Filed 9/11/19 Lujan v. L.A. County Metropolitan Transportation etc. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

GEORGE LUJAN, Plaintiff and Respondent, v. LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, Defendant and Appellant.	B287730 (Los Angeles County Super. Ct. No. BC582020)

APPEAL from a judgment and postjudgment order of the Superior Court of Los Angeles County, Paul A. Bacigalupo, Judge. Affirmed.

Liebman, Quigley & Sheppard, Jack L. Sheppard; Greines, Martin, Stein & Richland, Alison M. Turner and Carolyn Oill for Defendant and Appellant.

Joseph Farzam Law Firm, Joseph S. Farzam; The Ehrlich Law Firm and Jeffrey I. Ehrlich for Plaintiff and Respondent.

George Lujan (Lujan) was severely injured when the bus he was riding suddenly accelerated and swerved. Lujan sued the bus's operator, Los Angeles County Metropolitan Transportation Authority (MTA), for negligence. A jury found for Lujan. MTA now appeals, contending there was insufficient evidence of negligence and that the trial court misinstructed the jury on the special emergency doctrine. We reject these contentions and affirm the judgment.

BACKGROUND

Lujan testified that, on the morning of January 17, 2014, he took MTA's 910 Silver Line bus from El Monte to downtown Los Angeles to meet a friend at the convention center. Lujan remembered he took the 910 because the bus's color had just changed to an unmistakable solid gray. Lujan planned to get off the bus at the First and Hill stop and walk to the convention center for exercise.

As the bus approached Lujan's stop, he pushed the button or pulled the cord to alert the driver. Lujan stood and grabbed the overhead rail while making his way to the exit. He stopped and waited, holding onto a pole. Suddenly, the bus accelerated and swerved. Despite having a tight grip on the pole, he lost his grip and was thrown back three to four feet against the hard plastic seats, ending up on the floor. Lujan described the bus's movement as sharp; he had never before experienced that kind of movement on other buses and had never fallen. He did not know why the bus swerved.

The driver, described by Lujan as a husky, Black man about 35 to 55 years old, asked him if he wanted to file a report. Although Lujan was in some pain, he was also embarrassed and wanted to leave, so he refused and got off the bus. However, he

realized that he was hurt more severely than he previously thought, so his friend, whom he met at the convention center, took him to the hospital. Initially, he was told his ribs were fractured and was sent home. When Lujan began to have trouble breathing, he returned to a hospital. He had seven broken ribs and a punctured lung that had filled with blood, leading to renal failure. He stayed at the hospital to undergo surgery and further treatment of his injuries.

MTA determined that Freddie Howell was the only driver fitting Lujan's description of the man driving the 910 that day at the time and location of the accident. Howell testified that he did not recognize Lujan despite his claim that he generally remembers everyone's faces, even someone he has not seen in four years. He had no recollection of anyone falling on his bus as Lujan described. Had someone fallen on his bus, he was obligated to report it, even if the person did not want to file a report. Howell agreed that veering a bus does not occur normally in the course of driving it. However, during his years driving buses, he once veered to avoid hitting a child and again to avoid a dog.

Based on this evidence, the jury found that MTA, but not Lujan, was negligent, and awarded Lujan $1,135,037.95. The trial court entered judgment accordingly. MTA moved for judgment notwithstanding the verdict on the ground of insufficiency of the evidence. The trial court denied the motion.

DISCUSSION

MTA contends that the trial court should have granted its motion for judgment notwithstanding the verdict because there was insufficient evidence it was negligent. We disagree.

A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the prevailing party, that there is no substantial evidence in support of it. (*Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167, 192.) As in the trial court, we review the matter for substantial evidence. (*Ibid.*) We may not reweigh the evidence or judge the credibility of witnesses, and instead resolve any conflict in the evidence and draw all reasonable inferences therefrom in favor of the jury's verdict. (*Ibid.*)

To establish negligence, a plaintiff must prove the existence of a duty, breach of duty, legal cause, and damages. (*Paz v. State of California* (2000) 22 Cal.4th 550, 559.) As a common carrier providing transportation to the public, MTA is subject to a heightened duty of care, that is, to use the utmost care. (Civ. Code, § 2100; *Gomez v. Superior Court* (2005) 35 Cal.4th 1125, 1128.) Common carriers must do all that human care, vigilance, and foresight reasonably can do under the circumstances. (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 785.) Even so, not every accident entitles an injured person to recover damages, as there is no presumption of negligence. (*Staggs v. Atchison, Topeka & S. F. Ry. Co.* (1955) 135 Cal.App.2d 492, 506.) Common carriers are not insurers of their passengers' safety, and the degree of care and diligence they must exercise is only that which can reasonably be exercised consistent with the character and mode of conveyance and the practical operation of the carrier's business. (*Lopez*, at p. 785.)

Where a common carrier's passenger is injured and an unusual movement of the conveyance caused the injury, such evidence establishes a prima facie case of negligence. (*McIntosh*

v. Los Angeles Ry. Corp. (1936) 7 Cal.2d 90, 94.) In *McIntosh*, the plaintiff was a passenger on an electric street car. As his stop approached, the plaintiff made his way to the exit. The car rounded a curve at a greater speed than usual, causing the plaintiff to be half thrown out of the window. The plaintiff sued the street car company for negligence, and he was awarded damages. The street car company contended on appeal that there was no evidence it negligently operated the car. *McIntosh* found that an inference could be drawn from the injury—being thrown through the window—that the car was not operated in its ordinary and usual manner. (*Id.* at p. 94.) "While it is true that a mere injury to a passenger does not place upon the carrier the duty of explanation, such proof, however, coupled with evidence that the injury was caused by an unusual movement of the car, does cast upon the carrier the burden of proving that the injury was due to some other cause than its own negligence." (*Ibid.*)

Lujan's case is like *McIntosh*. Lujan testified that the 910 bus he was on suddenly accelerated and swerved in a way that was beyond that of ordinary movement. Lujan, who had been riding buses since he was a teenager, had never experienced such a movement. That Lujan, who had been holding tightly to a pole, was thrown back three to four feet is further evidence that the movement was not ordinary. Bus driver Howell agreed that a sudden veering of a bus is not ordinary movement. And Lujan's severe injuries—seven broken ribs which caused a punctured lung—are yet further evidence of the bus's unusual, forceful movement. Although there are certainly non-negligent reasons for a driver to cause his bus to swerve, this evidence was sufficient to establish a prima facie case of negligence. (See *McIntosh v. Los Angeles Ry. Corp.*, *supra*, 7 Cal.2d at p. 94.)

This leads to MTA's next argument, that plaintiff improperly shifted the burden of proof to MTA by persuading the trial court, over MTA's objection,[1] to instruct on the sudden emergency or imminent peril doctrine.[2] The doctrine rests on the theory that "a person who, without negligence on his part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to himself or to others, is not expected nor required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments." (*Leo v. Dunham* (1953) 41 Cal.2d 712, 714.) The doctrine applies where an unexpected physical danger is presented so suddenly as to deprive the nonnegligent driver of his or her power of using reasonable judgment. (*Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 216.)

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[1] Any discussion regarding jury instructions is not part of the record. Nonetheless, in his declaration supporting a posttrial motion, MTA's attorney described how the trial court gave the instruction over his objection. This suffices to preserve the issue for appeal.

[2] The trial court accordingly instructed: "MTA claims it was not negligent because it acted with reasonable care in an emergency situation. MTA was not negligent if it proves all of the following: [¶] 1. That there was a sudden and unexpected emergency situation in which someone was in actual or apparent danger of immediate injury; [¶] 2. That MTA did not cause the emergency; and [¶] 3. That MTA acted as a reasonably careful person would have acted in similar circumstances, even if it appears later that a different course of action would have been safer."

MTA points out that Lujan requested the instruction. MTA suggests he did so to mislead the jury that MTA had the burden of proving it was not negligent, instead of plaintiff having the burden of proving MTA was negligent. This, MTA says, was especially troublesome because there was no evidence of a sudden emergency. We agree that an instruction, although correct in the abstract, should not be given where the evidence does not support it or it is likely to mislead the jury. (*Joyce v. Simi Valley Unified School Dist.* (2003) 110 Cal.App.4th 292, 303.) We also agree that there was no explanation for why—an emergency or otherwise—the bus accelerated and swerved. We know only it did.

However, we disagree that the instruction improperly shifted the burden of proof and, in any event, that it is reasonably probable the instruction misled the jury. Any instructional error in a civil case is not inherently prejudicial. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.) We consider the nature of the error, including its natural and probable effect on a party's ability to place his or her full case before the jury, and the likelihood of actual prejudice as reflected in the trial record, considering the state of the evidence, the effect of other instructions, the effect of counsel's arguments, and any indications by the jury it was misled. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 983.)

As we have said, the state of the evidence was that Lujan suffered his injuries while on the 910 bus, which suddenly accelerated and swerved. MTA's theory was that Lujan was *not* on the 910 bus at all. Accordingly, the jury was instructed that Lujan had to prove he was on an MTA bus the day of the accident. (CACI No. 907.) MTA introduced evidence to support its theory; namely, Lujan initially said in discovery that he was

on the 190 bus instead of the 910 bus and Lujan's TAP card did not show he rode the 910 bus that day. However, the jury necessarily rejected MTA's theory, believing instead that Lujan was injured on its bus.

Also, viewing the instructions as a whole, there is not a reasonable probability the jury would have placed the burden of proof on MTA. Rather, the trial court instructed the jury that Lujan had to prove that MTA was negligent, that he was harmed, and that MTA's negligence was a substantial factor in causing his harm. (CACI No. 400.) Per the sudden emergency instruction, MTA was not negligent if it proved the elements of that defense. But this did not obviate Lujan's initial burden to establish negligence. The challenged instruction did not state that MTA was negligent *unless* it could prove it acted in a sudden emergency.

Nor did counsel make any argument that might have caused confusion. Instead, MTA's counsel reinforced the principle that Lujan had the burden of proof. Counsel thus clearly stated its position that any accident did not occur on its bus. He further argued that even if Lujan was on a MTA bus, the bus driver did nothing wrong "and [Lujan] can't meet his burden of proof that he did, and [counsel doesn't] have to show that somebody stepped off a curb or a dog ran into the street. [Counsel doesn't] have to do that. [Lujan] has to prove that that veering maneuver was a negligent act." MTA's counsel thus reiterated that the burden of proof rested on Lujan.

Based on the entire record, it is not reasonably probable any error in instructing the jury on the sudden emergency doctrine prejudiced MTA.

DISPOSITION

The judgment and postjudgment order are affirmed. George Lujan is awarded his costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

EGERTON, J.