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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

AHMADPOUR ABULGHASEM, Plaintiff and Appellant, v. JOHNNIE'S RESTAURANT, INC., Defendant and Respondent.	B272266 (Los Angeles County Super. Ct. No. BC553245)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elaine W. Mandel, Judge. Affirmed.

Ahmadpour Abulghasem, in pro. per., for Plaintiff and Appellant.

Veatch Carlson, John E. Stobart and Serena L. Nervez for Defendant and Respondent.

Plaintiff and appellant Ahmadpour Abulghasem (plaintiff) appeals from the judgment entered in favor of Johnnie's Restaurant, Inc. (defendant), following a jury trial in this action concerning injuries plaintiff allegedly sustained as the result of a fall at defendant's restaurant. Plaintiff contends the judgment should be reversed and a new trial granted because the trial court erred by failing to remove a biased juror, admitting into evidence plaintiff's prior felony conviction for forgery, failing to instruct the jury on the doctrine of res ipsa loquitur, and failing to apply that doctrine at the trial. Plaintiff also challenges the credibility of defendant's witnesses and the substance of their trial testimony.

We affirm the judgment.

FACTUAL BACKGROUND

Plaintiff was a patron at defendant's restaurant on December 15, 2013. He was accompanied by several other people who had attended a conference that day. The indoor seating area was full, so the party went to the outdoor patio to find a table. The patio seating consisted of wooden picnic tables and detached wooden benches.

Plaintiff initially sat on a bench that had been moved close to a fire pit located in the center of the patio, but a waitress told plaintiff he could not sit there. Shortly thereafter, plaintiff fell backward over one of the benches. The facts are disputed as to whether plaintiff fell while standing or attempting to stand up from the bench on which he had initially been sitting near the fire pit, or whether he fell while sitting or attempting to sit on another bench at a nearby table.

After plaintiff fell, his companions helped him up, and the party moved to a table. Plaintiff seated himself, ordered food, and remained at the restaurant for approximately another hour.

Plaintiff claimed the fall caused injury to his shoulder that required surgery. He also claimed injury to his back. Plaintiff incurred $13,675.22 in medical expenses.

PROCEDURAL HISTORY

Plaintiff filed the instant action on July 31, 2014.[1] On January 8, 2015, plaintiff filed a motion in limine for an order prohibiting defendant from referring to or questioning any witness regarding plaintiff's prior felony conviction for forgery. Defendant opposed the motion.[2] The trial court denied plaintiff's motion in limine. Neither the reporter's transcript of the hearing on the motion in limine nor the order denying the motion is included in the record on appeal. The reporter's transcript of proceedings that took place outside of the presence of the jury on the first day of trial includes the trial court's discussion of its ruling on plaintiff's motion in limine: "About the prior conviction. And what I said was that because they involved crimes of moral turpitude and they were not remote in time that the defense counsel could bring those up." The trial court also summarized the substance of its order as follows: "[T]he minute order says defendant may relay the fact that plaintiff has a felony conviction, the date of the conviction and the name of the charge. Any further information regarding impeachment must be brought up outside of the jury's presence unless the door is opened by the plaintiff."

During the jury selection process, defendant's trial counsel informed the trial court that he had attended high school with

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[1] Neither the complaint nor the answer is included in the record on appeal.

[2] Plaintiff's motion in limine is not part of the record on appeal; only defendant's opposition to that motion is included in the record.

Juror No. 29. Plaintiff's counsel asked for more information, and defendant's counsel responded that Juror No. 29 had dated one of his high school friends, that counsel may have spoken to Juror No. 29 a "handful" of times, but they had never socialized in a small group setting. The trial court agreed to ask all of the jurors if they knew any of the attorneys, and if Juror No. 29 indicated that she knew defendant's counsel, the court would excuse her. When jury selection resumed, the trial court had the attorneys stand when the court stated their names and asked if any of the jurors recognized them. No one, including Juror No. 29, responded.

A four-day jury trial ensued at which plaintiff, two of his companions at the restaurant on the date of the accident, and an employee of defendant's, testified. Defendant's safety expert also testified, as did defendant's medical damages expert.

At the close of evidence, the trial court denied defendant's motion for nonsuit and a directed verdict and then instructed the jurors. The jury returned a verdict in favor of defendant, answering "no" to the following question: "Was Johnnies Restaurant, Inc. negligent in the use of or maintenance of the property?" This appeal followed.

DISCUSSION

I. Alleged juror bias

Plaintiff contends the trial court erred by not excusing Juror No. 29, who attended the same high school as defendant's trial counsel, and who plaintiff allegedly observed "giving friendly eyes" to defendant's trial counsel during a lunch break. Plaintiff also alleges misconduct on the part of alternate Juror No. 2, who purportedly asked plaintiff if he was okay after she saw him drop his cell phone in the hallway.

We review the trial court's decision to retain or discharge a juror under the abuse of discretion standard. (*People v. Earp*

(1999) 20 Cal.4th 826, 892.) Under that standard, we must uphold the trial court's decision unless it ""falls outside the bounds of reason."" (*Ibid.*)

The record discloses no abuse of discretion. There is no evidence of bias on the part of Juror No. 29, who did not recognize defendant's trial counsel when the jurors were questioned about the attorneys during the jury selection process.

We disregard plaintiff's arguments concerning alleged misconduct by alternate Juror No. 2, as those arguments are based on facts that are not part of the record. (*Weller v. Chavarria* (1965) 233 Cal.App.2d 234, 246 [a reviewing court "will disregard statements of alleged facts in the briefs on appeal which are not contained in the record"].)

II. Admission of prior felony conviction

Under Evidence Code section 788, prior felony convictions may be used for the purpose of attacking the credibility of a witness. (Evid. Code, § 788.) "[U]pon proper objection to the admission of a prior felony conviction for purposes of impeachment in a civil case, a trial court is bound to perform the weighing function prescribed by [Evidence Code] section 352. [Citations.]" (*Robbins v. Wong* (1994) 27 Cal.App.4th 261, 274.) Under Evidence Code section 352, the "court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Plaintiff contends the trial court erred by denying his motion in limine to exclude evidence of a prior felony conviction for forgery. We review the grant or denial of a motion to exclude a witness's prior conviction under the abuse of discretion standard. (*People v. Rowland* (1992) 4 Cal.4th 238, 259.) A trial

court has abused its discretion when it has acted in "an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

Plaintiff fails to establish any abuse of discretion. Neither his motion in limine nor the trial court's order denying that motion is part of the record on appeal. The only evidence in the record regarding the trial court's ruling is the trial court's statement on the record that plaintiff's prior conviction involved a crime "of moral turpitude" that was "not remote in time" and that defense counsel could use the fact that plaintiff had suffered a felony conviction, the date of the conviction, and the charge for which he had been convicted for the purpose of impeaching plaintiff's credibility. Nothing in the record establishes that the trial court's ruling was arbitrary, capricious, or patently absurd. (*People v. Jordan, supra,* 42 Cal.3d at p. 316.)

III. Res ipsa loquitur

Plaintiff contends the doctrine of res ipsa loquitur supports a finding of liability in this case.

"'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. [¶] The applicability of the doctrine depends on whether it can be said the accident was probably the result of negligence by someone and defendant was probably the person who was responsible. [Citations.] In the absence of such probabilities, there is no basis for an inference of negligence serving to take the place of evidence of some specific

negligent act or omission. [Citation.] . . . .' [Citation.]" (*Scott v. Rayhrer* (2010) 185 Cal.App.4th 1535, 1540.)

"At trial, before the burden-shifting presumption [of res ipsa loquitur] arises, *the plaintiff must present some substantial evidence* of three conditions: (1) the injury must be the kind which ordinarily does not occur in the absence of someone's negligence; (2) the injury was caused by an instrumentality in the exclusive control of the defendant; and (3) the injury was not due to any voluntary action or contribution on the part of the plaintiff. [Citations.]" (*Elcome v. Chin* (2003) 110 Cal.App.4th 310, 316-317.)

The parties filed a set of joint and contested proposed jury instructions in which plaintiff requested an instruction for res ipsa loquitur and defendant opposed that request. Plaintiff apparently withdrew this request, however, as it was not included among the proposed instructions the parties discussed with the trial court when the jury instructions were finalized. An instruction on res ipsa loquitur accordingly was not given.

"Before alleged error in the refusal to give an instruction will be reviewed on appeal, the record must show, (1) a proper request for such instruction, and (2) the ruling of the trial court refusing to give the requested instruction. [Citations.]" (*Blair v. Williams* (1952) 109 Cal.App.2d 516, 519.) Plaintiff has failed to meet this burden.

To the extent plaintiff suggests this court should apply res ipsa loquitur as a matter of law, he fails to point to any evidence in the record that supports the doctrine's application. He accordingly has established no error.

IV. Sufficiency of the evidence to support the verdict

We treat plaintiff's request that we assess the credibility of defendant's witnesses as well as the weight and substance of

their testimony as a challenge to the sufficiency of the evidence supporting the jury's verdict.

"In resolving challenges to a verdict based on sufficiency of the evidence, we review the record as a whole, resolving all conflicts and indulging all legitimate and reasonable inferences in favor of the prevailing party, to determine whether substantial evidence supports the verdict. [Citation.] 'Substantial evidence' in this regard does not mean 'any evidence.' Rather, to be 'substantial,' the evidence must be "'of ponderable legal significance, . . . reasonable in nature, credible, and of solid value."' [Citation.] If there is substantial evidence, contradicted or uncontradicted, that will support the finding, it must be upheld regardless of whether the evidence is subject to more than one interpretation. [Citations.]" (*Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 Cal.App.4th 257, 273.) Substantial evidence supports the verdict.

Sandra Proctor, a waitress at Johnnie's Restaurant for 33 years, testified that she was working on the night of plaintiff's accident. She described the restaurant's outdoor patio where plaintiff's accident occurred and said that the patio surface is roughly textured concrete similar to a sidewalk. Proctor said that she did not notice any holes or breaks in the concrete that were large enough to present a problem, and if she had, she would have alerted her manager.

Proctor testified that she was standing approximately two feet away from plaintiff at the time of the accident and that she witnessed his fall. She said that she saw plaintiff sitting facing the firepit on a wooden bench that had been placed less than a foot away from the firepit. When Proctor told plaintiff that he could not sit there, plaintiff attempted to push or slide the bench backward with his feet. The bench tipped over, and plaintiff fell backward.

Proctor's testimony conflicts with that of plaintiff and his witness Kia Saidi, who had accompanied plaintiff to the restaurant on the night of the accident. Both plaintiff and Saidi testified that the fall occurred after plaintiff had vacated the bench on which he had initially been sitting adjacent to the firepit. According to Saidi and plaintiff, plaintiff fell backwards while he was sitting or attempting to sit on another bench at a nearby table. Plaintiff also testified that he had never seen Proctor and disputed that she was one of the waitresses working at the restaurant on the night of his fall. Plaintiff argues that this conflict in the evidence undermines Proctor's credibility. An appellate court, however, cannot reweigh the evidence, and all conflicts in the evidence and questions concerning the credibility of witnesses must be resolved in favor of the jury's verdict. (*Barouh v. Haberman* (1994) 26 Cal.App.4th 40, 44.)

Plaintiff's challenge to the testimony of defendant's safety expert, Ned Wolfe, fails for similar reasons. Wolfe, a mechanical and safety engineer, testified that he visited Johnnie's Restaurant in April 2016 and inspected an exemplar of the bench from which plaintiff had fallen. Wolfe examined an exemplar because the original bench was not identifiable, as the benches at the restaurant are all the same size, construction, and color. Wolfe measured the exemplar, weighed it, and sat on it. He also examined the tilt of the patio floor and found it to be "slightly over one degree which is barely perceptible by the eye."

Wolfe opined as to the friction coefficient between the bench and the concrete floor, determined how much force would be required to tip the bench over given its size and plaintiff's weight, and concluded that it would have taken a "considerable force" of 55 pounds applied horizontally to tip the bench. Wolfe further opined that a person sitting down in a reasonable manner on the bench would not cause it to tip over, but that to do so

would require an "intentional application" of "horizontal force, through the legs to cause it to tip back."

Both Proctor's and Wolfe's testimony constitute substantial evidence that supports the jury's determination that defendant was not negligent in the use or maintenance of its property.[3] Plaintiff has failed to establish that he is entitled to a new trial on any of the issues he raises in this appeal.

DISPOSITION

The judgment is affirmed. Defendant is awarded its costs on appeal.

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_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT

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[3] Plaintiff also challenges the testimony of defendant's medical expert, Dr. Ronald Kvitne, who testified regarding plaintiff's injuries and damages. Plaintiff's injuries and medical expenses are not at issue in this appeal, however, because after the jury returned a defense verdict on the issue of liability, it made no findings as to plaintiff's alleged injuries and damages.