Filed 4/2/18 Krause v. Mercedes-Benz USA CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

ANDREW KRAUSE et al., Plaintiffs and Respondents, v. MERCEDES-BENZ USA, LLC, Defendant and Appellant.	2d Civ. No. B277612 (Super. Ct. No. 56-2014-00447380-CU-BC-VTA) (Ventura County)

Andrew Krause and Cynthia Krause brought this action to enforce their right under the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.), commonly known as the "lemon law," to compel Mercedes-Benz USA, LLC (MBUSA) to repurchase their defective vehicle. MBUSA appeals the judgment following the jury's verdict in the Krauses' favor.

MBUSA contends the trial court was biased against it, committed prejudicial evidentiary errors and incorrectly denied its request for a jury instruction on its "lack of maintenance"

affirmative defense. We conclude each of these contentions lacks merit. We therefore affirm.

FACTS AND PROCEDURAL HISTORY

On April 29, 2012, the Krauses purchased a new 2012 Mercedes-Benz GLK350 vehicle ("the vehicle"). MBUSA expressly warranted that the vehicle would be free from defects. During the second year of ownership, the Krauses began experiencing problems with the vehicle's emergency (or parking) brake. Specifically, the emergency brake light would randomly come on while the vehicle was being driven. This would cause the whole dashboard to light up. It also would cause the vehicle to make a loud, continuous dinging noise as a reminder to release the emergency brake. This occurred even though the brake was not engaged.

Between June and September 2013, the Krauses returned the vehicle to MBUSA's authorized dealership for the diagnosis and repair of the problem. After four attempts at repair failed, the Krauses filed a complaint against MBUSA for the repurchase of the vehicle under the lemon law.

MBUSA's designated expert, Eric Wierman, inspected the vehicle in September 2014. The Krauses' expert, Dan Calef, also was present. During the inspection, Wierman did not remove the paneling that covers the emergency brake mechanism. As a result, no photographs or videos of the emergency brake assembly were taken.

Calef was first deposed in April 2015. Calef diagnosed the emergency brake problem as an electrical issue. He based his opinion on the vehicle's repair history and his observations at the September 2014 inspection.

The trial was scheduled for November 9, 2015. In preparation for trial, Calef examined the vehicle to ensure it "is

fresh in [his] mind." After speaking with Mr. Krause, Calef realized additional testing was necessary. Based on this testing, Calef concluded the problem is mechanical rather than electrical. His opinion is that the mechanical components in the emergency brake system are defective in that they do not allow the emergency brake pedal to return to its proper "home" position. In Calef's view, this defect is causing the emergency brake light to sporadically come on while the vehicle is being driven.

The Krauses' counsel advised MBUSA's counsel that Calef's opinions had changed, and they arranged for a second deposition of Calef. After completing the second deposition, MBUSA moved ex parte to continue the trial date to permit a second defense inspection of the vehicle. Alternatively, MBUSA requested that Calef's new opinions be excluded at trial.

The Krauses' counsel "vigorously" objected to a continuance of the trial date and a second defense inspection of the vehicle. The trial court suggested that counsel reconsider his position given that it appeared to be "gamesmanship." Counsel refused, and the court found, "as a matter of fact, that the tactics utilized by [the Krauses'] counsel are dishonest, disingenuous and a direct violation of the spirit of the discovery statutes. The behavior of . . . counsel is gamesmanship on the worst order. The conduct of [the Krauses'] advocate is completely unreasonable. Rarely, in the Court's 18 years on the bench has it seen such unprofessional conduct." Notwithstanding these comments, the court determined the Krauses "should not suffer for their attorney's disreputable practices," and decided not to exclude Calef's new opinions. Instead, the court continued the trial date and reopened discovery for the limited purpose of allowing another defense inspection of the vehicle and a second deposition of Wierman.

MBUSA conducted its second inspection of the vehicle in November 2015. At that time, Wierman removed the paneling that covers the emergency brake mechanism. Upon removing the paneling, Wierman observed that one of the emergency brake bolts was "rounded off."

Prior to Wierman's trial testimony, the Krauses requested a hearing pursuant to Evidence Code section 402, which permits the trial court to "hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury." (Evid. Code, § 402, subd. (b).) The Krauses asserted that portions of Wierman's anticipated testimony should be excluded for lack of foundation and speculation. The portions included testimony regarding "user error," demonstrative/exemplar evidence and Wierman's opinion that the vehicle's condition had changed between MBUSA's first and second inspections.

After considering the evidence presented during the hearing, the trial court determined Wierman was not allowed to testify as to "user error," i.e., that the Krauses had inadvertently set the emergency brake. The court explained: "When Mr. Wierman was deposed and asked if he had any evidence of user error or outside influence, he said no. . . . If [his opinion is] not supported by evidence, it is speculation. If it's speculation, and there's an objection, I'm required to sustain it."

The trial court further determined that Wierman could not testify that the bolt in the emergency brake mechanism was "rounded off" sometime between MBUSA's first and second vehicle inspections. Wierman conceded that since he did not remove the paneling covering the bolt at the time of the first inspection, he could not affirmatively state whether or not the bolt was "rounded off" or sheared at the time of that inspection. The court ruled that although Wierman could testify regarding

the compromised condition of the bolt, he could not speculate as to when the bolt was compromised or who caused it to be compromised. The trial court also refused to allow the MBUSA's demonstrative/exemplar evidence relating to emergency brake systems in other vehicles.

At the conclusion of the hearing, counsel for MBUSA complained that "[i]t appears that facts are being decided against us." The trial court admonished counsel for being disrespectful. It stated: "You have the permission to make arguments. But if you want to make them disrespectfully, which is what you are doing right now, I have the right to not consider them. And I'm real close to not considering your arguments. You will change your tone and change your manners now, or your case is going to shorten up a lot. No, I'm not deciding the facts. . . ." The court then reiterated its rulings, explaining that Wierman is not permitted to "wander" from his deposition testimony or rely on speculation as the basis for his opinions.

MBUSA requested that the trial court give a modified jury instruction based on CACI 3220 (Affirmative Defense -- Unauthorized or Unreasonable Use). The proposed instruction stated: "Mercedes-Benz U.S.A., LLC is not responsible for any harm to plaintiffs if Mercedes-Benz U.S.A., LLC proves that any defect in the vehicle was caused by lack of proper maintenance of the vehicle after it was sold." The court declined to give the instruction, finding it was not properly "tailored in the way that describes the brake problem." MBUSA's counsel responded, "That's fine."

The jury returned a 9-3 verdict in favor of the Krauses. It found that a defect existed in the vehicle that MBUSA failed to repair after a reasonable number of repair opportunities, and that MBUSA failed to promptly replace or repurchase the vehicle.

The trial court entered judgment for the Krauses in the amount of $34,454.24,[1] plus attorney fees and costs. MBUSA appeals.

DISCUSSION

Judicial Bias

MBUSA asks us to reverse the judgment because the presiding trial judge was biased against it and therefore denied it a fair trial. According to MBUSA, certain comments and adverse rulings made by the judge, both before and during the six-day trial, demonstrate judicial bias that required the judge to recuse himself. It also contends the judge had an undisclosed "personal" relationship with the Krauses and one of their witnesses, Amanda Erwin, all of whom are local attorneys. This latter contention is based on two internet articles from 2008 and 2009 that MBUSA proffers for the first time on appeal.

Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(iii) states: "A judge shall be disqualified if . . . [¶] . . . [¶] A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." Any party seeking to disqualify a judge on this ground, or any other ground identified in Code of Civil Procedure section 170.1, must do so "at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification." (*Id.,* § 170.3, subd. (c)(1).) "This strict promptness requirement is not to be taken lightly, as a failure to comply constitutes forfeiture or an implied waiver of the disqualification." (*Tri Counties Bank v. Superior Court* (2008) 167 Cal.App.4th 1332, 1337 (*Tri Counties*); *In re Steven O.* (1991) 229 Cal.App.3d 46, 54.) "The matter cannot then be raised for the first time on appeal." (*In re Steven O.*, at

---

[1] The parties stipulated to the amount of damages set forth in the special verdict form.

p. 54; *Moulton Niguel Water Dist. v. Columbo* (2003) 111 Cal.App.4th 1210, 1218 [Appellants "did not preserve their claim of judicial bias for review because they did not object to the alleged improprieties and never asked the judge to correct remarks made or recuse himself"]; see *People v. Brown* (1993) 6 Cal.4th 322, 335-336; *Roth v. Parker* (1997) 57 Cal.App.4th 542, 548.)

"The purpose of the requirement that alleged grounds for disqualification be asserted at the earliest practicable opportunity is that ""[i]t would seem . . . intolerable to permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not."" [Citations.] In other words, '[a] party should not be allowed to gamble on a favorable decision and then raise such an objection in the event he is disappointed in the result.' [Citation.]" (*Tri Counties*, *supra*, 167 Cal.App.4th at pp. 1337-1338; *In re Steven O.*, *supra*, 229 Cal.App.3d at p. 55.)

Here, MBUSA's counsel was present when the trial judge made the allegedly improper comments to the jury and issued the adverse rulings. At no point, however, did counsel raise the issue of judicial bias. He had numerous opportunities to do so as the judge routinely asked counsel, after excusing the jury for the day or for breaks, whether there was any matter that needed to be taken up. MBUSA's counsel remained silent on the issue until the opening brief was filed.

Our legal system is predicated upon principles of fairness and due process. This includes notice and an opportunity to be heard. (*Edward W. v. Lamkins* (2002) 99 Cal.App.4th 516, 538.) MBUSA did not give the trial judge notice of its claim of judicial

bias and an opportunity to be heard on that claim. In the absence of a fully developed record, the issue is waived on appeal. (*Tri Counties*, *supra*, 167 Cal.App.4th at p. 1337; *In re Steven O.*, *supra*, 229 Cal.App.3d at p. 54.)

At oral argument, MBUSA's counsel maintained that the trial judge had a duty to disclose his "personal" relationships with the Krauses and Erwin, as evidenced by the two internet articles from 2008 and 2009. The articles do not demonstrate, however, that the trial judge even knew the Krauses and Erwin before this case was filed. The first article contains quotes from the trial judge, Mr. Krause and Erwin regarding mental illness issues. (Mental Illness Never Takes a Vacation, VC Reporter (Jun. 19, 2008), https://www.vcreporter.com/2008/06/mental-illness-never-takes-a-vacation/.) It appears the author interviewed each of them for the article, but there is no indication of any other connection.

The second article advertises a speech to be given by Mrs. Krause at an upcoming general meeting of Ventura County's National Alliance on Mental Illness (NAMI). (Newsletter, NAMI (July/Aug. 2009), pp. 1, 2, 7, http://www.namiventura.org/uploads/NAMIVentura_JulAug2009.pdf.) The only mention of the trial judge is that he sits on NAMI's Advisory Board and supported a NAMI-sponsored walking event. Once again, there is no indication that he and Mrs. Krause knew each other prior to this case. Moreover, even if they had some knowledge of each other, "[i]t is not unusual in this day and age for attorneys practicing law in the same community to be friendly acquaintances," and that "[a]bsent more, [this sort of friendly professional acquaintance] does not create [an] 'impression of possible bias.'" (*Gonzalez v. Interinsurance Exchange* (1978)

84 Cal.App.3d 58, 63-65; see also *Banwait v. Hernandez* (1988) 205 Cal.App.3d 823, 830.)

In any event, we have reviewed the record before us, including the five-volume trial transcript. If we were to consider the judicial bias claim based on this record, we would reject it. While it is true that some rulings went in the Krauses' favor, they also lost many of their evidentiary objections. A fair reading of the trial judge's statements and rulings is that they were evenhanded and unbiased. The judge's conduct was appropriate and considerate at all times. On one occasion, the judge did admonish MBUSA's counsel for his discourteousness, but it was done outside the jury's presence. And that admonishment was a proper exercise of the judge's "power to control the trial." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1108.) In sum, the record does not, as MBUSA claims, "paint[] a picture of a trial court which simply appeared to favor one side over the other."

Denial of MBUSA's Request to Exclude Calef's New Opinions

MBUSA contends the trial court abused its discretion by denying its ex parte application to preclude Calef from offering new opinions beyond his first deposition. The Krauses respond that MBUSA has not shown that the court's decision exceeds "'the bounds of reason, all of the circumstances before it being considered.'" (*In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 197.) The Krauses are correct.

MBUSA's ex parte application contained two alternative requests. It sought an order "(1) barring any of . . . Calef's new opinions based upon his last minute 'inspection' *or*, (2) [allowing] a second vehicle inspection so that MBUSA's expert can ascertain what material 'change' of the subject vehicle occurred within the last 13 months." (Italics added.) Assuming the second alternative was chosen, MBUSA requested a continuance of the

trial "to complete this second inspection and then submit its expert [Wierman] for deposition and rebuttal."

The trial court *granted* the ex parte application by choosing the second alternative. It continued the trial and reopened discovery to allow a second defense inspection and deposition. Undoubtedly, MBUSA would have preferred the exclusion of Calef's new opinions, but it fails to show that the court's granting of its alternative request constitutes an abuse of discretion.

MBUSA emphasizes the trial court's remarks that the Krauses' counsel engaged in "gamesmanship" by opposing the application to continue the trial and order a second inspection. The court chose, however, not to punish the Krauses "for their attorney's disreputable practices." This ruling was within the court's discretion. MBUSA has not demonstrated that "'no judge could reasonably have made the order that he did.'" (*Smith v. Smith* (1969) 1 Cal.App.3d 952, 958; *DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679.)

Exclusion of "User Error" Opinion Evidence

MBUSA maintains that the trial court abused its discretion by prohibiting MBUSA's expert, Wierman, from testifying that the periodic activation of the emergency brake light was due to "user error." We are not persuaded.

During his deposition, Wierman was asked if he had found "any evidence of user error or outside influence?" He answered, "No." Wierman also was asked if anyone at the dealership had told him that "they think the Krauses are inadvertently setting the brake." He responded, "No." At the evidentiary hearing, Wierman conceded that the dealership maintenance records do not "reflect any suggestion of user error."

An expert's opinion is properly excluded if it is based on speculation or conjecture. (*Lockheed Litigation Cases* (2004)

115 Cal.App.4th 558, 564-565; *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117 [an expert's opinions based on assumptions without evidentiary support or on speculative or conjectural factors have no evidentiary value and may be excluded].) In the absence of evidence that "user error" was causing the brake warning light to come on, any such testimony by Wierman would have been purely speculative, as well as contrary to his deposition testimony. The trial court did not abuse its discretion by excluding it. (See Evid. Code, § 803.) Nor did it err by barring any exemplar vehicle demonstratives supporting the "user error" theory.

Rejection of Jury Instruction on "Lack of Maintenance" Affirmative Defense

MBUSA contends the trial court committed reversible error by rejecting its proposed jury instruction on "lack of maintenance." The proposed instruction, which was based upon CACI 3220, stated: "Mercedes-Benz U.S.A., LLC is not responsible for any harm to plaintiffs if Mercedes-Benz U.S.A., LLC proves that any defect in the vehicle was caused by lack of proper maintenance of the vehicle after it was sold."

In declining to give the instruction as written, the trial court determined the instruction was too broad. It stated: "The concern that I have with this instruction, it says 'any defect'. Well, any defect can be any problem anywhere in the car. This has to be tailored in the way that describes the brake problem." Defense counsel responded, "That's fine."

When asked whether the "defense [is] requesting any other special [instructions]," MBUSA's counsel answered, "No, your Honor." Under these circumstances, we conclude there was no error. The proposed instruction is overbroad in that it would have permitted the jury to find MBUSA not liable if *any defect* in

the vehicle was caused by lack of proper maintenance. This case was not about "any defect" in the vehicle; it was about the claimed defect with the emergency brake system. The trial court appropriately rejected the instruction as drafted.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Kent M. Kellegrew, Judge
Superior Court County of Ventura

Universal & Shannon, Jon D. Universal, Mark S. Julius and James A. Mayo, for Defendant and Appellant.

The Bickel Law Firm, Brian J. Bickel, Erika N. Kavicky and Jordan K. Wager, for Plaintiffs and Respondents.