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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

SUSAN RIVERA et al.,

Plaintiffs and Appellants,

v.

LOAD CENTER, INC.,

Defendant and Respondent.

E051939

(Super.Ct.No. CIVSS709571)

OPINION

APPEAL from the Superior Court of San Bernardino County. Joseph R. Brisco, Judge. Affirmed.

Wilcoxon Callaham, William C. Callaham and Craig J. Rolfe for Plaintiffs and Appellants.

Osman & Associates, Richard L. Scott; Hayes, Scott, Bonino, Ellingson & McLay, Mark G. Bonino and Miya R. Peard for Defendant and Respondent.

Che R. Rivera, Sr. (Rivera or decedent) died of injuries sustained when his neck became pinned between the rail of the boom lift in which he was standing and an I-beam

where he was checking his welds. Plaintiffs, Rivera's surviving wife and child, filed an action for wrongful death and personal injury against the designer or manufacturer of the boom lift, and Load Center, Inc. (Load Center), the company that owned, maintained, and leased the boom lift that was involved in the accident. Robert Ettleman, the coworker who was injured while trying to rescue Rivera, sued the same defendants for personal injuries he sustained. At a consolidated trial, Load Center was permitted to introduce evidence that the plaintiffs' decedent had alcohol and marijuana in his system at the time of the accident. The jury trial concluded with a defense verdict, finding that Rivera was 100 percent responsible for the accident. Plaintiffs appeal.

On appeal, plaintiffs argue that the trial court's ruling on the motion in limine to exclude evidence of the toxicology results was an abuse of discretion.¹ We affirm.

BACKGROUND

Rivera, Julius Abellera, and David Glover, were union ironworkers who were hired by Shore Steel to work on a Stater Bros. project. The project involved a warehouse job. Within the warehouse was an administration room or building where Rivera, Abellera, and Glover performed welding work on July 3, 2007. At noon, everyone went to lunch. Rivera went to lunch with coworker, Jaime Olmos, at a nearby café as he

¹ Plaintiffs also argued that it was prejudicial error to allow the defendants to ask prospective jurors questions relating to marijuana and alcohol use. Because plaintiff did not timely object to the voir dire questions, we do not reach that issue. (Evid. Code, § 353.)

usually did, where each of them ordered a hamburger, french fries, and a beer, which they drank from a Styrofoam cup, so as to go unnoticed.

Neither Olmos nor Rivera had time to finish their respective lunches or beers before having to return to work. They each returned to the work they had been doing prior to the lunch break. Rivera had been welding near an I-beam in the administration room, and after lunch, Ertleman instructed him to check his welds. Ertleman and Abellera then took a forklift and a scissor lift out of the administration room to work in another area. Glover also left the area after some period of time, to work on a catwalk on the other side of the entrance.

At some point, Dan Clem, the general foreman, walked into the room where Rivera was working and saw the boom lift pinned up against the bottom of the I-beam in the northwest corner of the room. Clem could see Rivera was in trouble and went to the ground controls on the left side of the lift, to try to boom the lift down. Although the engine was running, Clem was unsuccessful in getting the controls to work after two or three attempts.² When he could not get the controls to work, Clem went out of the room to get more help. Glover heard Clem yell and drove his forklift into the room where he could see Rivera stuck in the lift on a beam.

² Abellera had used the same boom lift previously and had noticed that the lift had a tendency to drift one or two feet after he removed his foot from the pedal. Normally, taking one's foot off the pedal should have stopped the lift immediately. He had reported the problem at a safety meeting.

Ettleman and Abellera had also come into the room to see what had happened. Ettleman could see that Rivera was trapped with his neck at the bottom flange of the I-beam and the back of his neck against the top handrail of the basket of the lift. When Ettleman heard Clem say he could not get the ground controls to work, he decided to go up the boom. Ettleman ran up the boom and jumped into the basket at the top. The basket was up hard against the I-beam. Ettleman checked Rivera, but could not detect a pulse. Based on Rivera's position, Ettleman could not simply retract the boom because it would decapitate Rivera; instead, the basket had to come straight down to release Rivera's head.

Glover maneuvered his forklift into position and raised his forklift boom, scoping it out and inserting the tip of the boom's jib inside the basket of the boom lift in which Rivera was trapped. Then, Glover lowered his boom, pushing the basket of Rivera's lift down. After two attempts, the basket came down far enough to Ettleman to get Rivera's head out and to lay him on the floor of the basket. When Glover released the boom, it went right up against the beam.

Ettleman then tried operating the boom lift from the controls in the basket, and got it started. When it started, it took off at a high speed and slammed Ettleman into a beam, squeezing his midsection, and fracturing his left arm. As Ettleman screamed in pain, Clem climbed up into the basket of the boom lift. Clem stayed low, using one hand to operate the foot pedal in the basket of the boom lift, and the other hand to pull the boom-down lever to lower the boom. The boom and basket lowered to the ground.

Once on the ground, Ettleman was pulled from the basket. Abellera and Glover performed cardio-pulmonary resuscitation on Rivera until paramedics arrived and took over. Ettleman and Rivera were then taken away by paramedics. After the two injured men had been taken by paramedics, their coworkers attempted to locate a telephone number with which to notify Rivera's family of the incident. They broke into his truck to see if he had a telephone book or telephone numbers in it. Inside an ashtray in the truck was a marijuana cigarette butt. Olmos indicated that the marijuana belonged to him, although he and Rivera had smoked marijuana together on four or five occasions.

An autopsy was performed on Rivera. The cause of death was attributed to asphyxia brought about by compression of the neck. As part of the autopsy procedure, Rivera's blood was tested. The toxicology studies detected delta 9-tetrahydrocannabinol (3.5 nanograms per milliliter) and its breakdown product, delta 9-carboxy tetrahydrocannabinol (54 nanograms per milliliter, as well as alcohol (.02 percent). The results were consistent with recent, as well as regular use of cannabis. The amount of alcohol present indicated Rivera either drank recently or drank a lot the night before. The levels of marijuana and alcohol would have caused impairment.

Ettleman suffered four herniated discs, a compound fracture of the arm requiring the surgical implantation of a plate, and priapism.

On November 26, 2007, Rivera's surviving spouse and child filed a complaint for wrongful death against OEM Controls, Inc., and JLG Industries, Inc., the designer and manufacturer of the boom lift, as well as Load Center, Inc., the owner/lessor of the boom

lift, and Oltmans Construction Co., the contractor who leased the boom lift.³ Ettleman filed an action to recover for his personal injuries on April 18, 2008, against the same defendants. The actions were consolidated on June 9, 2009. Jury trial commenced on April 5, 2010.

At the time set for trial, plaintiffs made a motion in limine to exclude the toxicology report showing the use of marijuana or alcohol by Rivera, on the ground that the probative value of such evidence was outweighed by its prejudicial effect. The trial court reserved ruling on the admissibility of the evidence pending a foundational hearing pursuant to Evidence Code section 402. Plaintiff's counsel requested that the defendants be directed not to mention the evidence in their opening statements, and the court granted that request. No requests were made respecting voir dire.

During voir dire, which was not reported, plaintiffs' counsel complained that defense counsel had asked prospective jurors questions about marijuana and alcohol use, although plaintiff had not objected to the questions. Plaintiffs' counsel requested that further jury selection be delayed until after the Evidence Code section 402 hearing. Defense counsel pointed out that the court had indicated that the areas of marijuana use and alcohol could be explored with the jury and the plaintiff had not objected. The court denied plaintiffs' request because it had previously determined the defense could ask

³ By the time trial commenced, there were only two defendants left, JLG Industries, and Load Center. On April 26, 2010, defendant JLG Industries, Inc. was dismissed following an order granting its application for order determining good faith settlement.

questions about marijuana and alcohol use during voir dire because there was no dispute that the decedent had marijuana and alcohol in his system at the time of the accident, there were no expert witnesses available in the morning for the court to conduct a 402 prior to voir dire, and the court did not want to dismiss the jurors for a second day, to reconvene on a third day for jury selection.

The evidentiary hearing on the Evidence Code section 402 in limine motion was conducted on April 13, 2010. The defense called an expert who testified that the quantities of marijuana and alcohol in Rivera's blood were consistent with recent use. Further, the presence of a metabolite of marijuana in Rivera's system indicated that Rivera was a regular user of the substance. The ingestion of alcohol would affect Rivera's perception, awareness and alertness. The use of marijuana would have an impact on Rivera's ability to coordinate, be aware, perceive, or observe. The combined effects of alcohol and marijuana would be additive, resulting in greater lack of coordination and responsiveness. The expert opined that the combination of the two substances would have impaired Rivera's ability to operate the boom lift at the time of his death.

After the defense expert testified in limine, the court concluded there was probative value in the proffered expert testimony, although there was also prejudice. However, the court determined that prejudice was outweighed by the probative value. After further argument, the court denied plaintiffs' in limine motion to exclude the

toxicology report and the expert's opinion testimony regarding marijuana and alcohol use.

Following the presentation of evidence over 24 days of trial, the jury returned a special verdict. Although the jury found that Load Center was negligent in failing to properly inspect and maintain the lift, it concluded that Load Center's negligence was not a substantial factor in causing harm to the plaintiff's decedent, who was determined to be 100 percent responsible for his own death and for Eittleman's injuries. Judgment was entered accordingly. On September 24, 2010, plaintiffs appealed.

DISCUSSION

On appeal, plaintiffs' primary challenge is that the trial court erred in its ruling on the admissibility of the evidence of the toxicology reports showing that Rivera had marijuana and alcohol in his system at the time of the accident that caused his death. We conclude that the probity of the evidence far outweighed any potential for undue prejudice, within the meaning of Evidence Code section 352.

Evidence Code section 352 provides that the court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate under consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. We review any ruling by the trial court as to the admissibility of evidence for abuse of discretion. (*People ex rel. Lockyer v. Sun Pac. Farming Co.* (2000) 77 Cal.App.4th 619, citing *People v. Alvarez* (1996) 14 Cal.4th 155, 201.) We do not substitute our judgment for that of the trial court

and may grant relief only when the asserted abuse of discretion constitutes a miscarriage of justice. (*Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 44.)

Evidence is substantially more prejudicial than probative only if, broadly stated, it poses an intolerable risk to the fairness of the proceedings or the reliability of the outcome. (*People v. Eubanks* (2011) 53 Cal.4th 110, 144.) The term “prejudice,” as used in Evidence Code section 352, does not mean the evidence is damaging to a party’s case. (*Piscitelli v. Salesian Society* (2008) 166 Cal.App.4th 1, 11.) Exclusion of evidence under Evidence Code section 352 is reserved for those cases where the proffered evidence has little evidentiary value and creates an emotional bias against the party. (*Ajaxo Inc. v. E*Trade Group Inc.*, *supra*, 135 Cal.App.4th at p. 45.)

If a proper objection under Evidence Code section 352 is raised, the record must affirmatively demonstrate that the trial court did in fact weigh prejudice against probative value. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 599.) However, the court need not make findings or expressly recite its weighing process, or even expressly recite that it has weighed the factors, so long as the record as a whole shows the court understood and undertook its obligation to perform the weighing function. (*Ibid.*)

In a negligence case, a plaintiff has the burden of proving that the conduct of the defendant was a cause in fact of the result. (*Garbell v. Conejo Hardwoods, Inc.* (2011) 193 Cal.App.4th 1563, 1569.) A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at

best evenly balanced, it is the duty of the court to direct a verdict for the defendant.

(*Ibid.*, citing *Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205-1206.)

The statutory definition of negligence provides, in relevant part, that everyone is responsible for an injury occasioned to another by his or her want of ordinary care or skill except so far as the latter has brought the injury upon himself or herself. (Civ. Code, § 1714, subd. (a).) To constitute a defense, the negligence of a plaintiff must be a proximate cause of the injury, and the usual rules of causation apply. (*Bua v. G. I. Taxi Co.* (1960) 186 Cal.App.2d 612, 616.) The party claiming that the plaintiff failed to exercise due care has the burden of proof on that issue. (*Gyerman v. United States Lines Co.* (1972) 7 Cal.3d 488, 503.) As evidence bearing on plaintiff's impaired operation of the boom lift related to the issue of his contributory negligence, the evidence is admissible. (*Miller v. Peters* (1951) 37 Cal.2d 89, 94.) Where the complexity of the causation issue is beyond common experience, expert testimony is required to establish causation. (*Garbell v. Conejo Hardwoods, Inc., supra*, 193 Cal.App.4th at p. 1569.)

An ambulatory person in a state of intoxication can be guilty of contributory negligence and is held to the standard of care of an ordinarily prudent person. (*Cloud v. Market Street Railway Co.* (1946) 74 Cal.App.2d 92, 97.) In *Cloud, supra*, a toxicologist was permitted to testify as to whether a person with a specific alcoholic content in his blood would be ambulatory, in a case where an off-duty streetcar conductor was crushed by a streetcar while intoxicated. Judgment in favor of the defendant streetcar company

was affirmed based on evidence that the decedent's intoxication impaired his ability to avoid being hit by the streetcar.

In the present case, the issue of liability depended upon the jury's determination of the cause-in-fact of the accident with the boom lift. The plaintiff's theory was that the boom lift shifted due to either negligent design or manufacture relating to the negligent placement of auxiliary power and emergency stop buttons on the JLG lift, or due to negligent inspection and maintenance by Load Center. Plaintiff's biomechanical expert testified that Rivera had his hands on the controls and his foot on the pedal of the lift, using the lift swing controller to approach the north side of the I-beam. As he came into close proximity to the beam, he let off the lift swing controller, expecting that it would stop, and brought it back to the right. However it continued to move or drift. When he took his hands off the control, the lift moved him back and to his right, trapping him against the back rail of the lift and the lower flange of the I-beam.

The defense theory was that the accident was caused in fact by plaintiff's recent ingestion of alcohol and use of marijuana, as shown by the toxicology report, which impaired his perception and motor coordination, caused him to activate the drive function of the boom lift and drive into the beam. According to the defense theory, the impairment was a contributing factor in Rivera's death.

Negligence and causation are issues of fact for the jury. (*Kisbey v. California* (1984) 36 Cal.3d 415, 422; *Hoyem v. Manhattan Beach City Sch. Dist.* (1978) 22 Cal.3d 508, 520; see also *Lawson v. Safeway Inc.* (2010) 191 Cal.App.4th 400, 416.) Expert

evidence that the additive (or cumulative) effects of alcohol and marijuana probably contributed to the accident was highly probative on the issue of liability. The fact that it contradicted plaintiffs' theory, or that plaintiffs' expert would contradict the defense expert, went to its weight, not admissibility.

The trial court properly ruled that the evidence of the cumulative affects of alcohol and marijuana was admissible.⁴ There was no abuse of discretion.

DISPOSITION

The judgment is affirmed. Load Center is awarded costs on appeal.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

CODRINGTON
J.

⁴ Because the court properly ruled on the admissibility of the toxicology results in limine, there was no error in subsequently admitting the evidence, and no error in allowing the defense to question jurors on the subject of alcohol or marijuana during voir dire. Thus, even if those issues had been preserved for review, our conclusion would be the same.