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

JENNY ALEXANDER,
Plaintiff and Appellant,
v.
WEALTH PROPERTIES, INC.,
Defendant and Respondent.

A139093
(San Francisco County
Super. Ct. No. CGC-11515300)

This is an appeal from judgment following a civil jury trial. Plaintiff Jenny Alexander brought tort claims against defendant Wealth Properties, Inc. (Wealth) after slipping and falling in the lobby of the office building where she worked, which was owned and managed by Wealth. The jury rejected plaintiff's claims and the trial court then denied her motions for new trial and judgment notwithstanding the verdict. On appeal, plaintiff contends the trial court erred when declining to instruct the jury on her theory of negligence per se and denying in part her motion to tax costs. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This personal injury lawsuit arose when plaintiff entered her office building at 1388 Sutter Street in San Francisco (1388 Sutter), and slipped and fell on the lobby floor, causing injury to her back. According to plaintiff's complaint, filed October 21, 2011 in San Francisco Superior Court, defendant Wealth, the owner and manager of 1388 Sutter, was at fault for her injury because the company failed to properly maintain the lobby on the day in question when it neglected to put out the customary protective non-skid runner

to prevent rain water from pooling on the marble floor.¹ Trial by jury began on March 19, 2013, at which the following evidence was heard.

Plaintiff worked as an administrative assistant for Chek Tan & Company, a certified public accounting firm that leased commercial office space from Wealth on one of the upper floors of 1388 Sutter. This office building has 12 stories and a common entryway leading into a large lobby with a marble floor. The lobby must be crossed by tenants, employees and guests in order to reach the elevator bank that serves the building's upper floors. Usually, when there is rainy or damp weather, a member of Wealth's maintenance or security team would place a non-skid runner mat over the marble lobby floor to permit tenants, guests and others to safely cross the lobby to the elevator bank. However, on the day in question, October 22, 2010, Wealth did not place down this customary mat despite early morning rain.

Witnesses disagreed on whether it was raining by the time plaintiff slipped and fell in the lobby of 1388 Sutter sometime between 8:30 a.m. and 9:00 a.m. on the day in question. Plaintiff's witness, Martha Diaz, who saw plaintiff fall, testified that conditions that morning when she left her Pittsburgh residence were rainy, causing the streets and sidewalks to be wet. However, Diaz was uncertain whether, when she entered the building around the same time as plaintiff, it was still raining. Nor could Diaz recall seeing any water on the lobby floor when she arrived. However, after Diaz approached plaintiff subsequent to her fall, Diaz did see water that appeared to have been tracked by others into the building.

Similarly, plaintiff testified that it was raining when she left her house for work that day. However, plaintiff was uncertain whether it was raining when she arrived at 1388 Sutter. Plaintiff acknowledged that she did not see any water on the lobby floor prior to her fall, although, once she sat up after her fall, she noticed "some water there on the floor, but not while I was lying down."

¹ Plaintiff's complaint asserted causes of action for general negligence, willful failure to warn, dangerous condition of public property, and premises liability, and sought compensatory, special and general damages.

Plaintiff's expert, safety engineer Albert Ferrari, testified that one way to ensure the safety of a slippery surface such as a marble floor would be to "put[] down a mat." However, he acknowledged lacking any information to form an opinion as to how long water had been present on the floor at 1388 Sutter on the day in question.

The building's security guard, Bill Harkins, testified that it had stopped raining earlier in the morning, and was merely misty by 7:40 a.m. or 7:50 a.m., when he arrived. Wealth's asset manager, Alvin Chan, likewise testified that it was not raining by 8:00 a.m. when he arrived for work. Finally, defense expert Brad Michael Wong, an engineer and accident reconstructionist, testified that, on the day of plaintiff's fall, a permanent "walk-off mat" had been placed just inside the lobby doors, a fact confirmed by Diaz. According to Wong, while a runner is typically placed in the lobby from the edge of this permanent mat to the elevators when it is raining, the runner was not there on the day of her fall. There was, however, a yellow warning placard in the area.

Following the trial, the jury returned a 10-2 verdict in favor of Wealth after rejecting plaintiff's negligence theories. Plaintiff thereafter filed a motion for new trial and for judgment notwithstanding the verdict, in which she challenged the trial court's decisions to exclude evidence that Wealth violated certain safety regulations and to decline to instruct the jury on her related theory of negligence per se. Plaintiff also moved to tax costs sought by Wealth. The trial court denied plaintiff's post-trial motions after agreeing to tax \$114 in costs, and awarded Wealth costs totaling \$24,878.39. This timely appeal followed.

DISCUSSION

Plaintiff raises two primary contentions on appeal. First, plaintiff contends the trial court prejudicially erred by refusing to instruct the jury on her theory of liability that Wealth committed negligence per se by violating its regulatory duty under the California Occupational Health and Safety Act (Cal-OSHA), Labor Code section 6300 et seq., to maintain a safe work environment for those working in its building. Second, plaintiff challenges the trial court's award of \$24,878.39 in costs to Wealth as the prevailing party

on the ground that several cost items were excessive, unsubstantiated or not reasonably necessary to its defense. Each of these issues is separately addressed below.

I. Failure to Instruct on Negligence Per Se for Violating Cal-OSHA Regulation.

Plaintiff contends Wealth is chargeable with negligence per se because Wealth had a nondelegable duty imposed by statute and regulation obligating the company to ensure the safety of its building lobby at 1388 Sutter Street, where plaintiff worked as an administrative assistant for Chek Tan & Company, which leased commercial office space on one of the upper floors. (See *Felmler v. Falcon Cable TV* (1995) 36 Cal.App.4th 1032, 1038-1039 [“Nondelegable duties may arise when a statute provides specific safeguards or precautions to insure the safety of others”].) Specifically, plaintiff relies upon a Cal-OSHA regulation relating to the safety of slippery floors. (Cal. Code Regs., tit. 8, § 3273, subd. (a).) According to plaintiff, Wealth violated this Cal-OSHA regulation by neglecting to put out a customary non-skid runner after water pooled on the marble floor of the lobby due to rain on the morning in question. Plaintiff’s argument lacks merit.

Plaintiff is, of course, correct in stating the general proposition that “[a] plaintiff can rely on statutory law to show that a defendant owed the plaintiff a duty of care.” (*SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 596 (*SeaBright*)). “Not only are Cal-OSHA violations punishable by civil and/or criminal penalties ([Lab. Code,] § 6423 et seq), but the Act specifies that ‘[s]ections 452 and 669 of the Evidence Code shall apply to this division and to occupational safety and health standards adopted under this division in the same manner as any other statute, ordinance, or regulation.’ ([Lab. Code,] § 6304.5.) This means that ‘Cal-OSHA provisions are to be treated like any other statute or regulation and may be admitted to establish a standard or duty of care in all negligence and wrongful death actions’ (*Cortez v. Abich* (2011) 51 Cal.4th 285, 292 [*Cortez*].)

At the same time, however, plaintiff fails to adequately explain why, in this case, Wealth, the company that leased office space to plaintiff’s employer but did not employ plaintiff or her employer, owed plaintiff a duty of care to comply with Cal-OSHA

provisions. Indeed, as the excerpt from *Cortez*, set forth above, makes clear, Cal-OSHA provisions must be treated “like any other statute or regulation,” meaning, for purposes of the negligence per se doctrine, mere technical noncompliance with a specified regulation does not amount to liability. Rather, as reflected in plaintiff’s own proposed instruction (based upon CACI 418), a plaintiff claiming negligence per se is entitled to the presumption that a defendant failed to exercise due care only if each of the following is established: (1) the defendant violated a statute, ordinance, or regulation; (2) this violation proximately caused the plaintiff’s injury (or death); (3) the injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and (4) the plaintiff *was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted*. (Evid. Code, § 669, subd. (a), italics added.) We thus must turn to the identified Cal-OSHA provisions to determine whether plaintiff made this requisite showing, such that the trial court had a duty to give her proposed instruction to the jury.

We begin with the substantive legal framework. Cal-OSHA was enacted “for the purpose of assuring safe and healthful working conditions for all California working men and women.” (Lab. Code, § 6300.) A person is an “employee” for purposes of Cal-OSHA if he or she is directed by an employer “to engage in any employment.” (Lab. Code, § 6304.1, subd. (a).) “ ‘Employment’ includes the carrying on of any trade, enterprise, project, industry, business, occupation, work . . . except household domestic service.” (Lab. Code, § 6303, subd. (b).)

Here, plaintiff’s theory that Wealth owed her, and breached, a duty to comply with certain Cal-OSHA regulations implicitly rests on the assumption that she qualified as Wealth’s “employee” for purposes of Cal-OSHA. To support this theory, plaintiff directs us to the so-called “multiemployer worksite rule,” which sets forth four types of “employer” under Cal-OSHA in situations, like this one, where an employee is injured at

a job site shared by several distinct employers.² Relevant here, plaintiff claims Wealth qualified under this rule as an employer “who actually created the hazard,” “who had the authority for ensuring that the hazardous condition is corrected,” or “who had the responsibility for actually correcting the hazard.” (Lab. Code, § 6400, subd. (b)(2)-(4); see also Cal. Code. Regs., tit. 8, § 336.10, subds. (b)-(d).)

However, even assuming for the sake of argument that plaintiff is correct that Wealth qualified as an “employer” under Cal-OSHA, plaintiff still must establish that, as an employer, Wealth *owed plaintiff* a duty to comply with the identified Cal-OSHA safety standard. (See Evid. Code, § 669, subd. (a).) Undisputedly, plaintiff was not hired by Wealth or in any way called upon by Wealth to provide any service or perform any duty. And, contrary to plaintiff’s suggestions, we know of no binding legal authority for the proposition that a property owner/manager that provides workspace for independent employers owes a general, nondelegable obligation to comply with Cal-OSHA workplace regulations to employees of these independent employers. Indeed, the California Supreme Court recently denied the existence of any such legal obligation: “Whether Cal-OSHA imposes on an employer like US Airways a tort law duty of care that extends to the employees of other parties such as independent contractors is a question that remains unsettled.” (*SeaBright, supra*, 52 Cal.4th at pp. 596, 600-601 [holding that “the tort law duty, if any, that a hirer owes under Cal-OSHA and its regulations to the employees of an

² Labor Code section 6400 provides that employers are required to furnish safe and healthy workplaces and, when employees are illegally exposed to hazards on multiemployer worksites, employers falling into the following categories may be subject to citation: “(1) The employer whose employees were exposed to the hazard (the exposing employer). [¶] (2) The employer who actually created the hazard (the creating employer). [¶] (3) The employer who was responsible, by contract or through actual practice, for safety and health conditions on the worksite, which is the employer who had the authority for ensuring that the hazardous condition is corrected (the controlling employer). [¶] (4) The employer who had the responsibility for actually correcting the hazard (the correcting employer).” (Lab. Code, § 6400, subd. (b).) The statute further states that employers falling within one or more of these categories may be cited whether or not their own employees were exposed to the hazard. (*Id.*, § 6400, subds. (a)-(b).)

independent contractor” is delegable].) Our high court then went a step further to explain the relevant law as follows:

“Under current law, a plaintiff may rely on Cal-OSHA requirements, in the same manner that it can rely on other statutes and regulations, in an attempt to show that a defendant owed the plaintiff a duty of care (§ 6304.5), but the law now defines ‘employer’ more narrowly than it did before 1971. Before 1971, the Legislature’s definition of the term ‘employer’ included ‘every person having direction, management, control, or custody of any employment, place of employment, or any employee.’ (Stats. 1937, ch. 90, § 6304, p. 306.) This broad definition of employer was an underpinning of this court’s 1968 holding in *De Cruz [v. Reid]* (1968) 69 Cal.2d 217, that employers can be liable in tort to the employees of other parties for violations of workplace safety requirements. (See *id.* at pp. 228-229.) Through a 1971 amendment to *section 6304*, the Legislature narrowed its previous broad definition of employer, leaving simply a cross-reference to *section 3300*. (See Stats. 1971, ch. 1751, § 2, p. 3780.) As relevant here, *section 3300* defines an employer as ‘[e]very person . . . which has any natural person in service.’ (§ 3300, subd. (c).) The effect of these changes on our holding in *De Cruz* is uncertain, *but we have never held under the present law that a specific Cal-OSHA requirement creates a duty of care to a party that is not the defendant’s own employee.*” (*SeaBright, supra*, 52 Cal.4th at pp. 596-597 [italics added].)

Accordingly, we conclude plaintiff’s reliance on the “multiemployer worksite rule” under Labor Code section 6400 to establish a duty owed to her by Wealth to comply with Cal-OSHA safety standards is misplaced. (*Ibid.*; see also Lab. Code, § 6400, subd. (c) [“It is the intent of the Legislature, in adding subdivision (b) to this section, to codify existing regulations with respect to the responsibility of employers at multiemployer worksites. Subdivision (b) of this section is declaratory of existing law and *shall not be construed or interpreted as creating a new law or as modifying or changing an existing law*”] [italics added].) Simply put, there is no controlling authority for plaintiff’s theory that Wealth was legally obligated to provide her an OSHA-compliant workplace, such that the trial court could properly reject her proposed jury instruction.

Finally, we point out another flaw in plaintiff's proposed negligence per se instruction. Plaintiff contends Wealth violated a particular Cal-OSHA regulation requiring it to maintain safe entryways to the building by placing a protective mat on the lobby floor to prevent hazardous pooled water. However, when the identified regulation is examined more closely, and in proper context, its applicability to plaintiff's lawsuit becomes questionable. This regulation reads as follows: "Permanent floors and platforms shall be free of dangerous projections or obstructions, maintained in good repair, and reasonably free of oil, grease, or water. *Where the type of operation necessitates working on slippery floors*, such surfaces shall be protected against slipping by using mats, grates, cleats, or other methods which provide equivalent protection. *Where wet processes are used* drainage shall be maintained and false floors, platforms, mats, or other dry standing places provided." (Cal. Code Regs., tit. 8, § 3273, subd. (a), italics added.)

In this case, as stated above, Wealth owned and managed an office building, leasing commercial work space to independent businesses like plaintiff's employer, Chek Tan & Company. Given these facts, it is quite an analytical stretch to maintain that Wealth operated a business that "necessitated working on slippery floors" or utilized "wet processes" within the meaning of the Cal-OSHA regulation underlying plaintiff's negligence per se theory. As such, we conclude the trial court had other reasonable grounds (to wit, the factual disconnect between the circumstances at hand and the identified regulation) to reject plaintiff's negligence per se instruction in favor of general principles of negligence. (See *Lua v. Southern Pacific Transp. Co.* (1992) 6 Cal.App.4th 1897, 1903-1904 ["the per se effect of a statute is limited to the conduct the statute or regulation was designed to prevent. (See, e.g., *Mark v. Pacific Gas & Electric Co.* (1972) 7 Cal.3d 170, 183 . . . [ordinance prohibiting persons from extinguishing street lights not designed to prevent death by electrocution]; *Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 422 . . . [regulations requiring deep end of swimming pool to be marked designed to prevent drowning accidents, not diving accidents]. See also Prosser & Keeton, Torts,

supra, § 36, p. 222, ‘. . . courts . . . have been careful not to exceed the purpose which they attribute to the legislature.’”].)

Thus, the trial court’s instruction to the jury, consistent with ordinary principles of negligence, that Wealth could be held liable to plaintiff for her injury if it found that Wealth failed to use reasonable care in maintaining the safe and hazard-free condition of its lobby floor was appropriate. The jury’s verdict in favor of Wealth therefore stands.

II. Award of Costs to Wealth Pursuant to Code of Civil Procedure, Section 998.

Plaintiff’s remaining challenge is to the trial court’s partial denial of her motion to tax the costs sought by Wealth. Specifically, plaintiff challenges the following ordinary costs included in Wealth’s total final award of \$24,878.39 as excessive, unnecessary or unsubstantiated: (1) \$5,619 in costs incurred for court reporter fees; (2) \$1,769.67 in costs incurred subpoenaing “duplicative” medical records from plaintiff’s medical provider; (3) \$10,830.90 in costs incurred in connection with deposing plaintiff’s expert witnesses; (4) \$190 in costs for unnecessary “rush orders on service of subpoenas”; and (5) \$419 in costs incurred for unnecessary “demonstrative evidence.”³ The governing law is not in dispute.

Where, as here, a defendant makes a good faith offer pursuant to Code of Civil Procedure section 998 to settle a case prior to trial, and the offer is rejected, the defendant may recover from the plaintiff its reasonable ordinary litigation costs, including expert witness fees, from the time of the offer if the defendant ultimately prevails on more favorable terms.⁴ (Code Civ. Proc., § 998, subd. (c)(1) [“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 pay the defendant’s costs from the time of the offer. In addition, in any

³ After plaintiff filed her motion to tax costs, Wealth conceded the impropriety of \$114 in costs. The trial court thereafter granted plaintiff’s motion to tax with respect to this amount, and in all other regards denied her motion.

⁴ Here, Wealth made a pre-trial offer pursuant to Code of Civil Procedure section 998 to settle this lawsuit for \$10,001. However, plaintiff rejected this offer and elected to proceed to trial.

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 postoffer 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 arbitration, or during trial or arbitration, of the case by the defendant”]; see also *Guzman v. Visalia Community Bank* (1999) 71 Cal.App.4th 1370, 1375 [“Section 998 reflects this state’s policy of encouraging settlements”].)

“ ‘Where, as here, the offeror obtains a judgment more favorable than its offer, the judgment constitutes prima facie evidence showing the offer was reasonable and the offeror is eligible for costs as specified in section 998. *The burden is therefore properly on plaintiff, as offeree, to prove otherwise.*’ [Citation.]” (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 152 [italics added].) Thus, “[i]f the items appearing in a cost bill appear to be proper charges, the burden is on the party seeking to tax costs to show that they were not reasonable or necessary. On the other hand, if the items are properly objected to, they are put in issue and the burden of proof is on the party claiming them as costs. [Citations.] Whether a cost item was reasonably necessary to the litigation presents a question of fact for the trial court and its decision is reviewed for abuse of discretion. [Citation.] However, because the right to costs is governed strictly by statute [citation] a court has no discretion to award costs not statutorily authorized. [Citations.]” (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774-775 (*Ladas*). See also *Carver v. Chevron U.S.A., Inc., supra*, 97 Cal.App.4th at p. 142 [“de novo review of . . . a trial court [cost] order is warranted where the determination of whether the criteria for an award of attorney fees and costs in [a particular] context have been satisfied amounts to statutory construction and a question of law”].)

Returning to this case, we first consider plaintiff’s argument that the court erred in awarding Wealth the costs incurred in connection with deposing plaintiff’s expert witnesses. According to plaintiff, fees paid by a party to depose expert witnesses are “specifically disallowed, unless ordered by the court,” pursuant to Code of Civil Procedure section 1033.5, subdivision (b). The law, however, is not so: “[S]ection 998,

subdivision (c) gives the trial court the discretion to award the defendant's expert fees, regardless of whose witness the expert is, in the event that the plaintiff fails to obtain a more favorable judgment or award, pursuant to the terms of the statute. [¶] . . . Section 998 allows a prevailing party to recover fees paid to experts under the specific circumstances outlined in the statute *in addition to* the costs allowable under [Code of Civil Procedure] sections 1032 and 1033.5, such as court-ordered experts.” (*Chaaban v. Wet Seal, Inc.* (2012) 203 Cal.App.4th 49, 55, italics added; see also Code Civ. Proc., § 998, subd. (c).) Accordingly, we reject plaintiff's first challenge.

With respect to plaintiff's next claim that the trial court erred by not taxing the costs incurred by Wealth to subpoena duplicative medical records, the record belies her claim. As set forth in the declaration filed by Wealth in support of its memorandum of costs, Wealth served two subpoenas on Kaiser Permanent Medical Group, which each sought distinct medical records regarding plaintiff's injuries (to wit, one sought ordinary medical records and the other sought radiological films). Despite having the burden of proof, plaintiff offers no contrary evidence. We thus decline to disturb the court's judgment. (*Carver v. Chevron U.S.A., Inc.*, *supra*, 97 Cal.App.4th at p. 152. See also *Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324 [“appellant must not only present an analysis of the facts and legal authority on each point made, but must also support arguments with appropriate citations to the material facts in the record. If he fails to do so, the argument is forfeited”].)

We likewise reject plaintiff's challenge to the trial court's refusal to tax the costs incurred by Wealth to cover court reporter fees. Plaintiff reasons that “transcripts of court proceedings not ordered by the court are disallowed (See [Code Civ. Proc.,] § 1033.5(b))”. However, as set forth in Wealth's supportive declaration, these costs, with the exception of \$54, which was included in the \$114 in costs conceded by Wealth, were not for trial transcripts, but for court reporter fees, which are in fact recoverable.

Finally, with respect to plaintiff's contentions that Wealth unnecessarily incurred costs for rush orders on service of subpoenas and certain demonstrative evidence, we reject them based upon her failure to provide the requisite reasoned analysis and

evidentiary showing. Neither the trial court nor this court is under any obligation to accept plaintiff's mere conclusory statements as a sufficient basis to rebut Wealth's prima facie showing that its requested costs were recoverable. (See *Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1266-1268 [mere assertions that claimed costs are not necessary or reasonable are insufficient to shift burden of proof to the moving party]; accord *Ladas, supra*, 19 Cal.App.4th at p. 774; see also *Nielsen v. Gibson, supra*, 178 Cal.App.4th at p. 324.)

Accordingly, the trial court's ruling on plaintiff's motion to tax costs is affirmed.⁵

DISPOSITION

The judgment is affirmed. Defendant/respondent Wealth Properties, Inc. is awarded costs on appeal.

Jenkins, J.

We concur:

Pollak, Acting P. J.

Siggins, J.

⁵ Plaintiff also raises several new arguments in her Reply Brief to challenge the trial court's partial denial of her motion to tax costs. Most notably, plaintiff asserts for the first time that Wealth's pretrial offer to compromise (Code Civ. Proc., § 998) was neither reasonable nor made in good faith and, as such, cannot support Wealth's recovery of \$10,830.90 in expert fees. Plaintiff also adds a challenge to Wealth's charges for exhibits or blow-ups prepared for, but not ultimately used at, trial. It goes without saying arguments raised for the first time in a reply brief are forfeited. (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52.) Accordingly, we decline to consider plaintiff's new contentions.