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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CARLOS MADRIGAL,

Plaintiff and Respondent,

v.

RICHARD TANG,

Defendant and Appellant.

B246120

(Los Angeles County
Super. Ct. No. BC445794)

APPEAL from a judgment of the Superior Court of Los Angeles County,
William A. MacLaughlin, Judge. Affirmed.

McClagherty & Associates and Jay S. McClagherty; Sedgwick,
Christina J. Imre and Michael M. Walsh for Defendant and Appellant.

The Homampour Law Firm and Arash Homampour; Madison Law Group and
Kyle Madison, for Plaintiff and Respondent.

Plaintiff Carlos Madrigal was partially paralyzed when the motorcycle he was riding collided with a car driven by defendant Richard Tang. Madrigal sued Tang, and the jury found that Tang's negligence was solely responsible for the collision. Tang appeals from the judgment and contends the court erred in admitting testimony about Madrigal's habit of revving the engine to warn other motorists, and in limiting testimony by Tang's experts. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Accident

The accident took place on July 13, 2009 on a four lane roadway with two lanes in each direction. Tang was driving his car westbound in the center lane ahead of Madrigal, who was riding his motorcycle in the curb lane going in the same direction. Tang turned right to enter a driveway, and the two vehicles collided. Madrigal suffered brain and spinal cord injuries as a result of the accident and was left a paraplegic. On September 17, 2010, Madrigal sued Tang for negligence.

2. Exclusion of Expert Testimony

Before the jury trial began, Madrigal filed a motion in limine to exclude, *inter alia*, testimony by Tang's "human factors expert" Dr. Mark Sanders as to "what [] Tang saw in his rear view and right hand mirrors prior to the accident," as well as Sanders' opinion "[t]hat Plaintiff should have exercised caution where vehicles could turn into his path of travel." The court granted the motion as to these opinions, stating that "I'm not going to let the expert tell us what [Tang] didn't see," and that whether Madrigal "should have exercised caution" is "not for him to tell us."

Madrigal also filed a motion in limine to exclude testimony by Tang's expert Keith McKibben that Madrigal "made a 'dangerous' and 'risky' move of trying to pass [] Tang on the right." The court granted the motion, finding that "it's not for the expert to characterize and testify as to whether or not the conduct . . . meets the standard of reasonable care." However, the trial court permitted McKibben to testify as to "elements of risk."

The court also excluded certain opinions by Tang's "visibility" expert, Paul Kayfetz. Kayfetz had prepared a "visibility study" to show "what was available to be seen under defined speeds and positions." Tang stipulated that this study was "limited to what a person driving would see under the circumstances of the videos, and it is not a reconstruction of this accident." Madrigal's counsel argued that the following testimony by Kayfetz improperly reconstructed the accident: Kayfetz's opinion that (1) the motorcyclist in the visibility video had "ample time" to avoid the collision, and (2) Tang did not have "enough time" to "avoid" the accident. The trial court agreed, and excluded the opinions as improperly pertaining to reconstruction.

3. *The Jury Trial*

At trial, Tang testified that, prior to the accident, he was driving in the center lane when he put his right turn signal on, "checked behind" him and looked in his side mirror, and then moved into the curb lane such that the front of his car was three to four car lengths from the driveway he intended to turn into. He then testified that he "drove slowly," "checked [his] right side again, and rearview mirror again . . . put on [his]

right-turn signal,” and then turned into the parking lot. Tang said he did not see Madrigal prior to the collision. Madrigal could not remember the accident.

The two bystanders who witnessed the accident testified that Tang had, in fact, made a right turn from the center lane. Aurelio Heredia-Ramos testified that he saw Tang turn right from the center lane into the driveway in front of Madrigal’s motorcycle. Likewise, Fidel Avendano testified that he saw Tang turn from the center lane, “cut[ting] off” the motorcycle.

Both Tang’s and Madrigal’s experts testified that Tang started his turn into the driveway while his car was, at least partially, still in the center lane. Madrigal’s accident reconstruction expert, Robert Caldwell, opined that the physical evidence from the accident indicated that Tang had made his turn from the center lane. Tang’s engineering expert, Dr. Terrence Honickman, acknowledged that the evidence indicated that Tang either turned while he was in the center lane or while “straddling” the curb and center lanes. Honickman also said that Tang could not have made his turn from the curb lane, as Tang claimed, and that parts of Tang’s version of events were “unreliable.”

4. *Testimony About Revving*

The defense argued that Madrigal was negligent because he was traveling faster than was “safe for conditions” at the time of the accident, and suggested that bystanders heard the sound of Madrigal “flooring it” as he attempted to pass Tang’s car on the right. Madrigal’s counsel argued that the sound bystanders heard was Madrigal’s deliberate revving of his engine to alert others of his presence.

Two bystanders testified that they heard Madrigal's motorcycle approaching just prior to the accident. Noemi Galaviz said that she started to cross the street, and then retreated because she heard "the noise of the motorcycle" and saw Madrigal "going fast . . . like they go on the freeway." Avendano said that he saw the motorcycle accelerate right before the accident, and heard a revving sound.

Madrigal testified that he had a "practice" of revving his engine "for the safety of myself and the safety of others" "to notify the people that [I] was coming or so I could be visible to them." In addition, Madrigal's reconstruction expert Caldwell testified that that there was no correlation between the sound of a motorcycle revving and its speed. Both sides' experts testified that Madrigal was driving between 30-34 miles per hour at the time of the accident, which was within speed limit.

5. *The Verdict*

The jury returned a special verdict finding that Tang was negligent operating the vehicle, that Madrigal was not negligent, and that Madrigal was damaged in the amount of \$9,105,006. The jury split nine to three in favor of Madrigal on both questions of negligence. Tang moved for a new trial, which the trial court denied. Tang timely appealed.

CONTENTIONS

Tang contends that the trial court erred in admitting testimony about Madrigal's habit of revving his engine to warn other motorists, and in excluding certain opinions by Tang's experts.

DISCUSSION

1. Admission of Habit Evidence

Tang makes three primary arguments about why the court erred in admitting testimony about Madrigal's habit of revving his engine: (1) Madrigal's testimony on this subject was improper character evidence; (2) Madrigal did not suggest what "triggered" his response of revving the engine; and (3) Madrigal's expert, Caldwell, was improperly allowed to testify that a motorcycle's revving had no relation to the vehicle's speed.

a. Character Evidence

Tang argues that Madrigal's testimony about his habit of revving his motor to warn other drivers of his presence constituted inadmissible character evidence barred under Evidence Code section 1101. Evidence Code section 1101 prohibits, with some exceptions, evidence of "a person's character or a trait of his or her character . . . when offered to prove his or her conduct on a specified occasion." "Character evidence" is evidence of "the tendency to act in a certain manner under given circumstances. [Citations.] . . . 'There are *different traits of character* and the evidence must relate to the particular trait involved.' [Citation.]" (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 446-447, fn. 2.)

Character evidence "is clearly distinguishable from that establishing a custom or habit of doing some particular thing in a particular way. Because one is a skillful workman in a given occupation does not tend to disprove negligence in some specific act, but, if the question in controversy is whether he did the thing at all or his manner of

doing it, his custom or habit regarding that particular matter would be significant.”

(*Wallis v. Southern Pacific Co.* (1921) 184 Cal. 662, 666.) “Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom.” (Evid. Code, § 1105.)

Here, evidence that the plaintiff had a habit of revving his motor in order to warn other motorists of his presence did not constitute evidence of a “general character trait” inadmissible under Evidence Code section 1101. Tang does not explain what “character trait” he believes this evidence related to. In fact, Tang acknowledges that this evidence was introduced in response to witnesses’ testimony that they heard Madrigal’s motorcycle approaching, and to show that such a sound was not evidence of acceleration or speed, but rather of Madrigal revving the engine. Accordingly, this evidence was not introduced to show a character trait – such as Madrigal’s tendency to drive cautiously – and therefore, was not barred by Evidence Code section 1101.

b. *Evidence Triggering the Habit*

Tang also argues that Madrigal never suggested what circumstances “triggered” his response of revving the engine. In fact, plaintiff’s counsel argued that Madrigal may have revved his engine to warn the eyewitness, Noemi Galaviz, as she attempted to cross the road in front of him. Accordingly, Madrigal did identify circumstances that may have caused him to rev his engine.

c. *Caldwell’s Testimony*

Tang contends that the trial court improperly allowed Madrigal’s reconstruction expert, Caldwell, to testify that there was no correlation between the sound of

a motorcycle revving and the motorcycle's speed. A trial court "has wide discretion to admit or exclude expert testimony. [Citations.]" (*People v. Page* (1991) 2 Cal.App.4th 161, 187.)

Tang first argues that it is common knowledge that a motorcycle can "rev its engine while not in gear," and thus, Caldwell's opinion was improperly within a layperson's knowledge. An expert witness's testimony is "limited to such an opinion as is . . . [r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact" (Evid. Code, § 801, subd. (a).) Tang's argument misrepresents Caldwell's testimony. Caldwell testified that a motorcycle engine's speed causes the sound of "revving," not the speed of the vehicle itself, and thus, it is possible for the engine speed to be higher when the motorcycle is in a lower gear than when the motorcycle is in a higher gear. Caldwell did not testify that a motorcycle can rev its engine while not in gear.¹

In addition, Tang argues that the court improperly allowed Caldwell to testify beyond his expert designation as a reconstruction expert. Caldwell was designated "to testify as to all aspects of accident/incident reconstruction and the dynamics of the event, [Tang's] vehicle, [Madrigal's] rider and motorcycle, and visibility and rebuttal to any issues raised by [Tang's] experts." Here, the testimony regarding the significance

¹ In fact, defense counsel was corrected on this point during trial when he cross-examined Madrigal: "[Defense counsel]: Now, when you rev the engines, the motorcycle is actually in neutral, correct? [Madrigal]: You could be on gear. [Defense counsel]: And still rev the engine? [Madrigal]: Yeah. You hold the clutch. That means you're on neutral. [Defense counsel]: Okay. [Madrigal]: But you could still be [on] gear. [Defense counsel]: Okay. Okay. Well, I'm -- thank you for explaining that. I'm not a motorcycle rider myself."

of the sound of an engine revving was relevant to the speed of the plaintiff's motorcycle at the time of the accident, and therefore, was part of accident reconstruction.

Tang has also failed to show that admission of Caldwell's testimony prejudiced him. Tang argues that this evidence undercut testimony by the bystanders Avendano and Galaviz that Madrigal was driving at an unsafe speed. However, both Avendano and Galaviz testified that they not only heard the sound of the motorcycle approaching, but that they also visually observed Madrigal driving fast.² Furthermore, neither Avendano nor Galaviz estimated the speed at which they observed Madrigal to be traveling.

On the other hand, both parties' experts agreed that Madrigal was not driving in excess of the speed limit and was, in fact, going between 30-34 miles per hour at the time of impact. Although the jury could have concluded that 30-34 miles per hour was an unsafe speed under the circumstances present at the time of the accident, there was scant evidence that Madrigal was driving above that speed beyond vague observations by Avendano and Galaviz that he was driving fast. As the trial court observed, the evidence of Madrigal's habit of revving his motorcycle "seems [] much to do about something with not very much consequence." Accordingly, its admission, even if erroneous, was not prejudicial to the defendant.

² Defense counsel made this argument himself during his closing: "[Defense counsel:] And notice how plaintiff's counsel tries to explain away flooring it. He says it's just the sound. But Mr. Avendano is right there. He sees the speed accelerating."

2. *Exclusion of Defense Experts' Testimony*

Tang contends that the trial court improperly excluded testimony by his experts Sanders, Kayfetz and McKibben. The trial court may exclude expert testimony if it will waste time, create undue prejudice, confuse the issues, or mislead the jury. (Evid. Code, § 352.) “We review the court’s admission of expert testimony for clear abuse of discretion, looking to whether the court’s ruling ‘exceeded the bounds of reason.’ [Citations.]” (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 972.)

a. *Sanders's Testimony*

Tang contends that the trial court improperly barred Sanders from testifying (1) about “what Tang might have seen before the accident, based on the visibility study and statistics of typical driving patterns,” as well as (2) that Madrigal “knew, or should have known, that passing Tang on the right created an unnecessary risk that the two vehicles would cross paths.”

With respect to the first opinion, Tang argues that Sanders should have been permitted to testify as to “Tang’s likely perceptions in this accident” – specifically that “it is very common for individuals to forget that they saw a motorcycle and to say that they did not see it,” and that “it is very common in motorcycle versus automobile accidents that the driver will report that he or she did not see the motorcycle”

At trial, Tang testified about what he saw before the accident: he said that although he looked in both his mirrors and over his shoulder before the collision, he did not see Madrigal. Yet, Tang argues that Sanders should have been permitted to supplement this testimony with information about “studies of motorcycle accidents” and

“statistics of typical driving patterns” showing that “it would be a common experience for Tang to have seen Madrigal at the time, but still not recall doing so.” The trial court was not unreasonable in concluding that it would be “speculati[ve]” for Sanders to override Tang’s clear testimony of his recollection of the accident with evidence of what car drivers involved in other accidents generally perceived. Furthermore, the exclusion of this testimony was not prejudicial to Tang: evidence that Tang actually saw Madrigal behind him, but turned anyway, is not helpful to Tang’s case.

With respect to the second opinion at issue – that Madrigal knew or should have known that passing Tang on the right created an unnecessary risk of a collision – this constituted a conclusion that Madrigal was negligent in passing Tang on the right. An expert should not be allowed to invade the province of the jury by testifying that a plaintiff did not act with reasonable care. (*Moore v. Norwood* (1940) 41 Cal.App.2d 359, 366-367.) This testimony would have supplanted the jury’s role and, thus, was properly excluded by the trial court.

b. *Kayfetz’s Testimony*

The trial court excluded as improper reconstruction opinions Kayfetz’s testimony that the motorcyclist in the visibility study had “ample time” to observe the car and “avoid the collision” while the car driver did not have “enough time” to “avoid” a collision with a motorcycle passing on his right. Tang argues that these were not reconstruction opinions but were merely “opinions about the visibility of either driver based on the [visibility] study.” However, these opinions were plainly not about what either driver saw, but about the time each had to react to what they saw in order to avoid

a collision. This constituted an attempt to reconstruct the accident, and, therefore, the trial court did not abuse its discretion in excluding this testimony.

c. *McKibben's Testimony*

Tang contends that the trial court erred in barring McKibben from characterizing certain motorcycle maneuvers as risky and dangerous because such opinions would have been “helpful” to the jury “in light of the jury’s likely inexperience with motorcycles.” The trial court did permit McKibben to testify as to “elements of risk” but found that expert testimony regarding whether a motorcycle maneuver was risky or dangerous supplanted the jury’s role to “decide whether . . . certain conduct occurred, [and] . . . to evaluate whether or not that was dangerous or risky.”

Under Evidence Code section 805, expert testimony may “embrace[] the ultimate issue to be decided by the trier of fact.” However, the “opinion is inadmissible ‘if it invades the province of the jury to decide the case.’ [Citation.]” (*People v. Frederick* (2006) 142 Cal.App.4th 400, 412.) Here, the trial court did not abuse its discretion in limiting McKibben’s testimony to “elements of risk.” This small circumscription on McKibben’s testimony allowed him to identify the risks of certain motorcycle maneuvers without supplanting the jury’s role of determining whether Madrigal acted negligently by performing a dangerous maneuver.

Furthermore, McKibben’s actual testimony included statements that (1) there were “dangers for a motorcycle in overtaking or passing a vehicle on the right” because another “vehicle could cross your path,” (2) “those dangers increased if the vehicle that the motorcycle is passing or overtaking is partially in the same lane,” and (3) certain

maneuvers by a motorcycle “increase[d] the risk.” Such testimony that “dangers” existed or that the risk “increase[d]” when certain motorcycle maneuvers were performed is effectively the same as characterizing those maneuvers as dangerous or risky. Accordingly, there was no prejudicial impact resulting from the trial court’s limitation on McKibben’s testimony.

DISPOSITION

The judgment is affirmed. The plaintiff is awarded his costs on appeal.

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CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.