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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

TAYLOR GRIGSBY et al., Plaintiffs, Appellants and Respondents., v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant, Respondent and Appellants.	2d Civil No. B233430 (Super. Ct. No. 1305881) (Santa Barbara County)

A jury awarded Taylor Grigsby $355,000 after he fractured his kneecap during a college baseball game at respondent's, Regents of the University of California (Regents), baseball field. Taylor and his parents, Daniel Grigsby and Karen Grigsby, appeal from the judgment because the trial court granted summary adjudication on parents' cause of action for negligent infliction of emotional distress (bystander liability) and denied Taylor's motion for new trial. Regents appeal from a post-trial order denying, in part, its motion to tax costs or conduct discovery on Taylor's claimed costs for models, blowups, and photocopies of exhibits. We affirm.

Facts & Procedural History

Taylor, an intercollegiate player on the University of Southern California baseball team (USC), was injured trying to catch a high-fly foul ball at an April 18, 2008 University of California Santa Barbara (UCSB) game. As the ball drifted over the left

field fence, Taylor slid on the ground to avoid hitting the fence and struck a board in the grass, fracturing his right kneecap (patella).

Taylor's parents were in the bleachers and saw Taylor make a "pop slide" and stop abruptly just short of the fence. Parents realized Taylor was injured when he did not get up.

Doctor Bert Mandelbaum, an orthopedic surgeon, performed surgery on April 23, 2008. During the one hour surgery, Doctor Mandelbaum removed bone and cartilage fragments and used two metal screws and wire to repair the fracture. Taylor had a good recovery but was no longer able to engage in competitive sports.

On February 27, 2009, Taylor sued for dangerous condition of public property and parents sued for negligent infliction of emotional distress (NIED). Regents moved for summary adjudication on the NIED cause of action. The trial court granted the motion because parents did not know the board was on the baseball field or that it caused Taylor's injury.

Regents made a $400,000 statutory offer. (Code of Civ. Proc., § 998.)[1] Taylor rejected the offer and proceeded to trial on damages. Doctor Mandelbaum testified that Taylor should have a $10,000 surgery to remove the knee hardware and that Taylor would not be able to play college baseball. The doctor opined that Taylor would experience knee pain and osteoarthritis symptoms over the next 10 to 15 years. New treatments, such as viscosupplementation and platelet rich plasma (PRP), would delay the onset of arthritis at a cost of about $1,000 a year. The doctor opined that Taylor could require knee surgery in 10 to 15 years at a cost of $45,000 (partial knee replacement) to $55,000 (full knee replacement).

The jury awarded $95,000 future medical expenses and $260,000 non-economic damages. Taylor unsuccessfully moved for a new trial and filed a memorandum of costs for $76,116.03 preoffer costs and $18,285.35 postoffer costs. Regents filed a motion to tax costs and a memorandum of costs based on the theory that

[1] All statutory references are to the Code of Civil Procedure unless otherwise stated.

the $400,000 statutory offer made it the prevailing party under the cost shifting provisions of section 998. The trial court struck $26,669 in preoffer costs and found that the remaining $49,446 preoffer costs incurred by Taylor plus the $355,000 verdict was in excess of the $400,000 statutory offer.

Negligent Infliction of Emotional Distress

Parents argue that the trial court erred in concluding there were no material triable facts of contemporaneous awareness of the injury producing event to support a claim for negligent infliction of emotional distress (NIED). The grant of summary adjudication is reviewed de novo. (*Rosales v. Battle* (2003) 113 Cal.App.,4th 178, 1182.) " 'On review of a summary [adjudication], the appellant has the burden of showing error, even if he did not bear the burden in the trial court. [Citation]. . . . "[D]e novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. . . . " .' " (*Baines v. Moores* (2009) 172 Cal.App.4th 445, 455.)

Thing v. La Chusa (1989) 48 Cal.3d 644 (*Thing*) holds that a plaintiff/bystander may sue for NIED "only if the plaintiff: (1) is closely related to the injury victim, (2) is present at the scene of the injury-producing event at the time it occurs *and is then aware that it is causing injury to the victim* and, (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness." (*Id*., at p. 647, emphasis added.) Many of the published NIED cases involve medical malpractice settings in which the plaintiff/bystander lacked the medical acumen to know the negligent medical treatment, when administered, injured the family member. (See e.g., *Bird v. Saenz* (2002) 28 Cal.4th 910, 916-919; *Golstein v. Superior* Court (1990) 223 Cal.App.3d 1415, 1422-1423.) As a matter of public policy, "[t]he overwhelming majority of 'emotional distress' which we endure, . . . is not compensable." (*Thing, supra,* 48 Cal.3d at p. 667.) There are, however, "extreme" examples, such as where the plaintiff watches a surgeon amputate a relative's sound limb by mistake. (*Bird v. Saenz,*

supra, 28 Cal.4th at p. 918 (*Bird*).) "Such an accident, and its injury-causing effects, would not lie beyond the plaintiff's understanding awareness. " (*Ibid.*)

Missing here is contemporaneous sensory awareness of the causal connection between the negligent conduct and the resulting injury. The complaint states: "The wooden plank was not readily observable, and was partially hidden by the grass. The wooden plank constituted a dangerous condition, which was the direct cause of Plaintiff TAYLOR GRIGSBY'S injuries and damages." The complaint states that the "wooden plank was concealed and hidden inside the field of play on the SUBJECT PROPERTY." The pleadings set the boundaries of the issues to be resolved by summary judgment or summary adjudication. (*Oakland Raiders v. National Football Leage* (2005) 131 Cal.App.4th 621, 648.)

The board was hidden in the grass and parents were not contemporaneously aware that the board caused Taylor's injury. (*Thing*, *supra*, 48 Cal.3d at p. 647.) This is established by the deposition testimony. Parents did not see the board, know that Taylor's knee hit the board, or know that Taylor was seriously injured by the board. From their vantage point in the bleachers, Taylor may have suffered a cramp, pulled a muscle, hit a clump of grass, or caught a baseball clete, when he slid to an abrupt stop and did not get back up.

Parents argue that their sports training and experience enabled them to realize that Taylor hit something. Parents, however, did not know the board was left in the grass before the game. (See e.g., *Morton v. Thousand Oaks Surgical Hospital* (2010) 187 Cal.App.4th 926, 934-935 [daughters witnessing mother's post-surgical decline could not circumvent *Thing* and *Bird* by alleging they were "experienced in the medical field" and thus perceived alleged malpractice].) Nor did they know, at time of impact, that the board shattered Taylor's knee. *Thing* requires contemporaneous awareness of the causal connection between the negligent conduct and the resulting injury. (*Thing, supra,* 48 Cal.3d at p. 647; see *Ra v. Superior Court* (2007) 154 Cal.App.4th 142, 149 ["contemporaneous" awareness requires proof of "simultaneous awareness"].) The point is not that the perception has to be visual, but that the negligent act (i.e. a board left in the

grass) is "contemporaneously understood as causing injury. . . . [Citation.]" (*Bird, supra,* 28 Cal.4th at p. 916.)

Like the trial court, we utilize common sense in drawing inferences from the undisputed facts. (*Visueta v. General Motors Corp.* (1991) 234 Cal.App.3d 1609, 1615.) If Taylor did not see the board hidden in the grass, logic dictates that parents did not see it from the bleachers. "[U]nder controlling Supreme Court precedent the absence of 'contemporaneous sensory awareness of the causal connection between the [injury-producing event] and the resulting injury' precludes recovery. [Citations.]" (*Ra v. Superior Court, supra,* 154 Cal.App.4th at p. 149.)

Attorney Misconduct

On May 25, 2010, more than a year after the action was filed, Regents admitted liability. Before jury selection, Taylor waived any claim for past medical expenses. The trial court, over Taylor's objection ruled that it would allow evidence of Taylor's past medical expenses and read the following stipulation to the jury: "The wood plank was the legal cause of Taylor Grigsby's physical injury to his knee. The University of California, Santa Barbara agrees it is responsible for the physical injury. Thus, the University of California, Santa Barbara does not dispute liability and the only issue that remains for you, the jury, to decide is whether plaintiff sustained damages from the injury, and, if so, the amount of those damages."

Taylor claims he was denied a fair trial because defense counsel told the jury that Regents had always admitted liability and wanted to pay Taylor's medical expenses. The comment was in response to plaintiff's counsel who, in opening statement, told the jury: "We've had litigation for almost three years. There are boxes and boxes of depositions and litigation going back and forth over the last three years. [¶] It wasn't until last July [2010] that the defendant finally admitted liability. Until then there was a bunch of stuff back and forth, and then they offered a stipulation, and that is why liability is no longer part of this case."

Defense counsel reminded the jury that statements of counsel were not evidence and that the total cost of Taylor's surgery and rehabilitation was $26,585. "The

medical records, when you see them, are very thin. . . . [¶] . . . We have always wanted to give Mr. Grigsby that amount of $26,585. Obviously it has been withdrawn -- [.]" The trial court sustained an objection.

Defense counsel then stated "the evidence will show this litigation was filed before Mr. Grigsby ever stopped – excuse me – ever even stopped treating with Dr. Mandelbaum; that it was always the intent in this case, unfortunately, to bring this matter before you. And the evidence will show no efforts were tried to resolve this short of coming here and asking for money." The trial court sustained an objection and instructed the jury to disregard the comment.

Midtrial, Taylor moved to reopen to admit Regents' answer to the complaint and introduce discovery that Regents disputed liability for over a year. Taylor argued that the evidence would rebut defense counsel's statement that "the first time we were ever asked to admit liability, we did." Taylor's attorney wanted to "level the playing field" because "we've had a lot of innuendo . . . . [¶] It's become a – the lawyer's a target, lawyer driven kind of a defense, and I - - I'm very concerned about that."

The trial court denied the motion to reopen because the jury had already been instructed that statements of counsel are not evidence. "[P]laintiff at one point asked the Court to intercede when a similar comment was made and the Court immediately sustained the objection and struck the statement. . . . [¶] Additionally, the Court always urges settlement of important issues prior to trial. The Regents stipulated that " 'both the issues of negligence and causation' were not going to be challenged. To say that plaintiff has not made that 'admission' clear to the jury with rhythmic regularity would be a gross misstatement. To now allow the plaintiff to additionally argue there was a delay in reaching that concession would be a very chilling signal to send to litigants; there are real benefits to the public and the Court in resolving all issues possible before trial. . ."

The trial court found that the proffered evidence had no probative value and would be highly prejudicial. (Evid. Code, § 352.) "[T]he goal of the plaintiff is to paint the Regents badly because they did not immediately stipulate to negligence . . . and to

argue that counsel has attempted to mislead the jury; such arguments will be to encourage the introduction of punitive damages where none are otherwise available."

Taylor renewed the attorney misconduct claim in a motion for new trial which was denied. On appeal, he argues that defense counsel created the false impression during voir dire and opening statement that Regents took immediate responsibility for its wrong. Taylor, however, has not provided a reporter's transcript of jury voir dire. What the record does show is that innuendos were made by plaintiff's counsel during opening statement.[2] When defense counsel attempted to rebut, the trial court sustained Taylor's objections and instructed the jury to disregard the comments.

On review, it is presumed that the jury understood and followed the instructions. (*NBC Subsidiary (KNBC-TV) Inc. v Superior Court* (1999) 20 Cal.4th 1178, 1223-1224.) " 'It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove any effect his conduct or remarks would otherwise have.' [Citation.]" (*Horn v. Atchison, T. & S.F. Ry. Co.* (1964) 61 Cal.2d 602, 610.)

Taylor argues that a government lawyer has a special duty not to engage in misconduct. (See e.g., *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871.) But a new trial will not be ordered unless the misconduct is sufficiently egregious to cause prejudice. (*Id*., at p. 872; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800-802.) "[I]n a long trial, as this one was, vigorously prosecuted and defended, frayed tempers leading to intemperate outbursts are a to-be-expected byproduct. Skilled advocates are not always endowed with 'high boiling points.' Juries, characteristically composed of

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[2] Plaintiff's counsel, in opening statement, inferred that the Regents wrongfully delayed admitting liability, forcing Taylor to engage in unnecessary litigation that filled "boxes and boxes of depositions and litigation going back and forth over the last three years." Counsel likened it to the Mafia breaking a person's kneecaps if the person fails to pay his or her debt. "Why do they do that? Not because they don't have another part of the anatomy to break, but they know if you break a kneecap, you will have a lifelong memory of what you did to them and what they did to you."

average men and women, may be assumed able to withstand substantial blandishments without surrendering their ability to reason soberly and fairly. Recognizing these factors, reviewing courts are not, and should not be, overly eager to reverse for conduct which is merely moderately captious." (*Love v. Wolf* (1964) 226 Cal.App.2d 378, 393.)

Prejudice is lacking here because the parties stipulated to liability. Regents admitted liability and acknowledged that Taylor should be awarded damages, the only question being how much. It is beside the point when Regents admitted liability.[3]

We reject the argument that counsel's tit-for-tat comments in opening statement denied Taylor a fair trial. " 'A trial judge is in a better position than an appellate court to determine whether a verdict resulted wholly, or in part, from the asserted misconduct of counsel and [the trial court's] conclusion in the matter will not be disturbed unless, under all the circumstances, it is plainly wrong.' [Citation.]" (*Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 318, fn. 5.) We have reviewed the entire record and conclude there is no reasonable probability that Taylor would have obtained a more favorable verdict absent the alleged misconduct. (*Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th at pp. 802-803.)

Motion to Tax Costs

Regents argue that the trial court abused its discretion in not striking most of Taylor's preoffer costs. After the verdict was entered, each side filed a memo of costs and claimed it was with prevailing party. The trial court awarded Taylor $49,466 in preoffer costs, which, when added to the $355,000 verdict, resulted in a $404,446 judgment. (See *Mesa Forest Products, Inc. v. St. Paul Mercury Ins. Co.* (1999) 73

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[3] Taylor argues that defense counsel's statements violated Evidence Code section 1152 which prohibits evidence of settlement discussions and offers of compromise to prove a defendant's liability. (*Zhou v. Unisource Worldwide Inc.* (2007) 157 Cal.App.4th 1471, 1475, fn. 3.) Evidence Code section 1154 precludes evidence of an injured party's offer to discount a claim to prove the claim's invalidity. (*Ibid.*) "These sections only prohibit 'the introduction into evidence of an offer to compromise a claim *for the purpose of proving liability for that claim.*' [Citation.]" (*Young v. Keele* (1987) 188 Cal.App.3d 1090, 1093-1094.)

Cal.App.4th 324, 330-311 [preoffer costs are included in determining whether judgment is more favorable than the statutory offer].)

Regents contends that the preoffer exhibit costs should have been stricken because many of the exhibits were not used at trial.[4] (See former § 1033.5, subd. (a)(12) [now subd. (a)(13)]; *Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1559-1560.) After Regents stipulated to liability, the trial court granted an in limine motion to exclude many of the exhibits.

Taylor and Regents cite conflicting case authority on whether it is proper to award costs for exhibits not used at trial. (Compare *Applegate v. St. Francis Lutheran Church* (1994) 23 Cal.App.4th 361, 364 [costs for photographs and blueprints permitted even though action dismissed before trial] and *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 855-857 [prevailing party awarded costs for photocopying exhibits even though most of the exhibits were not used at trial]), with *Seever v. Copley Press, Inc., supra,* 141 Cal.App.4th 1550, 1559-1560 [costs for exhibits not used at trial not permitted]; *Ladas v. California State Automobile Association* (1993) 19 Cal.App.4th 761, 775 [trial court erred in awarding costs for trial exhibits, blowups and transparencies excluded at trial]; *Great Western Bank v. Converse Consultants, Inc.* (1997) 58 Cal.App.4th 609, 615 [case settled; exhibits not "reasonably helpful to aid the trier of fact"].)

In *Applegate v. St. Francis Lutheran Church, supra,* 23 Cal.App.4th 361 (*Applegate*) plaintiff dismissed a nuisance abatement action the day of trial and claimed

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[4] Taylor incurred $71,182 in preoffer costs for models, blowups, medical illustrations, diagrams, and photocopies of exhibits. Regents claims the following preoffer costs should be stricken: $9,734.83 for photos of Taylor and his awards/trophies; a "Ladder of Success" graphic that cost $8,244.43; $7,421.84 for a "Graphics Creation"; a $1,371.88 "Physical Therapy" uncensored graphic; a $4,033.31 "Symptoms" timeline graphic; a $300 bronze machine screw depicting the surgical screw used to repair Taylor's knee; and $2,216.17 for "After Hours/Weekend/Holiday Service," "Packing/Shipping Sleeve," "Metal Easel," "Color Markers" and "Messenger Service" for the models, blowups, and exhibit photocopies.

that defendant could not recover costs for trial exhibits not used at trial. Rejecting the argument, the Court of Appeal held that "[i]t was within the trial court's discretion to allow the costs for photographs and blueprints pursuant to section 1033.5, subdivision (c)(2) if they were reasonably necessary to the conduct of the litigation. . . Until a dismissal was filed, defendants were forced to continue preparing for trial in the matter. The exhibits prepared were 'reasonably necessary to the conduct of the litigation.' An experienced trial judge recognized that it would be inequitable to deny as allowable costs exhibits which a prudent attorney would prepare in advance of trial. . . ." (*Id.*, at p. 364. fn. omitted.)[5]

The same principle applies where a defendant makes a statutory offer the eve of trial and then admits liability to undercut plaintiff's preoffer costs. Regents made the $400,000 statutory offer on April 28, 2010, four months before the scheduled July 6, 2010 trial date. On May 25, 2010, Regents admitted liability and, at a pretrial hearing, brought an in limine motion to exclude Taylor's trial exhibits.

Taylor's verified memorandum of costs lists $71,182 in preoffer costs for trial exhibits, photos, and graphics. The trial court found that "[s]ome of the graphics were prepared for use at trial, although not used for reasons not anticipated at the time of their creation. Further, some of their content was ultimately used, even if it had to be modified to conform to the court's pretrial rulings. The costs were incurred in good faith, [and] were reasonably necessary to the conduct of the litigation and the court will exercise its discretion to allow the costs under the authority of CCP § 1033.5(c)(4)."

The trial court rejected Regents' argument "that it is not believable that [Taylor] would have incurred so many costs a full 9 months before the trial took

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[5] Section 1033.5, subdivision (c)(2) states: "Allowable costs shall be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation." Subdivision (c)(4) states: "Items not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion."

place. . . . [T]he original trial date was in February, 2010, and the trial date was continued a number of times for a number of reasons, and . . . this explains why the costs were incurred at this point in time. Because timely trial preparation is to be encouraged and applauded, and not punished, the Court does not find it unreasonable that plaintiff incurred such a great amount of costs prior to the 4/28/10 (998) offer and declines to make any inference with respect to their propriety simply because of the time at which they were incurred."

"Whether a cost is 'reasonably necessary to the conduct of the litigation' is a question of fact for the trial court, whose decision will be reviewed for abuse of discretion. [Citations.]" (*Gibson v. Bobroff* (1996) 49 Cal.App.4th 1202, 1209.) Regents complains that the invoices should have been more detailed and included a "Job Tracking Report" of the work performed in preparing each exhibit. Regents, however, did not ask for such a report nor is there any evidence that Taylor has such a report.

Regents complains that Attorney Adam Feit's declaration in support of costs lacks foundation and does not authenticate each billing and invoice. This is a substantial evidence argument which was waived by Regents' failure to completely and fairly summarize the evidence supporting the trial court's findings. (Eisenberg et al., Cal. Practice Guide, Civil Writs & Appeals (Rutter 2011) [¶] 8:71, p. 8-36; *Arechiga v. Dolores Press, Inc.* (2011) 192 Cal.App.4th 567, 571-572.) "A party who challenges the sufficiency of the evidence to support a finding must set forth, discuss, and analyze all the evidence on that point, both favorable and unfavorable. [Citation.]" (*Doe v. Roman Catholic Archbishiop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218.) The verified memorandum of costs, invoices and billings, and supporting declaration is prima facie evidence that the preoffer costs were reasonable and necessarily incurred. (*Benach v. County of Los Angeles, supra,* 149 Cal.App.4th at p. 856.)

Regents cites *Ladas v. California State Auto Assn., supra,* 19 Cal.App.4thj 761, 774, for the principal that a motion to tax costs automatically shifts the burden to Taylor to make a full evidentiary showing that the costs area reasonable and necessary. Regent's reading of *Ladas* is incorrect. (See *Benach v. County of Los Angeles, supra,* 149

Cal.App.4th at p. 856; *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 131.) "[I]t is not enough for the losing party to attack submitted costs by arguing that he thinks the costs were not necessary or reasonable. Rather, the losing party has the burden to present evidence and prove that the claims costs are not recoverable." (*Seever v. Copley Press, Inc., supra,* 141 Cal.App.4th at p. 1557.)

The trial court did not abuse its discretion in denying discovery or concluding that the costs were reasonably necessary to conduct the litigation. (§ 1033.5, subd. (c)(4); *Appelgate v. St. Francis Lutheran Church, supra,* 23 Cal.App.4th at pp. 363-364; *Science Applications Internat. Corp. v. Superior Court* (1995) 39 Cal.App.4th 1095, 1103; *Benach v. County of Los Angeles, supra,* 149 Cal.App.4th at p. 857.) "Burden of proof is not an issue in this instance, since, having presided over the trial, the trial court had all the evidence needed to determine whether the items claimed were reasonably helpful to the trier of fact" or reasonably necessary to conduct the litigation. (*Nelson v. Anderson, supra,* 72 Cal.App.4th, at p. 133.)

Regents' remaining arguments have been considered and merit no further discussion.

The judgment is affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Thomas P. Anderle, Judge

Superior Court County of Santa Barbara

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Mardirossian & Associates, Inc., Gary Mardirossioan and Adam Feit, for Appellants and Respondents.

Karen K. Peabody; Nye, Peabody, Stirling Hale & Miller, for Respondents and Appellants.