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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

RHONDA BRISTOW-VERMILLION,

Plaintiff and Appellant,

v.

SIERRA COMMUNITY COLLEGE DISTRICT,

Defendant and Respondent.

C072285

(Super. Ct. No. SCV 26583)

The lack of a complete record dooms this appeal.

Plaintiff Rhonda Bristow-Vermillion contended she developed respiratory ailments from mold discovered in her office area. She sued her employer, respondent Sierra Community College District, alleging causes of action under the Fair Employment and Housing Act (Gov. Code, § 12940 et seq.) for unlawful discrimination, failure to accommodate, and retaliation based on her disability, and under Labor Code section 1102.5, the state whistleblower statute. Following a 10-week trial, the jury returned

special verdicts against each of her causes of action, and the trial court entered judgment against her.

Plaintiff appeals in propria persona, contending (1) she submitted sufficient evidence to satisfy all of the elements of her causes of action (which we interpret to mean insufficient evidence supports the jury's findings of fact); (2) the trial court abused its discretion on a number of evidentiary rulings on in limine motions and during trial; (3) the trial court committed instructional error; (4) the jury, the court, and defense counsel committed misconduct; and (5) defense counsel improperly contested her motion for new trial.

We affirm the judgment. Plaintiff did not submit a complete record of the trial court's proceedings. The submitted portions of the reporter's transcript contain only the testimony of three of the many witnesses who testified at trial and defense counsel's closing argument. Plaintiff did not submit an agreed statement or a settled statement. Having failed to submit a complete record, plaintiff forfeits her contentions.

DISCUSSION

Appealed judgments and orders are presumed correct. An appellant bears the burden of overcoming this presumption by affirmatively showing error on an adequate record. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141.) “[I]n the absence of a required reporter's transcript and other [relevant] documents, we presume the judgment is correct.” (*Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1039; see generally, Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2014) ¶¶ 4:2 to 4:3.2, pp. 4-1 to 4-2.)

“ ‘A necessary corollary to this rule [is] that a record is inadequate, and appellant defaults, if the appellant predicates error only on the part of the record he provides the trial court, but ignores or does not present to the appellate court portions of the proceedings below which may provide grounds upon which the decision of the trial court could be affirmed.’ [Citation.]” (*Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435.)

Consequences flowing from these rules severely limit our consideration of plaintiff's appeal. Because plaintiff failed to provide a complete trial transcript, she cannot challenge the sufficiency of the evidence supporting the judgment. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132.) Plaintiff spends much of her opening brief attacking the sufficiency of the evidence supporting the jury's findings. However, without a complete trial transcript, we are unable to review those findings and must presume sufficient evidence supporting them exists in the transcript portions that are not contained in the record on appeal. Accordingly, plaintiff forfeits all of her claims against the jury's findings based on the sufficiency of the evidence.

Plaintiff also cannot obtain a reversal based on an alleged abuse of discretion where the record is insufficient for us to determine whether any abuse of discretion was prejudicial. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 136-137.) We can reverse a judgment only upon finding an error resulted in a miscarriage of justice, also known as prejudicial error, but we can declare a miscarriage of justice only upon examining the *entire* case, including the evidence. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; *Cassim v. Allstate Insurance Co.* (2004) 33 Cal.4th 780, 800, 801-802.) Except where the record shows prejudicial error per se, we cannot determine the existence of prejudicial error and abuse of discretion without having the entire record before us. Thus, plaintiff forfeits all of her claims alleging the trial court committed an abuse of discretion. These claims include plaintiff's allegations of evidentiary error.

A similar fate befalls plaintiff's contentions of instructional error. Although we review a claim of instructional error de novo, as the question is one of law (*People v. Berryman* (1993) 6 Cal.4th 1048, 1089, disapproved on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1), we must nonetheless determine whether any instructional error was prejudicial based on the record before us. (*Collins v. Navistar, Inc.* (2013) 214 Cal.App.4th 1486, 1510.) To do this, we must consider “ (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.’ [Citation.]” (*Ibid.*) We cannot perform this analysis where, as here, the appellant does not provide us with a complete record of the evidence and a transcript of all counsel’s arguments. Plaintiff thus forfeits her claims of instructional error.

We turn to plaintiff’s contentions of misconduct. She asserts several jurors were biased against her, defense counsel acted improperly towards the jury and improperly spoke with jurors outside of court, the court made improper remarks to hurry the trial along, and defense counsel committed misconduct in the closing argument. These contentions also fail for lack of an adequate record.

Plaintiff contends a number of jurors were biased against her. However, she cites to no evidence in the record that would support the factual accusations she levies against them. “[I]f it is not in the record, it did not happen” (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364.)

Plaintiff contends defense counsel grinned and winked at the jury. Again, she cites to no evidence in the record to support this allegation.

Plaintiff asserts the court committed misconduct by instructing her attorney in front of the jury to hurry the trial along. The only record of such an instance occurred when the court, upon plaintiff’s counsel informing it that a particular document was in evidence, replied: “Are you going to read each and every word? If so, we’re going to be here until the cows come home.” Plaintiff did not object to the court’s statement. By failing to object to the comment or seek a jury admonition regarding it, plaintiff forfeited this claim on appeal. (*People v. Snow* (2003) 30 Cal.4th 43, 78.)

Plaintiff contends defense counsel committed misconduct in the closing argument. At trial, however, she objected to only two of defense counsel’s statements. The first occurred when defense counsel, arguing plaintiff did not suffer from a real disability, stated her three-year-old son has Down syndrome. Plaintiff’s counsel objected. The court directed defense counsel to state the facts of the case, and it reminded plaintiff’s

counsel that she, too, had made two or three “similar missteps” in her argument. Defense counsel then argued her son’s condition was a real disability, but plaintiff’s was not. Plaintiff offered no further objection to this line of argument.

Assuming only for the sake of argument that defense counsel erred in discussing her son’s condition, the error was harmless. Despite defense counsel’s argument, the jury determined the District had in fact treated plaintiff as disabled by her condition. Any reference to counsel’s son or his condition as a real disability thus had no effect on the verdict.

Later, defense counsel sought to show the verdict form to the jury. Plaintiff objected, stating she had not used the form. The matter was resolved in a sidebar conference, and defense counsel proceeded to argue without objection using what appears from the transcript to be a generic form. Plaintiff mentions this incident in her opening brief, but does not explain how this could have prejudiced her. Whatever error may have occurred was cured by the trial court, and no evidence supports a claim of prejudice.

Plaintiff also alleges defense counsel committed misconduct by misstating the law, referencing a coplaintiff’s husband’s income, misstating evidence, and using the so-called “Golden Rule” argument. Plaintiff, however, made no objections to these arguments or requested the jury be admonished. Nor has she shown the actions were so persistent or egregious as to demonstrate the misconduct was incurable. She thus forfeits her challenges against them. (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1411-1412.)

In her final argument, plaintiff faults the District’s memorandum of points and authorities filed in opposition to her motion for new trial, claiming it contained numerous misstatements of law and evidence. These are arguments plaintiff should have made to the trial court in reply to the District’s opposition. At this point, the arguments are irrelevant. Before us, she does not contest the trial court’s denial of her motion other than by way of the arguments we have already addressed.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to defendant. (Cal. Rules of Court, rule 8.278(a).)

NICHOLSON, Acting P. J.

We concur:

ROBIE, J.

DUARTE, J.