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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ANDREA HUBER,

Plaintiff and Respondent,

v.

RICHARD WOLF MEDICAL
INSTRUMENTS CORPORATION,

Defendant and Appellant.

D058956

(Super. Ct. No.
37-20080-00078376-CU-MM-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Frederic L. Link, Judge. Affirmed.

Defendant Richard Wolf Medical Instruments Corp. (Wolf) appeals a judgment in favor of plaintiff Andrea Huber in her product liability action against it. On appeal, Wolf contends the trial court: (1) violated its constitutional due process rights by applying Code of Civil Procedure section 437c, subdivision (l)¹ (hereinafter section 437c(l)) in the

¹ All statutory references are to the Code of Civil Procedure unless otherwise specified.

circumstances in this case; (2) abused its discretion by allowing one of Huber's expert witnesses to testify regarding causation; and (3) erred by sustaining Huber's objection to an argument Wolf made in closing.

FACTUAL AND PROCEDURAL BACKGROUND

On February 23, 2007, Dr. Gary O'Hara performed laparoscopic surgery on Huber at Sharp Mary Birch Hospital to remove endometrial growths. O'Hara used a Wolf monopolar electro-surgical device to cauterize the endometrial growths superficially. He did not observe any problems with Huber's bowel during the surgery, and was unaware of any complications from the surgery. O'Hara did not see any evidence of a mechanical or traumatic injury during the 30-minute surgery. After the surgery, Huber went home without severe pain. About two weeks after the surgery, O'Hara examined Huber and found she appeared to be doing well.

On March 13, Huber experienced severe, debilitating pain and cramping. She was admitted to Sharp Mary Birch Hospital that day and her condition rapidly deteriorated. On March 14, O'Hara examined her and told her he was not sure what was wrong with her, but it likely was a problem from her February 23 surgery. Dr. Yerevanian, a general surgeon, believed Huber had a bowel perforation and, with O'Hara's assistance, performed exploratory surgery on Huber. They found a hole in Huber's bowel that, as O'Hara later testified at trial, looked as "if somebody kind of [threw] a little miniature hand grenade or something in there, it looked like there was a part of the bowel that had just basically blown open." Yerevanian removed a five-inch portion of Huber's bowel

and installed a colostomy. Huber remained in the hospital for about a week after the surgery.

On April 30, Yerevanian performed another surgery on Huber, removing the colostomy and reattaching her bowel. Within a few months, Huber returned to her "normal self." However, several months later, an additional surgery was performed to remove her fallopian tubes after doctors found the tubes were blocked by vegetable matter that had spilled into her abdomen after the bowel perforation.

On February 20, 2008, Huber filed a complaint against O'Hara and Sharp Healthcare Corporation (Sharp), alleging causes of action for negligence and medical malpractice. It also alleged a strict product liability cause of action against unnamed "Doe" defendants, asserting the medical device used in Huber's February 23, 2007, surgery was defectively designed and/or manufactured. On May 15, Huber filed a first amended complaint alleging the same causes of action. In August, she filed two amendments to that complaint, adding Valleylab, Inc., as Doe 1 and Karl Storz Endoscopy America, Inc., (Storz) as Doe 2.

On June 26, 2009, O'Hara apparently was deposed and testified he used a Wolf device, and not a Storz device, during Huber's surgery. On July 8, Huber filed an ex parte application for leave to file an amendment to her complaint adding Wolf as a Doe defendant. On July 9, the trial court granted Huber's ex parte application and on July 9 Huber filed an amendment to her complaint adding Wolf as Doe 3.

On June 18, 2009, O'Hara filed a motion for summary judgment on the ground that Huber's claims had no merit, there was no triable issue of material fact, and Huber could

not prevail as a matter of law. On August 21, Huber filed a notice of nonopposition to O'Hara's motion for summary judgment. At a September 4 hearing, the trial court confirmed its tentative ruling granting the unopposed motion for summary judgment. In its written order issued on September 10, the trial court stated: "Summary judgment was granted because there was no triable issue of material fact to establish that [O'Hara] was liable to [Huber] on her First Amended Complaint. . . . The undisputed evidence shows that the care and treatment provided by [O'Hara] was well within the applicable standard of care. The undisputed evidence also shows that [Huber's] alleged harm was not due to any negligence on the part of [O'Hara]."

On or about September 22, 2009, Huber apparently dismissed Storz as a defendant. On January 15, 2010, the trial court granted Sharp's unopposed motion for summary judgment.

Before trial, Huber filed an in limine section 437c(*l*) motion to preclude Wolf from presenting any evidence, testimony, or argument attempting to attribute fault to Sharp and O'Hara. The trial court granted the motion.

At trial, the jury returned a special verdict finding Wolf liable to Huber on both her strict product liability and negligence causes of action. It awarded Huber a total of \$2,201,283.30 in damages. The trial court entered judgment for Huber based on that verdict. Wolf timely filed a notice of appeal.

DISCUSSION

I

Section 437c(l)

Wolf contends the trial court violated its constitutional rights to due process by applying section 437c(l) in the circumstances of this case to preclude it from attempting to attribute fault to O'Hara during trial.

A

Section 437c(l) provides:

"In actions which arise out of an injury to the person or to property, if a motion for summary judgment was granted on the basis that the defendant was without fault, no other defendant during trial, over plaintiff's objection, may attempt to attribute fault to or comment on the absence or involvement of the defendant who was granted the motion." (Italics added.)

Pursuant to section 437c(l), Huber filed an in limine motion to exclude any and all evidence, testimony, or argument by Wolf attempting to attribute fault to Sharp and O'Hara during the trial of her claims against Wolf, the sole remaining defendant. The trial court granted the motion, explaining to Wolf:

"Fault equals cause. Whether or not it's within the standard of care, fault equals cause, so you cannot in any way argue that Dr. O'Hara . . . caused this injury. That is [what] we are talking about. Did he cause the injury, and you can't say that."

The court further explained: "[Section 437c(l)] says without fault. That is what this says. 'Fault' means that he . . . caused the injury. Whether or not it's within or without — outside of the standard of care I don't care. It says 'fault.' " The court instructed Wolf that it could not argue O'Hara caused the injury even though he acted within the standard

of care. It further stated: "[A]s far as I am concerned 'fault' means fault and you cannot in any way argue that Dr. O'Hara had any fault in this case, based on [section 437c(l)]." Accordingly, it granted Huber's motion.

B

Wolf asserts the trial court violated its constitutional due process rights to notice and an opportunity to be heard when it granted Huber's section 437c(l) motion and applied that statute to preclude Wolf from attempting to attribute fault for Huber's injury to O'Hara during trial. "The state and federal Constitutions prohibit the government from depriving persons of property without due process. (U.S. Const., 5th [& 14th] Amend[s].; Cal. Const., art. I, § 7, subd. (a).) In line with this constitutional bedrock, an adjudicative governmental action that implicates a significant or substantial property deprivation generally requires the procedural due process standards of reasonable notice and opportunity to be heard."² (*Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613, 622.)

However, the record in this case shows Wolf received notice of and an opportunity to be heard on Huber's section 437c(l) motion and subsequently at the trial of Huber's claims against it. Wolf does not assert otherwise. Accordingly, there does not appear to be any due process violation directly arising out of the trial court's application of section

² The Fourteenth Amendment to the United States Constitution provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." Article I, section 7, subdivision (a), of the California Constitution similarly provides: "A person may not be deprived of life, liberty, or property without due process of law"

437c(l) to preclude Wolf from attempting to attribute fault to O'Hara during the trial of Huber's claims against it. Section 437c(l) provides that no "*defendant during trial, over plaintiff's objection, may attempt to attribute fault to . . . [another] defendant who was granted*" a motion for summary judgment on the basis that it was without fault.

Therefore, that statute sets forth, in effect, an evidentiary rule for civil trials involving injuries to persons or property.³ If a plaintiff objects during trial, a defendant is precluded from presenting evidence, questioning witnesses, or arguing to the jury in an attempt to attribute fault to another defendant granted summary judgment before trial based on an absence of fault. By applying the express terms of section 437c(l) and barring Wolf from attempting at trial to attribute fault to O'Hara, the trial court did not deprive Wolf of its constitutional rights to notice and an opportunity to be heard.

Nevertheless, the main gist of Wolf's argument appears not to be based on the trial court's application of section 437c(l) during trial, but rather on the procedures for summary judgment motions. In its opening brief Wolf argues in a footnote: "Wolf should, at a minimum, have had notice and an opportunity to be heard with respect to Dr. O'Hara's motion for summary judgment before it was so profoundly prejudiced by the resolution of that motion." Wolf argues that, as a late-added defendant (i.e., on July 9,

³ Generally speaking, the application of rules of evidence at trial falls within a trial court's discretion and does not involve any constitutional right. (Cf. *People v. Abilez* (2007) 41 Cal.4th 472, 503 ["[T]he application of the ordinary rules of evidence under state law does not violate a criminal defendant's federal constitutional right to present a defense, because trial courts retain the intrinsic power under state law to exercise discretion to control the admission of evidence at trial."]; *People v. Lawley* (2002) 27 Cal.4th 102, 155.)

2009), it did not receive notice of O'Hara's motion for summary judgment filed on June 18, 2009, and served on all parties to the action at that time, and it did not receive notice of the hearing and/or an opportunity to be heard on that motion. However, in so arguing, Wolf presents only a conclusory argument and omits any substantive analysis of applicable law showing its due process rights were violated.⁴ Accordingly, we deem that argument to be waived. "The burden of affirmatively demonstrating error is on the appellant." (*Fundamental Investment etc. Realty Fund v. Gradow* (1994) 28 Cal.App.4th 966, 971.) "An appellant must provide an argument and legal authority to support his contentions. This burden requires more than a mere assertion that the judgment is wrong. 'Issues do not have a life of their own: If they are not raised or supported by argument or citation to authority, [they are] . . . waived.' [Citation.] It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness. When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

⁴ Wolf's belated argument in its reply brief challenging the application of section 437c, *subdivision (a)*, in the circumstances of this case as violating its due process rights is untimely and we do not consider it. Nevertheless, we doubt due process compels us to tailor a court-made amendment to section 437c, *subdivision (a)*'s provisions regarding notice to other parties at the time a summary judgment motion is filed. To the extent Wolf believes the application of that statute is unfair to defendants added after the filing of a summary judgment motion, it should seek recourse from the Legislature and not the courts.

"Where a point is merely asserted by [appellant] without any [substantive] argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion." (*People v. Ham* (1970) 7 Cal.App.3d 768, 783, disapproved on another ground in *People v. Compton* (1971) 6 Cal.3d 55, 60, fn. 3.) "Issues do not have a life of their own: if they are not raised or supported by [substantive] argument or citation to authority, we consider the issues waived." (*Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99; see also *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700; *Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn. 3; *Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, 1301, fn. 2 ["The dearth of true legal analysis in her appellate briefs amounts to a waiver of the [contention] and we treat it as such."]; *Bayside Auto & Truck Sales, Inc. v. Department of Transportation* (1993) 21 Cal.App.4th 561, 571.) In any event, assuming arguendo Wolf has not waived that contention, its appellate argument is vague and conclusory and it has not carried its burden on appeal because it has failed to present any persuasive substantive argument or analysis showing the trial court erred, as it contends. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Fundamental Investment etc. Realty Fund v. Gradow, supra*, 28 Cal.App.4th at p. 971; *Paterno v. State of California* (1999) 74 Cal App.4th 68, 105 [conclusory claims did not persuade appellate court].)

In any event, we are persuaded by Huber's argument that Wolf's due process rights were not violated because it was not deprived of any property during the trial of her claims against it. Huber argues the trial court's exclusion of any evidence, questioning, or argument attempting to attribute fault to O'Hara during that trial did not deprive Wolf of

any indemnity claim against O'Hara for his fault in causing her injuries. On the contrary, Wolf concedes that, despite its inability to attribute fault to O'Hara at the trial of Huber's claims against it, it retains the right to file a separate indemnity action against O'Hara to recover whatever damages it had to pay Huber but were attributable to his negligent conduct.⁵ Therefore, Wolf was not deprived of any property because of the trial court's ruling that section 437c(l) precluded it from attempting to attribute fault to O'Hara during the trial of Huber's claims against it. Contrary to Wolf's conclusory assertion, we do not consider attorney fees, costs, or other litigation expenses Wolf may have avoided had it been able to attribute fault to O'Hara during the trial of Huber's claims to constitute a deprivation of property by the government for purposes of constitutional due process rights.⁶

⁵ Wolf does not persuade us it would be a violation of its constitutional due process rights were it required to file and prosecute a separate action against O'Hara to attribute fault to, and obtain indemnity from, him. Addressing a somewhat analogous situation, one authority commented: "Due process requirements, however, do not mean that all related issues must be subject to resolution within a single forum. Although admitting that '[d]ue process requires that there be an opportunity to present every available defense,' the Supreme Court held in 1972 that Oregon could enact legislation denying tenants the right to show that their landlords had failed to make repairs as required by contract or statute in eviction proceedings brought by landlords. It is enough, explained the Justices, that this can be shown by a tenant in other forms of litigation." (2 Rich, *Modern Constitutional Law* (3d ed. 2011) § 22:8, p. 31, fns. omitted, citing *Lindsey v. Normet* (1972) 405 U.S. 56.)

⁶ Although neither party raises it and therefore we do not address its merits, we note that California's constitutional due process provision does not require a deprivation of property. (*Ryan v. California Interscholastic Federation-San Diego Section* (2001) 94 Cal.App.4th 1048, 1069; *People v. Ramirez* (1979) 25 Cal.3d 260, 263-264.) Furthermore, neither party raises, and therefore we do not address, the established multiple-factor analysis for determining whether there is a procedural due process

We are not persuaded by Wolf's citation of *Knowles v. Tehachapi Valley Hospital Dist.* (1996) 49 Cal.App.4th 1083 as support for its argument that, despite section 437c(l)'s provisions, it nevertheless should have been permitted to present evidence at trial of O'Hara's nonnegligent conduct that was a cause of Huber's injuries. *Knowles* expressly declined to address the merits of that issue. (*Id.* at p. 1095 ["We will not determine whether the [trial] court's decision violated section [437c(l)].".]) Furthermore, we are not persuaded by Wolf's conclusory argument that it was so unfair as to violate its due process rights that it was precluded from presenting evidence of O'Hara's nonnegligent conduct that may have caused Huber's injuries.⁷ As the trial court noted, section 437c(l) precludes evidence attributing "fault" to O'Hara, who had obtained a summary judgment based on the absence of any negligence or conduct falling below the standard of care. On this record, Wolf has not carried its burden on appeal to persuade us the term "fault," as used in section 437c(l), is limited to legal "fault" or liability and cannot be construed as also including "fault" in the form of nonnegligent conduct that may have caused Huber's injuries. (*People v. Otto* (2001) 26 Cal.4th 200, 209-210

violation under the United States or California Constitutions. (See, e.g., *Ryan*, at pp. 1059-1076; *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, 390-391.) In any event, we conclude Wolf has not carried its burden on appeal to show that a proper analysis of those factors shows its due process rights were violated by the trial court's granting of Huber's section 437c(l) motion.

⁷ We likewise are not persuaded by Wolf's assertion that it was unconstitutionally unfair for it to appear at the trial of Huber's claims without any codefendants (e.g., O'Hara), making it a "sitting duck" for the jury to blame it for all of the sympathetic plaintiff's (i.e., Huber's) severe injuries.

[defendant has heavy burden to show statute violates due process; presumption is in favor of statute's validity].) Wolf does not present any evidence or argument showing the Legislature intended section 437c(l) to be interpreted or applied in this restrictive manner.⁸ For purposes of this opinion, we need not decide whether the term "fault," as used in section 437c(l), means only legal "fault" or liability *or* also includes "fault" in the form of nonnegligent conduct of another defendant that may have caused the plaintiff's injuries.

II

Expert Testimony on Causation by Huber's Expert

Wolf contends the trial court abused its discretion by allowing Dr. Ruslana Kadze, one of Huber's expert witnesses, to testify as an expert on the issue of causation of Huber's injuries. It asserts Kadze was not, as a matter of law, qualified to testify on that issue.

A

Wolf filed an in limine motion to exclude expert testimony by Kadze, a gynecologist and obstetrician and one of Huber's expert witnesses, on the issue of the causation of Huber's injuries. Wolf argued Kadze's qualifications were insufficient for

⁸ Because we conclude the trial court did not violate Wolf's due process rights in granting Huber's section 437c(l) motion, we need not address Huber's argument that Wolf was not prejudiced by that ruling because evidence of O'Hara's "fault" or conduct in causing her injuries was, in fact, admitted at trial despite that ruling. Nevertheless, we note Wolf presented the testimony of its expert witness, Dr. Richard Soderstrom, that Huber's injuries were "more likely than not" caused by trauma and not electricity. He testified he believed O'Hara abraded Huber's bowel during the surgery.

her to offer an expert opinion on the cause of Huber's injuries. In opposition, Huber argued any question regarding Kadze's qualifications should go to the weight of her testimony and not its admissibility. The trial court denied Wolf's motion.

B

Evidence Code section 720, subdivision (a), provides: "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert." A trial court has broad discretion in deciding whether an expert witness is qualified to testify on a particular issue. The California Supreme Court stated:

"The trial court is given considerable latitude in determining the qualifications of an expert and its ruling will not be disturbed on appeal unless a manifest abuse of discretion is shown. [Citations.] [¶] However, whether a person qualifies as an expert in a particular case depends upon the facts of that case and the witness' qualifications." (*People v. Kelly* (1976) 17 Cal.3d 24, 39.)

Alternatively stated, "[t]he trial court's determination of whether a witness qualifies as an expert is a matter of discretion and will not be disturbed absent a showing of manifest abuse. [Citation.] " "Where a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than its admissibility." " (*People v. Bolin* (1998) 18 Cal.4th 297, 321-322.)

C

We conclude Wolf has not carried its burden on appeal to show the trial court abused its discretion by deciding Kadze was qualified to testify as an expert on the issue of causation of Huber's injuries. In support of its in limine motion to exclude Kadze's testimony, Wolf argued and presented supporting evidence that she had never before qualified as an expert witness, had no research experience regarding bowel injuries, had never performed a laparoscopy in which there was a bowel injury, had never dealt with an electrical injury to the bowel, had no pathology experience in distinguishing between electro-thermal and traumatic bowel injuries, and had not consulted any pathologists or pathology literature in reaching her expert opinion on causation. However, in opposition to Wolf's motion, Huber submitted evidence that Kadze, as an OB/GYN and surgeon, had performed over 700 surgeries during her seven years of practice, the majority of which involved laparoscopic electrosurgery. At the hearing on Wolf's motion, the trial court confirmed that Kadze uses those same electrical instruments in her surgeries every time and was aware there is a possibility of electrical problems (i.e., injuries) during surgery. The court then denied the motion.

In the circumstances of this case, the trial court considered Kadze's training and experience as an OB/GYN surgeon and found she was qualified to testify as an expert on the causation of Huber's injuries. The court did not abuse its discretion in so finding. Although, as Wolf notes, Kadze did not have experience with electrosurgery that caused a bowel injury, the trial court could reasonably conclude that lack of experience did not preclude her from having a sufficient basis on which to form an opinion as to the cause of

Huber's injuries in this case. The court did not abuse its discretion by allowing Kadze to testify as an expert on the issue of causation.⁹ (*People v. Bolin, supra*, 18 Cal.4th at pp. 321-322; *People v. Kelly, supra*, 17 Cal.3d at p. 39.)

III

Wolf's Closing Argument

Wolf contends the trial court erred by sustaining Huber's objection to Wolf's closing argument that the FDA found its device to be safe and effective.

A

During trial, Wolf presented the testimony of Ron Haselhorst, its regulatory affairs and quality assurance manager, who stated the United States Food and Drug Administration (FDA) "regulates [Wolf's monopolar coagulation suction electrodes] in terms of making sure that this product is safe and effective for use." In closing, Wolf argued: "The FDA says [Wolf's device is] safe and effective." The trial court sustained Huber's objection as not part of the evidence and instructed Wolf to continue its argument. Wolf then continued, arguing: "Well the evidence is this can't be sold without FDA approval"

B

"In conducting closing argument, attorneys for both sides have wide latitude to discuss the case. ' ' ' "The right of counsel to discuss the merits of a case, both as to the

⁹ Because we conclude the trial court did not err by denying Wolf's in limine motion to exclude causation expert testimony by Kadze, we do not address Wolf's extensive argument that the admission of that testimony was prejudicial.

law and facts, is very wide, and he has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom. . . . " " [Citations.] . . . "An attorney is permitted to argue all reasonable inferences from the evidence" [Citation.] "Only the most persuasive reasons justify handcuffing attorneys in the exercise of their advocacy within the bounds of propriety." [Citation.]' " (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 795.) "While a counsel in summing up may indulge in all fair arguments in favor of his client's case, he may not assume facts not in evidence or invite the jury to speculate as to unsupported inferences." (*Malkasian v. Irwin* (1964) 61 Cal.2d 738, 747.) "A trial judge has discretionary power to restrict argument within reasonable limits." (*People v. Nails* (1963) 214 Cal.App.2d 689, 693.) Accordingly, an appellate court reviews a trial court's decision to restrict a party's closing argument for abuse of discretion. (Cf. *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.)

C

We do not agree with Wolf's assertion that the trial court erred by sustaining Huber's objection to his closing argument that the FDA said its device was "safe and effective." As noted above, Haselhorst testified that the FDA "regulates [Wolf's monopolar coagulation suction electrodes] in terms of making sure that this product is safe and effective for use." Although it is possible other trial courts may have found that testimony could support a reasonable inference the FDA found Wolf's device was safe and effective, we cannot conclude the trial court in this case abused its discretion by finding otherwise. Trial courts are required to make many evidentiary and other

discretionary decisions during trial, oftentimes without time for reflection. Therefore, we generally afford trial courts wide latitude in making such decisions and will not reverse such a decision unless there is a manifest abuse of discretion. In the circumstances of this case, we conclude the trial court could reasonably find Haselhorst's testimony that the FDA *regulated* Wolf's device for safety was not equivalent to a statement that the FDA *actually found* Wolf's device to be safe and effective. Accordingly, the trial court properly exercised its discretion in sustaining Huber's objection to Wolf's closing argument to that effect.¹⁰ (*People v. Nails, supra*, 214 Cal.App.2d at p. 693; *Shamblin v. Brattain, supra*, 44 Cal.3d at pp. 478-479.)

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.

¹⁰ In any event, assuming arguendo the trial court erred by sustaining Huber's objection, we nevertheless would conclude Wolf has not carried its appellate burden to show it is reasonably probable it would have obtained a more favorable result at trial had the court overruled that objection. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Cassim v. Allstate Ins. Co., supra*, 33 Cal.4th at pp. 800-802.) Wolf has not shown it was prejudiced by that purported error.