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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JEREMY JOHNSON, Plaintiff and Respondent, v. TOMOE MICHINO et al., Defendants and Appellants.	2d Civ. No. B279450 (Super. Ct. No. BC561701) (Los Angeles County)

Plaintiff Jeremy Johnson was riding his motorcycle when he was struck by an automobile driven by defendant Tomoe Michino (Mrs. Michino). A jury found in favor of Johnson, who was severely injured, and awarded him $2,434,264.85 in damages. Mrs. Michino and her husband, defendant Mitch Michino (Mr. Michino), contend on appeal that the trial court abused its discretion by denying their pre-trial motion to continue the trial and to reopen discovery. They claim that if they "had been allowed even a short continuance to conduct discovery and designate experts, they would have been able to

present expert testimony to rebut [Johnson's] claims, including [Johnson's] claims related to his speed at the time of the accident, and to otherwise prepare for trial."

We conclude that because the Michinos' motion to continue the trial and to reopen discovery did not include a request to extend the time for designating expert witnesses, that issue was not before the trial court. We further conclude that the Michinos have failed to demonstrate that the denial of their motion was an abuse of judicial discretion. Accordingly, we affirm.

FACTS AND PROCEDURAL BACKGROUND

A. The Accident

On September 22, 2014, Johnson was driving his motorcycle in the number 1 lane of eastbound San Vincente Boulevard in Brentwood. He was travelling at about 35 miles per hour. Mrs. Michino was driving her husband's automobile. She drove out of a shopping mall parking lot and made a wide right turn through the number 2 lane and into the number 1 lane of San Vincente Boulevard and collided with Johnson. Neither driver saw the other prior to the collision. Johnson's right leg was crushed between the car and the motorcycle before he and his motorcycle went flying into the air. Johnson was seriously injured in the crash and had to undergo two extended hospital stays.

The Michinos did not have automobile liability insurance. In lieu of insurance, the Michinos had posted $30,000 with the California Department of Motor Vehicles, as permitted by Vehicle Code section 16054.2.

B. The Lawsuit

On October 28, 2014, Johnson sued Mrs. Michino and Quesenberg Investment Company (Quesenberg), the owner of the mall property, for personal injuries. Attorney Michael Shook

represented Mrs. Michino and filed an answer on her behalf. He also filed a cross-complaint for indemnification and apportionment of fault against Johnson, Quesenberg and Duesenberg Investment Company (Duesenberg). The claims against Quesenberg and Duesenberg were later settled.

Johnson subsequently amended his complaint to add Mr. Michino and his son, Eddie Michino, as defendants based on their alleged ownership of the vehicle and negligent entrustment of the vehicle to Mrs. Michino. Johnson dismissed Eddie Michino from the case before trial.

Shook answered the amended complaint on behalf of Mr. Michino and Eddie Michino. Shook also filed cross-complaints on their behalf against Johnson, Quesenberg and Duesenberg.

The case was originally set for trial on April 28, 2016. The discovery cut-off date was March 31, 2016.

C. Discovery Efforts

In November 2014, Johnson propounded a series of discovery requests to Mrs. Michino. Shook served responses on her behalf. Mrs. Michino's deposition was taken on December 7, 2015. Counsel for all parties were present. Mr. Michino, who is an attorney, also was present.

In November 2015, Shook propounded form interrogatories and requests for admission to Johnson. Shook did not propound any additional discovery, request an independent medical examination, retain experts or notice any expert depositions.

In December 2015, Johnson served a demand for exchange of expert witness information under Code of Civil Procedure section 2034.210.[1] Before the exchange date of March 9, 2016,

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[1] All statutory references are to the Code of Civil Procedure unless otherwise stated.

Johnson served his expert witness information. A day after the exchange date, Shook served a response, which stated: "[The Michinos] have not retained the services of any experts at this time. Research is still continuing as to the procurement of experts to testify at the time of trial on behalf of the [Michinos]. When [the Michinos'] experts are retained and ascertained this information will be provided." The Michinos never provided such information.

Shook took Johnson's deposition on February 26, 2016. Shook also appeared at a vehicle inspection of Mr. Michino's vehicle.

D. Ex Parte Application to Continue the Trial

Fifteen days before the discovery cut-off date, the Michinos retained attorney Eric Dobberteen to serve as co-counsel with Shook. Shook filed an ex parte application to continue the trial, to reopen discovery and to allow the Michinos to retain expert witnesses. The application did not seek leave to submit tardy expert witness information pursuant to sections 2034.710 and 2034.720. Nor was it accompanied by proof that the Michinos had served any proposed expert witness information on the parties. (§ 2034.720, subd. (c)(3).)

The trial court denied the ex parte application without a hearing. It determined there was "[i]nsufficient showing of immediate danger, irreparable harm or any other basis upon which relief may be granted ex parte."

E. Oral Request to Continue the Trial

On April 11, 2016, Dobberteen disassociated as co-counsel for the Michinos. The following day, Shook appeared at the final status conference and made an oral request to continue the trial. The trial court denied the request.

On April 19, 2016, the Michinos substituted attorney John Arai Mitchell in place of Shook. The parties stipulated to continue the trial date to July 11, 2016 to allow for mediation. The stipulation did not reopen discovery.

F. Motion to Continue the Trial and to Reopen Discovery

On May 19, 2016, the Michinos moved again to continue the trial and to reopen discovery. The Michinos claimed they were entitled to a continuance of six months to file a summary judgment motion. They also asserted that reopening discovery and continuing the July 11, 2016 trial date were necessary because Shook had "failed to take the minimum steps required to protect their interests" and "[t]he Michinos should not be punished for Mr. Shook's inexcusable neglect." The motion did not request permission to submit tardy expert witness information or provide proof that the Michinos had served proposed expert witness information on the parties. (§ 2034.720, subd. (c)(3).)

On May 31, 2016, the Michinos substituted attorney John Doherty for Mitchell. Doherty cancelled the pending mediation and appeared at the hearing on the motion to continue the trial and to reopen discovery. After hearing argument, the trial court adopted its tentative decision to deny the motion.

In its written order, the trial court applied the factors in rule 3.1332 of the California Rules of Court in addressing the continuance request, and applied the factors in section 2024.050 in analyzing the request to re-open discovery. The court concluded that "it is difficult to find [Shook's] conduct 'excusable'; indeed, Defendants expressly argue that it was malpractice, which is not excusable." With respect to the motion to reopen discovery, the court found that the Michinos had "failed to show

diligence, and [had] failed to show lack of prejudice, as re-opening of discovery would necessarily give rise to a trial continuance."

The Michinos filed a petition for writ of mandate challenging the order. Division Eight of this District summarily denied the petition, with one justice stating, "I would issue a temporary stay and ask for a preliminary response."

G. Motion for Summary Judgment

On June 29, 2016, the Michinos moved for summary judgment,[2] noticing the motion for hearing on April 20, 2017, over eight months after the scheduled trial date of July 11, 2016. They also filed another ex parte application to continue the trial to allow the summary judgment motion to be heard. The trial court denied the continuance request, noting that the motion for summary judgment was not timely filed.

H. Continuance of Trial Date and New Request to Reopen Discovery

When the matter was called for trial on July 11, 2016, both sides "announce[d] ready," but there was no court available to try the case. After participating in a mandatory settlement conference, the parties stipulated to continue the trial to September 21, 2016.

The Michinos moved to reopen discovery to allow certain depositions to go forward before the new trial date. The trial court denied the motion. It explained: "The Court finds the trial continuance was granted as a result of the unavailability of a

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[2] The motion for summary judgment included a declaration from an accident reconstruction expert, Henricus "Harm" Jansen. Jansen opined that the collision occurred because Johnson was inattentive, did not use reasonable care while driving his motorcycle, and was exceeding the posted speed limit by 20 to 25 miles per hour.

trial court on the date of trial. This is not a material change in the facts of the case that justifies revisiting the prior order denying the request to reopen discovery."

I. The Trial

The trial began on October 4, 2016, more than four months after Doherty first appeared in the case. It concluded on October 12, 2016. During trial, Johnson presented substantial expert testimony on the issues of liability, causation and damages. His witnesses included an accident reconstruction expert, a forensic economist, a life care planner, a vocational rehabilitation counselor, a hyperbaric medicine physician, a vascular surgeon and a physical therapist. The Michinos were barred from presenting any competing experts because they had failed to comply with the statutory disclosure requirements. (§ 2034.300.)

The jury returned a special verdict finding that (1) Mrs. Michino was negligent, (2) her negligence was a substantial factor in causing Johnson's harm, (3) Johnson's total damages were over $2.8 million, (4) Johnson also was negligent, (5) Mrs. Michino was 85% responsible for the harm to Johnson, (6) Johnson was 15% responsible, (7) Mr. Michino was the owner of the vehicle, and (8) Mr. Michino gave Mrs. Michino permission to drive the vehicle. The trial court entered judgment in favor of Johnson and against the Michinos in the amount of $2,434,264.85.[3] The Michinos appeal.

DISCUSSION

A. Standard of Review

The Michinos contend the trial court erred by denying their May 19, 2016 motion to continue the trial and to reopen

[3] Mr. Michino's liability was limited to $15,000 pursuant to Vehicle Code section 17151, subdivision (a).

discovery. Both requests are reviewed for abuse of discretion. (See *Noel v. Thrifty Payless, Inc.* (2017) 17 Cal.App.5th 1315, 1337 ["A trial court has broad discretion to grant or deny a continuance"]; *Foster v. Civil Service Com.* (1983) 142 Cal.App.3d 444, 448 ["The granting or denying of a continuance is a matter within the court's discretion, which cannot be disturbed 'on appeal except upon a clear showing of an abuse of discretion'"]; *Hernandez v. Superior Court* (2004) 115 Cal.App.4th 1242, 1246 [trial court's ruling on request to extend discovery deadlines is reviewed for abuse of discretion].) An abuse of discretion occurs "'where, considering all the relevant circumstances, the court has exceeded the bounds of reason or it can fairly be said that no judge would reasonably make the same order under the same circumstances.'" (*In re Marriage of Olson* (1993) 14 Cal.App.4th 1, 7.)

B. The Michinos Did Not Request an Extension of Time to Designate Expert Witnesses

The Michinos principally argue that the granting of the motion to continue the trial and to reopen discovery was necessary to allow them to present expert witnesses to rebut the testimony of Johnson's multiple experts. The flaw in this argument is that the Michinos never requested leave to serve a tardy expert witness designation. The motion only requested a reopening of discovery.

Discovery deadlines are set by statute. Parties must complete discovery no later than 30 days before trial. (§ 2024.020, subd. (a).) They must serve expert witness designations at a specified date no later than 50 days before trial or 20 days after service of the demand, whichever is closer to the trial date. (§ 2034.230, subd. (b).) The deadline for completing expert witness depositions is the 15th day before the date

initially set for trial, instead of the 30-day deadline applicable to other depositions and discovery. (§ 2024.030.)

The trial court has discretion to relieve a party of these statutory deadlines. The court may reopen discovery within 30 days of trial. (§ 2024.050, subd. (a).) It also may allow a party to serve a tardy expert witness designation. (§ 2034.710, subd. (a).) In exercising its discretion to grant relief, the court must consider several specified factors. (§ 2024.050, subd. (b) [factors for reopening discovery]; § 2034.720 [conditions for allowing tardy expert witness designation].)

Here, the trial court cannot be faulted for not extending the period for designating expert witnesses when no such statutory request was made. (See *Wood v. Santa Monica Escrow Co.* (2007) 151 Cal.App.4th 1186, 1192 ["We will not consider points on appeal that were not raised in the trial court"]; *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564 [refusing to consider assertions of error based upon arguments that could have been, but were not presented to the trial court].) Moreover, section 2034.720, subdivision (c) prohibits the court from allowing a tardy expert witness designation unless it finds that the moving party did all of the following: "(1) Failed to submit the [expert] information as the result of mistake, inadvertence, surprise, or excusable neglect. [¶] (2) Sought leave to submit the information promptly after learning of the mistake, inadvertence, surprise, or excusable neglect. [¶] (3) Promptly thereafter served a copy of the proposed expert witness information described in [s]ection 2034.260 on all other parties who have appeared in the action."

As Johnson points out, the Michinos failed to satisfy these mandatory conditions. They did not establish any mistake, inadvertence, surprise, or excusable neglect; they did not

establish when they learned of Shook's failure to retain experts; they did not demonstrate that they acted promptly thereafter; and they submitted no proof that they had served a copy of their "proposed expert witness information described in [s]ection 2034.260." (§ 2034.720, subd. (c)(3).) The required expert witness information includes the names and addresses of the proposed experts and expert witness declarations. (§ 2034.260.) The Michinos never identified their proposed experts by name, nor did they serve any expert witness declarations. (See *ibid.*) Thus, even if the Michinos' motion to reopen discovery could be liberally construed as a motion to submit tardy expert witness information, they failed to proffer the information necessary to obtain such relief.

C. The Trial Court Did Not Abuse Its Discretion by Denying the Motion to Continue the Trial and to Reopen Discovery

"To ensure the prompt disposition of civil cases, the dates assigned for a trial are firm. All parties and their counsel must regard the date set for trial as certain." (Cal. Rules of Court, rule 3.1332(a).) Trial continuances are disfavored and may be granted only on an affirmative showing of good cause requiring the continuance. (Cal. Rules of Court, rule 3.1332(c); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1127; *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 823).)

Less than two months before the July 11, 2016 trial date, the Michinos moved for a six-month trial continuance to allow their new counsel time to complete discovery following Shook's departure. According to the Michinos, Shook mishandled their case by failing to conduct discovery and to designate appropriate experts, and Shook's withdrawal left the Michinos with insufficient time for their new counsel to correct Shook's many

mistakes and to file a summary judgment motion. The Michinos contend Shook's inadequate representation amounted to "positive misconduct" that required the trial court to continue the trial and to reopen discovery. (*Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 898 (*Carroll*).)

(1) Positive Misconduct Doctrine

An attorney's negligence is generally imputed to his or her client and may not be offered as a basis for relief from an order or judgment caused by the attorney's negligence. "The client's redress for inexcusable neglect by counsel is, of course, an action for malpractice." (*Carroll*, *supra*, 32 Cal.3d at p. 898.) An exception exists where "'the attorney's neglect is of that extreme degree amounting to positive misconduct . . . [that,] in effect, obliterates the existence of the attorney-client relationship'" and thereby prevents the attorney's neglect from being imputed to the client. (*Ibid.*, italics omitted.)

For this exception to apply, there must be "a total failure on the part of counsel to represent the client" sufficient to show "it would have been unconscionable to apply the general rule charging the client with the attorney's neglect." (*Carroll*, *supra*, 32 Cal.3d at p. 900; see *People v. One Parcel of Land* (1991) 235 Cal.App.3d 579, 584; *Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 739.) In *Carroll*, the Supreme Court emphasized the positive misconduct exception "should be narrowly applied, lest negligent attorneys find that the simplest way to gain the twin goals of rescuing clients from defaults and themselves from malpractice liability, is to rise to ever greater heights of incompetence and professional irresponsibility while, nonetheless, maintaining a beatific attorney-client relationship." (*Carroll,* at p. 900.)

The record here does not show that Shook's representation was a total failure, making it unconscionable to impute his alleged malfeasance to the Michinos. As explained above, Shook took some action on his clients' behalf. He answered the pleadings, filed a cross-complaint on the Michinos' behalf, answered Johnson's discovery requests, propounded form interrogatories and requests for admission, appeared at the vehicle inspection, took Johnson's deposition, defended Mrs. Michino's deposition and associated counsel to assist him during trial. Shook also made two motions to continue the trial date and appeared at various court hearings. The Michinos are understandably dissatisfied with the quality of Shook's representation, particularly with respect to expert discovery, but even gross mishandling of routine discovery and other matters does not amount to positive misconduct sufficient to prevent the court from imputing the attorney's negligence to the client. (*Carroll*, *supra*, 32 Cal.3d at p. 900.) There must be a total failure to represent the client and the record does not compel that conclusion.

(2) Denial of Continuance of the Trial

Rule 3.1332(c) of the California Rules of Court identifies the factors a trial court should consider in deciding whether "good cause" exists for a continuance. The relevant factors here are (1) "substitution of trial counsel, but only where there is an affirmative showing that the substitution is required in the interests of justice," and (2) "[a] party's excused inability to obtain essential testimony, documents, or other material evidence despite diligent efforts." (Cal. Rules of Ct., rule 3.1332(c)(4), (6).) In addition, the court must consider all relevant facts and circumstances, including the proximity of the trial date; whether previous continuances were granted; the length of the requested

continuance; prejudice that parties or witnesses will suffer as a result of a continuance; whether the case is entitled to preferential trial setting; and whether the interests of justice are best served by a continuance. (Cal. Rules of Ct., rule 3.1332(d).)

The trial court considered each of these factors, noting that "[they] are difficult and discretionary calls." With respect to rule 3.1332(c), the court explained that "ordinarily the Court considers an attorney's illness, death, suspension, conflict of interest, etc., to be grounds that require a substitution of attorney in the interest of justice. Additionally, it is difficult to find the prior attorney's conduct 'excusable'; indeed, [the Michinos] expressly argue that it was malpractice, which is not excusable." Based on these findings, the court determined there was no good cause to continue the July 11, 2016 trial date.

In addressing the rule 3.1332(d) factors, the trial court observed that the trial had been continued from its initial date to accommodate a mediation which the Michinos unilaterally cancelled. The court stated: "The fact that the mediation went off calendar is of concern and relevant to the court's determination of [the] motion." It further noted that the Michinos' remedy is a lawsuit against Shook, not a continuance of the trial, and that their motion gave "no consideration whatsoever for whether or not there is prejudice to the plaintiff." The court explained: "[The Michinos' counsel] mentioned a lot about what [his] client wants and doesn't want. [He] mentioned the court and I think [his] arguments about the fact that this will not impact the court are not well taken. I think it does impact the court. This courtroom alone has more than 6,000 cases on this docket." Thus, "[w]hen cases . . . get continued, it impacts the court's ability to administer justice, so it does have an impact on the court." The court concluded: "Given the circumstances of

this case and the balance of equities, as [the court has] evaluated them on this motion, the court's tentative [to deny the motion] will be the ruling."

It is well established that lack of diligence in conducting discovery is not a basis for a continuance. (*Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389, 1396.) Nor is the mere assertion that a party might be able to discover favorable evidence if given more time. (*Wiler v. Firestone Tire & Rubber Co.* (1979) 95 Cal.App.3d 621, 628 ["The rules of discovery contemplate that a party must use all due diligence to discover favorable evidence"].) Given that the usual circumstances justifying denial of a continuance, such as proximity to trial, prejudice to Johnson and previous dilatory conduct, were present, we cannot conclude that the trial court abused its discretion. Indeed, the record reflects that the court carefully weighed its options and gave counsel a full and complete hearing before denying the continuance request.

Furthermore, the Michinos have not demonstrated prejudice from the denial of the motion for a continuance. (*Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1141 [appellant must demonstrate prejudice from the trial court's denial of a request to continue trial], disapproved on another ground as stated in *Hernandez v. Restoration Hardware, Inc.* (Jan. 29, 2018, S233983) ___ Cal.5th ___ [2018 Cal. Lexis 538, 15].) Due to scheduling issues, the Michinos ultimately received a continuance to September 21, 2016, and the trial did not start until October 4, 2016. Because Doherty first appeared in the case on May 31, 2016, he had more than four months to conduct an investigation and to prepare for trial. (See *Pullin v. Superior Court* (2000) 81 Cal.App.4th 1161, 1165, fn. 4 ["If it is a lawful investigation, it is not 'discovery' within the meaning of the

Discovery Act, and it is immaterial that the discovery cut-off date may have come and gone"].) The continuance the Michinos received, therefore, was only two months less than the six months requested in the motion.

(3) Denial of Motion to Reopen Discovery

The Michinos also contend the trial court abused its discretion by denying their motion to reopen discovery. We are not persuaded.

As previously discussed, discovery generally must be completed "on or before the 30th day . . . before the date initially set for the trial of the action." (§ 2024.020, subd. (a).) The trial court, however, has discretion to allow additional discovery to be taken after the cut-off date. (§ 2024.050, subd. (a).) Section 2024.050, subdivision (b) states that in deciding whether to grant or deny a motion to reopen discovery, the court must consider four factors: "(1) The necessity and the reasons for the discovery. [¶] (2) The diligence or lack of diligence of the party seeking the discovery . . . and the reasons that the discovery was not completed . . . earlier. [¶] (3) Any likelihood that permitting the discovery . . . will prevent the case from going to trial on the date set, or otherwise interfere with the trial calendar, or result in prejudice to any other party. [¶] (4) The length of time that has elapsed between any date previously set, and the date presently set, for the trial of the action." (See *McCoy v. Gustafson* (2009) 180 Cal.App.4th 56, 97 ["Discovery can be reopened on motion by any party for good reasons when it is necessary, the party seeking further discovery has been diligent, and there will be neither prejudice to the opponent nor impact on the scheduled trial date"].)

Once again, the trial court cited and applied the requisite factors in denying the motion. The court explained: "This motion

is being heard less than 30 days prior to the rescheduled / continued 7/11/16 trial date. The Court finds [d]efendants failed to show diligence, and failed to show lack of prejudice, as re-opening of discovery would necessarily give rise to a trial continuance."

On this record, the trial court was well within its discretion in concluding the Michinos had not shown diligence in their pursuit of discovery. In fact, they conceded that Shook had failed to conduct the necessary discovery due to his inexcusable neglect. The court also reasonably concluded that reopening discovery would prevent the case from being tried on July 11, 2016, and would require another continuance of the trial date. We cannot say the Michinos have shown the court's discovery ruling "'exceeds the bounds of reason, all of the circumstances before it being considered.'" (*Maffei v. Woodlawn Memorial Park* (2005) 130 Cal.App.4th 119, 124.)

In addition, we cannot say that the trial court's ruling prejudiced the Michinos. Their briefs focus almost exclusively on the harm they sustained by being unable to counter the testimony of Johnson's expert witnesses. The Michinos assert that "[e]xpert designation and testimony [were] fundamental to all the key issues," and that "[h]ad the defense been allowed to designate and present testimony by experts the trial would have been adversarial." They specifically reference their expert's opinion that Johnson was riding as fast as 55 to 60 miles per hour at the time of the collision.

As discussed above, even if discovery had been reopened, it would not have allowed the Michinos to serve a tardy expert witness designation. The reopening of discovery only would have permitted the Michinos to conduct additional non-expert discovery, and to perhaps depose Johnson's experts. It would not

have put them in a position to proffer their own experts. We are unable to conclude, based on the record before us, that a reasonable probability exists that the verdict would have been different had this additional discovery been available at trial. As the Michinos concede, the expert evidence presented by Johnson at trial was overwhelming and, for the most part, undisputed.

DISPOSITION

The judgment is affirmed. Plaintiff/respondent shall recover his costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Michelle Williams Court, Judge
Laura C. Ellison, Judge
Superior Court County of Los Angeles

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