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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

EUNHEE CHANG, Plaintiff and Appellant, v. FINE DISCOUNT NO. 1, INC., Defendant and Respondent.	B278505 (Los Angeles County Super. Ct. No. BC530141)

APPEAL from a judgment of the Superior Court of Los Angeles County. Brian S. Currey, Judge. Affirmed.

Law Office of Juan Hong and Juan Hong for Plaintiff and Appellant.

Koeller, Nebeker, Carlson & Haluck, and Zachary M. Schwartz for Defendant and Respondent.

INTRODUCTION

Plaintiff Eunhee Chang's retail store caught ablaze after a fire of unknown origin started at the neighboring warehouse operated by defendant Fine Discount No. 1. The fire reduced both businesses to roofless, crumbling structures filled with debris. Plaintiff sued defendant for negligence both in starting the fire and in causing the fire to spread to her building. The court granted nonsuit on the first cause of action for starting the fire and the jury found in favor of defendant on the second cause of action.

Plaintiff appeals from the judgment arguing that the court erred in granting nonsuit as to her first cause of action. Plaintiff also asserts the court erred by preventing her from pursuing a negligence per se theory of liability on the second cause of action. Finally, she contends the court abused its discretion in admitting photographic evidence and a declaration by defendant's counsel about costs. We affirm on all grounds.

FACTS AND PROCEDURAL BACKGROUND

1. The Properties

Plaintiff's business, Super Dollar, rented a freestanding retail building adjacent to defendant's warehouse in Compton. The two buildings stood only inches apart. Super Dollar's west wall was so close to defendant's east wall that a person could not walk between the buildings. At about the middle of each adjacent wall, there was a metal door. It appeared that at one point in time, a single business operated both the warehouse and retail store, and used these doors to pass between the buildings. At the time of the fire, the warehouse stored household products, like paper towels, very similar to the products sold next door at Super Dollar.

Next to the east side of the rear/north part of defendant's building was a fenced-in outside storage area with a canopy to park vehicles. On the day of the fire, a truck and forklift were parked in this outside storage area.

In 2010, defendant hired a contractor and architect to install shelving in the warehouse. The shelves were used and purchased as-is; they had varying heights, some greater than 12 feet tall. This fact was important to plaintiff's case as products stacked over 12 feet high would require a permit for high-piled storage under the California Fire Code as well as implementation of additional safety measures. Notably, defendant did not store products over 12 feet high, even though some of its shelving units were taller than that height. For this reason, defendant never applied for a high-pile storage permit.

After the shelving was installed, the City of Compton and the Compton Fire Department inspected defendant's warehouse. The shelves and building received approval from the City and Fire Department, who informed defendant it only needed to have fire extinguishers in the building. Defendant received a certificate of occupancy from the City, dated November 10, 2010. Defendant did not modify the shelves or add shelves prior to the August 2012 fire. The Fire Department performed yearly inspections of the warehouse and never found a violation within the warehouse.

2. The Fire

On Saturday, August 11, 2012, around 6:00 a.m., a fire occurred in the rear/north side of defendant's building, near the outside storage area. The fire was both inside and outside the building when the Fire Department arrived. The fire's origin was unknown. Although initially contained to defendant's warehouse,

the fire eventually spread to plaintiff's property. The Fire Department quickly responded to the fire but was ultimately unable to extinguish it before it caused massive damage to both buildings and their contents. Both businesses were closed at the time of the fire, and there were no human casualties.

3. Plaintiff's Lawsuit

In December 2013, plaintiff sued defendant alleging two causes of action: (1) negligence in starting the fire and (2) negligence in causing the fire to spread. It appears that the parties were anticipating trial in the fall of 2015. At an October 2015 status conference, the court heard plaintiff's motion in limine to exclude five photos that were only recently produced by defendant's expert (they were not produced during discovery). The court granted plaintiff's motion to exclude the photos "in part subject to the oral testimony of [defendant's fire expert] to establish when the photographs came to be in his possession." At this point in time, Judge William Barry presided over the case.

The case proceeded to trial in July 2016, before Judge Brian S. Currey. Judge Currey revisited plaintiff's motion to exclude the photos and ruled that the photographs were admissible. Although this ruling was made at a proceeding prior to trial, for which we lack the transcript, the court repeated its ruling during trial.

4. Plaintiff's Case in Chief

Trial commenced on July 26, 2015. Plaintiff pursued two theories: (1) defendant negligently caused the fire to start as shown by res ipsa loquitur, and (2) defendant negligently caused the fire to spread to plaintiff's building, largely premised on allegations that defendant violated several Fire Code sections. In addition to her own testimony, plaintiff presented testimony from

her son-in-law who worked at Super Dollar and lived with plaintiff at the time of the fire, one of defendant's employees, Compton Fire Department Captain Robert Mendez who investigated the fire in this case, plaintiff's fire expert Robert Rowe, and plaintiff's forensic accountant Alan Lurie. The undisputed factual components of their testimony are included where pertinent in the summary above.

Fire expert Robert Rowe's testimony was the heart of plaintiff's case. Rowe, who did not inspect the premises before or after the fire, based his expert opinion on photos, the Fire Department's report, and a phone conversation with a Compton fire inspector. Rowe did not offer any opinion as to the origin or cause of the fire. Rowe opined that defendant had high-piled storage, without the proper alarm or sprinkler system required by the Fire Code. This high-piled storage fueled the fire and caused the fire to spread to plaintiff's property. He based this opinion on his observation of the shelving height, not an observation of products on shelves.[1] Rowe nonetheless acknowledged that if the products were not actually piled higher

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[1] At oral argument, plaintiff's counsel represented that Rowe had testified there was high-piled storage based on both the visible shelf height in photographs and the heat of the fire at the warehouse. This was not the case. Rowe specifically testified that he based his opinion that there was high-piled storage solely on seeing racks higher than 12 feet in photographs. The court also sustained defendant's objection to Rowe testifying that merchandise was high-piled on the racks because Rowe's opinion lacked foundation. Plaintiff did not appeal this evidentiary ruling.

than 12 feet, defendant did not require sprinklers or a fire alarm system.

Rowe also faulted defendant with ventilating the fire and encouraging its spread to plaintiff's property through the metal door in defendant's east wall (which was unusable as it abutted plaintiff's west wall). Rowe asserted that this was a penetration in the building that defendant should have covered up or removed.

Rowe additionally opined that the outside storage area/carport was part of the structure and therefore required sprinklers because a truck and forklift were parked under it. Rowe offered no authority showing that the outside storage area under the awning required sprinklers besides his assertion that the awning was part of the interior of the building.[2]

In concluding his testimony, Rowe explained that the Fire Code violations that actually mattered were only those related to high-piled storage and the corresponding need for sprinklers and a fire alarm system.

5. Defendant's Motion for Nonsuit

Following the close of plaintiff's case, defendant moved for nonsuit on both of plaintiff's claims. For the first cause of action, defendant argued that plaintiff failed to produce any evidence that defendant negligently started the fire. Plaintiff responded that the court should give the jury the res ipsa loquitur instruction and that the evidence provided at trial supported the three elements of res ipsa loquitur. The court concluded that there was no substantial evidence of the first two elements of res

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[2] Plaintiff's other witness, Compton Fire Department Captain Robert Mendez testified that the awning was not considered to be inside the building.

ipsa loquitur, because the fire's source, cause, and originating location (inside or outside the building) were unknown, and there was no evidence that the fire was caused by something only defendant controlled. The court granted nonsuit on the first cause of action, finding that plaintiff failed to present any evidence that defendant negligently caused the fire. The court denied the motion on the second cause of action.

6. Defendant's Evidence

Defendant had two witnesses: one of its employees and its fire expert, Fred Herrera. To prepare his opinion, Herrera reviewed photographs, discussed the fire with a Compton fire inspector, and personally evaluated the scene of the fire. Herrera testified that the cause of the fire and exactly where it started (outside or inside the building) were undetermined because of extensive fire damage to the building. He stated that he could not rule out arson, negligence by a homeless person, or an electrical short in the landlord's electrical box as causes of the fire.

Herrera opined that the fire occurred primarily at the top portion and roof of the building, and that the collapsing roof provided ventilation. Because the heat escaped up and out through the collapsing roof, the metal door on the east side of the warehouse did not contribute any significant ventilation or cause the fire to spread. Based on the top-down damage he observed in the buildings, Herrera opined that the fire spread via the roof to plaintiff's property.

Herrera testified that the Fire Code requirements for fire sprinklers or alarms did not apply to the warehouse because there was no evidence of high-piled storage. This opinion was based on defendant's employee's testimony that products had not

been stacked higher than 12 feet and on the Fire Department's yearly inspections of the building, which found no issues with the building or storage. He also stated that there was no evidence that the truck and forklift parked in the outside storage area contributed to the fire.

7. Defendant's Motion for Partial Nonsuit as to Negligence Per Se Based on Fire Code Violations

After both sides had rested, defendant moved for nonsuit on the second (and only remaining) cause of action. Plaintiff's primary theory of liability was that defendant committed negligence per se in causing the fire to spread to her business as shown by the Fire Code violations. In its motion, defendant argued the insufficiency of any evidence of any violation of the Fire Code. Defendant asserted that plaintiff's evidence never showed that the products were stocked higher than 12 feet, which would require sprinklers and an alarm system under the Fire Code. Defendant also requested a special jury instruction that there was no evidence of a violation of the Fire Code. In response, plaintiff argued that the jury should decide between the expert testimonies on code violations.

The court found that there was no evidence of high-piled storage, and thus sprinklers and an alarm system were not required under the Code. Rather, the testimony indicated that defendant was aware of the Fire Code limitations and kept merchandise below 12 feet. The court instructed the jury that there was no Fire Code violation.

8. Jury Instructions

The court refused Plaintiff's proposed jury instruction on res ipsa loquitur because it had granted nonsuit as to the first cause of action. The trial court also refused plaintiff's request for

a negligence per se instruction for Fire Code violations, reiterating its previous analysis.

9. Verdict and Costs Award

The jury returned a special verdict in favor of defendant on the second cause of action (the only cause of action presented to it), finding that defendant was not negligent in causing the fire's spread.

Following the verdict, defendant filed a memorandum of costs for close to $60,000. Plaintiff filed a motion to strike or tax the costs. The trial court issued its tentative ruling, reducing defendant's costs to $5,693.72. During the hearing on costs, the court granted defendant leave to file a supplemental declaration to provide foundation for its cost-related exhibits. After receiving the supplemental declaration, the trial court issued a new tentative ruling, setting costs at $28,966.42. This tentative became the court's final ruling on costs.

DISCUSSION

1. The Court Did Not Err in Granting Nonsuit on the First Cause of Action

Plaintiff argues that the court erred in granting nonsuit on her cause of action for negligently starting the fire. "On review of a judgment of nonsuit, as here, we must view the facts in the light most favorable to the plaintiff. '[C]ourts traditionally have taken a very restrictive view of the circumstances under which nonsuit is proper. The rule is that a trial court may not grant a defendant's motion for nonsuit if plaintiff's evidence would support a jury verdict in plaintiff's favor. [Citations.] [¶] In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must

be accepted as true and conflicting evidence must be disregarded. The court must give "to the plaintiff's evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the evidence in plaintiff's favor. . . ." ' [Citation.] The same rule applies on appeal from the grant of a nonsuit." (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1214-1215.)

Because it was undisputed that the origin of the fire was unknown, plaintiff relied on the doctrine of res ipsa loquitur to prove her first cause of action for negligence in starting the fire. "Res ipsa loquitur is a rule of evidence allowing an inference of negligence from proven facts. [Citations.] It is based on a theory of 'probability' where there is no direct evidence of defendant's conduct, [citations], permitting a common sense inference of negligence from the happening of the accident. [Citations.] The rule thus assists plaintiffs in negligence cases in regard to the production of evidence." (*Gicking v. Kimberlin* (1985) 170 Cal.App.3d 73, 75 (*Gicking*).)

To invoke the presumption established by res ipsa loquitur, there must be "evidence satisf[ying] three conditions: ' "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; [and] (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." ' [Citation.]" (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 825-826; *Gicking, supra*, 170 Cal.App.3d at pp. 75-76.) "The doctrine of res ipsa loquitur is applicable where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the

defendant is probably the one responsible." (*Di Mare v. Cresci* (1962) 58 Cal.2d 292, 298-299.) " 'In considering the applicability of res ipsa, . . . the court merely determines whether the plaintiff has produced sufficient substantial evidence to permit a jury to draw such an inference. Where reasonable men may differ as to the balance of probabilities, the trial judge must leave the question to the jury [citations].' " (*Albers v. Greyhound Corp.* (1970) 4 Cal.App.3d 463, 474.)

Here, the court granted defendant's original nonsuit because plaintiff had presented no evidence that defendant caused the fire and failed to present evidence justifying the invocation of res ipsa loquitur to prove causation by logical inference. After reviewing the res ipsa loquitur elements, the court informed plaintiff, "you as the plaintiff bear the burden of proving that the three res ipsa elements have been demonstrated; one, that the injury from fire ordinarily wouldn't have happened unless someone was negligent. [¶] I don't know that you proved that because we don't know what the source of the fire was. It's a fire of unknown origin. . . . [¶] Two, that the harm was caused by something only the defendant controlled. That's where you run into problems because the fire is unknown origin. We don't know what caused the fire." The court explained that the fire captain, who was at the scene of the fire, testified that "before he arrived, the building was on fire inside and out. So that doesn't give you the presumption that the harm was caused by something that only the defendant controlled."

We agree plaintiff failed to present sufficient evidence of the first two elements to allow the jury to draw an inference of negligence under the doctrine of res ipsa loquitur.

a. The First Element of Res Ispa Loquitur

Plaintiff provided no evidence that this was the type of accident which ordinarily does not occur in the absence of someone's negligence. "[R]es ipsa loquitur cannot be applied to infer negligence where the cause of an accident is merely speculative [citation], that is, where there are several possible causes and no cause can be excluded or included by the evidence." (*Gicking, supra,* 170 Cal.App.3d at p. 77.) Plaintiff offered nothing more than speculation when counsel argued that defendant caused the fire.

On appeal, plaintiff recites a laundry list of combustible materials within the warehouse and states that there were no fire sprinklers or alarms in the warehouse in asserting that there was sufficient evidence to support the first prong of res ipsa loquitur. Yet, this evidence fails to address how a negligent act *started* the fire. "The mere fact that the fire occurred is insufficient to raise an inference of negligence on the part of [defendant]." (*Bartholomai v. Owl Drug Co.* (1940) 42 Cal.App.2d 38, 42.) " '[T]here are many accidents which, as a matter of common knowledge, occur frequently enough without anyone's fault.' " (*Gentleman v. Nadell & Co.* (1961) 197 Cal.App.2d 545, 554.) Examples include " 'a fire of unknown origin' and . . . such occurrences 'will not in themselves justify the conclusion that negligence is the most likely explanation; and to such events res ipsa loquitur does not apply.' " (*Ibid.*)

Here, plaintiff's own witnesses explicitly testified that the origin of the fire was unknown and offered no explanation of how the fire could have been started by defendant. Based on the dearth of causation evidence introduced by plaintiff, it cannot be

said in this case that the fire of unknown origin would not ordinarily occur without someone's negligence.

b. The Second Element of Res Ispa Loquitur

Plaintiff also failed to establish that the fire was caused by an agency or instrumentality within the exclusive control of defendant. At trial, plaintiff presented no evidence as to why, how, or where the fire ignited (inside or outside of the building). At the close of plaintiff's case, there was no evidence of what instrumentality caused the fire, let alone evidence that plaintiff had exclusive control of such an instrumentality. Plaintiff did not even elicit testimony of probable causes of the fire. Without such information, plaintiff failed to prove the second res ipsa loquitur prong—that the cause of the fire was in the exclusive control of defendant. (Cf. *Horner v. Barber* (1964) 229 Cal.App.2d 829, 833 [res ipsa loquitur supported by evidence where fire expert testified that although precise cause of fire at an auto repair shop was unknown, the most probable cause of fire was either the pilot light of the heater in the office or its burner, or both, igniting gasoline fumes from vehicles in the building].)

Thus, without offering evidence of the first two prongs, res ipsa loquitur was inapplicable. The court properly granted nonsuit as to the first cause of action.[3]

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[3] We observe that plaintiff also asserts the trial court erred in not instructing the jury on res ipsa loquitur. As we have held that the court properly granted nonsuit on that ground, there was also no need to instruct on the subject.

2. The Court Did Not Err in Refusing to Instruct on Plaintiff's Negligence Per Se Theory for the Second Cause of Action

Plaintiff's fire expert, Robert Rowe, testified that defendant violated the 2010 California Fire Code. Based on this, plaintiff requested a negligence per se jury instruction for three Fire Code violations related to sprinkler and fire alarm requirements for high-piled storage and storage of fueled equipment. This was the central theory of plaintiff's second cause of action—negligence in causing the fire to spread.

During a conference with counsel, the court initially rejected plaintiff's negligence per se instruction. The court explained that plaintiff's evidence showed that defendant had high shelving but failed to show the merchandise in defendant's warehouse was high-piled. Thus, Rowe's opinion notwithstanding, the court found that as a matter of law the Fire Code did not require defendant to have sprinklers or alarms because the uncontroverted evidence was that defendant had neither high-piled storage nor improperly-stored fueled equipment.[4]

After both parties had rested, defendant moved for partial nonsuit under Code of Civil Procedure section 581c, subdivision (b), as to that part of the second cause of action that was based on the alleged Fire Code violations. Defendant again

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[4] We note that the parties' arguments focused on the existence of high-piled storage as the presence of that storage would have required sprinklers and an alarm system at defendant's warehouse. This was because plaintiff's fire expert testified that the "two significant [Fire Code violations], the ones that [he] believe[d] mattered in the fire" were the lack of sprinklers and lack of a fire alarm.

argued that although plaintiff's expert testified to the existence of shelves over 12 feet high, plaintiff presented no evidence that the *stock* was piled higher than 12 feet on these shelves. Defendant requested that the court instruct the jury that there was no Fire Code violation. The court agreed that "there's no evidence of [a] violation of [the] California Fire Code." The court instructed the jury: "you have heard some evidence, some testimony from the expert witnesses about Fire Code violations. The Fire Code, of course, is a law. I'm telling you as the judge now, that there has not been sufficient evidence in this case to establish the violation of any of the Fire Codes."[5]

Plaintiff argues the court erred in refusing the negligence per se jury instruction for the second cause of action based on the alleged Fire Code violations, and instead instructing the jury that there was no Fire Code violation. These two issues are intertwined factually and legally. We conclude that the court correctly instructed the jury.

Plaintiff "is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him [or her that] is supported by substantial evidence." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) " 'A reviewing court must review the evidence most favorable to the contention that the requested instruction is

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[5] As previously observed, defendant moved for partial nonsuit on the issue of negligence per se at the same time it requested the instruction quoted in the text. Although the court had not explicitly granted partial nonsuit on negligence per se, the court appears to have intended to do so based on its conclusion that no evidence supported negligence per se. The court's instruction that there had been no Fire Code violation was functionally equivalent to granting a partial nonsuit.

applicable [because] the parties are entitled to an instruction thereon if the evidence so viewed could establish the elements of the theory presented.' " (*Norman v. Life Care Centers of America, Inc.* (2003) 107 Cal.App.4th 1233, 1242.)

The issue becomes whether substantial evidence supported plaintiff's negligence per se theory such that the court should have instructed the jury on negligence per se and refrained from giving its Fire Code instruction. In order to establish negligence per se, plaintiff must show that defendant violated a statute, ordinance, or regulation of a public entity, that the violation resulted in plaintiff's injury, that the statute was designed to protect against that kind of injury and that it is intended to protect people like plaintiff. (*DiRosa v. Showa Denko K.K.* (1996) 44 Cal.App.4th 799, 805; Evid. Code, § 669.)

Plaintiff's request was based on alleged violations of three Fire Code sections (1) prohibiting storage of fueled equipment within a building (Fire Code § 313.1), (2) requiring fire sprinklers in a building with high-piled storage (Fire Code § 2306.2), and (3) requiring fire alarms in the building with high-piled storage (Fire Code § 2306.4).[6] The court found that plaintiff had failed to produce evidence of the Fire Code violations and thus could not prove the first prong of negligence per se.

We agree. The code sections requiring fire sprinklers and alarm systems only applied when there was high-piled storage. Yet, plaintiff failed to produce evidence showing that merchandise was high-piled. Rather, plaintiff's sole evidence on this issue was Rowe's testimony that the shelving was more than

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[6] The section numbers were provided by plaintiff in her proposed jury instructions and refer to the California Fire Code as it existed in 2010.

12 feet high. No one testified that any products were stacked over 12 feet high. Rowe did not and could not provide such testimony because (1) the post-fire photos did not show merchandise stacked that high and (2) Rowe had not seen the warehouse before the fire. Defendant provided the only evidence related to the height of merchandise on the shelving: testimony from defendant's employee that the products were never stacked higher than 12 feet. Defendant's witnesses also testified to yearly inspections by the Compton Fire Department without any citations for high-piled storage.

The violation regarding fueled equipment in the building also was not supported by evidence. Testimony indicated that the forklift and truck were parked outside the building, under an awning. Plaintiff's own expert testified that the location where the vehicles were parked was not a significant factor in the fire, rather the high-piled storage code violations were the ones that "mattered." The evidence did not support a violation of Fire Code section 313.1 and did not show that an alleged violation of that section resulted in the harm to plaintiff. The court properly denied plaintiff's negligence per se instruction.

The trial court also did not err when it instructed the jury that there was no Fire Code violation. The court has discretion to instruct the jury not to determine or consider a particular issue or theory of liability when it is not supported by evidence. (*McShane v. Cleaver* (1966) 247 Cal.App.2d 260, 266 [holding that the court properly told the jury prior to deliberations that contributory negligence was not to be considered or determined by them because there was no evidence to support the theory, although it was raised as an issue earlier in the trial].) Doing so reduced juror confusion and focused the jury's inquiry on the only

remaining theory of liability: negligence based on the storage of flammable materials and failure to cover or remove the metal door on the east wall of defendant's building.

3. Plaintiff Waived Her Argument that the Court Improperly Admitted Certain Photos into Evidence

Plaintiff argues that the trial court erred in allowing defendant's expert witness to show the jury and discuss five photographs that the trial court previously conditionally excluded in response to plaintiff's motion in limine. In making this argument, plaintiff makes no citation to any legal authority to support her position. "To demonstrate error, [the] appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error." (*In re S.C.* (2006) 138 Cal.App.4th 396, 408; see Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2014) ¶ 8:17.1, p. 8–6, citing *Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368.) In cases like this one, when the appellant asserts a point but fails to support it with reasoned argument and citations to authority, we may treat it as waived and pass it without consideration. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; see, e.g., *Taylor v. Roseville Toyota, Inc.* (2006) 138 Cal.App.4th 994, 1001, fn. 2 [contention forfeited, where it is "merely asserted without argument or authority"].)

4. The Trial Court Did Not Err Admitting Defendant's Supplemental Cost Declaration

Following the verdict in defendant's favor, defendant filed a memorandum of costs, seeking $59,160.06 in costs from plaintiff. Plaintiff responded with a motion to tax, arguing that most of those costs occurred before defendant's settlement offer. Defendant then filed its opposition to the motion to tax costs with

exhibits, but failed to provide a declaration to identify and provide foundation for the exhibits. The court issued a tentative decision that proposed to reduce defendant's costs to $5,693.72, noting that it could not consider any of the documents attached to defendant's opposition because they lacked foundation. At the hearing and over plaintiff's objection, the court withdrew its tentative decision, continued the hearing on the motion to tax costs, and allowed defendant to provide declarations to support its opposition and lay foundation for the attached exhibits. In response to the new declaration, the trial court issued a second tentative decision finding $28,966.42 in recoverable costs for defendant.

Plaintiff argues that the declaration was untimely under Code of Civil Procedure section 1005, subdivision (b), and the court abused its discretion by accepting defendant's declaration in support of the opposition. We disagree for two reasons.

First, plaintiff's argument that defendant's opposition papers were untimely is not supported by the statute she cites. Code of Civil Procedure Section 1005, subdivision (b) states: "All papers opposing a motion so noticed shall be filed with the court and a copy served on each party at least nine court days, and all reply papers at least five court days before the hearing. [¶] *The court, or a judge thereof, may prescribe a shorter time*." (Italics added.) The statute gives the court the discretion to allow a litigant to file reply papers in less time than the typical five days before the hearing, setting no limits on the timeline the court must impose. Clearly, if the court has the discretion to receive reply papers belatedly, it may also exercise its discretion to continue the hearing to give a party more time to file those papers. (See *Maximum Technology v. Superior Court* (1987)

188 Cal.App.3d 935, 937 ["In general, a court has discretion in the control and regulation of its calendar."].) Here, the court exercised such discretion. Contrary to plaintiff's contentions, defendant's behavior was not unlawful.

Second, plaintiff has not provided this Court with transcripts from the relevant hearing, a copy of defendant's declaration, or a copy of defendant's initial memorandum of costs. Plaintiff, as the appellant, has the burden of providing this court with a record to review the error and must "support the arguments in [her] briefs by appropriate reference to the record." (*Bernard v. Hartford Fire Ins. Co.* (1991) 226 Cal.App.3d 1203, 1205; Cal. Rules of Court, rule 8.204(a)(1)(C).) "If a party fails to support an argument with the necessary citations to the record, that portion of the brief may be stricken and the argument deemed to have been waived." (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.)[7]

Without a complete record we cannot evaluate whether the court's decision to provide defendant additional time to file the declaration was an abuse of discretion. We therefore presume the court's award of costs correct. (*Denham v. Superior Court, supra,* 2 Cal.3d at p. 564 [" 'error must be affirmatively shown' "].)

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[7] During oral argument, plaintiff's counsel explained that the deficient record was attributable to defendant's failure to file a final costs order. This order is irrelevant to our conclusion that plaintiff failed to furnish the court with a sufficient record. Transcripts from the relevant hearing, a copy of defendant's declaration, and a copy of defendant's initial memorandum of costs were all essential for evaluating error and were not included in the record.

DISPOSITION

We affirm the judgment. Defendant and Respondent Fine Discount No.1 is awarded costs on appeal.

RUBIN, Acting P.J.

WE CONCUR:

FLIER, J.

GRIMES, J.