalk.

Additionally, Alcala alleged a substantial number of vehicles passing through the intersection on Reseda Boulevard exceeded the speed limit of 35 miles per hour. There was a high volume of pedestrian traffic at the intersection due to its proximity to CSUN and retail establishments. In the approximately eight years prior to Alcala's accident, there were 48 traffic accidents at the same intersection; nine of these involved pedestrians in the crosswalk. The City was aware of these accidents "but failed to correct [the dangerous] condition by for example, installation of pedestrian actuated overhead flashing

beacons, warning lights and/or in-roadway warning lights placed in the crosswalk."

D. Alcala's Motion in Limine To Exclude Evidence of Murga's Intoxication

Prior to trial, the City designated five expert witnesses: two doctors, a traffic engineer, a biomechanical engineer/accident reconstructionist, and a clinical neuropsychologist. After the deadline to designate experts had passed, Alcala filed a motion in limine to exclude evidence of consumption of alcohol by Murga and of his blood alcohol level. Alcala argued the City's failure to designate an expert to testify regarding blood alcohol level meant the City had "nobody to connect the dots" between the testimony of the accident reconstructionist and evidence of Murga's blood alcohol level, as there was "no witness that can testify to how [Murga's blood alcohol level] moderated the perception reaction time." She also sought to exclude evidence of Murga's alcohol use under Evidence Code section 352 as more prejudicial than probative.

Counsel for the City responded that the jury could "infer from the mountain of evidence that [Murga] was intoxicated, that that was the exclusive cause of this particular accident." Counsel argued that "[a]t best they've got the argument that it goes to weight, but it does not go to admissibility" of the evidence; the evidence was "highly relevant."

The trial court denied the motion in limine, ruling the effect of Murga's intoxication was for the jury to decide. The day after the ruling, Alcala's counsel filed a supplemental brief arguing that expert testimony was required where a matter was not one of common knowledge. The trial court responded that it did not "think you have to have an expert testify to the objective

symptoms of somebody drinking." Rather, "[a]ny witness can say I can smell alcohol, and a police officer can testify—I don't know if that happened in this case—but to the objective symptoms and the field sobriety test." Alcala's counsel disagreed, pointing out there would be evidence as to safety issues with the intersection. Counsel argued that without an expert witness, the City could not prove that Murga's "perception reaction time was so diminished that . . . it wouldn't have made any difference" if there were a traffic signal or pedestrian activated warning device at the intersection. The court declined to change its ruling.

E. Trial Evidence

During trial, the jury heard from a number of percipient and expert witnesses regarding the crosswalk and potential safety systems beyond those in place at the time of the accident. Alcala contended that, in addition to the marked crosswalk and existing signage, the City should have installed pedestrian activated flashing lights—a so-called "smart" crosswalk. While Alcala asserts the City based its entire defense on Murga's later determined blood alcohol level, the record does not support this claim. The City also contended, among other things, that the crosswalk was not in a dangerous condition at the time of the accident—a contention with which the jury agreed. The City introduced evidence, for example, that based on traffic volume and accident history the chance of a pedestrian being involved in an accident in the subject crosswalk was less than one in 20 million.

As Alcala does not challenge the sufficiency of the evidence supporting the jury's determination that the crosswalk was not in a dangerous condition at the time of the accident, we recite only the testimony necessary to provide context to Alcala's discovery

abuse claim. Ken Firoozmand is a traffic engineer with the City of Los Angeles Department of Transportation (LADOT). Firoozmand wrote a June 4, 2003 letter responding to a risk manager at CSUN who had requested the installation of a traffic signal or "smart pedestrian warnings" at the intersection of Dearborn Street and Reseda Boulevard. Firoozmand's letter referenced comprehensive traffic engineering studies that had been performed for that intersection as well as two others, and said the studies failed to justify the installation of a traffic signal or smart pedestrian warnings. Firoozmand testified he no longer had a copy of the referenced studies due to the passage of time, as LADOT does not keep records past seven years. Firoozmand asserted he provided Alcala with all requested documents in his files.

Randall Tanijiri was Firoozmand's superior in 2003. Tanijiri explained that if citizen complaints were made about a particular intersection (such as a request from the CSUN risk manager), and studies were done, the studies would be placed in the same folder as the one created for the citizen complaint. Tanijiri did not know how long the folders were kept at the office responsible for that intersection. If they were purged from the office, they might be sent to the master files downtown. Tanijiri would only see the studies if Firoozmand sent them to him because something needed his attention.

Tanijiri further testified that studies would only be kept one to two years, "because then the traffic data would be old and traffic patterns can change." He had no personal knowledge as to how often the files were purged. He also had no personal knowledge regarding the complaints about, and studies

regarding, the intersection of Reseda Boulevard and Dearborn Street prior to 2009.

John Fisher, the retired assistant general manager of the City's Office of Traffic Operations, testified that prior to installing a traffic control signal at the intersection of Reseda Boulevard and Dearborn Street, the City had installed numerous controls that met or in most cases exceeded national and state guidelines. "For example, we had advanced pavement markings that said, ped x-ing on both approaches, and that was supplemented with a sign that said, symbolically, ped crossing ahead. And then at the intersection we had a pedestrian crossing sign not only on the right, but on the left. Further, we had a long length of red curb on the approach to the intersection which would ensure that anyone stepping into the crosswalk from the curb had a clear line of sight with the vehicle, or stated another way, that the motorist would have a clear line of sight with the pedestrian. And, in addition, we had installed high visibility crosswalks called the ladder-style crosswalks, which is more than the conventional two parallel lines that define a crosswalk, but also had the, if you will, the rungs of a ladder in between them to make them more visible."

F. Discovery of the Missing Comprehensive Traffic Engineering Studies

While cross-examining Fisher on the afternoon of Friday, March 11, 2016, Alcala's counsel asked questions about whether certain studies were conducted, or still existed. In the City's view, these questions suggested the studies were in fact never conducted. On Saturday afternoon, Firoozmand called the City's trial counsel and told him that Firoozmand went to the office late Saturday, pulled out the file, and discovered the 2003 study for

the Dearborn/Reseda intersection, as well as one from 1995.[3] The City made copies of these studies for Alcala's counsel.

In court the following Monday morning, counsel for the City explained what had occurred over the weekend and apologized, saying he did not know "why this mix-up occurred." Alcala's counsel asserted prejudice, pointing out that he could not send the newly discovered studies to his expert for review, because his expert had left on vacation. Alcala's counsel noted plaintiff had spent a lot of time and money preparing for trial, working under the assumption that the 2003 study did not exist, and suggested two options: "One option is to declare a mistrial and hit [the City] with sanctions of 8- or $900,000 [for time expended by plaintiff's counsel] . . . . The other option is to say, . . . too bad. You didn't produce it, we went forward on that basis, and you don't get to use it now."

The trial court asked Alcala's counsel if he was asking for a mistrial. Counsel responded that he was not asking for a mistrial, but was asking that the evidence be excluded. The City indicated it had no objection to such exclusion. The trial court ruled: "We're not going to use these documents, and if [Alcala's counsel is] going to ask for sanctions, we will set-up a motion for that." Alcala's counsel thanked the court for the ruling.

G. Judgment and New Trial Motion

The jury was given a special verdict form, including the questions (1) "Was the public property in a dangerous condition

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[3] Alcala's briefing suggests a 2008 study was missing. However, Firoozmand testified the 2008 study was produced, identified it while testifying, and Alcala's counsel then proceeded to ask questions about it.

at the time of the incident?" and, if yes, (2) "Was the dangerous condition a substantial factor in causing harm to [Alcala]?" The special verdict form also included questions about any contributory negligence of Murga. The jury found, nine to three by special verdict, that the public property was not in a dangerous condition at the time of the incident, and accordingly did not answer any of the other questions on the special verdict form. The trial court entered judgment in favor of the City.

Alcala moved for new trial.[4] As pertinent to this appeal, Alcala asserted (1) the City "withheld requested documents from" Alcala until after she had rested, and her expert was no longer available to review and use the documents, and (2) the court erred in admitting evidence of Murga's intoxication. In support of the new trial motion, Alcala submitted a declaration by one of her experts. That expert stated the 2003 report showed 17 of the 20 points necessary to warrant a smart pedestrian crosswalk were present, and when that study was combined with other information that the expert believed would justify the addition of further points, the City's internal threshold "would have been met and the [s]mart [p]edestrian [c]rosswalk would have been installed, directly contradicting Ken Firoozm[a]nd's [June 4, 2003] letter . . . ." In particular, Alcala's expert claimed additional points should have been added based on accident experience and the proximity of CSUN.

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[4] Alcala also filed a notice of motion for judgment notwithstanding the verdict or, in the alternative, to set aside the judgment. Alcala does not challenge the denial of this motion on appeal.

At the hearing on the new trial motion, Alcala's counsel argued the court should grant the motion because the documents withheld were material, and "you have to send a clear message that the violation of discovery is not to be condoned, and that the parties have a right to have all of the information available to them." Counsel acknowledged he did not request a mistrial but explained that at the time the City produced the documents, plaintiff's expert was not available to review the documents and evaluate their significance.

The trial court denied the motion. It noted that at the time the City produced the missing documents, the court asked counsel what he wanted to do, and counsel requested that the City not be allowed to use the documents. The court noted that had counsel "requested a mistrial at that time, it probably would have been granted." The court added that the missing documents did not contain meaningful new information, but rather "are just supplemental documents that backup the results that were given to you."

DISCUSSION

A. Admission of Evidence of Murga's Intoxication Was Harmless

Alcala contends that the trial court erred in admitting evidence of Murga's intoxication because the City presented no expert testimony illustrating what Murga's blood-alcohol level or degree of impairment was at the time of the collision, or how Murga's alcohol consumption had any causal connection to the accident. We need not determine whether the trial court erred in admitting the evidence, because in light of the jury's finding on the special verdict form that the crosswalk was not in a

dangerous condition at the time of the incident, any error was necessarily harmless.

Evidence Code section 353 provides: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless . . . the error or errors complained of resulted in a miscarriage of justice." In civil cases, a miscarriage of justice should be declared only when the reviewing court, after an examination of the entire cause, including the evidence, finds it reasonably probable the jury would have reached a result more favorable to the appealing party in the absence of the alleged error. (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.)

Government Code section 835, subdivision (b), provides that "a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and . . . [t]he public entity had actual or constructive notice of the dangerous condition . . . ." "A 'dangerous condition' is a condition of public property that creates a substantial risk of injury to members of the general public when the property is . . . used with reasonable care and in a reasonably foreseeable manner. . . ." (CACI No. 1102.) The requirement that a plaintiff show the property was in a dangerous condition at the time of the injury exists independent of any third party conduct. As noted in *Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, " 'it is insufficient to show only harmful third party conduct, like the conduct of a motorist. " '[T]hird party conduct, by itself,

unrelated to the condition of the property, does not constitute a "dangerous condition" for which a public entity may be held liable.' ". . .' [Citation.]" (*Id.* at pp. 1069-1070; see also CACI No. 1102 ["Whether the property is in a dangerous condition is to be determined without regard to whether . . . [a third party] exercised or failed to exercise reasonable care"].)

The jury returned a verdict in favor of the City based solely on Alcala's failure to establish the crosswalk was in a dangerous condition at the time of the accident. The jury accordingly never reached issues of causation, Murga's role in the accident, or contributory negligence. Because evidence of Murga's drinking was irrelevant to the jury's determination of whether the crosswalk was in a dangerous condition, and the jury did not reach causation or other issues as to which the evidence was potentially relevant, it is not reasonably probable the jury would have reached a more favorable result to Alcala had evidence of Murga's intoxication been excluded. Any error in admitting the evidence was therefore harmless. (*Pool v. City of Oakland*, *supra*, 42 Cal.3d at p. 1069.)

B. The Denial of Alcala's New Trial Motion Was Proper

1. *Standard of Review*

A trial court may grant a new trial based on newly discovered evidence. (Code Civ. Proc., § 657, subd. 4; *Montoya v. Barragan* (2013) 220 Cal.App.4th 1215, 1227.) "A motion for a new trial on the grounds of newly discovered evidence is generally 'a matter which is committed to the sound discretion of the trial court.' " (*Aron v. WIB Holdings* (2018) 21 Cal.App.5th 1069, 1078.) The trial court's exercise of discretion is given great deference on appeal. (*Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1160.) Thus, we will not interfere with the

trial court's exercise of discretion " 'unless a clear abuse of discretion is shown.' " (*Aron*, *supra*, at p. 1078.)

2. *Alcala Waived Her Claim Regarding the City's Discovery Violation*

Alcala claims the trial court was required to grant her new trial motion to punish the City for its discovery abuse. The trial court agreed a remedy was necessary at the time the City brought its dereliction to the attention of plaintiff's counsel and the court. At that time, Alcala indicated she did not want a mistrial—which for all practical purposes in this context is the same as a new trial—and instead wanted the evidence excluded and the opportunity to request monetary sanctions. The City asserts that Alcala thereby waived her right to raise her claim of error on appeal. We agree.

" '[A]n appellant may waive his right to attack error by expressly or impliedly agreeing at trial to the ruling or procedure objected to on appeal.' [Citations.] There is nothing shocking about [this] rule[]. [It is] consistent with the adversary system's appreciation that lawyers in civil litigation must be given adequate breathing room to select whatever trial strategies they deem appropriate. Absent the need for the same constitutional protections afforded to defendants in criminal cases, there is considerable judicial deference to attorney creativity in civil cases. Admittedly the results of such creativity can be mixed with the lawyer and his or her client being rewarded in some cases and not in others. Nonetheless our adversary system requires that we allow counsel the right to maximize the use of his or her trial skills so that the fairness of the result will not be questioned because the court curtailed the lawyer's role." (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677,

1685-1686.) Under the invited error doctrine, "where a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial error." (*Id*. at p. 1686.)

These principles apply here. Alcala chose to request (and received) exclusion of the 2003 comprehensive traffic study and the potential monetary sanctions as the remedies for the City's failure to provide that study in discovery, rather than a mistrial. Having made that choice, she cannot now claim that a new trial is the required remedy for the City's discovery violation. (*Mesecher v. County of San Diego*, *supra*, 9 Cal.App.4th at pp. 1685-1686; cf. *Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 667 [by requesting modified jury instruction, plaintiff was not entitled to new trial based on the erroneous instruction]; *Gimbel v. Laramie* (1960) 181 Cal.App.2d 77, 85-86 ["By electing to reopen his case, rather than move for a mistrial, appellant waived his right to a new trial or to a reversal of the judgment on that ground"].)

3. *The Cumulative Alleged Irregularities Did Not Prevent a Fair Trial*

Alcala also raised the court's admission of the intoxication evidence as grounds for a new trial. Considering the alleged errors cumulatively, we see no reasonable likelihood of a different result had the intoxication evidence been excluded and had the City honored its pretrial discovery obligations. The jury was not given a general verdict form, but rather a special verdict form that required it to consider whether the intersection was in a dangerous condition separately from any causation or damages issues related to Murga's intoxication. There was strong evidence the intersection was not in a dangerous condition at the time of

the accident, including that the chance of a pedestrian being involved in an accident in the subject crosswalk was less than one in 20 million. The conclusion of the 2003 study was produced prior to trial, and the 2003 study itself did not justify the installation of a traffic signal or smart pedestrian warnings.

To the extent Alcala's expert believed additional points were warranted beyond those set forth in the 2003 study, Alcala's expert so testified at trial. Alcala's expert told the jury additional points were warranted (and a smart crosswalk justified) based on CSUN's proximity; the City disputed this contention, arguing that the criteria at issue applied to schools at which children are present, and not a college like CSUN attended by adults. Alcala's expert similarly had available before trial traffic history that included a period before the 2003 study, later data showing similar consistent traffic volumes, and accident data, and the parties debated the import of this information before the jury. Indeed, Alcala's expert testified based on the facts he reviewed, the City was aware by 2004 the subject crosswalk was in a dangerous condition because "[t]hey've done the study and they've gotten the crash data. And they've got points enough [under the City's criteria] to do the smart pedestrian situation, and they know the conditions we've been talking about as they're reasonable engineers."

Thus, Alcala had an opportunity to present her arguments about CSUN's proximity and accident history resulting in the 2003 study in fact having the requisite points for installation of a smart crosswalk, and the jury rejected those arguments. It is therefore not reasonably likely that timely production of the 2003 study itself and any other documents not previously provided would have led to a different result.

DISPOSITION

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

NOT TO BE PUBLISHED

WEINGART, J.*

We concur:

ROTHSCHILD, P. J.

BENDIX, J.

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