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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

MARNA PAINTSIL ANNING,

Plaintiff and Appellant,

v.

ALONZO EISEMAN et al.,

Defendants and Respondents.

A132497

(Alameda County
Super. Ct. No. RG08397542)

I. INTRODUCTION

After a three-day trial, a jury found defendants and respondents not responsible for damage to appellant’s Nissan automobile after a collision in Berkeley between that car and a construction vehicle driven by respondent Eiseman. Appellant appeals, claiming that (1) the trial court erred in various evidentiary rulings and (2) the trial judge was biased against her. Respondents argue that we should reject both of these contentions, and also dismiss the appeal because of a late-filed opening brief by appellant. We will not dismiss the appeal, but we do affirm the judgment of the trial court.

II. FACTUAL AND PROCEDURAL BACKGROUND

Sometime between 7 and 8 a.m. on the morning of March 6, 2008, Michael Johnson, appellant’s fiancé, was driving her Nissan automobile westbound on Gilman Street near 8th Street in Berkeley. Johnson had dropped off appellant, Anning, in San Francisco and was returning to their Richmond home, in her car, at the time.

Also driving westbound on Gilman Street at the same time was respondent Eiseman. He was operating a piece of construction equipment known as a “loader” and

was on two-lane Gilman Street in front of the Nissan being driven by Johnson. The loader did not move very fast, i.e., had a maximum speed of 22 mph, and at the time Eiseman approached the 8th Street intersection, he had slowed it down to around 10 miles per hour as a safety precaution, as it had only a set of rear brakes. The loader had both a rear scraper and a front bucket.

As Eiseman approached the intersection of Gilman and 8th Streets, he noticed two vehicles passing him on the left. The first vehicle passed without a problem but the second, the Nissan owned by appellant and being driven by Johnson, struck a portion, i.e., either the edge of the rear scraper or the front bucket, of the loader. The contact damaged almost the entire right passenger side of the Nissan, but caused no personal injuries. Appellant alleged that the damages to her car totaled somewhere between \$8,000 and \$12,000.

Appellant¹ filed a complaint against Eiseman and other respondents in Alameda County Superior Court on July 10, 2008. A few days later, the case was assigned “for all purposes” to the Honorable Patrick Zika.

On March 8, 2010, the parties appeared before Judge Zika to commence the trial, appellant having asked for a jury and respondents declining to do so. On that date, the court heard argument from both parties regarding various matters, including motions in limine, and made rulings on some of those issues. After so doing, it stated that “all other exhibits that are listed on either list are admitted into evidence as of today. So you don’t need to go through the technical foundation, et cetera.”

But the following day, appellant verbally challenged Judge Zika under Code of Civil Procedure sections 170.1 through 170.5² “alleging she was not treated fairly and not judged with the same standard as defense counsel.” The pre-trial proceedings were

¹ Both in the trial court and here, appellant, apparently a law school graduate but not yet admitted to the bar, appeared in pro per.

² All further statutory references are to the Code of Civil Procedure unless otherwise noted.

briefly recessed, and when reconvened Judge Zika stated that he “cannot figure out the basis for plaintiff’s motion,” but in any event vacated the trial date.

On March 10, 2010, appellant filed a request to disqualify Judge Zika for cause under sections 170.1-170.6. On March 18, 2010, Judge Zika denied that motion on several grounds, including its untimeliness, lack of foundation, etc., but nonetheless disqualified himself from the case.

On September 17, 2010, the case was reassigned to Judge Yvonne Gonzalez Rogers. On March 28, 2011,³ the case came to trial before her. During the course of the first day of trial, before the jury was empanelled, the trial court made several evidentiary rulings which will be discussed below.

After a three-day trial and only a few hours of deliberation, the six-person jury⁴ returned a unanimous verdict finding that Eiseman was not negligent. As a result of that finding, the jury did not need to, and thus did not, reach the additional questions posed by the verdict form, i.e., regarding Johnson’s possible negligence, etc. The jury was polled, and the results were the same.

On April 20, appellant moved for a new trial and judgment notwithstanding the verdict. Both were denied and judgment in favor of the respondents was entered on May 3.

Appellant filed a timely notice of appeal on July 1.

III. DISCUSSION

Before getting to the central issue in appellant’s appeal, we will first discuss the other two points raised by the parties, i.e., (1) respondents’ argument that we should dismiss the appeal because of the late filing of appellant’s opening brief and (2) appellant’s argument that Judge Gonzalez Rogers was biased against her because of her possible familiarity with Mr. Frank Zelinka, the owner and operator of Zelco Development Inc., and one of the respondents.

³ Unless otherwise stated, all further dates noted are in 2011.

⁴ Appellant requested a jury of only six persons; respondents waived a jury trial.

Both points lack merit. Regarding the first, although appellant was late in filing her opening brief, when that brief was tendered to this court on April 18, 2012, Presiding Justice Kline specifically approved its filing. Our order of that date—an order which is publically available online—specifically says as much: “filed late w/permission.”

Appellant’s belated claim that the trial judge was biased because of her association with a principal of respondent Zelco is equally unavailing. It was and is based on the assertion that, after trial, it was “discovered by Petitioner [sic: appellant] that Hon. Judge Yvonne Gonzalez Rogers and her spouse Matthew Rogers, are longtime contributing members of the Piedmont Council of Boy Scouts of America, a not-for-profit organization located in Piedmont, CA.” as also, apparently, is “Frank Zelinka, owner and operator of Zelco Development, Inc., a Respondent party to this case.” This argument is repeated in appellant’s reply brief to us with the addition of the allegation that “[e]vidence obtained on the organization’s website indicates that as part of their membership Judge Gonzalez Rogers and Mr. Zelinka frequently attended fundraising campaigns for this organization which are hosted annually” Such was, appellant continues, “sufficient to warrant notice to Petitioner [sic] of their affiliation” and the fact that she did not do so “was a violation of judicial ethics, and denied Petitioner [sic] constitutional right to a hearing before a fair and impartial judge.”

We disagree. The record does not reflect that Judge Gonzalez Rogers or Zelinka even attended the same annual Piedmont Boy Scout events, much less that they had any personal acquaintanceship with each other either there or otherwise. Appellant’s suggestions are, thus, based on pure speculation.

Put another way, and per the vocabulary used by a leading expert on this subject, appellant has made no showing of a “social friendship” between the trial judge and Zelinka, and such would be necessary in order for Judge Gonzalez Rogers to be required to even disclose anything to the parties much less disqualify herself. (See Rothman, Cal. Judicial Conduct Handbook (2007) § 7.51.)

Appellant also has provided us with no explanation as to why the issue of Judge Gonzalez Rogers’ possible acquaintance with Mr. Zelinka was not brought up in the trial

court. The fact that it was not also means that, even assuming the issue had some merit, it has been forfeited. Section 170.3, subdivision (c)(1), provides in relevant part: “If a judge who should disqualify himself or herself refuses or fails to do so, any party may file with the clerk a written verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting the grounds for disqualification of the judge. The statement shall be presented at the earliest practical opportunity after discovery of the facts constituting the ground for disqualification.”

In neither of her brief statements on this issue does appellant provide any explanation of either (1) when she learned of the joint membership of the trial judge and Mr. Zelinka in the Piedmont Boy Scouts Council or (2) why she did not bring a motion to disqualify Judge Gonzalez Rogers, as specifically required by the just-quoted statute. In her opening brief to this court, appellant simply states that “[i]t was subsequently discovered” that both the trial judge and Zelinka were “long time contributing members” of the Council; a similar statement is made in her reply brief. Under the law, such is simply not sufficient. As one of our sister courts wrote recently: “A party may seek a judge’s disqualification for cause under the procedure set forth at section 170.3, subdivision (c). However, the party must do so ‘at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification.’ (§ 170.3, subd. (c).) This strict promptness requirement is not to be taken lightly, as a failure to comply constitutes forfeiture or an implied waiver of the disqualification. [Citation.]” (*Tri Counties Bank v. Superior Court* (2008) 167 Cal.App.4th 1332, 1337.)

Under this law, appellant has clearly forfeited any claim of bias by Judge Gonzalez Rogers.

Now as to the major issue in the case: did the trial court err in ruling, during the course of trial, that appellant was not entitled to introduce certain pieces of evidence relevant to the repair estimates given to her regarding her car?

First of all, and before getting to the specific rulings at issue, it is clear that our standard of review of a claim that a trial court erred regarding the admissibility of evidence is abuse of discretion. (See, e.g., *People v. Williams* (1997) 16 Cal.4th 153,

196-197; *Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317; *Zhou v. Unisource Worldwide, Inc.* (2007) 157 Cal.App.4th 1471, 1476; see, generally, Eisenberg et al., *Cal. Practice Guide: Civil Appeals & Writs* (The Rutter Group 2011) ¶¶ 8:96.1 et seq.) We find no such abuse here.

Appellant’s main claim is that the trial court erred when, during the course of appellant’s closing argument to the jury, it sustained respondents’ counsel’s objection to appellant’s references to the damage estimates she had secured regarding the cost of repairing her Nissan. The court did indeed do so, on the basis that the claimed “three estimates” referenced by appellant were never admitted into evidence.

We find no error in this ruling. It is correct, as appellant notes in her briefs to us, that the three repair estimates were, indeed, among those marked as exhibits by the parties prior to the originally-scheduled 2010 trial before Judge Zika. Appellant claims that Judge Zika, in the course of a pre-trial hearing, admitted the parties’ listed exhibits into evidence. But notwithstanding Judge Zika’s brief statement a year earlier about “all other exhibits that are listed on either list [being] admitted,” any uncertainty about what evidence was and was not before the court and jury *in 2011* was clarified when, during appellant’s personal testimony, Judge Gonzalez Rogers sustained objections by respondents’ counsel to her references to the repair estimates. Almost immediately after that ruling by the trial court, appellant offered some of the photographs of the damaged Nissan into evidence, as well as her expert’s report regarding that damage. The offered exhibits were all received into evidence by the court. However, appellant made no reference at that point to the three repair estimates, much less moved to admit them into evidence.

Further, before the matter went to the jury, there was an extensive discussion between counsel and the trial court regarding evidence that could and could not be argued before the court. In the course of that discussion, the trial court verbally listed—by number—“the exhibits that I have admitted” and asked for “[a]ny comments?” Appellant had only one, regarding an exhibit 16 (not a repair estimate), but other than that had “[n]o

comment.”⁵ Nothing more was said, or even hinted at, by appellant regarding repair estimates. In view of this record, clearly during the 2011 trial before Judge Gonzalez Rogers, appellant could not have reasonably believed that all of the exhibits marked a year earlier before Judge Zika were, in fact, already in evidence.

In any event, it seems clear on this record that any evidentiary error would be harmless in view of the jury’s unanimous verdict. This is so because, as noted above, it took it less than two hours, including a lunch break, to make just one finding, i.e., that the collision of the two vehicles was *not* due to Eiseman’s negligence. And such alleged negligence was precisely the issue appellant argued to the jury. Her core argument was, per the testimony of Johnson and the actual damage to her car (again, shown to the jury by pictures and detailed by an expert’s report),⁶ that the damage was caused when Eiseman tried to make a left turn onto 8th Street from Gilman after the first car had passed him, and did so by first moving to the right and then trying to turn left onto 8th Street while the light at that intersection was still green.

Eiseman’s testimony (while being examined by appellant herself) was that he was *not* trying to make a left turn onto 8th Street, but was simply proceeding westbound through the intersection of Gilman and 8th Streets when the loader he was driving was clipped by appellant’s car, being driven by Johnson, as the latter was trying to pass the

⁵ Such was, indeed, the basis for the trial court’s ruling sustaining respondents’ counsel’s objections to appellant’s references during her closing argument, to the repair estimates. During an in-chambers conference on this issue, the judge stated to appellant that she had “tried to go through comprehensively to make sure you understood what was admitted and what was not. You had somewhere in the neighborhood of 30 exhibits and I specifically identified what had been admitted [¶] . . . I need to be fair to both sides; and had you raised it, perhaps they would have been included but [respondent’s counsel] has a right to rely on the state of the record and they were not brought up [in] your case in chief. They were never referenced. They were never mentioned. They were not. You didn’t ask me to admit them. So they’re not in the record.”

⁶ As noted above, both a number of pictures of the damaged Nissan and a report by an “Accident Reconstruction Expert” retained by appellant were admitted into evidence. Appellant is thus incorrect when she argues to us that “she was prevented from proving to the jury the fact that her [Nissan] was actually damaged.”

loader while also headed west on Gilman Street.⁷ Almost certainly, the jury believed Eiseman’s version of events and not the version being advanced by appellant—both in the trial court and to us—that the accident was the result of an attempted left turn by Eiseman, an attempt being made while Johnson was trying to pass him on the left and Eiseman was moving his loader to the right to facilitate his planned left turn.

In short, even if the trial court erred in not allowing the jury to see the repair estimates for appellant’s Nissan, any such error was harmless. Almost certainly, the jury couldn’t have been influenced much—if at all—by any such estimates, because it rather clearly believed Eiseman’s version of how the accident happened and not that of appellant or her fiancé.

IV. DISPOSITION

The judgment is affirmed.

Haerle, J.

I concur:

Richman, J.

I concur in the judgment:

Kline, P.J.

⁷ Eiseman’s testimony was that, having just gotten more diesel fuel for the loader at a service station on Gilman Street, he was returning to a construction worksite at Gilman and 7th Streets.