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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

CHARLENE ADAMS,  
Plaintiff and Appellant,

v.

BETH JORDAN,  
Defendant and Respondent.

A141688

(Alameda County  
Super. Ct. No. RG11562111)

In this personal injury action, plaintiff Charlene Adams appeals following a jury verdict finding both parties negligent and allocating 80 percent of the fault to plaintiff. We affirm.

BACKGROUND

Plaintiff and defendant Beth Jordan were involved in a car accident at the intersection of Gilman and Fourth Streets. The speed limit on Gilman Street is 25 miles per hour. At the time of the accident, it was dark and traffic was congested because of lowered barriers blocking Gilman Street at a railroad crossing approximately one block west of Fourth Street.

Defendant testified she was driving south on Fourth Street and stopped at the stop sign at Gilman Street. There was a long line of cars stopped in the westbound lane on Gilman Street, but the cars had left the Fourth Street intersection clear. Defendant slowly entered the intersection, crossing the westbound lane of Gilman Street and then looking down the eastbound lane. She did not see any headlights approaching. As she crossed

the eastbound lane, she was hit by plaintiff's car driving east on Gilman Street. The force of the accident caused defendant's car to spin around.

The deposition testimony of two eyewitnesses was read at trial. Max Woodworth was the first car stopped at the railroad barrier in the eastbound lane of Gilman Street. Woodworth noticed that the car behind him was revving its engine and the driver appeared impatient. When the railroad barrier went up and Woodworth began to proceed, the car behind him passed him by crossing into the westbound lane and accelerating very fast. Woodworth saw the car return to the eastbound lane, drive approximately 40 miles per hour for one or two short blocks, and then strike defendant's car.

Charles Stoecker was stopped in traffic in the westbound lane of Gilman Street, just before the Fourth Street intersection, which he had left clear. He saw a car cross the railroad tracks while the barrier was still down. The car was travelling approximately 40 miles per hour. The car collided with defendant's car while defendant's car was in the intersection.

Plaintiff testified she was driving eastbound on Gilman Street and was the first car stopped at the railroad barrier. As she was waiting, a car passed her by moving into the opposite lane of traffic and crossing the railroad tracks. Plaintiff did not do the same. When she entered the Fourth Street intersection, she was traveling 20 to 25 miles per hour. As she was in the intersection, defendant's car struck her.

Both sides presented expert testimony. Defendant's expert opined that, at the time of the collision, plaintiff was driving between 35 and 40 miles per hour and defendant was driving about 10 miles per hour. Plaintiff's expert opined plaintiff's speed was approximately 33 miles per hour and defendant's was approximately 10 miles per hour. Plaintiff's expert further opined that, even if plaintiff had been traveling 25 miles per hour, the accident still would have occurred.

The jury found both parties negligent and apportioned 80 percent of the fault to plaintiff and 20 percent to defendant. Based on the jury's determination of plaintiff's

damages,<sup>1</sup> the trial court issued judgment awarding plaintiff \$4,723. The trial court denied plaintiff's post-trial motions for judgment notwithstanding the verdict and for a new trial.

## DISCUSSION

Plaintiff argues (1) the evidence was insufficient to support the jury's liability verdict, (2) the trial court erred in allowing certain evidence at trial, and (3) the trial court improperly refused a jury instruction requested by plaintiff.<sup>2</sup>

### I. *Substantial Evidence*

Plaintiff contends the evidence was insufficient to support the jury's verdict apportioning 80 percent of the fault to her. We disagree.

“The comparative fault doctrine ‘is designed to permit the trier of fact to consider all relevant criteria in apportioning liability. The doctrine ‘is a flexible, commonsense concept, under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury (whether their responsibility for the injury rests on negligence, strict liability, or other theories of responsibility), in order to arrive at an ‘equitable apportionment or allocation of loss.’ ” [Citation.]’ . . . Generally, a defendant has the burden of establishing that some nonzero percentage of fault is properly attributed to the plaintiff, other defendants, or nonparties to the action.” (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1285 (*Pfeifer*).

“On review for substantial evidence, we ‘consider the evidence in the light most favorable to the prevailing party, giving that party the benefit of every reasonable inference and resolving conflicts in support of the judgment. [Citation.]’ [Citation.] Under this standard, ‘ “the appellate court may not substitute its judgment for that of the jury or set aside the jury’s finding if there is any evidence which under any reasonable view supports the jury’s apportionment. [Citation.]” ’ [Citation.] For this reason, courts

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<sup>1</sup> Plaintiff does not challenge the determination of her damages on appeal.

<sup>2</sup> These contentions were the basis of plaintiff's post-trial motions. To the extent plaintiff separately challenges the trial court's denial of her post-trial motions, we reject this challenge for the reasons discussed below.

rarely disturb the jury's apportionment of fault." (*Pfeifer, supra*, 220 Cal.App.4th at p. 1286.)

There is ample evidence supporting the challenged verdict. There is evidence plaintiff was driving between 35 and 40 miles per hour in a 25 miles per hour speed zone, after dark, in congested traffic conditions. There is evidence that defendant proceeded through the intersection cautiously. The jury could reasonably conclude that plaintiff's speed or other lack of reasonable care was 80 percent responsible for the collision.

Plaintiff vigorously disputes the evidence she was driving more than 33 miles per hour, pointing to her expert's testimony and contesting the testimony of defendant's expert. On substantial evidence review, we must view the evidence in the light most favorable to the defendant (*Pfeifer, supra*, 220 Cal.App.4th at p. 1286), which means crediting defendant's expert's testimony as to plaintiff's speed. In any event, even assuming plaintiff's speed was 33 miles per hour, there was still sufficient evidence to support the verdict in light of all the circumstances.

Plaintiff also argues defendant could not see whether the intersection was clear and violated the Vehicle Code by nonetheless proceeding. There was evidence that defendant proceeded with caution through the intersection. The fact that defendant was also negligent does not preclude the jury from allocating 80 percent of the fault to plaintiff.

Plaintiff points to her expert's testimony that the accident would have happened even if plaintiff had been driving the speed limit and claims this testimony was uncontradicted. The jury was not compelled to accept this testimony. " "[A]s a general rule, "[p]rovided the trier of fact does not act arbitrarily, he may reject *in toto* the testimony of a witness, even though the witness is uncontradicted. [Citations.]" [Citation.] This rule is applied equally to expert witnesses.' " (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 632 (*Howard*)).<sup>3</sup>

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<sup>3</sup> Plaintiff cites *Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal.App.3d 278, which held that "when the matter in issue is within the knowledge of experts only and not within common knowledge, expert evidence is conclusive and cannot be disregarded." (*Id.* at

In sum, substantial evidence supports the jury’s verdict finding plaintiff negligent and apportioning 80 percent of the fault to her.

## II. Admission of Evidence

Before trial, plaintiff sought the exclusion pursuant to Evidence Code section 352 of evidence that her car pulled into the opposite lane to quickly cross the railroad tracks.<sup>4</sup> Plaintiff argued the evidence was prejudicial and irrelevant to her conduct at the time of the collision. The trial court allowed the evidence.

“ [I]t is for the trial court, in its discretion, to determine whether the probative value of relevant evidence is outweighed by a substantial danger of undue prejudice. The appellate court may not interfere with the trial court’s determination . . . unless the trial court’s determination was beyond the bounds of reason and resulted in a manifest miscarriage of justice.’ ” (*McCoy v. Pacific Maritime Assn.*(2013) 216 Cal.App.4th 283, 296.)

The evidence that plaintiff pulled into the opposite lane to pass the car ahead of her and cross the railroad tracks gives rise to the inference that plaintiff was impatient and/or in a hurry, and is therefore relevant to plaintiff’s speed at the time of the collision. We do not agree with plaintiff’s assertion that the evidence was so prejudicial it likely “caused the jury to dislike [plaintiff] and want to punish her.” The trial court’s ruling was not an abuse of discretion.

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p. 313.) This “*exceptional* principle requiring a fact finder to accept uncontradicted expert testimony as conclusive applies *only* in professional negligence cases where the standard of care must be established by expert testimony.” (*Howard, supra*, 72 Cal.App.4th at p. 632.) “Because the instant case does not present any issues of professional negligence or medical malpractice, there was no reason to require the trier of fact to accept as ‘conclusive’ the uncontradicted testimony of [plaintiff’s] expert[]. Instead, the general rule applies.” (*Id.* at pp. 632–633.)

<sup>4</sup> Although plaintiff claims she also sought exclusion pursuant to Evidence Code section 350, her motion below solely identifies section 352.

### III. *Jury Instruction*

#### A. *Background*

Plaintiff's final argument is the trial court erred in denying her request for a jury instruction that every person has a right to presume that others will obey the law. Plaintiff requested this instruction pursuant to *Swartz v. Feddershon* (1928) 92 Cal.App. 285, which stated: " 'The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person.' " (*Id.* at p. 290.) The trial court denied the request on the ground that the instruction did not add anything to the standard negligence instructions.

Following the court's ruling, plaintiff's counsel asked the court "whether I can say to the jury, when you are driving down the street like this, and there is cross-streets, you have a right to assume" another driver is not going to "enter the intersection when they can't see whether you are coming or not." The court ruled the argument was allowed.

The jury received the relevant standard instructions on vehicle negligence, including that the failure to use reasonable care in driving is negligence. (CACI Nos. 700, 701, 703, 706, 707.) The jury was also instructed that a driver must stop at a stop sign and yield the right of way to approaching vehicles until the driver can proceed with reasonable safety. (Veh. Code, §§ 22450, subd. (a), 21802, subd. (a).)

During closing arguments, plaintiff's counsel argued: "the plaintiff -- by the way, another rule of law, which is not part of the instructions -- had the right to rely on the defendant doing the right thing legally." Following counsel's argument, a member of the jury submitted a note asking whether this point of law was accurate. The trial court responded: "I'm not going to comment on whether their statements on the law are accurate or not. I'll simply state that the entirety of the law for you to consider is contained within the jury instructions. [¶] I will point out to you that a number of the instructions . . . talk about everyone's responsibility to use reasonable care."

## B. Analysis

“ ‘A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence.’ ” (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1217.) “ ‘[E]rror cannot be predicated on the trial court’s refusal to give a requested instruction if the subject matter is substantially covered by the instructions given.’ ” (*Ibid.*) Moreover, “instructional error in a civil case is not grounds for reversal unless it is probable the error prejudicially affected the verdict. [Citation.] In determining whether instructional error was prejudicial, a reviewing court must evaluate ‘(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel’s arguments, and (4) any indications by the jury itself that it was misled.’ ” (*Ibid.*)

We find no error in the trial court’s refusal of the instruction because negligence principles were amply covered by the given instructions. Plaintiff does not contend the provided instructions incorrectly stated the law.

Even assuming it was error, plaintiff has not shown prejudice. Counsel was allowed to argue the principle in closing, emphasizing plaintiff’s position that defendant violated her legal duties at the intersection and that plaintiff used reasonable care in assuming no drivers would enter the Fourth Street intersection when she was approaching. The trial court’s response to the jury’s question was proper and we are not persuaded that the jury was misled. It is not reasonably probable that the refusal to issue the instruction prejudicially affected the verdict.<sup>5</sup>

## DISPOSITION

The judgment is affirmed. Defendant is awarded her costs on appeal.

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<sup>5</sup> To the extent plaintiff separately complains that the trial court erred in allowing her counsel to argue the point after refusing to issue the instruction, the challenge is barred by the doctrine of invited error. Plaintiff’s counsel requested permission to make the argument, despite knowing the instruction would not be provided. “ ‘Under the doctrine of invited error, when a party by its own conduct induces the commission of error, it may not claim on appeal that the judgment should be reversed because of that error.’ ” (*Transport Ins. Co. v. TIG Ins. Co.* (2012) 202 Cal.App.4th 984, 1000.)

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SIMONS, Acting P.J.

We concur.

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NEEDHAM, J.

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BRUINIERS, J.