Filed 9/25/19 Ash v. Pick 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

HIRAM ASH, Plaintiff and Appellant, v. HAROLD PICK, Defendant and Respondent.	B279672 Los Angeles County Super. Ct. No. BC499614

APPEALS from a judgment and order of the Superior Court of Los Angeles County, Richard E. Rico, Judge. Affirmed.

Hiram Ash, in pro. per., for Plaintiff and Appellant.

Mark R. Weiner & Associates and Kathryn Albarian for Defendant and Respondent.

Plaintiff Hiram Ash sued defendant Harold Pick, alleging defendant's dog bit him, causing plaintiff personal injuries. Plaintiff appeals the judgment entered on the jury's special verdict, which found defendant did not own the dog that bit plaintiff. Plaintiff asserts numerous trial court errors, but he does not dispute that the evidence at trial supported the jury's finding. He also contends the court erred in denying his motion to tax defendant's costs. We affirm.

FACTS AND PROCEDURAL BACKGROUND

We draw the facts from plaintiff's trial testimony, which was the only evidence he presented at trial. We state additional facts and procedural history relevant to plaintiff's appellate arguments in the related discussion sections of this opinion.

Plaintiff sued defendant in January 2013, asserting three causes of action for motor vehicle negligence, intentional tort, and general negligence, all based on the allegation that defendant's dog lunged out of the passenger window of a van and bit plaintiff on the cheek.[1] The complaint included a claim for exemplary damages.

In March 2015, defendant moved for summary adjudication of plaintiff's exemplary damages claim, asserting the claim had no merit. The trial court granted the motion on September 16, 2015. On July 15, 2016, plaintiff filed a motion seeking leave to file an amended or supplemental complaint to revive the exemplary damages claim. Defendant opposed the motion, arguing it was procedurally defective and constituted an

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[1] Plaintiff also named defendant's mother, Annedore Pick, as a defendant, alleging she owned the van involved in the incident. The trial court granted nonsuit in Ms. Pick's favor. Plaintiff does not challenge the ruling in this appeal.

untimely motion for reconsideration of the summary adjudication order. The trial court denied plaintiff's motion.

On August 23, 2016, the court held a one-day jury trial on plaintiff's claims. Plaintiff offered the following testimony: On the day of the alleged incident, plaintiff was walking through the parking lot of the Northrop Grumman Building Complex in Manhattan Beach on his way to a swap meet. As he passed a van in the parking lot, a dog lunged from a passenger side window and bit him on the left cheek. He immediately put his hand to his cheek and found it covered in blood.

Plaintiff identified the dog as a "big German shepherd." He took down the van's license plate number, but did not leave a note. He reported the incident to a security guard, who was about 50 feet away. When he returned to the location of the incident with the security guard, about two minutes later, the van was gone. He was still bleeding and sought aid from paramedics. The security guard called the local police department, which sent an animal control unit to the scene.

The paramedics put a compression on plaintiff's wound, took his blood pressure and other vitals, and told plaintiff to seek medical treatment from a doctor. It took about 15 minutes for the bleeding to stop.

Plaintiff spoke to the animal control officer who reported to the scene. He gave the officer the van's description and license plate number.

Two days after the incident, plaintiff saw his doctor. The doctor examined the wound and advised plaintiff to monitor it. He prescribed plaintiff antibiotics, but did not recommend sutures, because they would leave a bad scar. Plaintiff experienced a lot of pain from the cheek wound, especially

when he ate. Although the discomfort persisted for a few weeks, plaintiff no longer experiences it.

Plaintiff spoke again to an animal control representative, who advised him that officials would contact the dog's owner. He later received a letter from the county health department notifying him that the dog had been quarantined and that it did not have rabies. Plaintiff became distressed, however, when he learned the health department did not impound the dog, but had relied upon the dog's owner to quarantine the dog at home. The health department advised plaintiff that if the dog is licensed and the dog's owner confirms it is up-to-date on its rabies vaccination, then the department allows the owner to quarantine the animal.

Plaintiff learned through discovery that defendant owned two dogs. He testified that this revelation increased his concern about rabies, because he worried the wrong dog may have been quarantined. Defendant reported that his other dog was an Anatolian shepherd. Plaintiff did not see a second dog in the van when he was bitten. He has never met defendant and has had no face to face contact with him. He has visited the swap meet several times since the incident, but has not seen the van.

After plaintiff testified, his counsel told the court that plaintiff had no other witnesses. The court asked if plaintiff was resting his case, and counsel confirmed that he was, subject to recalling plaintiff for rebuttal. With that confirmation, defendant elected not to present any witnesses and to rest his case.[2]

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[2] Outside the jury's presence, defendant moved for nonsuit, asserting plaintiff failed to present evidence that would support a finding that he, or his mother who was also named as a defendant, owned the dog that bit plaintiff. As noted (*ante*, fn. 1),

In closing argument, plaintiff's counsel emphasized that plaintiff had not seen the dog's owner when the incident occurred, because the van fled the scene, but he was able to identify the dog that bit him with the van's license plate number. Counsel then discussed plaintiff's testimony regarding his injury and the distress he felt before receiving confirmation that the dog had a rabies vaccine.

Defense counsel argued there was insufficient evidence to prove defendant owned the dog that bit plaintiff. He emphasized plaintiff had the burden of proof, the evidence was limited to plaintiff's testimony, and plaintiff had failed to present documentary or other evidence to corroborate his account of the incident. In particular, counsel noted that plaintiff did not present any of the discovery responses that he referenced in his testimony, nor did he present corroborating testimony from the animal control officers who investigated the incident and the owner's identity. Regarding damages, defense counsel argued plaintiff's testimony supported a figure of $500, at most.

In rebuttal, plaintiff's counsel focused on damages, arguing plaintiff experienced significant pain, suffering, and anxiety as a result of the bite.

The jury returned a special verdict, finding (by 10 to 2) that defendant's dog did not bite plaintiff.

Plaintiff moved for a new trial, asserting attorney misconduct by defense counsel and trial court error with respect to the exclusion of certain evidence. The court denied the motion.

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the court granted nonsuit as to Ms. Pick, but allowed the case to go to the jury as to defendant.

Plaintiff moved to strike defendant's memorandum of costs, or to tax certain items. Defendant opposed the motion and offered the supporting declaration of his counsel, attesting to the cost of each challenged item. The trial court denied plaintiff's motion.

Plaintiff filed timely appeals from the judgment and the order denying his motion to tax costs.

DISCUSSION

1. *Legal Principles Governing Appellate Proceedings: The Presumption of Correctness and Appellant's Burden to Establish Prejudicial Error*

"[I]t is a fundamental principle of appellate procedure that a trial court judgment is ordinarily presumed to be correct and the burden is on an appellant to demonstrate, on the basis of the record presented to the appellate court, that the trial court committed an error that justifies reversal of the judgment." (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608–609 (*Jameson*).)[3]

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[3] For the first time in his reply brief, plaintiff argues *Jameson* compels reversal of the judgment, because the trial court failed to make a court reporter available for the hearing on his new trial motion. In *Jameson*, our Supreme Court reversed a nonsuit against an indigent plaintiff, concluding the San Diego Superior Court's general policy of not providing official court reporters, even for indigent litigants, violated the public policy of facilitating equal access to the courts embodied in Government Code section 68630, subdivision (a). (*Jameson, supra,* 5 Cal.5th at pp. 598–599.) Critically, the *Jameson* court concluded the policy was prejudicial under the circumstances of the case, because the trial court entered nonsuit based on the contents of the indigent plaintiff's unreported opening statement. (*Id.* at pp. 623–625.) Here, even if the trial court failed to make an official court reporter available (a matter we cannot confirm from

" 'This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' " (*Denham v. Superior Court of Los Angeles County* (1970) 2 Cal.3d 557, 564 (*Denham*); see Cal. Const., art. VI, § 13.)

"No judgment shall be set aside . . . in any cause, on the ground of . . . the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) This constitutional mandate "generally 'prohibits a reviewing court from setting aside a judgment due to trial court error unless it finds the error prejudicial.' [Citation.] The [mandate] applies to both constitutional and nonconstitutional errors. [Citation.] It 'empower[s]' appellate courts 'to examine "the entire cause, including the evidence," ' and 'require[s]' them 'to affirm the judgment, notwithstanding error, if error has not resulted "in a miscarriage of justice." ' " (*F.P. v. Monier* (2017) 3 Cal.5th 1099, 1108 (*F.P.*).) "Under this standard, the appellant bears the burden to show it is reasonably probable he or she would have received a more favorable result at trial had the error not occurred." (*Citizens for Open Government v. City of Lodi* (2012)

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the record presented), there still would be no prejudice, because plaintiff's new trial motion was based on trial proceedings for which we have a transcript to review. (Cf. *id.* at p. 599 [observing, "the Court of Appeal rejected plaintiff's appeal without reaching the merits of plaintiff's legal challenge to the nonsuit on the ground that plaintiff's legal contentions could not be pursued on appeal in the absence of a reporter's transcript"].)

205 Cal.App.4th 296, 308, citing *People v. Watson* (1956) 46 Cal.2d 818, 836; see also Code Civ. Proc., § 475 ["There shall be no presumption that error is prejudicial, or that injury was done if error is shown."].)

Finally, while we are sympathetic to the challenges facing plaintiff as a pro. per., the fact that he is representing himself does not diminish his burden to establish prejudicial error on appeal. The law permits a party to act as his own attorney, however, " '[s]uch a party is to be treated like any other party and is entitled to the same, but no greater[,] consideration than other litigants and attorneys. [Citation.]' [Citation.] Thus, as is the case with attorneys, pro. per. litigants must follow correct rules of procedure." (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247.)

With these principles in mind, we turn to the merits of plaintiff's various challenges to the judgment and cost award.

2. *Plaintiff Fails to Establish Prejudicial Error Regarding the Transfer of His Case and the Order to Refile His Discovery Motions*

To respond to systematic budget reductions, in March 2013, the Los Angeles Superior Court (LASC) issued a General Order establishing three Personal Injury Courts to adjudicate all pretrial matters in the more than 18,000 general jurisdiction personal injury cases then pending in the Central District. (See Super. Ct. L.A. County, Amended General Order re Personal Injury Court Procedures (July 15, 2013) p. 2 [General Order].)

On January 22, 2013, when plaintiff filed his original complaint, the LASC assigned the case to Judge James Dunn in Department 26. On March 11, 2013, following the General Order, the LASC reassigned the case to Judge Samantha Jessner in Department 93, one of the newly created Personal Injury

Courts. While the case was pending in Department 93, plaintiff filed four motions to compel various discovery responses. On January 6, 2014, the LASC reassigned the case to Judge Teresa Beaudet in Department 97, another of the Personal Injury Courts.

On February 19, 2014, Judge Beaudet issued an order determining the case was "more complicated than the Personal Injury Courts can handle." The order transferred the case to Judge Richard Rico in Department 17, and vacated the hearing date on plaintiff's pending discovery motions. Plaintiff petitioned this court for writ relief, arguing the case was not complicated and the transfer would delay adjudication of the action. We summarily denied the petition.

On April 1, 2014, Judge Rico issued a ruling after a status conference with the parties, ordering "plaintiff's four pending discovery motions off calendar, to be refiled." Plaintiff did not refile the discovery motions as the court had directed, but instead filed a fifth motion to compel responses to different discovery. On September 24, 2014, the court granted the motion in part.[4]

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[4] Plaintiff maintains defendant failed to serve him with defendant's opposition to the motion to compel and the court erred in ruling on the motion without striking the opposition. Our review of the court's order shows it denied part of plaintiff's motion based on the contents of defendant's discovery responses. While plaintiff complains that he was not served with defendant's opposition, he does not explain why the court's ruling was substantively erroneous. Plaintiff has failed to establish an abuse of discretion. (See *Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1074 [appellant's failure to address trial court's "various and varying reasons for sustaining 25 separate objections" with " 'argument and citations to authority

Plaintiff contends the transfer of his case from the Personal Injury Court to Judge Rico's independent calendar court violated the LASC's governing General Order. He also argues the transfer deprived him of vital discovery by vacating the pending hearing date in the Personal Injury Court. Neither contention establishes reversible error.

The General Order provides, in relevant part: "The [Personal Injury] Courts will transfer a matter to an [Independent Calendar] Court if the case is . . . 'complicated.' In determining whether a personal injury case is too 'complicated' for the [Personal Injury] Courts to manage, the [Personal Injury] Courts will consider, among other things, whether the case will involve numerous parties, cross-complaints, witnesses (including expert witnesses), and/or pretrial hearings." (General Order, *supra,* at p. 8.) A supplement to the General Order elaborates that a personal injury case that involves "*several discovery disputes* and issues of first impression will require more pretrial court resources than the [Personal Injury] Courts can deliver," and "[a]t the direction of Department One, the [Personal Injury] Courts transfer such cases to Independent Calendar Courts . . . because the [Independent Calendar] Courts have greater capacity to manage such cases." (Super. Ct. L.A. County, Personal Injury Courts Frequently Asked Questions (July 15, 2013) p. 3, italics added.) In view of plaintiff's four pending discovery motions, Judge Beaudet did not err in determining the case was too complicated for the Personal Injury Courts to manage.

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as to why the trial court's evidentiary rulings were wrong' " constituted waiver of issue on appeal].)

As for plaintiff's contention that the case should have been returned to Department 26, where it had been originally assigned, rather than transferred to Department 17, plaintiff again fails to establish a violation of the General Order. While the General Order supplement states that "cases filed before March 18, 2013 [will be returned] to the [Independent Calendar] Court assigned to the case before it was transferred to the [Personal Injury] Courts," it also stipulates that, "[i]f the judge presiding in the previous [Independent Calendar] Court is no longer available, the case will be assigned to another [Independent Calendar] Court in the same District." (Personal Injury Courts Frequently Asked Questions, *supra,* at p. 4.) Plaintiff has not shown that Judge Dunn was available to preside over his case when the transfer occurred. In the absence of such a record, we must presume the Presiding Judge complied with the General Order and the LASC local rules governing the assignment of direct calendar cases. (See *Jameson, supra,* 5 Cal.5th at pp. 608–609; *Denham, supra,* 2 Cal.3d at p. 564; see also Super. Ct. L.A. County, Local Rules, rules 3.2 & 3.3(a).)

Plaintiff's contention that the transfer deprived him of vital discovery likewise lacks merit. The trial court "is vested with wide statutory discretion to manage discovery." (See *Pomona Valley Hospital Medical Center v. Superior Court* (2012) 209 Cal.App.4th 687, 692.) Faced with plaintiff's multiple motions to compel discovery responses, the Personal Injury Court was not only warranted in transferring the case to an independent calendar court, but it also was required to vacate the pending hearing on those motions. Further, because the General Order establishes unique procedural prerequisites for bringing a motion to compel (see General Order, *supra*, at pp. 6-7), Judge

Rico was plainly justified in ordering plaintiff to refile the motions in compliance with the local rules applicable to his courtroom. (See Super. Ct. L.A. County, Local Rules, rule 3.24(c) [outlining procedure for first status conference and evaluation of case-management plans].) Ultimately, for reasons that are not entirely clear from the record, plaintiff decided not to refile the motions as the court's order directed. That was plaintiff's choice; it was not the trial court's error.

3. *Plaintiff Fails to Establish Prejudicial Error Regarding the Court's Denial of a Trial Continuance*

On August 18, 2016, five days before trial, plaintiff filed an ex parte application requesting a trial continuance on the grounds that: (1) plaintiff wanted to attend a three-day conference in San Francisco, for which he had "purchased and made travel arrangements some time ago"; and (2) he recently identified a potential witness with information about another attack by one of defendant's dogs that would support his dismissed exemplary damages claim. The trial court denied the request.

On August 23, 2016, the morning before trial was to commence, plaintiff filed another ex parte application for a trial continuance, this time seeking additional time to serve a trial subpoena on the witness identified in the earlier application. Plaintiff asserted he had delayed serving the subpoena because he thought his earlier request for continuance would be granted and he could not serve the subpoena without a "firm" trial date. The court denied the request and the case proceeded to trial as scheduled.

Plaintiff appears to argue the court's refusal to grant a trial continuance denied him the right to have his case decided on the

merits. He relies upon *Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389, where the reviewing court held the trial court abused its discretion when it denied a trial continuance based solely upon "the impact of a continuance on the court's calendar," without considering other "competing interests at stake." (*Id.* at p. 1399.) In reaching that conclusion, the *Oliveros* court observed: " ' "While it is true that a trial judge must have control of the courtroom and its calendar and must have discretion to deny a request for a continuance when there is *no good cause* for granting one, it is equally true that, absent [a *lack of diligence* or other abusive] circumstances which are not present in this case, a request for a continuance supported by a showing of good cause usually ought to be granted." ' " (*Id.* at p. 1396, italics added.)

While plaintiff focuses on what he views as prejudice, he fails to explain why the trial court was wrong to find a lack of good cause for the requested continuance.[5] Rule 3.1332 of the California Rules of Court makes clear: "[T]he dates assigned for a trial are firm" and "[a]ll parties and their counsel must regard the date set for trial as certain." (Cal. Rules of Court,

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[5] Plaintiff suggests the trial court's management of the case and its ongoing discovery disputes, punctuated by the court's refusal to grant a trial continuance, caused him to delay urgent surgery and contributed to what has developed into a severe heart condition. We are of course sympathetic to plaintiff's medical condition, and recognize that medical emergencies are grounds for a continuance when they cause a party, essential witness, or trial counsel to be unavailable. (Cal. Rules of Court, rule 3.1332(c)(1)–(c)(3).) However, we cannot consider plaintiff's medical condition in this appeal, because he did not raise it as a ground for continuance in his applications to the trial court.

rule 3.1332(a).) The rule specifies that the party seeking a continuance "must make the motion or application as soon as reasonably practical once the necessity for the continuance is discovered" and that the court "may grant a continuance only on an affirmative showing of good cause requiring the continuance." (Cal. Rules of Court, rule 3.1332(b) & (c).)

Plaintiff admits he knew of the conflict between the conference and the pending trial date "some time ago," yet he failed to request a continuance until five days before the trial. As for the newly identified witness, plaintiff's excuse that he could not have subpoenaed the witness's appearance until he had a "firm" trial date cannot be reconciled with rule 3.1332(a)'s explicit instruction that "[a]ll parties and their counsel must regard the date set for trial as certain."[6] (Cal. Rules of Court, rule 3.1332(a).) On this record, we cannot find the trial court abused its discretion in denying plaintiff's belated continuance requests.

4. *Plaintiff Fails to Establish Prejudicial Error Regarding the Court's Evidentiary Rulings*

On the morning of the trial, before jury voir dire, the trial court held a hearing with counsel to discuss plaintiff's preliminary exhibit list. Defendant objected to the following exhibits on the grounds they were either irrelevant or constituted inadmissible hearsay for which plaintiff could not establish a valid exception: (1) letters from plaintiff's counsel to defendant

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[6] Moreover, as we explain below with respect to the ruling on summary adjudication, because the new witness's testimony related to only the question of exemplary damages, and would not have supported the predicate finding that defendant's dog bit plaintiff, the denial of a continuance to subpoena the witness was harmless, in any event.

regarding the incident; (2) documents purportedly from the Department of Public Health, including quarantine records and an incident/bite report; (3) a Sheriff's Department record regarding attempts to serve process on defendant; (4) vaccination records for defendant's dog; (5) an Internet article regarding the 10 dog breeds on the Center for Disease Control and Prevention's most dangerous list; and (6) federal court documents from an unrelated case against defendant.[7] After hearing argument from counsel, the court excluded the exhibits.

Plaintiff contends the court erred in excluding the exhibits. We need not reach the merits of plaintiff's contentions regarding

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[7] For the first time on appeal, plaintiff argues the court erred by allowing defendant to make oral in limine motions in violation of applicable local rules. Plaintiff forfeited this claim by failing to make his objection in the trial court. (See *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 826 ["an appellate court will ordinarily not consider procedural defects or erroneous rulings where an objection could have been, but was not raised below"].) Moreover, in the reply brief for his new trial motion, plaintiff admitted (as defendant's opposition noted) that he did not identify his proposed trial exhibits to defendant until the morning of the trial, in violation of the court's order to exchange trial exhibits at the final status conference. (See Super. Ct. L.A. County, Local Rules, rule 3.25(f)(1) ["At least five days prior to the final status conference, counsel must serve and file lists of pre-marked exhibits to be used at trial . . . . Failure to exchange and file these items may result in not being able to call witnesses, present exhibits at trial, or have a jury trial."].) Although the trial court does not appear to have excluded the exhibits based on this violation, it is difficult to see, as a practical matter, how defendant could have filed written in limine motions to trial exhibits that plaintiff did not identify until the morning of the trial.

the letters from plaintiff's counsel, the Sheriff's Department record, the quarantine and vaccination records, the Internet article, and the federal court records, because none of these documents establishes it was defendant's dog that bit plaintiff. Thus, regardless of whether it was error to exclude them, there was no prejudice given the jury's special verdict finding. (*F.P., supra,* 3 Cal.5th at p. 1108.)

As for the bite report, the trial court reasonably exercised its discretion to exclude this document as inadmissible hearsay. (See *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281 [evidentiary rulings are reviewed for abuse of discretion].) The bite report purports to have been taken by an employee of Redondo Beach Animal Control, identified only as "MSO M.Sparks." It contains a narrative of the incident, as reported by plaintiff, and a description of the animal, identifying defendant as the owner.

Plaintiff contends the document should have been admitted under the public record exception to the hearsay rule, which allows "[e]vidence of a writing made as a record of an act, condition, or event" to be admitted "to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or event. [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, § 1280.)

Plaintiff's reliance on the public record exception is misplaced. First, to the extent it is relevant because it identifies defendant's dog as the animal involved in the bite incident, the report does not disclose what the source of the information was

for making that identification, and plaintiff's counsel made no offer of proof regarding the source when arguing for the report's admissibility. Without the source's identity, the court had no way to judge whether the source was "such as to indicate [the information's] trustworthiness." (Evid. Code, § 1280.)

Moreover, because it is safe to assume the source was not the public employee who prepared the report, using it to prove the dog's owner also creates a double-hearsay problem. While the public record exception theoretically could apply to the outer layer of hearsay—the out-of-court written statement by the public employee who prepared the report—plaintiff has not offered an exception that would apply to the inner layer of hearsay—the out-of-court statement to the employee about the identity of the dog's owner. (Cf. *Clark v. Optical Coating Laboratory, Inc.* (2008) 165 Cal.App.4th 150, 169 [public record exception applied to outer layer of hearsay, while admission against interest exception applied to inner layer]; see also *Burge v. Department of Motor Vehicles* (1992) 5 Cal.App.4th 384, 389 [absent additional exception, "[p]ublic employee business records . . . are admissible in civil actions only to the extent that they report the employee's firsthand knowledge"].) Without an applicable exception for the inner layer of hearsay, there is no relevant purpose for which the report could have been admitted into evidence. Plaintiff has failed to establish an abuse of discretion.[8]

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[8] Plaintiff contends defendant's testimony would have been sufficient to authenticate the incident report, and he argues the trial court improperly precluded him from calling defendant to testify. The record does not support this assertion. After plaintiff's testimony, his counsel confirmed, in response to the

5. *Plaintiff Fails to Establish Attorney Misconduct*

Plaintiff contends defense counsel engaged in misconduct during his closing argument when he emphasized that plaintiff failed to present additional witnesses and documentary evidence to corroborate his testimony regarding the incident. We find nothing improper in counsel's argument.

"In conducting closing argument, attorneys for both sides have wide latitude to discuss the case. ' " ' "The right of counsel to discuss the merits of a case, both as to the law and facts, is very wide, and he has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom." ' " ' " (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 795.) "[I]t is the privilege of an attorney to draw any inference with respect to the facts or the credibility of witnesses of which the evidence is reasonably susceptible." (*McCullough v. Langer* (1937) 23 Cal.App.2d 510, 522.) It likewise is proper to argue inferences that may arise from an opposing party's *failure*

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court's inquiry, that he had rested his case subject to recalling plaintiff for rebuttal. Defendant then elected to rest his case, without presenting any witnesses, and to move for nonsuit. In his reply brief, plaintiff suggests this was improper, because defendant had listed himself as a witness before trial. Nothing was improper about defendant's tactical decision, and plaintiff cannot establish trial court error, in any event. The record shows plaintiff did not ask to reopen his case after defendant stated his intention to rest, and plaintiff voiced no objection to proceeding with defendant's motion for nonsuit at that time. Indeed, in closing argument, plaintiff's counsel made a point to emphasize that defendant did not testify or challenge plaintiff's account. The trial court did not preclude plaintiff from examining defendant.

to produce witnesses or evidence. (See *People v. Gonzales* (2012) 54 Cal.4th 1234, 1275; CACI No. 203.) " ' " ' "The adverse party cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the consideration of the jury. . . ." ' " ' " (*Cassim,* at p. 795.) " ' "An attorney is permitted to argue all reasonable inferences from the evidence. . . ." [Citation.] "Only the most persuasive reasons justify handcuffing attorneys in the exercise of their advocacy within the bounds of propriety." ' " (*Ibid.*)

Our review of the record confirms defense counsel did not exceed this wide latitude in presenting his closing argument to the jury. Counsel emphasized, consistent with the evidence, that plaintiff had "presented you [the jury] nothing other than his own testimony regarding this incident." He continued: "People assisted [plaintiff] and helped him afterwards. Where are they? W[as] documentation properly admitted, where is that?" "What evidence did [plaintiff] put on to show that [defendant] owned the dog? Did he present any of these discovery responses that . . . came up during this litigation, during this lawsuit? [¶] Did he present any corroborating testimony? Did [he] bring in one of the animal control officers who investigated this and is able to link [defendant] to this dog that allegedly bit [plaintiff]? Where is this? You've got nothing."

Nothing in defense counsel's closing argument was inconsistent with the evidence presented at trial. As counsel noted, plaintiff did not "properly admit" documentation to show defendant owned the dog that bit him. And plaintiff did not offer corroborating testimony from the animal control officers who could have linked the dog to its owner. Nothing was improper about counsel highlighting plaintiff's failure to present this

evidence, particularly since nothing precluded plaintiff from calling the animal control officers to testify, and nothing precluded him from calling defendant to confirm the contents of defendant's discovery responses. (Cf. *Hansen v. Warco Steel Corp*. (1965) 237 Cal.App.2d 870, 878 [misconduct for defense counsel to emphasize the importance of an excluded document to which plaintiff successfully objected].) Indeed, the court instructed the jury, *without objection from plaintiff*, that "[i]f a party provided weaker evidence when it could have provided stronger evidence, you may distrust the weaker evidence." (CACI No. 203.) Defense counsel's argument was consistent with this instruction. We agree with the trial court's conclusion that there was no misconduct to warrant a new trial.

6. *Plaintiff Fails to Establish Error Regarding the Cost Award*

As defendant correctly observes in his respondent's brief, although plaintiff filed a notice of appeal from the denial of his motion to tax costs, and lists the cost award as an issue for review, he does not present an argument or legal authority in his opening brief addressing why he contends the award was improper. In his reply brief, plaintiff argues the award should be vacated because defendant "did not even attempt to prove [the cost items]" after plaintiff challenged some of the items in his motion to tax costs.[9]

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[9] Plaintiff also argues the perfecting of his appeal from the judgment "should have stayed further proceedings regarding costs until completion of the present appeal." This is incorrect. Notwithstanding plaintiff's appeal from the judgment, the trial court retained jurisdiction to decide ancillary or collateral matters, such as statutory costs, that do not affect the judgment

Plaintiff's failure to present an argument in his opening brief, which denied defendant an opportunity to respond, forfeits his challenge to the cost award. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125 ["an appellant's failure to discuss an issue in its opening brief forfeits the issue on appeal"].) Moreover, our review of the record confirms defendant substantively opposed plaintiff's motion to tax costs with a declaration from defense counsel that included invoices and other records supporting the challenged cost items. We find no error in the trial court's denial of plaintiff's motion to strike or tax costs.

7. *Plaintiff Cannot Establish Prejudice from the Other Purported Errors*

Finally, plaintiff challenges the court's summary adjudication ruling, which struck his exemplary damages claim, and the court's denial of his motion to supplement the complaint to revive the exemplary damages claim with newly discovered allegations. Because liability is a prerequisite to an award of exemplary damages (Civ. Code, § 3294, subd. (a)), and plaintiff has not met his burden to demonstrate reversible error with respect to the jury's finding of no liability, plaintiff cannot establish prejudice that would warrant appellate review of these rulings. (*Denham, supra,* 2 Cal.3d at p. 564; Cal. Const., art. VI, § 13.)

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on appeal. (*Silver v. Gold* (1989) 211 Cal.App.3d 17, 26; *Betz v. Pankow* (1993) 16 Cal.App.4th 931, 938; *Frank Annino & Sons Construction, Inc. v. McArthur Restaurants, Inc.* (1989) 215 Cal.App.3d 353, 357.)

DISPOSITION

The judgment and cost award are affirmed. Defendant Harold Pick is entitled to his costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

LAVIN, Acting P. J.

DHANIDINA, J.