Filed 12/20/12 Doe v. Frank CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JANE DOE, Plaintiff and Appellant, v. ROBERT FRANK et al., Defendants and Respondents.	B227871 (Los Angeles County Super. Ct. No. BC407240)

APPEAL from a judgment of the Superior Court of Los Angeles County, Malcom H. Mackey, Judge. Affirmed.

Caree Annette Harper, in pro. per., for Plaintiff and Appellant.

Gordon & Rees, Stephen E. Ronk, Anthony J. Bellone, and Stephanie P. Alexander for Defendants and Respondents.

Plaintiff Jane Doe[1] appeals from a directed verdict and jury verdict in her civil rights action against a security firm and one of its employees. We find no basis for reversal and affirm.

FACTUAL AND PROCEDURAL SUMMARY

Plaintiff describes herself as a civil rights and criminal defense attorney. On February 8, 2007, she was engaged in trial in Los Angeles at the United States District Court for the Central District of California.[2] That day she was scheduled to complete the examination of the primary defendant in the case. Her bag went through the security station x-ray machine at the entrance to the courthouse. But when plaintiff walked through the magnometer, defendant Robert Frank, a security officer, advised her that an alarm had sounded. He required plaintiff to go back through the magnometer seven or eight times, and to lift her arms as instructed. She was asked to twirl around three times, and bend over and lift her pant legs. Frank used a wand on plaintiff once. During this period, plaintiff believed that Frank waved other people through the security station although they did not clear the magnometer.

According to plaintiff, Frank had always been rude to her in previous contacts both in and out of court. She thought her treatment on February 8 was due to the manner in which she had cross-examined a defendant California Highway Patrol officer in court the previous day. She believed Frank had a personal issue with her or with some characteristic she may have had. Plaintiff felt like a "circus seal that [Frank] was having perform" as she went back and forth through the magnometer.

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[1] The trial court ordered the clerk of the court to substitute the plaintiff's true name for the Doe designation. But the clerk's and reporter's transcripts, as well as the briefs on appeal, continue to use the Doe designation instead. To avoid confusion in light of this record, we use the Doe designation.

[2] The case in which plaintiff was engaged involved a claim of excessive force against a California Highway Patrol officer. (*Mariscal v. Ledesma*.)

Plaintiff asked Frank to telephone the courtroom where the trial was ongoing, or to allow her to do so, but he refused. She retrieved her cell phone, and began to walk back to an area where cell phone calls are permitted in order to notify her co-counsel that she was being detained. While she was in the process of doing so, Frank was "yelling at [her] at the top of his lungs." He told her to go downstairs to use the phone, and also told her to come back. Plaintiff elaborated: "He was giving me dual orders. So that was occurring. And in the process I'm trying to get the call out. He comes up, and he grabs my arm hard and squeezed it. He caused pain, and he's pointing his finger in my face and leaning into me. And I'm leaning back. That occurred. And his face turned red. I thought he was going to . . . punch at me because he was yelling and visually changed from the times I'd seen him before. He visually changed the characteristics on his face." Plaintiff testified that Frank looked furious. He grabbed her arm once, but put his finger in her face multiple times. Plaintiff was afraid, thought she was going to be struck by Frank, and felt humiliated. She explained that she goes to the federal courthouse more frequently than any other courthouse. She said she was embarrassed as people who were passing by saw that Frank had taken hold of her. She said: "[I]t embarrassed me, it hurt me, it hurt my body, and my spirit, and I still have to go there time after time again and after."

Frank continued to yell at plaintiff and point at her, then both of them walked back up the stairs. Plaintiff was searched by another security guard. Plaintiff complained about her treatment to Ernest Cobarrubias, the lead court security officer on duty, and she demonstrated what had occurred. Frank also demonstrated his version of the encounter. Plaintiff said that Frank admitted putting his hands on her. She then went to the courtroom where her case was on trial and told co-counsel what had occurred. Later that day, plaintiff spoke with Officer Ross, a court security officer who had been present when she entered the courthouse. He advised her to get the tape of the incident.

Frank testified that as plaintiff attempted to clear security, she became argumentative, slamming buckets down, and making comments such as "'This is ridiculous, I come here all the time, why is this happening?'" He said that even attorneys

who often frequent the courthouse are not allowed to enter without passing through security. Frank denied yelling at plaintiff. She said she was late to court. The hand-held wand indicated a metal object on the right side of plaintiff's lower back area. Plaintiff said there was nothing there. Frank called for a female court security officer to conduct a pat-down search. When he explained this to plaintiff, she became visibly angry and raised her voice.

Frank testified that plaintiff breached security when she went back through the magnometer, around him, to the x-ray machine, and retrieved an item from her bag that was on the out-feed table of that machine. This is a secure area which visitors are not allowed to enter unless they have cleared security. It is a violation for a person who has not cleared security to go through items that have passed through the x-ray machine. Plaintiff then walked back past Frank toward the exit, appearing to be leaving the building. Visitors are not allowed to leave property in the building. When he told plaintiff she had to return to get the rest of her property, plaintiff said she did not have to do so. She said this in a loud and sharp manner. According to Frank, he repeated this order to plaintiff four or five times.

Plaintiff sued Frank and his employer, AKAL[3] Security (collectively defendants). AKAL was under contract with the federal government to provide security at the federal courthouse. Plaintiff alleged causes of action for negligence, false imprisonment, assault and battery, intentional infliction of emotional distress, "torts in essence" for violations of various penal statutes, violation of her civil rights under Civil Code sections 51.7, 52.1, subdivisions (a) and (b), and 52.3, and premises liability. The trial court granted summary adjudication of all causes of action except negligence, assault and battery, and violation of Civil Code sections 52.1, subdivisions (a) and (b) and 52.3.

The court granted a directed verdict in favor of Frank and AKAL on the cause of action for negligence, some statutory civil rights claims, and on the claim for punitive

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[3] At some places in the record AKAL is referred to as "Acal."

damages.[4] Plaintiff was represented by counsel during most of the trial, but also was an active participant in examining witnesses, arguing various points to the trial court, and in giving closing argument. A special verdict was submitted to the jury. The jury found that Frank did not interfere or attempt to interfere with Doe's right to safety and happiness by intentionally threatening or committing violent acts against her; that he was not liable for assaulting her; and that he was not liable for battery. Judgment that plaintiff take nothing from defendants was entered by the court. Plaintiff's motion for new trial was denied, as was her motion to recuse the trial judge. The motion to tax costs was denied. Defendants were awarded costs of $8,268.84. Plaintiff filed a timely appeal from the judgment and orders.

DISCUSSION

I

Plaintiff raises two claims of instructional error. First, she contends the instruction on her civil rights claim under Civil Code section 52.1, subdivisions (a) and (b) was incorrect. She also challenges the preliminary instructions given to the jury.

We review the propriety of jury instructions de novo as a question of law. (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 82.) When the claim is that a particular jury instruction is incorrect or incomplete, "'we evaluate the instructions given as a whole, not in isolation.' [Citation.]" (*Ibid.*) "'"For ambiguous instructions, the test is whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction."' [Citation.]" (*Ibid.*)

A. Instructions on Civil Code section 52.1

Plaintiff challenges the instruction on her cause of action under Civil Code section 52.1 on the ground that it did not accurately state that the basis for her claim was a

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[4] Apparently, the trial court also granted directed verdicts on the cause of action under Civil Code section 52.1, subdivision (a), which must be brought by the Attorney General or local prosecutor, and on the cause of action under Civil Code section 52.3, which must be brought by the Attorney General.

violation of her First and Fourth Amendment rights. Instead, the instruction given the jury was framed in terms of a violation of plaintiff's right to safety and happiness. Respondents argue that plaintiff invited the error and is barred from now complaining on appeal about the language of the instruction.

"Civil Code section 52.1, subdivision (a), provides that if a person interferes, or attempts to interfere, by threats, intimidation, or coercion, with the exercise or enjoyment of the constitutional or statutory rights of 'any individual or individuals,' the Attorney General, or any district or city attorney, may bring a civil action for equitable or injunctive relief. Subdivision (b) allows '[a]ny individual' so interfered with to sue for damages. Subdivision (g) states that an action brought under section 52.1 is 'independent of any other action, remedy, or procedure that may be available to an aggrieved individual under any other provision of law,' including Civil Code section 51.7." (*Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 841.)

During a pretrial conference regarding jury instructions, both plaintiff and defendants submitted versions of CACI No. 3025, the standard instruction for a Civil Code section 52.1 claim. It states: "[*Name of plaintiff*] claims that [*name of defendant*] intentionally interfered with [or attempted to interfere with] [his/her] civil rights by threatening or committing violent acts. To establish this claim, [*name of plaintiff*] must prove all of the following: [¶] 1. That [*name of defendant*] interfered with [or attempted to interfere with] [*name of plaintiff*]'s right [*insert alleged constitutional or statutory right*] by threatening or committing violent acts; [¶] 2. [That [*name of plaintiff*] reasonably believed that if [he/she] exercised [his/her] right [*insert right, e.g. 'to vote'*] [*name of defendant*] would commit violence against [him/her] or [his/her] property;] [¶] [That [*name of defendant*] injured [*name of plaintiff*] or [his/her] property to prevent [him/her] from exercising [his/her] right [*insert right*] or retaliated against [*name of plaintiff*] for having exercised [his/her] right [*insert right*];] [¶] 3. That [*name of plaintiff*] was harmed; and [¶] 4. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm." (Judicial Council of Cal. Civ. Jury Instns. (2011) CACI No. 3025.)

Although the record on appeal includes a list of the instructions requested by plaintiff, it does not include the version of CACI No. 3025 she proposed. The version requested by defendant is in the record. In the spaces provided to identify the right the plaintiff sought to exercise (paragraphs 1 and 2 of the instruction), the phrase "right to safety and happiness" appears. At the outset of the colloquy on instructions, plaintiff proposed that the instruction read "'Defendant Frank interfered with or attempted to interfere with plaintiff's Fourth Amendment right to.' . . . It has the 1st Amendment. Fourth Amendment right to freedom of—freedom against—there's a typo here. The 'and' shouldn't be in between. 'Freedom against unreasonable seizures.'"

When the trial court asked for clarification, plaintiff said her version cited "the Fourth Amendment right and interference with and attempt to interfere with First Amendment Right." She continued: "And really, it could be any constitutional right. It doesn't have to be limited to that. So we can modify that, give that as modified as the law says any constitutional right." The court responded: "We're giving 'interfered with right to safety and happiness'?" Initially, plaintiff replied no. Counsel for defendants said he did not object to using plaintiff's version of CACI No. 3025 rather than his own. Plaintiff said: "Actually, you know what, Your Honor? We'll withdraw it. It's in the packet. I'm not going to try to gerrymander. It will make it easier for the jury. Let's leave it like the one that's in the packet." After asking for a copy of the instruction to be given the jury, plaintiff said: "Here's what I propose, and I'm going by the CACI instruction and the bracketed portions. That number one reads 'that Robert Frank interfered with or attempted to interfere with Caree Annette Harper's right to safety, happiness, by threatening, or intimidating, or coercing . . . ."

The court requested a typed version of the instruction. As the counsel and court discussed the logistics of providing it, counsel for defendants said that plaintiff was now asking for language which was not in either plaintiff's original proposed version of CACI No. 3025, or the defense proposal. He explained that the defense would agree to either of those versions, but not the new language proposed by plaintiff. Plaintiff said she would prepare the instruction over the lunch hour. There is no other version of CACI No. 3025

in the record on appeal. Later, in discussing the language of the special verdict form on this cause of action, plaintiff said it should read "did you find that Robert Frank interfered with or attempted to interfere with . . . Caree Harper's right to safety or happiness."

In her brief, plaintiff asserts that neither Civil Code section 52.1 nor CACI No. 3025 "mention 'safety' and 'happiness' which is what the Court agreed to use over the repeated objection of the Appellant **[RT]** Said language only confused and misled the jury." Although a citation to the reporter's transcript was apparently planned, as indicated in the quoted passage, no page number is given. Contrary to plaintiff's position, we find no objection. Rather, plaintiff agreed to the language about which she now complains.

"'Under the doctrine of invited error, when a party by its own conduct induces the commission of error, it may not claim on appeal that the judgment should be reversed because of that error.' (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212 (*Mary M.*) and cases cited.)" (*Transport Ins. Co. v. TIG Ins. Co.* (2012) 202 Cal.App.4th 984, 1000.) "It has been said that the invited error doctrine 'applies "with particular force in the area of jury instructions. . . ."' (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1653), and numerous cases have held that a party who requests, or acquiesces in, a particular jury instruction cannot appeal the giving of that instruction. (See, e.g., *Nevis v. Pacific Gas & Electric Co.* (1954) 43 Cal.2d 626, 629–630; *Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 856–857, and cases cited; *Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 567 [jointly-proposed instruction].)" (*Ibid.*)

This is a classic case of invited error. Having specifically agreed to the language characterizing the rights violated as the rights to safety and happiness, plaintiff cannot now complain about it on appeal.

B. Preliminary Instructions

Plaintiff argues the trial court erred in its preliminary instructions to the jury at the beginning of trial, before evidence was presented. The trial court referred to plaintiff's claim under Civil Code section 52.3, although this cause of action was not part of the

trial. The challenged statement was: "In this case, Ms. Harper claims that Robert Frank and Acal Security breached their duty of care toward her, that Robert Frank caused her apprehension of a harmful or offensive contact, and made a harmful or offensive contact and that *Robert Frank and Acal Security violated the provisions of Civil Code 523* [52.3] *when Robert Frank allegedly intimidated, threatened, or coerced her at the federal courthouse*." (Italics added.) The italicized language was apparently a reference to the cause of action for a violation of Civil Code section 52.1 rather than Civil Code section 52.3.

Plaintiff states that her counsel sought a sidebar to correct this error, but that the court made the error more egregious by making an unproven, improper, and inaccurate statement of fact to the jury. The passage of the record cited by plaintiff shows that an unreported sidebar conference was held. After that, the trial court told the jury: "In the overview of the trial, let me read this last part again. [¶] *Robert Frank had a lawful privilege to make physical contact in the exercise of his duties as a court security officer*. This is just the overview that you'll get. [¶] And that whether he interfered with [plaintiff's] right to safety or there was a threat or intimidation, that's up to you to decide." (Italics added.) Plaintiff characterizes this as a "sua sponte" statement of fact that was highly prejudicial and "amounted to the Court making and [*sic*] improper statement about the evidence he apparently believed would come." In her brief she contends the error was prejudicial, using boldface for emphasis: "Had the trial court not made this error the 3 jurors who voted in favor of the plaintiff for assault could have easily been multiplied by three. **[RT 917-919] The judge's improper comment on privilege cost the Appellant the trial.**" The pages of the reporter's transcript cited by plaintiff report the polling of the jury after the verdicts were returned.[5]

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[5] The jury found that defendants were not liable on the causes of action for violation of Civil Code section 52.1, assault, or battery. When polled, all but two jurors agreed that this was their verdict as to cause of action under section 52.1; all but three agreed this was their verdict as to assault; and all agreed this was their verdict as to battery.

Defendants contend that the challenged passage was merely a repetition of one of their defenses, which the trial court had just summarized. Before the challenged statement was made, the trial court summarized the positions of the parties for the jury. In its earlier description of the defense position, the court said that defendants claimed "that Robert Frank had a lawful privilege to make the physical contact in the exercise of his duties as a court security officer. . . ."

Our review of the issue is hampered because the sidebar conference was unreported. Plaintiff asserts that its purpose was to correct the erroneous reference to a claim under Civil Code section 52.3 rather than Civil Code section 52.1. But after the conference, neither statute was mentioned. Nor did plaintiff raise a further objection after the sidebar when the trial court made the statement about Frank's privilege as part of his duties as a court security officer. Ordinarily, a lack of an objection at trial forfeits a challenge to remarks by the trial court. (*People v. Houston* (2012) 54 Cal.4th 1186, 1220 (*Houston*).) This rule does not apply when it is shown that an objection could not have cured the prejudice or would have been futile. (*Ibid.*) If plaintiff had objected that the trial court's statement did not make it clear that the defense had to prove that the privilege applied as a defense, the court could easily have cured any potential prejudice. Accordingly, the claim is forfeited. (*Ibid.*) In addition, the trial court already had admonished the jury: "Do not guess what I may think your verdict should be from anything I might say or do." We find no basis for reversal in this comment by the trial court.

II

Plaintiff also raises several claims of judicial misconduct.

"In conducting trials, judges '"should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side or the other." [Citation.]' (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237–1238.) Their conduct must "'"'accord with recognized principles of judicial decorum consistent with the presentation of a case in an atmosphere of fairness and impartiality[.]'"'" (*Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 462, disapproved on another ground

in *People v. Freeman* (2010) 47 Cal.4th 993, 1006, fn. 4.) ‘“The trial of a case should not only be fair in fact, . . . it should also appear to be fair.”’ (*Id.* at p. 455.)” (*Haluck v. Ricoh Electronics, Inc.* (2007) 151 Cal.App.4th 994, 1002.)

A. Sherlock Holmes

Plaintiff complains about a comment made by the trial judge when she was undergoing cross-examination by defense counsel. She was asked about Court Security Officer Rodriguez, who was the other security officer working the checkpoint at the courthouse on the day of the incident. Plaintiff’s claim is based on the following exchange: “Q. So he [Rodriguez] would be a witness to the events; is that correct? [¶] A. I can’t . . . [¶] Mr. Simons [plaintiff’s counsel]: Lacks foundation, your honor. [¶] The court: Elementary. Sherlock Holmes said, elementary my dear, Watson.” Plaintiff characterizes this statement by the court as judicial misconduct because it amounted to a conclusion of fact.

We disagree with plaintiff’s characterization of the court’s statement. A trial court must avoid comments that convey a message to the jury that the judge does not believe testimony by a witness. (*Houston*, *supra*, 54 Cal.4th at p. 1220.) In *Houston*, a capital case, during examination of the defense psychologist, the defense counsel asked whether it mattered in his examination of patients that they were charged with crimes or not. The psychologist said “A brain is a brain is a brain,” and went on to explain that a physician did not need to know whether a patient had been accused of a crime to perform procedures for which he had been trained. (*Id*. at p. 1219.) The trial court interjected: “‘Is that Gertrude Rubinstein? I’m sorry. Go ahead with your answer, Doctor.” (*Ibid.*) The Supreme Court treated the court’s comment as a play on the words of Gertrude Stein, that “‘Rose is a rose is a rose.’ [Citation.]” (*Ibid.*) But it concluded that the comment about “Gertrude Rubinstein” did not convey disbelief by the court of the witness’s testimony, and was instead “simply an ill-advised attempt to interject some levity into the proceedings, ‘always a risky venture during a trial for a capital offense.’ [Citation.]” (*Id*. at p. 1220.)

This analysis applies to the Sherlock Holmes comment in this case. Like the comment at issue in *Houston*, the statement was "an ill-advised attempt to interject some levity into the proceedings, . . ." (*Houston*, *supra*, 54 Cal.4th at p. 1220) but the reference to Sherlock Holmes did not denigrate plaintiff, and was harmless. (*Ibid.*)

B. Bias Against Plaintiff

Plaintiff argues the trial court displayed bias against her throughout the trial. She cites a declaration by a trial juror submitted in support of her motion for new trial. Juror No. 12 declared: "Throughout the trial it appeared as though the judge had a bee in his bonnet where the plaintiff was concerned. Specifically the judge seemed to be very biased against the plaintiff *personally*. The plaintiff was virtually attacked by the judge. It was uncomfortable for me to watch, I thought there was something that went on before the trial between the judge and plaintiff. There is supposed to be complete impartiality and I felt there wasn't."

Plaintiff claims the trial court repeatedly harassed her in front of the jury, causing prejudice, citing reporter's transcript pages 349–350. This was during the defense cross-examination of plaintiff. Defense counsel referred to a video clip which had just been played for the jury, and asked if it was the same as the video clip plaintiff obtained after complaining about defendant Frank's conduct. At first, plaintiff answered "We agreed it would be used—we have not had the time—." The trial court interjected: "You have to answer." Plaintiff began her answer: "We agreed—." Again, the trial court interrupted and said: "Answer the question. Is that the same video clip?" Plaintiff responded that she was unable to say that the clips were identical, but that she had stipulated that the clip would be used without objection. The court said: "Well, you're not—you're answering questions. You're not—you have an attorney. [¶] Just I don't want you getting—." Counsel for plaintiff interjected that the parties had stipulated to the use of the video.

Plaintiff also argues the trial court repeatedly yelled at her in front of the jury, did not allow her to answer questions, and allowed defendants' counsel to testify through her. The citation in support of the claim that the judge yelled at plaintiff in front of the jury is to another portion of the defense cross-examination of plaintiff regarding a video clip of

the incident. The court admonished plaintiff to describe what was happening on the video for the jurors because it was not exactly clear. Plaintiff then said: "That's Mr. Frank, that's—." The trial court interrupted, saying "No, no." She also cites another portion of her cross-examination, in which defense counsel asked whether defendant Frank told her he would have to radio for a female security officer to come do a secondary search of plaintiff. Plaintiff said he had not. The following exchange is cited: "Q. He never told you that? [¶] A. He didn't explain much of anything to me, sir. [¶] The Court: Did he tell you that or not? [¶] The witness: No."

In support of her claim that the trial court would not allow her to answer questions, and instead allowed the defense counsel "to testify through her," plaintiff cites two portions of her cross-examination. The first is on page 352 of the reporter's transcript, in a discussion of the x-ray machine at the security checkpoint through which trays of personal belongings are screened. "Q. We appear to be at 919 and 45 seconds on the first part of the clip. [¶] A. I—. [¶] Q. I'm going to point to something here, Ms. Harper—. [¶] The Witness: Your honor, I'm sorry—. [¶] The court: No, no. Just please listen to the question. [¶] Is there a question pending now?" The second passage is on the next page, regarding what was seen on the video clip. Defense counsel asked whether defendant Frank had just come into view, and then stepped back out of view behind the metal detector. Plaintiff replied: "Yes. And I just came in for the first time." Defense counsel said "There's no question." The court said: "No question pending. Listen." Plaintiff said she was sorry. The court asked her to describe what was happening on the video, saying that people are going through the metal detector. Defense counsel was admonished: "You have to describe, counselor, what is happening." Defense counsel then described people going through the metal detector as defendant Frank came in and out of view behind the detector. He asked plaintiff whether she had not yet come into view. She said "Yes. When I was trying to say something earlier."

Finally, plaintiff argues that in addition to casting aspersions and ridiculing her, the trial court allowed defense counsel to ridicule her, both while she was testifying as a witness and when she was acting as her own attorney. In the passage cited for this claim,

plaintiff was asked whether the video depicts the main elevator bay at the federal courthouse: "A. I get that confused even though I go there very frequently between the Spring and Main. [¶] I know that it is the one with the cafeteria that's across the street from it. [¶] Q. Okay. [¶] We've had testimony that you were located in the lobby. I'm sorry. That was you, that gentleman that came through? [¶] A. No. I said wait a sec. [¶] Such a nice guy. Okay. I believe that—. The court: There's no question."

As previously discussed, a failure to object to improper remarks by the trial court forfeits the claim on appeal. (*Houston*, *supra*, 54 Cal.4th at p. 1220.) Plaintiff does not contend that we should overlook this omission because an objection would not have cured the prejudice or would have been futile. (*Ibid.*)

C. Trial Court's Failure to Abide by Rulings

As we understand plaintiff's argument, at some point during the trial, she was no longer represented by counsel, and began acting as her own attorney. She contends that in light of this situation, "[a]s a prophylactic measure, and as not to make 'arguments' to the judge traditionally made as an attorney during trial, Appellant secured rulings out of the presence of the jury, and to allow plaintiff to argue at sidebar [citation]: however within minutes of issuing the ruling, the trial court called in the jury and simply said, 'I'm not on all fours here' when the Appellant mentioned the ruling. This prejudiced the plaintiff and further lends evidence to this Court's bias toward the plaintiff."

Several passages of trial transcript are cited by plaintiff in support of this claim. At page 616 of the reporter's transcript, the trial court declined her request for a sidebar conference, saying that the matter would be taken up at break. At page 624 of the reporter's transcript, the trial court again refused to allow a sidebar requested by plaintiff and said the issue would be handled at break. In the third passage, at page 663 of the reporter's transcript, defense counsel stated that he had concluded his examination of defendant Frank. The court invited plaintiff to conduct redirect examination of Frank. Plaintiff said: "Based on what we discussed earlier, we were going to table Mr. Frank. [¶] The court: No, no. Now is the time. I'm a little confused, but now is the time. He's made certain statements I'm a little confused as to what we are doing, but we just had

cross-examination. You may proceed, counsel. [¶] Ms. Harper: Okay. We did have extensive discussion. I have—. [¶] The court: I wasn't on all four's with you on the thing, but now is the time for you to proceed. Forgive me."

Plaintiff fails to explain how these rulings resulted in prejudice. Absent that showing, we find no prejudice arising from the court's decision to defer discussions to a recess instead of taking a sidebar with the jury in the courtroom. Plaintiff does not explain how she was prejudiced by the court's conduct in the final passage quoted, in which the court expresses some confusion about how plaintiff's examination of defendant Frank was going to proceed. Without more, the source of the court's confusion is unclear. On this record, we find no prejudicial conduct by the trial court in this respect.

D. Court Interference in Examination of Witness Beck

Plaintiff argues the trial court ignored the Evidence Code by requiring her witness, Thomas E. Beck, to appear before the jury three times "because the trial court refused to allow . . . testimony about the Appellant's statements *during* the encounter with Respondent Frank and while she was still upset about said encounter." Four passages of the trial transcript are cited in support of this claim.

The first is during examination of attorney Thomas Beck, who was lead attorney for the plaintiff in the federal trial in which plaintiff was engaged. Beck testified that he received a voicemail from plaintiff that morning. The trial court sustained a hearsay objection when Beck was asked what plaintiff said in the message. Beck went on to describe plaintiff's demeanor when she entered the federal courtroom as "beside herself . . . very distraught, and upset." He testified that plaintiff continued to be upset during her examination of the primary defendant in that case, and that she appeared distracted by what had just happened to her. Plaintiff also cites her testimony that, during the incident with Frank, she tried to call Beck. She was not asked, and did not testify to, what she said in her voicemail message to Beck. A third cited passage was plaintiff's testimony that she left a voicemail for Beck saying "'Hey Tom, this guy is doing this to me. And I'm down here and I'm stuck in' . . . ." The trial court overruled a hearsay objection to the last portion of this testimony.

The final cited passage occurred when Beck was recalled as a witness. The trial court did not allow him to testify about whether plaintiff told the federal court judge presiding over that trial that she was upset. Once again, the trial court sustained a hearsay objection to a question to Beck about the content of the voicemail left by plaintiff. Counsel for plaintiff asserted that it came within the excited utterance hearsay exception, but the trial court sustained the objection. The trial court also sustained a hearsay objection to a question asking Beck whether he could tell from plaintiff's voice what had happened to her.

Plaintiff asserts, without citation to the record, that Beck was called to testify again "and on the third and final time the court allowed Mr. Beck's testimony pursuant to hearsay objections. The trial court did not explain his reversal of rulings to the jury even after the Appellant requested a curative admonishment."

As defendants point out, in his third appearance as a witness at trial, Beck was allowed to testify about the content of plaintiff's voicemail. He said she was "very agitated, excited, angry, . . ." The trial court overruled a defense objection, and Beck testified to the content of the message: "[T]he gist of what I got from her at that moment was that, consistent with what I had seen of her demeanor when she was walking into the courtroom, that something awful had happened to her." The court directed Beck to testify to exactly what plaintiff said. He testified: "That a blue coat[6] put his hands on her unnecessarily, and she was offend[ed] and violated by that." He said that this recollection was consistent with what he heard plaintiff say to the federal court judge that morning.

Apparently, since the jury heard the content of plaintiff's voicemail to Beck, her issue on appeal is that Beck had to return to testify three times because the trial court excluded testimony as hearsay during his first two appearances. She does not explain how she was prejudiced by this. Defendants point out that the jury need not be concerned

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[6] Trial testimony established that the court security officers were sometimes called "blue coats."

with the reasons for court rulings made during the course of trial. On this record, we find no basis for reversal.

E. Dismissal of Jurors

Plaintiff's opening brief contains a heading reading: "D. Dismissal of female Jurors, and refusal to dismiss Juror who showed financial hardship prejudiced Appellant." There is no argument, citation to authority, or citation to the record under this heading. We treat it as abandoned. (*Ortega v. Topa Ins. Co.* (2012) 206 Cal.App.4th 463, 473, fn. 9.)

F. Continuances

Plaintiff asserts: "The Court granted the defendant's *oral* request to continue the trial with no showing of medical or physical unavailability in stark contrast to the court sanctioning the Appellant and refusing her a continuance for medical reasons and even refusing to allow an attorney to specially appear on her behalf." Plaintiff cites two pages of her motion to reconsider an award of sanctions made against her prior to trial in support of this claim. The statement of facts in support of that motion states that plaintiff was medically incapacitated at the time of the hearing and had not had time to seek a continuance. She also cites her declaration in support of the motion, providing information about her medical issue at the time. The declaration does not say that she was not allowed to have an attorney appear on her behalf. Instead, it says that Mr. Beck appeared, but "said absolutely nothing in defense of the motion." No authority is cited in support of this claim, and we treat it as forfeited. Even if preserved, plaintiff has failed to demonstrate error requiring reversal on this point.

III

Plaintiff argues the trial court improperly limited evidence on her negligence cause of action and compounded that error by granting a directed verdict to AKAL Security on that claim.

"'A directed verdict may be granted only when, disregarding conflicting evidence, giving the evidence of the party against whom the motion is directed all the value to

which it is legally entitled, and indulging every legitimate inference from such evidence in favor of that party, the court nonetheless determines there is no evidence of sufficient substantiality to support the claim or defense of the party opposing the motion, or a verdict in favor of that party. [Citations.]' [Citation.] On appeal, we decide de novo whether sufficient evidence was presented to withstand a directed verdict. [Citation.]" (*Bonfigli v. Strachan* (2011) 192 Cal.App.4th 1302, 1315.)

A. Exclusion of Evidence

Plaintiff argues the trial court refused to allow her to present evidence regarding continuing harassment and damages with respect to her negligence claim against AKAL. The claim is based on her examination of Frank. The trial court sustained a foundational objection when plaintiff asked Frank if he had been barred from the federal courtroom where she was trying the police misconduct case. The court overruled an objection when plaintiff asked Frank whether he had engaged in a pattern of harassment against her after this incident. The court allowed plaintiff to ask Frank whether, after this incident, he had come into a different courtroom where plaintiff was engaged and "mad dogged me similar to what you're doing now, sir?" Frank explained he had been assigned to the courtroom by his supervisor and denied staring at her in any way. When plaintiff asked whether Frank went to that courtroom intentionally because he knew she was trying a case there, Frank said he had not. The court interjected: "He's answered these questions, counsel." Plaintiff was also allowed to ask Frank whether he intentionally gave a federal judge another name when asked who he was. Frank denied this.

The trial court sustained an objection to the following question by plaintiff: "Isn't it true that you wrote a report regarding your contact with me in this courtroom and filed it in Judge Matts'[7] courtroom, and filed it with your supervisor, isn't that true, sir?" Plaintiff argued that an aspect of her claim for damages was the continuing harassment by Frank. The court had the question read back, sustained the objection, and asked plaintiff

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[7] We infer this is a reference to Senior United States District Judge A. Howard Matz.

to reframe it. Plaintiff then asked Frank whether he wrote a report regarding an incident on April 30, 2007. The court sustained a defense objection, citing Evidence Code section 352, noting that the question asked about events after the incident on which the lawsuit was based.

Plaintiff cites Evidence Code section 352, and argues a trial court must exercise its discretion under that statute reasonably. She asserts: "The fact[s] as stated above clear[ly] show that this cause of action should have gone to the jury as a question of fact and not be deposed [*sic*] of by the judge as a matter of law." Plaintiff cites *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659 for the proposition that the trial court should not exclude evidence directly relevant to the primary issues of the litigation because it is prejudicial to the opponent. (*Id*. at p. 674.) The only question cited by plaintiff as to which an objection was sustained under Evidence Code section 352 was whether Frank wrote a report regarding contact with plaintiff on April 30, 2007 (more than two months after the incident here). Plaintiff does not demonstrate how sustaining the objection to this question impaired her ability to prove her claim against defendant AKAL for negligence.[8]

B. Directed Verdict

After plaintiff rested, and before closing argument or jury instructions, defendants moved for a directed verdict as to all causes of action.[9] The motion was denied as to the cause of action for violation of Civil Code section 52.1. Defendants sought a directed verdict on the cause of action against Frank for negligence on the ground that there was no evidence of a breach of any duty he had to plaintiff. Plaintiff's counsel argued that

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[8] Plaintiff's brief contains the following conclusory assertion: "The trial court refused to allow the Appellant to testify about or elicit testimony regarding damages, continued harassment which went to damages and regarding AKAL Security's negligence; then denied shutting down the plaintiff's continued harassment evidence." (Footnotes omitted.)

[9] Defense counsel referred to filing a motion for directed verdict, but no written motion appears in the record on appeal.

Frank had a duty under the contract between AKAL Security and the United States Marshal Service to maintain security at the courthouse. He continued: "It is our position that his attempt to subdue his hardship as he refers to it is a breach of his duty under the contract." The court questioned whether plaintiff's attorney was referring to evidence of assault or battery, both intentional acts, rather than negligence. It asked plaintiff's counsel what Frank did that was negligent. Plaintiff's counsel responded: "Putting his finger in Ms. Harper's face could be considered a negligent act." The court indicated it had trouble treating that conduct as a negligent, rather than intentional, act.

Plaintiff's counsel then argued that Frank was negligent in not processing plaintiff through the security checkpoint in an appropriate manner. The court responded: "You have assault and battery coming up. No. I have a problem with looking at negligence. [¶] . . . We've had a lot of testimony by all the people from—what he did was—what was expected of him as a C.S.O. [court security officer] and there was no testimony as to negligence. I just can't find any negligence on the part of that, looking at all the evidence and disregarding conflicting evidence and indulging in every legitimate inference that may be drawn from the evidence in favor of plaintiff. [¶] The court finds there is no evidence sufficient or substantial to support a verdict in favor of the plaintiff on the negligence issue." Counsel for plaintiff cited evidence, including plaintiff's testimony and the video depicting her demeanor during the incident showing that she was cooperative during the incident, which went to Frank's negligence in breaching his duty. The trial court found that "all the testimony is to the contrary." A directed verdict on the negligence cause of action was granted as to Frank.

As to defendant AKAL, defense counsel argued plaintiff had presented no evidence to support her claim that it negligently retained and supervised Frank. In addition, he argued that no basis for respondeat superior liability had been proven since the trial court had directed a verdict in favor of Frank on the negligence theory. Plaintiff argued that her negligence claim against AKAL encompassed a claim for intentional infliction of emotional distress. The trial court said this related to other causes of action, and that the issue was her claim for negligent hiring, supervising and retaining defendant

Frank. It asked for the evidentiary basis to support that claim. Counsel for plaintiff began to argue the evidence against AKAL, when the court interrupted and said: "Was he unfit or incompetent to perform the work for which he was hired? I'm going to make the finding that he was not." Plaintiff said: "We withdraw that one. We want to get back to the negligence, intentional infliction of emotional distress, negligent infliction of emotional." The trial court said that plaintiff was referring to a different cause of action, and "we don't have it pled."

After a weekend recess, plaintiff brought a motion for reconsideration of the directed verdict ruling with respect to AKAL. The written motion, if there was one, is not in the record on appeal. The court said it already had ruled on the directed verdict. Plaintiff said "I'm making a motion to withdraw," but wanted to make a record for appeal. Plaintiff recounted that the jury had heard evidence regarding pattern and practice at AKAL. She contended that the jury could conclude that the AKAL witnesses lied, failed to investigate her complaint against Frank, conspired in their story, and that the court's directed verdict left "nowhere on the verdict form to check [AKAL] is liable for their employees and is negligent. Your honor didn't allow that question of fact to go to the jury." She argued that the directed verdict was improper in light of the conflicting evidence and that the court had overstepped its bounds. In response, defense counsel argued that the claim for negligent hiring, training, and retention was based on conduct by AKAL's personnel before the incident with plaintiff, rather than negligence in conducting an investigation of the complaint by plaintiff.

Although plaintiff at one point stated that she withdrew her negligence claim against AKAL, she changed her mind after a weekend recess and asked the court to reconsider the directed verdict on that claim. Based on the ensuing colloquy, we infer that the negligence claim against AKAL was reinstated. In the end, the trial court granted a directed verdict in favor of AKAL on the negligence cause of action. Before addressing that ruling, we consider the directed verdict as to Frank.

1. Directed Verdict as to Frank

The gravamen of the negligence claim against Frank as alleged in the complaint is that "Frank grabbed plaintiffs arm, squeezed it and caused pain without legal cause to do so. Plaintiff feared that Frank would strike her." Plaintiff testified that Frank grabbed her arm and squeezed it and pointed his finger in her face while yelling at her. This testimony describes intentional, rather than negligent acts. Plaintiff's causes of action against Frank for assault and battery were tried by the jury. Conduct which is the basis for an intentional tort is not a basis for a negligence claim: "The rule was stated in *Bartosh v. Banning* (1967) 251 Cal.App.2d 378, 59 Cal.Rptr. 382, as follows: '[A]ssault and battery are intentional torts. In the perpetration of such crimes negligence is not involved.' (*Id.* at p. 385.)" (*Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 349.) On this basis, we conclude the trial court properly granted a directed verdict on the *negligence* claim against defendant Frank.

2. Directed Verdict Against Defendant AKAL

The negligence cause of action in the complaint alleges that AKAL negligently hired Frank, failed to train him, and retained him although it knew or reasonably should have known that "he is incompetent to hold the position he currently holds. . . . [¶] Both AKAL and the U.S. Marshal has [*sic*] failed to investigate the instant matter. The defendants had a duty to protect plaintiff and to not cause unwarranted injury, all breached that duty."

On appeal, plaintiff's entire argument on the directed verdict is comprised of a long quotation of the argument on the motion. She provides no citation to authority. The basis of her argument to the trial court appears to be speculation the jury would find that Cobarrubias, Frank, and other AKAL employees lied about the incident, failed to investigate her personnel complaint, and conspired in creating a defense version about what happened. She argued: "[T]here's nowhere on the verdict form to check [AKAL] is liable for their employees and is negligent. Your honor didn't allow that question of fact to go to the jury." Plaintiff argued AKAL had a duty to investigate her personnel complaint, and failed to do so.

There was substantial evidence of Frank's background and training in law enforcement, and specifically his training for AKAL. He served almost seven years as a Los Angeles County Deputy Sheriff before becoming a court security officer. He went through the Sheriff's academy. He was medically retired by the Sheriff's Department after he was shot in the line of duty and became medically disabled. He left the department in good standing. In addition, he had extensive video training and training in Georgia for AKAL. He had been a court security officer for AKAL for almost six years at the time of trial. This involved daily clearing of several hundred people through security during this period. As an AKAL court security officer, he was sworn as a special deputy to the United States Marshal's Office, which required him to conform to the performance standards for that office. This gave him the authority of a United States Marshal while at work, including the power to arrest.[10] He carried a weapon when on duty for AKAL. He had the authority to detain and question people who may have engaged in suspicious activity. Had the situation with plaintiff escalated, Frank was authorized to arrest her.

Frank also testified that it would have been a breach of the U.S. Marshal's performance standards to allow plaintiff to simply leave her property unattended and exit the building. The building then would have had to be closed down.

Contrary to plaintiff's argument, the evidence presented at trial established that the incident was investigated. Frank wrote a report about the incident that day. He wrote a second report as well in response to specific questions. He was never charged with any crime as a result of this incident. At the conclusion of the investigation of the incident, Frank received instructions on how to handle such a situation. He went through this with his supervisor, Mr. Irwin, the site supervisor for AKAL.

After speaking with plaintiff and Frank on the morning of the incident, lead court security officer Cobarrubias wrote a report. He was interviewed as a part of an

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[10] Frank explained that the practice is to call the U.S. Marshal's Service in the event someone is to be arrested.

investigation concerning this matter. After plaintiff cleared security, Cobarrubias contacted Al Irwin, the AKAL site manager. Irwin ordered Cobarrubias to obtain statements from the other court security officers who had been at the checkpoint, Diane Rojas and Frank Rodriguez. These statements were sent to Irwin within 24 hours.

Site Supervisor Irwin conducted an investigation into the February 8, 2007 incident with plaintiff and prepared a report. He reported to Randy Martin, who had input to the investigation. Martin told him not to call plaintiff. Irwin never spoke with plaintiff. After completing his investigation, Irwin counseled defendant Frank regarding his manner of approaching plaintiff in this case. He discussed this with many of the court security officers in the building, as well as with Cobarrubias. An action report for defendant Frank documented this counseling. An action report is not considered a written warning. Irwin reviewed the video of the incident shortly after it occurred. After receiving the reports from Cobarrubias, he spoke with various witnesses, including Frank and Cobarrubias.

Plaintiff cites no evidence contradicting this showing by AKAL. Instead, she relies on speculation. She did not present evidence to withstand a directed verdict as to AKAL. (*Bonfigli v. Strachan*, *supra*, 192 Cal.App.4th at p. 1315.)

C. Limitation of Damages Evidence

We quote plaintiff's next challenge to the directed verdict in full: "This trial court repeatedly prevented Appellant from introducing damages to provide additional support for the causes of action at trial." In support of this argument, plaintiff cites the court's ruling on two lines of questioning during trial. In one, the trial court sustained objections to plaintiff's questions to court security officer Ross about whether he "knew it brightened [her] day every time [she] came into court to see [him] before this incident," and that he no longer spoke to her. In the second line of questioning, the trial court sustained objections when plaintiff attempted to ask Frank whether he had "mad dogged" her by entering a different courtroom on another day. Plaintiff cites no authority in support of her argument. We treat it as abandoned on that ground. (*Ortega v. Topa Ins. Co.*, *supra*, 206 Cal.App.4th at p. 473, fn. 9.)

D. Evidentiary Rulings

Plaintiff claims she has demonstrated cumulative error because the trial court improperly overruled or sustained objections to favor defendants. While several citations to the record are included, plaintiff provides no authority to support her claim that reversal of the directed verdict is warranted. We decline to treat it for that reason. (*Ortega v. Topa Ins. Co.*, *supra*, 206 Cal.App.4th at p. 473, fn. 9.)

IV

Plaintiff argues defense counsel violated a pretrial ruling and intentionally misled the jury. She asserts that defense counsel "represented to the Court that CSO Ross 'didn't know anything and did[n't] see anything' when in fact the Trial Transcript reveals that Ross was a percipient witness to the incident and told the Appellant to 'get the tape' of the incident." No citation to the record is given to support this claim and we therefore treat it as forfeited. Plaintiff also argues: "At RT 390 Defense counsel Ronk knows that answer he received on line 9-10 was in reference to a death the plaintiff suffered and was denied a continuance by the trial court. . . ." The cited passage is plaintiff's testimony that as a general rule, she is respectful to authority figures, with one large exception: that "death would cause someone to act differently than they would normally act in any other situation." On the page of the transcript cited by plaintiff, she explained that death is the exception to her rule of being respectful to authority figures. Defense counsel asked: "I'm sorry. Death?" Plaintiff answered: "If someone dies, we're liable to do whatever—I mean we're liable to do anything." Plaintiff does not explain why this line of questioning provides a basis for new trial.

Plaintiff also argues defense counsel committed misconduct by presenting an argumentative opening statement. She contends that counsel "testified" throughout the argument "as though counsel were not only present but [an] expert in policy, procedure, a psychic and a judge." Plaintiff contends the only remedy for this misconduct is a new trial.

The inclusion of argumentative matters in opening statements is misconduct. (*Love v. Wolf* (1964) 226 Cal.App.2d 378 [thinly veiled accusation in opening statement that party had bribed the head of the Food and Drug Administration to allow continued sale of substance that otherwise would have been removed from the market one example of misconduct]; see also Wegner et al., California Practice Guide: Civil Trials and Evidence (The Rutter Group 2012) [¶] 6:60, p. 6–12.) Admonishing the jury may cure any impropriety. (See *Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 318.)

Shortly after defense counsel began his opening statement, he said that AKAL is a private security company that almost exclusively contracts with the federal government. Counsel for plaintiff objected that defense counsel was testifying. The court instructed the jury: "Opening statements are not evidence; they are just what the facts, what . . . the attorneys feel the facts will show, to guide you as you go through the case. Defense counsel told the jury that AKAL's work for the federal courthouses is "not garden variety private security work. This is not security work at a mall, a gas station, 7-11." He also described the importance of AKAL's work by discussing the bombing of the Oklahoma City federal building, the trial of Timothy McVey for that bombing, the murder of a court security officer at a federal courthouse in Las Vegas, and an incident in which someone ran through security at the metal detector while carrying pipe bombs. Counsel for plaintiff objected that this was argumentative.

Defense counsel emphasized potential harm that can result from a breach of security, saying that it is a serious job taken seriously by the people who perform it. Then counsel said: "Mr. Frank himself knows that, if there's a lapse in security, the consequences can be fairly dramatic. He was manning a desk at the Sheriff's substation when a subject came in off the street and shot him." In describing the incident between plaintiff and Frank, counsel argued there are no exceptions to passing through security. "You can't just say, hey, I'm a lawyer, let me through. It's no excuse to say, I've been here many times because a lot of times as litigants or someone else who's a common or frequent guest at the courthouse who causes problems." Defense counsel told the jury that plaintiff is a former police officer who had dealt with such situations and knew the

proper procedure. Concluding, defense counsel said that the U.S. Marshal's Service found no fault with Frank, and that the jury "won't find anywhere that the police found any problem with Mr. Frank."

While these statements by defense counsel appear to have gone beyond the confines for opening statement and to have been improper, plaintiff has not demonstrated prejudice as a result. The trial court instructed the jury that the opening statements are not evidence. The jury also was instructed that "[w]hat the attorneys say during the trial is not evidence." No basis for reversal has been shown by plaintiff on this ground.

DISPOSITION

The judgment is affirmed. Respondents to have their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.