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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

GEORGIA LANGSAM et al.,

Plaintiffs and Appellants,

v.

CALIFORNIA DEPARTMENT OF
TRANSPORTATION,

Defendant and Respondent.

A130385

(Contra Costa County
Super. Ct. No. C08-01824)

Plaintiff in propria persona, attorney Georgia Langsam, and her husband, plaintiff Jon Langsam, appeal from the judgment for defendant California Department of Transportation in their suit for damages arising from an automobile accident.¹ Langsam alleged that the accident was caused by a dangerous condition of public property, and defendant prevailed on a defense of design immunity.

Langsam contends that: (1) her requests for accommodation of a disability were erroneously denied; (2) the evidence did not support the discretionary approval element of design immunity; or (3) she was erroneously required to present expert testimony through an offer of proof. These arguments lack merit and we affirm the judgment.

¹ For convenience, we will use the term “Langsam” to refer to Georgia Langsam individually because she was the one involved in the accident, her injuries are primarily at issue, and her arguments are advanced on behalf of both herself and her husband in her capacity as their counsel. We recognize that Jon Langsam is a party to the case through a claim for loss of consortium, and our references to “Langsam” can be taken to encompass both Langsams if the context so requires.

I. BACKGROUND

On the morning of January 22, 2007, Langsam was driving in the number one lane of northbound Highway 680 in Walnut Creek. She testified that she “came around [a] curve” driving at the 65-mile-per-hour speed limit “and all of a sudden . . . discovered that there was a gold Lexus stopped for no apparent reason” in the lane ahead of her. She was able to brake in time to avoid hitting the Lexus, but was struck from behind by an SUV. The impact pushed her Mercedes to within one-half inch of the Lexus, which drove away from the scene.

Langsam’s complaint was filed on July 15, 2008, with trial set for March 8, 2010. In December 2009, defendant moved to continue the trial, and in January 2010 moved to compel responses to discovery. The motion for discovery was set for hearing on February 9, 2010, and the motion to continue the trial was to be heard on February 11, 2010.

On February 5, 2010, Langsam transmitted a letter to the judge by facsimile stating that she could not attend the February 11 hearing on the continuance because she would be having surgery on February 8. She said that she had retained an attorney in January “to assist me with this case as it was apparent to me that my health was not going to allow me to serve as the trial attorney,” but had “been advised that counsel no longer wishes to represent Langsams in this matter.” She agreed with defendant that the March 8 trial date should be continued and asked that discovery “remain open until the normal statutory deadlines associated with the new date.”

At the February 9 hearing on the discovery motion, Sanford Cipinko appeared as counsel in lieu of Langsam and informed the court “that he has not officially taken this case, but that the client was under the impression that he was going to.” The court granted Cipinko’s request to continue the discovery hearing “so that the plaintiff can represent herself.” The discovery hearing was rescheduled for February 23.

Neither side appeared at the February 11 hearing on the motion to continue the trial, and the court adopted its tentative ruling denying the motion. The court also issued

an order to show cause for February 19 requiring Langsam to explain why the case should not be dismissed for her failure to file an issue conference statement.

On February 16, Langsam faxed a letter to the court advising that she underwent surgery on February 8, would be confined to bed rest until February 23, and would be unable to attend the February 19 hearing on the order to show cause. She asked the court to “continu[e] all pending matters to a future date when I will have recovered from my surgery and had sufficient time to prepare any necessary pleadings.”

On February 19, the court dismissed the case without prejudice for lack of prosecution. On March 8, Langsam moved for reconsideration of the dismissal and for reinstatement of the case. Her declaration in support of the motion explained that her February 8 surgery was unplanned and had to be expedited because it involved lumps discovered near the site of a 2002 mastectomy for breast cancer. She filed a February 23 declaration from her surgeon recommending that she not “return to full activities for another 45 to 60 days.”

On June 17, the court set aside the dismissal, set a trial date of August 9, and denied Langsam’s request to reopen discovery. Langsam renewed her request to reopen discovery at issue conferences on July 29 and 30, and the renewed requests were denied.

On August 2, Langsam filed a request seeking accommodation for a disability under California Rules of Court, rule 1.100.² Langsam alleged that she could not competently act as her own counsel because of disabilities she suffered as a result of the accident, including “brain damage and PTSD from [a] closed head injury.” Langsam asked that the trial be continued for six months “and that discovery be open so that I can obtain representation.” She noted that the August 9 trial date was set on June 17, and advised that “[n]o attorney contacted was willing to try the case on such short notice and [without] discovery being open.”

² Subsequent references to rules are to the California Rules of Court.

The request for accommodation was denied by the court's ADA (Americans With Disabilities Act of 1990; 42 U.S.C. § 12101, et seq.) coordinator. Langsam renewed her request on the first day of trial and the request was denied by the trial court.

The issue of design immunity was tried to the court, and the court found that defendant was entitled to judgment based on that defense.

II. DISCUSSION

A. Requests for Accommodation

Langsam contends that her requests for accommodation should have been granted.

(1) Rule 1.100

“It is the policy of the courts of this state to ensure that persons with disabilities have equal and full access to the judicial system.” (Rule 1.100(b).) “Requests for accommodations must be made as far in advance as possible, and in any event must be made no fewer than 5 court days before the requested implementation date.” (Rule 1.100(c).) Rule 1.100(f) states that “[a] request for accommodation may be denied only when the court determines that: (1) The applicant has failed to satisfy the requirements of this rule; (2) The requested accommodation would create an undue financial or administrative burden on the court; or (3) The requested accommodation would fundamentally alter the nature of the service, program, or activity.”

(2) Record

Langsam declared in support of her requests for accommodation that, as a result of the accident, she suffered “(in addition to broken bones, broken teeth, exploded breast, torn ligaments and spine damage) a closed head injury.” She was forced to close her law practice after the accident because she was not competent to represent clients. Her disabilities included double vision, reading at a 10th grade level, and inability to multitask. She had “developed a body ‘tic’ wherein my shoulders shrug and my head flops from side to side.” She had “recently [been] declared 100% disabled by the Social Security Administration.”

Langsam attached to her declaration a July 2007 order in a case where the court concluded she was “too cognitively challenged to continue with the trial,” as counsel for

a party, and a judge's July 2007 declaration in a State Bar proceeding that Langsam had "a number of shaking seizures" and "broke down sobbing" at a status conference. Langsam declared that the State Bar "decided not to disbar me when I voluntarily closed my practice."

Langsam also attached a March 15, 2010, report from neurologist Michael J. Nelson of the Neurology Medical Group of Diablo Valley stating that, after the accident, she "had multiple symptoms including memory loss, poor concentration, emotional lability, body twitches, visual changes, coordination troubles, mood changes, and dizziness." Dr. Nelson last saw Langsam on January 19, 2010. His report stated that May 2008 neuropsychological testing of Langsam by Howard J. Friedman, Ph.D. "offers the most complete and accurate assessment of [her] condition. I completely concur with the details of [Friedman's July 2008] report and particularly his conclusion which reads 'an implication of these results is that [Langsam] continues to display neurocognitive difficulties as well as emotional problems. The neurocognitive difficulties likely have some degree of an organic basis but also are impacted by the emotional condition. Although her recent accident was quite mild, the trauma that she experienced was accentuated by the pre-existing limitations that she had.' "

Friedman first evaluated Langsam in March 2007. His report stated: "[Langsam] has reported her view that she is unable to function on an occupational basis. The current results would support her view. . . . It was pointed out to her that given ethical and malpractice concerns for a professional, she should likely not be practicing law at the current time." When Friedman reevaluated Langsam in May 2008, "[t]here were not substantial changes in areas of intellectual functioning." His July 2008 report stated that Langsam "did hope that she would improve further over a longer time period, but she does not believe she would be able to return to the practice of law."

The remainder of Langsam's showing consisted of August 2007 and December 2008 reports from Nancy B. Larsen, a cognitive rehabilitation therapist, and what appears to be a Social Security Administration (SSA) "case analysis" dated December 31, 2008. Larsen's December 2008 report makes clear that she was not a physician and was "not

qualified to give a diagnosis.” The SSA report referred to a November 2008 “[r]eview of symptoms” stating that Langsam was “[u]nable to perform duties of being a lawyer,” and May 2008 neuropsychological evaluation stating that cognitive “performance of average is well below what is . . . required . . . for her job.”

On August 6th, the ADA coordinator denied Langsam’s request to continue the trial and reopen discovery on the ground that such an accommodation would “fundamentally alter the nature of the service, program, or activity.” On August 9th, the trial court denied the request on the grounds that Langsam did not establish her disability and her request was untimely. As for the alleged disability, the court stated: “The request for accommodations has conclusions submitted in it that . . . are not supported. There’s no medical evidence in the documentation submitted . . . that support[s] the wide ranging conclusions made by [Langsam] at this hearing.”

(3) Analysis

Langsam submits that the evidence supporting her accommodation requests showed that she suffered from disabilities within the general standards of the ADA and the Unruh Civil Rights Act (Civ. Code, § 51, et seq.). (See rule 1.100(a)(1) [defining “[p]ersons with disabilities”].) However, the specific disability that had to be established here was Langsam’s incapacity at the time of trial to act as counsel in this case.

Rule 1.100(f) specifies limited grounds on which a request for accommodation can be denied, but the rule plainly presupposes that a disability has been shown to exist. The existence of a disability is a factual issue which, for purposes of appellate review, presents a question of substantial evidence. (See generally *SFPP v. Burlington Northern & Santa Fe. Ry. Co.* (2004) 121 Cal.App.4th 452, 461-462 (*SFPP*) [findings of fact are reviewed for substantial evidence]; see also *Pichon v. Pacific Gas & Electric Co.* (1989) 212 Cal.App.3d 488, 500 [plaintiff’s disability was a question of fact].) Under the substantial evidence standard of review, the court’s finding that Langsam’s evidence did not establish her claimed incapacity to represent herself must be upheld unless, as a matter of law, the evidence compelled a contrary finding. We conclude that it did not.

Apart from Langsam's characterization of her limitations, which the court was not required to accept, the evidence specifically addressing her ability to function as a lawyer was very dated. Dr. Friedman's report was issued in 2007, and the judicial observations of her performance as an attorney were made in the same year. The findings listed in the SSA report were from 2008. Langsam lodged no medical report more recent than March of 2010, and no evidence that she consulted a physician concerning neurological matters after January of 2010. The earlier reports primarily concerned her ability to maintain an ongoing law practice, not her capacity to represent herself in a single case. Moreover, the court could observe firsthand how she was performing as counsel.

Under all of the circumstances, in particular the lack of current objective evidence of Langsam's medical condition, the court could reasonably find that she had failed to establish her claim of disability. (Compare *In re Marriage of James M. & Christine C.* (2008) 158 Cal.App.4th 1261, 1277 (*James M.*) [undisputed that party requesting accommodation was disabled within the meaning of the ADA].) That the SSA had found Langsam to be disabled did not compel the trial court to reach the same conclusion. (See *Sanders v. Arneson Products, Inc.* (9th Cir. 1996) 91 F.3d 1351, 1354, fn. 2 [eligibility for government disability benefits does not necessarily establish disability under the ADA].)

The timing of Langsam's request for accommodation also suggests that Langsam herself was apparently not persuaded of her alleged disability by any of the evidence generated before 2010. In her February 5, 2010, letter to the court, she said she did not realize until early January 2010 that she would be unable to handle the trial in this case. And while in her letter she stated that it became evident to her in early January that her health would not allow her to serve as trial counsel, the maladies she described were physical problems suffered from July 2009 to January 2010,³ not the cognitive difficulties

³ Langsam stated in the letter that she was "significantly disabled due to excruciating sciatic nerve pain in my back/right leg" from July to late October 2009. In early November 2009, she "experienced an episode of syncope and presumed atria fibrillations which resulted in me being transported to the hospital in an ambulance. . . . As

cited in the accommodation requests. Thus, it is unclear that Langsam regarded herself as cognitively disabled even in January of 2010.

Given this record, Langsam's disability claim can be seen as a belated 11th-hour attempt to obtain relief the court had repeatedly declined to afford. Inordinate delay in requesting accommodation constitutes a failure to satisfy the requirements of Rule 1.100, and thus a ground for denial of the request under Rule 1.100(f)(1). (See Rule 1.100(c)(2) [requests for accommodations must be made "as far in advance as possible . . . before the requested implementation date"].) Therefore, the requests for accommodation could also be denied as untimely.⁴

B. Design Immunity

The second amended complaint alleged that the accident was caused by a dangerous condition defendant created "by failing to provide and/or maintain Interstate Highway 680 (North) between exits 45A and 45B in the City of Walnut Creek in an adequate and safe condition by adding a 'cap' to the median barrier, thus obscuring motorist's visualization of potential traffic conditions, other motorists, and hazards on the far side of the curve, thereby depriving motorist of sufficient time to safely observe and react, thus rendering the curve unsafe if taken at the speed limit."

"A public entity is liable for injury proximately caused by a dangerous condition of its property if the dangerous condition created a reasonably foreseeable risk of the kind

I started to regain my health from the heart incident, I contracted the Swine Flu in late November . . . Unfortunately, before I completely recovered from the Swine Flu, I was exposed to an upper respiratory infection in late December, 2009 . . . The first week of January, I suffered another episode of syncope and atria fibrillations. . . . At or about this time . . . it was apparent to me that my health was not going to allow me to serve as the trial attorney."

⁴ We do not reach the ADA coordinator's finding that the accommodation "would fundamentally alter the nature of the service, program, or activity." (Rule 1.100(f)(3); but see *James M.*, *supra*, 158 Cal.App.4th at p. 1276 [continuance of trial "would not have fundamentally altered the nature of the judicial service, program, or activity affected by the request" because the "judicial service — the trial — would have been offered in the same form at a later date"].)

of injury sustained, and the public entity had actual or constructive notice of the condition a sufficient time before the injury to have taken preventative measures. [Citations.]

“However, a public entity may avoid such liability by raising the affirmative defense of *design immunity*. ([Gov. Code,] § 830.6.) A public entity claiming design immunity must establish three elements: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design. [Citations.]

“Design immunity does not necessarily continue in perpetuity. [Citation.] To demonstrate loss of design immunity a plaintiff must also establish three elements: (1) the plan or design has become dangerous because of a change in physical conditions; (2) the public entity had actual or constructive notice of the dangerous condition thus created; and (3) the public entity had a reasonable time to obtain the funds and carry out the necessary remedial work or bring the property back into conformity with a reasonable design or plan, or the public entity, unable to remedy the condition due to practical impossibility of lack of funds, had not reasonably attempted to provide adequate warnings.” (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 66, fn. omitted.)

Langsam is not making a claim that Caltrans lost its design immunity. Her argument is that Caltrans never established the discretionary approval element of the design immunity defense. “[I]n order to avail itself of the affirmative defense of design immunity, the public entity must demonstrate that the improvement as designed ‘conformed to a design approved by the public entity vested with discretionary authority.’ ” (*Wyckoff v. State of California* (2001) 90 Cal.App.4th 45, 52 (*Wyckoff*)). Langsam maintains that discretionary approval was lacking because the actual configuration of the freeway where the accident occurred was different from the one depicted in the approved plans. Langsam asserts that (1) the width of the left hand shoulder had decreased; (2) the number of lanes had increased from four to five; and (3) the median barrier had been raised.

But the improvement need not conform to the design in every detail. If “the improvement as built did not *materially depart* from the design approved by the public entity . . . the affirmative defense of design immunity is available to the State.” (*Ibid.* [italics added].)

The discretionary approval element of the design immunity defense is a question of fact. (*Hernandez v. Department of Transportation* (2003) 114 Cal.App.4th 376, 383, 387–388.) We therefore review the court’s determination for substantial evidence. (*SFPP, supra*, 121 Cal.App.4th at pp. 461–462.) We view the evidence “in the light most favorable to [the] respondent, giving the benefit of every reasonable inference, and resolving all conflicts in support of the judgment.” (*Rivard v. Board of Pension Commissioners* (1985) 164 Cal.App.3d 405, 412–413.)

Traffic engineer Edward Ruzak testified for defendant that plans for the curve that allegedly contributed to the accident, and for the freeway as built in that location, received discretionary approvals in 1988 and 1991. Ruzak said that police reports showed the accident occurring at post mile 13.83 or 13.73, points at which the roadway was straight and sight lines were unlimited. The approved plans showed where the road curved to the left from post mile 13.4 to 13.6. The 1800-foot radius of that curve and the 12-foot width of the lanes met defendant’s design standards. Defendant’s sight distance standard for 65-mile-per-hour driving is 660 feet. The sight distance at the beginning of the curve was 530 feet, but exceeded 660 feet for the remaining 99 percent of the curve.

Ruzak testified that the width of the road shoulder at the time of the accident was the same as the width shown in the approved plans. Langsam’s expert, Leroy MacIntyre, initially testified it “[a]ppears they’ve narrowed the shoulder width,” but later admitted he did not know if the current shoulder width differed from the shoulder depicted in the plans. Thus, the court could reasonably find that no change to the width was proven.

As for the addition of a fifth lane, Ruzak testified: “The geometry [of lane one] would not change. The sight distance would not change.” Thus, the fifth lane was not shown to be a material alteration that contributed to the accident.

MacIntyre testified that the median barrier was changed from a 32-inch high Type 50 as shown in the plans to a 60-inch high Type 50-C at the time of the accident. In the offer of proof we discuss below, Langsam stated that MacIntyre believed the higher median “substantially changed the condition of the . . . curve with respect to sight distances and that the construction of a 50-C barrier in the [curve] constituted a dangerous condition.” However, Ruzak testified that “[t]he median barrier to me is moot there. It’s the curvature of and topography of the [lane and the] way the lane’s laid out” that determined the sight lines. The court could believe Ruzak rather than MacIntyre. Thus, the heightened barrier was not demonstrated to be a “material[] depart[ure]” from the original plans. (*Wyckoff, supra*, 90 Cal.App.4th at p. 52.)

There was substantial evidence in support of the finding that the discretionary approval element of the design immunity defense had been satisfied.

C. Offer of Proof

Langsam contends that a portion of her expert MacIntyre’s testimony was erroneously limited to an offer of proof.

MacIntyre began testifying late in the first day of trial. As court was set to adjourn, the judge asked how much longer Langsam would take MacIntyre’s direct examination, and she replied, “Probably an hour.” When trial resumed the next day Langsam complained of double vision and the court, over defendant’s objection, called a recess until the following morning.

MacIntyre’s direct examination resumed the next day. The court eventually directed him to step outside the courtroom and asked Langsam for an offer of proof, saying, “I don’t understand what you’re doing with your expert.” Langsam said MacIntyre would be testifying that the Type 50-C median barrier affected sight distances around the curve.

MacIntyre resumed testifying and the court called a recess, telling Langsam, “I’ll expect you to complete your examination pretty soon after our return, because you have been going longer than the hour you estimated.” Langsam denied estimating the length of MacIntyre’s testimony, and the court replied, “The record will reflect you did.” After

the recess, Langsam told the court, “I apologize if somehow I gave the impression that I was going to be able to put on Mr. MacIntyre in half an hour . . . Because I would never have knowingly made that representation. I have six pages of prepared questions that would take me at least several hours.”

After further testimony from MacIntyre, the court directed Langsam to make an offer of proof as to the balance of his testimony “because you have consumed more than the hour you said you were going to take, and if you say you’re going to take several hours I’m not going to permit that.” Langsam responded at length, stating among other things that MacIntyre believed the height of the 50-C median barrier dangerously restricted sight lines around the curve. After completing the offer of proof, Langsam asked whether the court was accepting the offer as evidence. If not, she wanted “the opportunity to present that evidence so that it makes it in the record.” The court replied, “And it’s in the record.”

The case proceeded with cross-examination, and MacIntyre’s re-direct.

Langsam submits that the court deprived her of due process and committed structural error by limiting her expert’s testimony to an offer of proof. But her arguments rest largely on the false assertion that she was not allowed to further question MacIntyre after making the offer of proof, and the unsupported claim that the court ignored the offer of proof in rendering its decision. Nothing the court said in explaining why it found this case to be a “poster child” for design immunity established that it ignored the evidence set forth in the offer of proof. The court could, and apparently did, credit the defense testimony that the higher median barrier did not significantly affect sight distances on the curve. The court found that the “line of sight” at the time of the accident “was that same as it was in 1988 and . . . in 1991.” This does not suggest that the court ignored Langsam’s offer of proof to the contrary.

The court’s decision to accept an offer of proof in lieu of more lengthy testimony was well within its “power to control litigation and conserve judicial resources.” (*Lucas v. County of Los Angeles* (1996) 47 Cal.App.4th 277, 284.) “Unquestionably, the trial court has the power to . . . expedite proceedings which, in the court’s view, are dragging

on too long without significantly aiding the trier of fact.” (*In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 291.) Moreover, Langsam identifies no evidence she was prevented from presenting that might have changed the outcome of the case. There was no error or prejudice associated with the demand for an offer of proof.

III. CONCLUSION

The judgment is affirmed.

Siggins, J.

We concur:

McGuinness, P.J.

Jenkins, J.