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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ANNE MOORE et al., Plaintiffs and Appellants, v. ROBERT HUTCHINSON, Defendant and Respondent.	B267011 (Los Angeles County Super. Ct. No. BC498931)

APPEAL from a judgment of the Superior Court of Los Angeles County. Malcolm H. Mackey, Judge. Affirmed.

Neil C. Newson & Associates and Neil C. Newson for Plaintiffs and Appellants.

Taylor Blessey, N. Denise Taylor, and Dean J. Smith for Defendant and Respondent.

After losing her underlying slip-and-fall case, appellant Anne Moore (Anne) and now her husband, appellant John Moore (John) (collectively appellants), sued Anne's attorney, respondent Robert Hutchinson, for legal malpractice. Respondent's motion for summary judgment was granted and appellants appealed. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Underlying Lawsuit

On July 3, 2009, at around 10:35 p.m., Anne slipped and fell on a public sidewalk outside a restaurant in Beverly Hills (the City). She was wearing recently purchased three-inch-high wedge sandals when she came into contact with a streetlight electrical box with a vault cover depressed in the sidewalk. She contended that she tripped at the southeast corner of the box and that it happened so quickly she did not have any recollection of what happened. Anne suffered multiple fractures in her ankle and impaired mobility.

Anne retained respondent, who then retained expert Kenneth Solomon (Solomon), described by respondent as a "well-known accident reconstructionist and biomechanist." Solomon opined that the City had no liability because the measure of depression in the sidewalk was too trivial to trigger constructive notice. Respondent tried to convince Anne to settle, but she refused and sued the City for personal injury. Solomon refused to sign a declaration and Anne's case proceeded without an expert. The City obtained summary judgment. Anne retained new counsel and filed an appeal. In an unpublished opinion, *Moore v. City of Beverly Hills*, B239683, August 6, 2013, this division affirmed the summary judgment. We found there was no credible evidence in the record that the height differential between the

electrical box and the sidewalk was greater than one inch, and we concluded that this differential constituted a trivial defect as a matter of law. We also concluded that Anne failed to create a triable issue of fact as to whether there were any other aggravating circumstances that made the defect more dangerous than height alone.

The Instant Lawsuit

Anne and John retained another attorney to sue respondent for legal malpractice.[1] Respondent brought a motion for summary judgment. Appellants opposed the motion and submitted several declarations, including their own and one by a forensic flooring expert, Kenneth D. Newson (K. Newson). After sustaining many of respondent's objections to appellants' supporting declarations, including their expert's declaration, the trial court granted the motion. Appellants filed this appeal.[2]

DISCUSSION

Appellants make two contentions on appeal: (1) the trial court erred in sustaining respondent's evidentiary objections, and (2) there were triable issues of material fact.

We review a grant of summary judgment de novo, considering "'all of the evidence set forth in the [supporting and opposition] papers, except that to which objections have been

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[1] Appellants' operative first amended complaint contained a second cause of action for loss of consortium, based on respondent's alleged negligence in failing to advise them of this claim. Respondent's demurrer to this cause of action was sustained without leave to amend.

[2] Appellants' opening brief erroneously asserts they are appealing from the judgment in the underlying personal injury case.

made and sustained by the court, and all [uncontradicted] inferences reasonably deducible from the evidence.'" (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612; *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534.) A defendant moving for summary judgment must show either that one or more elements of a cause of action cannot be established or there is a complete defense thereto. (Code Civ. Proc., § 437c, subd. (o)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Once the moving party's burden is met, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of material fact. (*Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261.) The party opposing the motion must produce "'*substantial*" responsive evidence sufficient to establish a triable issue of fact. (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 417.)

We review a trial court's ruling on the exclusion of evidence in a summary judgment proceeding for abuse of discretion. (*Park v. First American Title Co.* (2011) 201 Cal.App.4th 1418, 1427.) To succeed on appeal, the appellant is required to establish, at a minimum: (1) where in the record he demonstrated "[t]he substance, purpose, and relevance of the excluded evidence was made known to the [trial] court" (Evid. Code, § 354, subd. (a)); (2) the error in excluding the evidence; and (3) how the error resulted in a "miscarriage of justice." (Cal. Const., art. VI, § 13; Evid. Code, § 354; Code Civ. Proc., § 475; *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.)

I. Evidentiary Objections

Appellants argue that respondent's objections were "untimely filed and improperly ruled upon."

There is no merit to appellants' timeliness argument. Pursuant to California Rules of Court, rule 3.1354(a), "[u]nless

otherwise excused by the court on a showing of good cause, all written objections to evidence in support of or in opposition to a motion for summary judgment or summary adjudication must be served and filed at the same time as the objecting party's opposition or reply papers are served and filed." Under Code of Civil Procedure section 437c, subdivision (b)(4), "[a] reply to the opposition shall be served and filed by the moving party not less than five days preceding the noticed or continued date of hearing . . ." Because the trial court sua sponte continued the hearing on respondent's summary judgment motion to March 24, 2015, respondent's reply papers and any written objections were due to be served and filed on March 19, 2015.

The record shows that on March 19, 2015, respondent filed and served by overnight mail both his reply brief and written objections to appellants' evidence. Appellants point out that the written objections show they were filed by the court on March 23, 2015.[3] But appellants ignore that the objections were also stamped as "Received" by the filing window on March 19, 2015. "Unless otherwise provided, a document is deemed filed on the date it is received by the court clerk." (Cal. Rules of Court, rule 1.20; *Fry v. Superior Court* (2013) 222 Cal.App.4th 475, 484.) The "Filed" date stamp is the same date the trial court signed and dated its ruling on the objections. We conclude the objections were timely filed and served.

Appellants assert that they had no opportunity at the hearing to make any comment or argument regarding the objections. We give this assertion no consideration. Appellants do not cite any place in the record to support this assertion, and there is no copy of the reporter's transcript in the appellate

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[3] Appellants' opening brief states the wrong year.

record. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281,1295–1296 [Failure to provide an adequate record on an issue requires that the issue be resolved against the appellant].)

Appellants next argue that "many of the objections were not well-founded." With respect to Anne's declaration, appellants simply conclude that her refreshed recollection as to how she fell was "fully admissible." With respect to the declaration of appellants' expert, appellants state that the "essence of the objections were lack of personal knowledge and other boilerplate objections." Appellants then conclude "there was sufficient foundation for the opinions expressed." Appellants' mere conclusions in the absence of reasoned arguments and citation to authority are insufficient to meet their appellate burden of demonstrating error by the trial court.

"'It is a fundamental rule of appellate review that the judgment appealed from is presumed correct and '"'all intendments and presumptions are indulged in favor of its correctness.'" [Citation.]" [Citation.] An appellant must provide an argument and legal authority to support his contentions. This burden requires more than a mere assertion that the judgment is wrong. "Issues do not have a life of their own: If they are not raised or supported by argument or citation to authority, [they are] . . . waived." [Citation.] It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness. When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citation.]' [Citation.]" (*Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 799.)

Appellants have failed to establish the trial court abused its discretion in sustaining respondent's evidentiary objections.

II. No Triable Issue Regarding Causation

Although not pointed out by appellants, the elements of a legal malpractice cause of action are (1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence. (*Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519, 1531; *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1199.)

Unlike other negligence cases, causation in a legal malpractice case involves trying a case-within-a-case methodology. This means that a plaintiff in a legal malpractice case must establish that he or she would have ultimately prevailed in the underlying action but for the defendant attorney's professional negligence. (*Roger H. Proulx & Co. v. Crest-Liners, Inc*. (2002) 98 Cal.App.4th 182, 195.) "Without such a showing, there is no cause of action because there are no damages caused by the breach of the professional's duty." (*Ibid*.) While causation is typically a question of fact, it may be decided as a matter of law if, under the undisputed facts, there is no room for a reasonable difference of opinion. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 790.)

Although the opening brief is somewhat difficult to follow, appellants appear to argue that Anne would have prevailed in her underlying personal injury case if the expert retained to consult in that case, Solomon, had been given more than a "dearth of information" by respondent, such that Solomon "would

likely ha[ve] opined that the defect was not 'trivial.'" Appellants purport to rely on various pieces of evidence in an attempt to create a triable issue on the causation element of their legal malpractice claim.

First, according to appellants the evidence in the personal injury case "clearly show[s] a change of condition after the fall in June 2009 . . . a point not clearly raised by the opposition to [the City's motion for] Summary Judgment," presumably because there was no declaration by Solomon. Appellants, however, do not identify any change of condition. While they mention "the sides to the box in the sidewalk had been [ground] down," this evidence was presented in the personal injury case and appellants concede that this work was done "prior to the date of the accident." To the extent appellants suggest that additional grinding took place after the accident, this opinion evidence in K. Newson's declaration in the instant case was objected to by respondent and the objections were sustained. Thus, the evidence is inadmissible. Moreover, we noted in our prior opinion that "[e]ven if the sidewalk was ground down at some point, actions taken to improve public property are not evidence that the property was in a dangerous condition at the time of injury," citing Government Code section 830.5, subdivision (b).

Second, appellants refer to photographs of the accident site taken by City police officer Daniel Tanner, which they claim also show a change of condition. But these photographs and his declaration were presented in the personal injury case. Officer Tanner's declaration in that case stated that he took photographs at the site on the day of the accident, July 3, 2009, and then again two years later on August 18, 2011, and "the condition of the sidewalk and of the Street Light Vault Box/Cover is identical

to the conditions on July 3, 2009." Thus, this evidence does not assist appellants.

Third, appellants point to Anne's declaration in the instant case stating that her memory had been refreshed and she now recalls that her fall was precipitated by the "rolling" of her left ankle. She claims Solomon was unaware of this "rolling" and that he never saw the shoes she was wearing at the time of the accident. But Anne's refreshed recollection that she rolled her left foot was objected to by respondent in the instant case, and this objection was sustained by the trial court. Thus, this evidence, which directly contradicts the position she took in the personal injury case that she could not remember anything about how she fell, is inadmissible. Also, photographs of Anne's shoes, which showed an absence of any scuffing or scraping on the sides or soles of the shoes, were in evidence in the personal injury case, and the City's expert opined that the absence of such markings indicated there was no rotation of the left foot. Appellants do not explain how Solomon's viewing of the actual shoes would have made any difference to the outcome of her personal injury case.

Fourth, appellants point to the declaration of K. Newson in the instant case, in which he opined that the cause of Anne's fall was due not only to the height differential at the southeast corner where Anne claimed to have fallen, but was also due to the lateral offset of the east side of the electrical box. Once again, this opinion evidence in his declaration was objected to by respondent, and the trial court sustained the objections. In any event, the height of the east side of the box was in evidence before the trial court in the personal injury case (three-fourths of an inch at its highest point) and the court in that case still found it to be trivial as a matter of law.

Fifth, appellants point out that respondent "waited until nearly two years after the accident to inspect the area with his expert, Dr. Solomon, but, by then crucial evidence had been destroyed." Appellants fail to identify what crucial evidence was lost or how it would have affected the outcome of the personal injury case. They also fail to explain how an earlier visit of the accident site would have made a difference. Appellants have not shown that Solomon did not have an adequate understanding of the conditions of the sidewalk or the electrical box as they existed at the time of the accident. Indeed, respondent's associate took photographs and a measurement of the southern edge of the box a mere 11 days after the accident. This evidence was before the trial court in the personal injury case, and we noted it in our prior opinion.

In sum, appellants have not presented either substantial or admissible evidence creating a triable issue of fact as to whether Anne would have obtained a better result in her personal injury case absent any alleged negligence by respondent. Accordingly, the trial court properly granted respondent's motion for summary judgment in this legal malpractice case.

DISPOSITION

The summary judgment in favor of respondent is affirmed. Respondent is entitled to recover his costs on appeal.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT