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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

MELINDA BARANY et al.,

Plaintiffs and Appellants,

A130891

v.

**(San Francisco County
Super. Ct. No. CGC09489471)**

HILARY BROOK ANDRON,

Defendant and Respondent.

_____ /

After he was injured during a car accident, plaintiff Albert M. Kun and the registered owner of the car he was driving, Melinda Barany (collectively, plaintiffs), sued Hilary Brook Andron, the driver of the other car, for personal injury and property damage. Before trial, Andron made an offer to compromise pursuant to Code of Civil Procedure section 998.¹ Plaintiffs did not accept the offer and trial began. A jury determined Andron was not negligent and the court entered judgment for her. Andron then sought approximately \$20,000 in costs. Plaintiffs moved to tax costs. The trial court granted the motion in part, denied it in part, and awarded plaintiffs \$15,446.11 in costs.

¹ Unless otherwise noted, all further statutory references are to the Code of Civil Procedure.

Plaintiffs appeal.² They contend: (1) the court abused its discretion by admitting eyewitness testimony about the accident without making a preliminary finding that the traffic light at issue was in working order; (2) the court “erred in miscounting the number of jurors voting for the verdict;” and (3) Andron was not entitled to an award of costs because the offer to compromise expired before trial and “was of no effect.” We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs’ operative first amended form complaint alleged Kun suffered personal injuries and property damage in an April 25, 2009 motor vehicle accident at the intersection of Franklin and Lombard Streets in San Francisco.³ Plaintiffs alleged Kun broke his hip and pelvis in the accident and had medical costs and expenses between \$20,000 and \$85,000. Before trial, plaintiffs moved in limine to exclude “[a]ny and all testimony regarding the color of the [traffic] lights” at the intersection on the day of the accident unless Andron offered “sufficient foundational testimony regarding the proper and legally sufficient operation of the lights.”

At trial, two eyewitnesses — Travis Sandberg and Peter Hickok — testified for the defense before the presentation of plaintiffs’ case. Sandberg testified he was riding his bicycle down Franklin Street; he stopped at the intersection of Franklin and Lombard Streets because the light was red for traffic on Franklin Street. Sandberg stopped his bike next to Kun’s car. The traffic light was red and appeared to be functioning properly. Sandberg was shocked when Kun “start[ed] to go through the intersection, just started

² The notice of appeal does not list Kun as a party. We construe the notice of appeal liberally to include both Barany and Kun as parties on appeal. (See Cal. Rules of Court, rule 8.100(a)(2); *Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 20.) As he did in the trial court, Kun, an attorney, represents plaintiffs on appeal.

³ Plaintiffs’ statement of facts is incomplete. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Stasz v. Schwab* (2004) 121 Cal.App.4th 420, 424 & fn. 1 (*Stasz*.) As a result, “we do not accept [plaintiffs’] factual assertions and rely instead on [Andron’s] statement of facts,” which is comprehensive and “supported by appropriate record references.” (*Stasz*, at p. 424, fn. 1.)

driving” against the red light and was hit by Andron’s car. When Andron’s car hit Kun’s car, the light for traffic on Franklin Street was red.

Hickok testified he was in the car directly behind Kun’s on the day of the accident. Hickok and Kun were stopped at the red light at the intersection of Franklin and Lombard streets when “all of a sudden,” Kun’s car “start[ed] to inch forward,” and “continued to go into the intersection” while the light was still red. At that point, Andron’s car came through the intersection and hit Kun’s car. Hickok testified Kun’s car ran the red light.

After Sandberg and Hickok testified, the court held an Evidence Code section 402 hearing outside the presence of the jury. Plaintiffs sought to introduce the testimony of associate transportation engineer for the City and County of San Francisco, Kenneth Kwong, on the question of whether the camera was actually controlling the traffic lights at the time of the accident. At the hearing, Kwong testified there is a camera next to the traffic light at the northeast corner of Lombard and Franklin; the camera’s purpose is to detect the presence of a car. The camera transmits the information to the traffic signal, but it does not automatically change the light when it detects the presence of a car. Kwong did not know of any complaints that the traffic signal was not working properly on the day of the accident. Kwong could not testify whether the camera was working on the day of the accident.

The court excluded Kwong’s testimony. It determined Kwong did not “have any testimony to give that [was] relevant to any of the issues in the case or to impeaching any of the witnesses in the case” and concluded any potential probative value of the testimony was “outweighed by the danger of confusing the issues and taking up the jury’s time on questions that have absolutely no relevance to the case.” The court rejected plaintiffs’ reliance on *People v. Khaled* (2010) 186 Cal.App.4th Supp. 1.

At the conclusion of the Evidence Code section 402 hearing, Andron testified “the light was green” when she drove through the intersection of Lombard and Franklin Streets. Kun testified he stopped at the intersection and “crossed Lombard Street after the light turned green.”

The Verdict

By special verdict, the jury determined Andron was not negligent. The first question on the special verdict form asked “Was . . . Andron negligent?” The jury answered “no.” The foreperson affirmed that nine or more jurors agreed to the answer to the first question. Plaintiffs then asked to have the jury polled and the following colloquy occurred:

“THE COURT: So at this time I’m going to ask . . . the clerk, to ask each of you whether that was your true verdict as to question number one.

“THE CLERK: As I call your seat number, please answer yes or no if this is your true special verdict to question one, which was: Was . . . Andron negligent? Answer being no. Juror number 1?

“THE COURT: Was that your verdict?

“JUROR No. 1: I answered that question no.

“MR. KUN: I didn’t hear that.

“THE COURT: He said he answered the question no. So the way we do it is we say, ‘Is that your true verdict,’ and if you answered the question ‘no,’ then say, yes, that was your true verdict. . . .

“THE CLERK: . . . Juror 2?

“JUROR NO. 2: Yes, that is my true verdict.

“THE CLERK: Juror number 3?

“JUROR NO. 3: Yes, that is my true verdict.

“THE CLERK: Juror number 4?

“JUROR NO. 4: Yes.

“THE CLERK: Juror number 5?

“JUROR NO. 5: No.

“THE CLERK: Juror number 6?

“JUROR NO. 6: Yes.

“THE CLERK: Juror number 7?

“JUROR NO. 7: Yes.
“THE CLERK: Juror number 8?
“JUROR NO. 8: Yes.
“THE CLERK: Juror number 9?
“JUROR NO. 9: Yes.
“THE CLERK: Juror number 10?
“JUROR NO. 10: No.
“THE CLERK: Juror number 11?
“JUROR NO. 11: No.
“THE CLERK: Juror number 12?
“JUROR NO. 12: Yes.”

At that point, Kun stated, “Your Honor, it doesn’t add up.” The clerk and the court clarified that nine jurors answered “no” to the question whether Andron was negligent, with three jurors confirming they answered “yes” and concluded Andron was negligent. The clerk read the verdict and the court discharged the jury. The court entered judgment for Andron and denied plaintiffs’ motions for judgment notwithstanding the verdict and new trial.

Plaintiffs’ Motion to Tax Costs

In June 2010, Andron served both plaintiffs with separate offers to compromise the case for a mutual waiver of litigation costs (§ 998). Plaintiffs did not respond to the offers and trial commenced in October 2010. On October 13, 2010, the jury returned a verdict for Andron. Andron filed a memorandum of costs seeking approximately \$20,000. Of this amount, \$15,567.02 represented expert witness fees.

Plaintiffs moved to tax costs. In their notice of motion, plaintiffs contended the fees pertaining to Andron’s expert witnesses were not “reasonable or necessary.” In their memorandum of points and authorities, however, plaintiffs claimed the offer to compromise had “expired and cannot be the basis for any expert testimony claimed.” Andron opposed the motion. She argued she was entitled to costs, including “the cost of the services of the expert witness[,]” because she was the prevailing party and because

plaintiffs did not obtain a more favorable judgment pursuant to section 998. In addition, Andron contended the fees paid to expert witnesses were “reasonable and necessary[.]”

The court granted the motion in part and denied it in part. The court allowed Andron to recover fees in the amount of \$15,446.11 but disallowed a portion of the fees for Dave Miles Atkin, M.D. in the amount of \$4,850.

DISCUSSION

The Court Was Not Required to Make a Preliminary Finding Before Admitting Sandberg and Hickok’s Testimony that Kun Ran a Red Light

Plaintiffs contend the court erred by failing to make a “preliminary finding that the automatic photographic system was in working order prior to allowing the testimony of witnesses Peter Hickok and Travis Sandberg[.]” They rely on three superior court appellate division cases, *Khaled, supra*, 186 Cal.App.4th Supp. 1, *People v. Park* (2010) 187 Cal.App.4th Supp. 9, and *People v. Goldsmith* (2011) 193 Cal.App.4th Supp 1.

Plaintiffs’ reliance on these cases is misplaced for two reasons. First, we are not bound by decisions of the appellate division of the superior court. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 503, p. 565.) Second, the cases are factually distinguishable. For example, in *Khaled*, the appellate division of the superior court reversed a red light conviction predicated solely on photographic evidence from a red light camera attached to a declaration. The *Khaled* court held the photographs and declaration were not admissible under the business or official records exceptions to the hearsay rule. (*Khaled, supra*, 186 Cal.App.4th at pp. Supp. 6-8.) In *Park*, the superior court appellate division reversed the defendant’s conviction for running a red light where the municipality failed to comply with a Vehicle Code statute requiring it to notify the public about the installation of the red light cameras. (*Park, supra*, 187 Cal.App.4th at pp. Supp. 13-14.) And in *Goldsmith*, the appellate division of the superior court held photographs taken by a red light camera were properly admitted. (*Goldsmith, supra*, 193 Cal.App.4th at pp. Supp. 7-8.) None of these cases bears any factual similarity whatsoever to this case. In this civil case, Andron and two eyewitnesses testified Kun ran a red light; Sandberg testified the traffic lights were functioning properly. We conclude

plaintiffs have not established the court abused its discretion by admitting Sandberg and Hickok's testimony before making a preliminary finding that the "automatic photographic system" at the intersection was working properly.

The Court Did Not Err by Accepting the Verdict as Complete and Discharging the Jury Pursuant to Section 618

Next, plaintiffs claim the "court prejudicially erred in miscounting the number of jurors voting for the verdict." Plaintiffs are incorrect. "'Trial by jury is an inviolate right . . . , but in a civil cause three-fourths of the jury may render a verdict.' When a jury is composed of 12 persons, it is sufficient if *any* nine jurors arrive at each special verdict, regardless of the jurors' votes on other special verdict questions." (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 255, quoting *Resch v. Volkswagen of America, Inc.* (1984) 36 Cal.3d 676, 679.)

"The polling process is designed to reveal mistakes in the written verdict, or to show 'that one or more jurors acceded to a verdict in the jury room but was unwilling to stand by it in open court.' [Citation.] Polling procedure applicable to civil matters is set forth in section 618, which provides: 'When the jury, or three-fourths of them, have agreed upon a verdict, they must be conducted into court and the verdict rendered by their foreperson. The verdict must be in writing, signed by the foreperson, and must be read to the jury by the clerk, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which is done by the court or clerk, asking each juror if it is the juror's verdict. If upon inquiry or polling, more than one-fourth of the jurors disagree thereto, the jury must be sent out again, but if no disagreement is expressed, the verdict is complete and the jury discharged from the case.'" (*Keener, supra*, 46 Cal.4th at p. 256, fn. & italics omitted, quoting § 618.)

Here, the court complied with section 618 because 9 of the 12 jurors concluded Andron was not negligent. Plaintiffs' argument to the contrary is based on a misunderstanding of the jury poll. Juror No. 1 informed the court that he answered "no" to the question whether Andron was negligent. Juror Nos. 2 through 12 were asked a different question: whether the verdict of not negligent was "your true verdict." Juror

Nos. 2, 3, 4, 6, 7, 8, 9, and 12 answered “yes” to that question. Therefore a total of 9 jurors concluded Andron was not negligent.

The Court Did Not Abuse Its Discretion by Awarding Costs to Andron

Plaintiffs’ final claim is Andron is “not entitled to any costs because the [section] 998 offer to compromise expired and was of no effect.” We reject this argument for several reasons.⁴ First, plaintiffs did not contest Andron’s entitlement to filing and motion fees (\$470), jury fees (\$2,193), deposition costs (\$1,811.09), service of process costs (\$255), and ordinary witness fees (\$172.02) in the trial court. They cannot challenge Andron’s entitlement to these fees for the first time on appeal. (*Greenwich, supra*, 190 Cal.App.4th at p. 767.) As the prevailing party, Andron was entitled to these fees. (§ 1032, subd. (b).)

Second plaintiffs’ reliance on section 998, subdivision (b)(2) is misplaced. Section 998, subdivision (b)(2) provides that if an offer to compromise is “not accepted prior to trial . . . or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence upon the trial. . . .” “However, this prohibition on the admissibility of unaccepted offers only bars evidence of the offer for the purpose of proving liability on the claim.” (Moore & Thomas, Cal. Civil Practice Procedure (2011) § 27:25; see also 7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 112, p. 649.)

Section 998, subdivision (c)(1) governs a situation where — as here — the offer to compromise is not accepted. It provides, “If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant’s costs from the time of the

⁴ Plaintiffs also contend the award of “expert witness fees must also be reversed because [Andron] failed to support her memorandum of costs with a written offer to compromise.” We reject this contention because plaintiffs did not raise this argument in the trial court. (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767 (*Greenwich*) [“[a]ppellant has waived any such claim by failing to raise it in the trial court below”].) We reject plaintiffs’ claim about the insufficiency of the section 998 offer for the same reason.

offer. In addition, in any action or proceeding other than an eminent domain action, the court . . . in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial . . . or during trial . . . , of the case by the defendant.” Pursuant to section 998, subdivision (c)(1), “if the . . . statutory offer to compromise is not accepted and the [plaintiff] fails to obtain a more favorable judgment, the prevailing [defendant] becomes eligible to seek reasonable and actually incurred expert witness fees and costs.” (*Saakyan v. Modern Auto, Inc.* (2002) 103 Cal.App.4th 383, 389 & fn. 6 (*Saakyan*)). Section 998 applies here, because plaintiffs did not accept the offer to compromise and “fail[ed] to obtain a more favorable judgment.” (*Saakyan, supra*, 103 Cal.App.4th at p. 390.)

Additionally, plaintiffs have not demonstrated the court abused its discretion under section 998, subdivision (c)(1) by awarding Andron some of the costs associated with the retention of her expert witnesses. On appeal from an order awarding costs and fees under section 998, “the burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown along with a miscarriage of justice, a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power. [Citation.] Such a discretionary ruling will not be disturbed on appeal absent a showing that discretion was exercised in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]” (*Najera v. Huerta* (2011) 191 Cal.App.4th 872, 877.) Plaintiffs have not established — by argument or citation to authority — that the award of a portion of Andron’s expert witness fees was arbitrary, capricious, or patently absurd.

DISPOSITION

The judgment is affirmed. Andron is entitled to her costs on appeal.

Jones, P.J.

We concur:

Needham, J.

Bruiniers, J.