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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

FEDERAL EXPRESS
VEHICLE COLLISION CASES

DEBRA LOYD,

Plaintiff and Appellant,

v.

FEDEX FREIGHT, INC., et al.

Defendants and
Respondents.

B288983

(Los Angeles County
Super. Ct. Nos. BC569593
& JCCP 4788)

APPEAL from a judgment of the Superior Court of Los Angeles County. John Shepard Wiley, Jr., Judge. Affirmed.

Dermot Givens for Plaintiff and Appellant.

Yukevich & Cavanaugh, Nina J. Kim, James J. Yukevich, Todd A. Cavanaugh, and David A. Turner for Defendant and Respondent.

The trial court granted summary judgment on a survival action brought on behalf of a traffic accident victim against the company whose driver was alleged to have caused the accident. This ruling was correct, so we affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In April 2014, a FedEx big rig crossed the center divider of the I-5 freeway in Orland, California and slammed into a bus transporting prospective applicants and alumni chaperones back from Humboldt State University. One of the chaperones who died was Michael Myvett, Jr. (decedent).

II. Procedural Background

A. Pleadings

Plaintiff Debra Loyd (Loyd) is decedent's grandmother. In January 2015, Loyd sued defendant FedEx Freight, Inc. (FedEx) and others.¹ As pertinent here, Loyd brought a survival claim against FedEx to recover economic damages suffered by decedent prior to his death as well as punitive damages.² Loyd eventually became administrator of decedent's estate.

In April 2015, Loyd joined the already-pending Judicial Council Coordination Proceeding (JCCP) designed to coordinate

¹ Because none of the other defendants is implicated in the motion for summary judgment under review, we do not further address the other defendants.

² Loyd also brought a wrongful death claim based on FedEx's negligence, but the trial court ruled that Loyd lacked standing to bring that claim and we subsequently affirmed that ruling. (*Loyd v. Loyd* (Nov. 29, 2018, B285512) 2018 Cal.App.Unpub. LEXIS 8050 [nonpub. opn.].)

the individual lawsuits arising out of the accident. Loyd did so by formally adopting the Master Complaint filed in the JCCP, which did not at that time seek to recover punitive damages. Loyd's formal adoption included her agreement "to be bound by any rulings [in the JCCP] with respect to the pleadings."

In June 2017, plaintiffs' lead counsel in the JCCP informed FedEx in writing that the individual plaintiffs had "made a collective decision not to seek to amend the complaint to add a claim for punitive damages." Loyd's counsel participated in the conference call in which that decision was made. Loyd's counsel was also served with a copy of the writing formally waiving punitive damages.

B. *Motion for summary judgment*

In October 2017, FedEx moved for summary judgment on Loyd's survival claim on the ground that she had not established that "decedent [had] incurred any" "damages recoverable in a survival action." Following further briefing and a hearing, the trial court granted the motion. In its written order, the court ruled that FedEx had "met its burden of showing that . . . Loyd's [survival claim] has no merit," such that Loyd had the burden of "sett[ing] forth the specific facts showing [that] a triable issue of material fact exists." "This," the court ruled, Loyd "failed to do." Specifically, the court ruled that Loyd had "offer[ed] no admissible evidence of lost or damaged personal property" and that she had also, as part of the JCCP, waived any claim for punitive damages.

C. *Appeal*

Loyd timely appealed.

DISCUSSION

Loyd argues that the trial court erred in granting summary judgment on her survival claim. We independently review an order granting summary judgment. (*Burgueno v. Regents of University of California* (2015) 243 Cal.App.4th 1052, 1057.)

I. Applicable Law

A. Law of summary judgment

A party in a civil case is entitled to summary judgment if it can “show that there is no triable issue as to any material fact.” (Code Civ. Proc., § 437c, subd. (c).)³ The party seeking summary judgment bears the initial burden of establishing that a cause of action has “no merit” by showing either that the opposing party cannot establish “[o]ne or more elements of [her] cause of action” or by showing a valid affirmative defense. (§ 437c, subds. (o) & (p)(2).) If this burden is met, the “burden shifts” to the party opposing summary judgment “to show a triable issue of one or more material facts exists as to that cause of action or [affirmative] defense.” (*Ibid.*; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849 (*Aguilar*); *Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 122.) “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Aguilar*, at p. 850.) In applying these standards, we must view the evidence in the light most favorable to the non-moving party (*Miller v. Bechtel Corp.* (1983) 33 Cal.3d 868, 874 (*Miller*)), but are confined to examining “admissible evidence” and inferences

³ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

“reasonably deducible from [that] evidence.” (§ 437c, subds. (c) & (d); *Miller*, at p. 874.)

B. Law regarding survival claims

To overrule the “common law” rule that claims for personal torts abate upon a putative plaintiff’s death (*County of Los Angeles v. Superior Court* (1999) 21 Cal.4th 292, 295 (*County of Los Angeles*)), our Legislature created the so-called “survival” claim that allows the administrator of a decedent’s estate or his successor in interest to sue a tortfeasor for the “loss or damage” suffered *by the decedent* during the window of time between the commission of the tort and the decedent’s subsequent death. (§§ 377.30, 377.34; *Williams v. The Pep Boys Manny Moe & Jack of California* (2018) 27 Cal.App.5th 225, 236.) The “loss or damage” recoverable in a survival claim includes compensatory damages and punitive damages, but excludes “damages for pain, suffering, or disfigurement.” (§ 377.34; *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 616 [observing that “[r]elatively minor compensatory damages . . . can be the springboard for substantial punitive damages” in a survival action].) A survival claim is brought on behalf of the decedent’s estate. (*County of Los Angeles*, at p. 305.)

C. Negligence law

To prevail on a claim for negligence, a plaintiff must establish that (1) the defendant “had a duty to use due care,” (2) it “breached that duty,” and (3) “the breach was the proximate or legal cause of the resulting injury.” (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 629.)

II. Analysis

A. *FedEx's initial burden*

We independently agree with the trial court that FedEx carried its initial burden of showing that Loyd could not establish one element of her negligence-based survival claim—namely, the element of damages. That is because FedEx was able to show that Loyd did “not possess, and cannot reasonably obtain, . . . evidence” that decedent had incurred any economic loss during the brief window of time between the time of the accident and the time of his death, which, as noted above, is the only type of compensatory damages recoverable in a survival claim. (*Aguilar, supra*, 25 Cal.4th at p. 855; § 377.34.) Specifically, FedEx cited Loyd’s discovery responses, which set forth no admissible evidence of such economic loss. FedEx also carried its initial burden of establishing that Loyd could also not recover any punitive damages. That is because punitive damages are not recoverable if there were no compensatory damages (*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147) and because Loyd had waived her right to seek punitive damages when she participated in and acquiesced to the waiver of such damages as part of the JCCP.

This was sufficient to shift the burden to Loyd.

B. *Loyd's consequent burden*

We also independently agree with the trial court that Loyd did not carry her burden of producing evidence “show[ing] . . . a triable issue of one or more material facts . . . as to” the element of damages. (§ 437c, subd. (p)(2).)

All that Loyd offered in response to the summary judgment motion was (1) argument in her opposition that decedent suffered economic loss because he survived the crash long enough to have

his clothes and personal belongings burned off of his body, destroyed on the bus, or taken, (2) reference in her opposition to *other* evidence “put forward in this case” that would corroborate her argument, including mention of Loyd’s written discovery responses, various deposition testimony, the coroner’s report and photographs, and a diagram indicating that decedent’s body was found outside the bus, (3) her special interrogatory response that identified the economic loss as the “[c]lothing worn and burned in the fire” and “personal property that was not recovered from [the] bus,” and (4) her counsel’s declaration that the punitive damages waiver pertained only to wrongful death claims and that he “underst[ood]” he “would be able to proceed with a claim for punitive damages” on the survival action as asserted in a letter he previously sent to FedEx treating the prior JCCP waiver as if it did not exist.⁴

None of these items constitutes *evidence* that raises a triable issue of fact. Statements in Loyd’s opposition are nothing more than the “[a]rgument [of] counsel,” which is “not evidence.” (*Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, 1433.) Documents that might exist somewhere in the case file but which were not presented in opposition to the summary judgment motion or made the subject of a request for judicial notice also do not constitute “evidence.” (*Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040, 1054 (*Roman*) [“Material not presented in opposition to the summary judgment

⁴ Loyd’s special interrogatory answers also referred to “[p]ersonal property stolen from [decedent’s] apartment immediately after the incident,” but Loyd has abandoned this basis for economic loss on appeal.

motion itself is not properly considered by the court in ruling on the motion.”].) Loyd’s special interrogatory responses did not establish that decedent survived the crash for *any* period of time (which is necessary for him to suffer any loss during the window between the crash and his death) and were otherwise inadmissible because they were not based on Loyd’s personal knowledge. (Evid. Code, § 702, subd. (a).) And even if Loyd’s counsel’s disclaimer of a waiver of punitive damages (and letter to that effect) somehow creates a triable issue of fact as to the validity of the waiver—despite being based on a reason (namely, that the waiver of punitive damages pertained only to the wrongful death claim) that is on its face not credible because punitive damages are *never* available in a wrongful death claim (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 812)—it still remains undisputed that Loyd failed to prove any compensatory damages, and this precludes her from pursuing punitive damages.

Loyd raises several further arguments.

First, she argues that the trial court erred in concluding that FedEx met its initial burden of showing the absence of any damages because FedEx submitted no *evidence* of a lack of damages. But FedEx did: Its counsel submitted a declaration attesting that Loyd’s discovery responses did not spell out that decedent had suffered any economic loss between the time of the accident and the time of his death. Loyd’s special interrogatory responses only confirmed this. A summary judgment movant’s initial burden can be met by the non-movant’s discovery responses indicating a lack of evidence supporting an element of a claim. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 580-581.)

Second, Loyd contends that the trial court erred in concluding that Loyd did not meet her consequent burden of showing that decedent *had* suffered economic loss because one could infer from the fact that Loyd, in a different proceeding that was part of this case, had testified that she had dropped decedent off at the bus stop and that he was wearing clothes while on the bus and had personal belongings with him. But Loyd did not submit her alleged testimony in opposition to the summary judgment motion; thus, it was not properly before the court. (*Roman, supra*, 237 Cal.App.4th at p. 1054.) More to the point, this other testimony does not establish that decedent survived the crash for any period of time, which is essential to any recovery for economic loss.

Third, Loyd asserts that the trial court wrongfully precluded her from presenting evidence by not granting her a continuance to submit a declaration to support her claim of economic loss. Loyd was not entitled to a mandatory continuance of the summary judgment hearing under section 437c, subdivision (h) because she did not submit an affidavit in support of her continuance request. (§ 437c, subd. (h); *Johnson v. Alameda County Medical Center* (2012) 205 Cal.App.4th 521, 532 (*Johnson*).) Further, the trial court did not abuse its discretion in denying her a discretionary continuance because Loyd did not establish “good cause” for such a continuance. (*Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 716.) Loyd proffered no explanation as to why she had not prepared and submitted her declaration along with her opposition, or how her declaration regarding dropping off a clothed decedent would have provided competent evidence regarding whether he survived the crash.

These are relevant considerations (*Johnson*, at p. 532), and the court did not act arbitrarily in denying a continuance.

Fourth, Loyd makes a number of arguments regarding the validity of the waiver of punitive damages in the JCCP, regarding the relevance of the settlement between FedEx and decedent's mother of the wrongful death claim against FedEx, and regarding the effect of the JCCP on her ability to conduct discovery. These arguments are irrelevant to (and do not call into question) the rationale upon which we affirm, so we have no occasion to reach them.

DISPOSITION

The judgment of dismissal is affirmed. FedEx is entitled to its costs on appeal.

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_____, J.
HOFFSTADT

We concur:

_____, P.J.
LUI

_____, J.
CHAVEZ