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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DONG JEE, Plaintiff and Appellant, v. CITY OF LOS ANGELES FIRE DEPARTMENT EMERGENCY MEDICAL SERVICES, Defendant and Respondent.	B234445 (Los Angeles County Super. Ct. No. BC38425)

APPEAL from a judgment of the Superior Court of Los Angeles County, Victor E. Chavez, Judge. Affirmed.

Karacter Law Firm, Ginam Lee and Jay Hong for Plaintiff and Appellant.

Carmen A. Trutanich, City Attorney, Amy Jo Field and Kjehl T. Johansen, Deputy City Attorneys, for Defendant and Respondent.

Plaintiff and appellant Dong Jee appeals from a judgment following the granting of a motion for nonsuit in favor of defendant and respondent City of Los Angeles Fire Department Emergency Medical Services in this personal injury action. Jee contends that he was entitled to reopen his case to present expert testimony and the trial court abused its discretion by denying a continuance. We find no abuse of discretion and affirm.

FACTS AND PROCEDURAL BACKGROUND

On the evening of March 1, 2007, Jee went to a bar with his brother and friends. He slipped and fell in the restroom, vomited, and was nonresponsive. The City's paramedics responded to a 911 call. The paramedics examined Jee for approximately five or ten minutes, including moving his head and neck. Jee did not move or make any sound. Jee's brother inquired about Jee's condition. The paramedics said he was okay. Jee's brother asked what he should do at that point. The paramedics said he could take Jee home or they could take him to the hospital. Jee's brother and a friend decided to take him home. They lifted him up on either side and dragged him to the elevator. Two paramedics rode down in the elevator with them. In the elevator, Jee groaned and tried to open his eyes. He vomited when they were out of the elevator. Jee's brother asked the paramedics if Jee was really okay. The paramedics said that Jee was okay. Jee went to the hospital and had brain surgery the following day.

Jee filed a negligence action against several defendants, including the City. A jury trial commenced against the City on February 1, 2011. The first day of trial consisted of jury selection. In Jee's opening statement on the second day of trial, his attorney stated that Jee, his brother, and Ohn would testify about the events on March 1, 2007. There was no mention of any expert witness. Jee and his brother testified to the facts described above.

The trial court directed Jee to call his next witness. Jee's attorney stated, "Your Honor, our next witness is currently in Korea. He's on his way here." The court responded, "We've discussed this. This is not appropriate for the jury to listen to. [¶]

The question is, do you have other witnesses to proceed?" Jee's attorney responded, "Not at this point, Your Honor." The court asked, "Do you have any witnesses here in the courtroom or . . . that can be here by 1:30 [p.m.]?" Jee's attorney said that he did not. The court excused the jury until 1:30 p.m.

The City made a motion for nonsuit on the ground that no expert testimony had been presented on the issue of gross negligence. Jee requested a recess until 1:30 p.m. to prepare a response to the motion, which the trial court granted. At 1:30 p.m., Jee argued that the testimony presented an issue for the jury. The court suggested that Jee needed to present expert testimony on the standard of care in the community regarding when paramedics are required to take a person to a hospital. Jee's attorney stated, "Well, in that case, plaintiff would request leave to reopen the case to bring [an] expert to --." The court interjected, "Do you have one here now?" Jee's attorney said, "Not right now. But we --." The court said, "Well, Counsel --." Jee's attorney continued, "We'd like [to] request --." The court finished, "I can't do that. . . . When would you have an expert here?" Jee's attorney stated, "I would have by tomorrow afternoon, Your Honor." The court informed him that it was not reasonable to expect the court and the jurors to wait and do nothing that afternoon and the next morning. The court stated, "If you have an expert here right now, I'd let you reopen. But you don't have one. If you had one in a half [hour] or an hour, maybe I'd consider that." The court granted the City's motion for nonsuit.

The trial court stated the jury would be discharged and the parties would proceed with evidence for default judgments against two other defendants. Jee's attorney asked if the default proceedings could be done the following morning. The court responded, "No, sir. [¶] You understand, I told you when you started here that we're not going to be sitting around waiting for you. [¶] I told you that. In chambers, you [were] told that. I repeated it again in the afternoon. [¶] We just can't sit around waiting for people to come in and testify." The court told Jee's attorney to be prepared to proceed with the default prove-up after the jury was dismissed. Additional testimony was presented from Jee's brother as to liability. At approximately 2:00 p.m., Jee's attorney requested

permission to present testimony on damages the following day. The court allowed a continuance to 8:45 a.m. the following morning for additional testimony in the default proceedings.

On June 27, 2011, the trial court entered judgment in favor of the City. Jee filed a timely notice of appeal.

DISCUSSION

Jee contends that he was entitled to reopen his case and present expert testimony on the issue of the standard of care for paramedics and the trial court abused its discretion by denying a one-day continuance to present this evidence. However, we find no abuse of discretion has been shown.[1]

Continuance of a trial is governed by California Rules of Court, rule 3.1332. The party requesting the continuance must show good cause requiring the continuance. (Cal. Rules of Court, rule 3.1332(c).) Circumstances that may constitute good cause for a continuance include: "[t]he unavailability of an essential lay or expert witness because of death, illness, or other excusable circumstances;" "[a] party's excused inability to obtain essential testimony, documents, or other material evidence despite diligent efforts;" or "[a] significant, unanticipated change in the status of the case as a result of which the case is not ready for trial." (Cal. Rules of Court, rule 3.1332(c)(1), (c)(6) & (c)(7).)

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[1] The dissent raises the issue of whether an expert witness was necessary to prove the City's actions were not consistent with due care. In Jee's opening brief on appeal, he does not contend that expert testimony was unnecessary. In fact, he contends that expert testimony was relevant to the issues. In respondent's brief, the City points out that Jee is not contending that expert testimony was unnecessary. In reply, Jee states that he is making "no concession about the absence of expert testimony and the effect on his case." However, he simply refers to his contention in his opening brief that expert testimony is relevant and adds no argument that expert testimony was unnecessary. Generally, we do not consider points raised for the first time in a reply brief (*Bardeen v. Commander Oil Co*. (1941) 48 Cal.App.2d 355, 357) and to reverse the judgment on a ground not raised or briefed by either party would violate Government Code section 68081.

The trial court may also consider other relevant factors, including: "(1) The proximity of the trial date; [¶] (2) Whether there was any previous continuance, extension of time, or delay of trial due to any party; [¶] (3) The length of the continuance requested; [¶] . . . [¶] (5) The prejudice that parties or witnesses will suffer as a result of the continuance; [¶] . . . [¶] (10) Whether the interests of justice are best served by a continuance, by the trial of the matter, or by imposing conditions on the continuance . . . ." (Cal. Rules of Court, rule 3.1332(d).) Furthermore, where a litigant requests a last minute continuance, the court must also examine "the degree of diligence in his or her efforts to bring the case to trial." (*Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389, 1396.)

The decision whether to grant a continuance rests within the trial court's sound discretion and will not be disturbed on appeal unless the decision is arbitrary, capricious, or patently absurd and results in a miscarriage of justice. (*Jensen v. Superior Court* (2008) 160 Cal.App.4th 266, 271.)

The record in this case clearly shows that Jee had opportunities to present expert testimony before and after the motion for nonsuit, but he did not have a witness available at the time of trial. There is no explanation in the record as to why Jee's witnesses were not available. There is no evidence that Jee was diligent in his efforts to present his case, and witnesses were not available due to circumstances beyond his control. Jee failed to demonstrate that his expert witness was not available due to excusable circumstances. In the absence of any showing of diligence, we cannot find that the trial court abused its discretion by denying a one-day continuance in the middle of trial and granting the City's motion for nonsuit.

DISPOSITION

The judgment is affirmed. Respondent City of Los Angeles Fire Department Emergency Medical Services is awarded its costs on appeal.

KRIEGLER, J.

I concur:

TURNER, P. J.

MOSK, J., Dissenting

I dissent.

It seems *questionable* that under the circumstances, an expert for Jee was necessary in connection with a nonsuit, as one could say that as a matter of common knowledge and observation, the treatment and actions were not consistent with due care. (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001; see *Gannon v. Elliot* (1993) 19 Cal.App.4th 1, 6-7.) Jee made clear that he "made [*sic*] no concession regarding the absence of expert testimony and its evidentiary effect on Appellant's case." When the trial court said an expert was necessary,[1] Jee only asked for one day to obtain one. Whether or not any expert was required, the refusal to give Jee this opportunity to obtain one in order to avoid nonsuit does not seem justified. Sometimes procedural hurdles evince a "policy [that] is less powerful than that which seeks to dispose of litigation on the merits rather than on procedural grounds." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

MOSK, J.

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[1] The trial court stated that an expert was necessary. Jee responded that "in that case" plaintiff would seek leave to reopen to present expert opinion.