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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KATHLEEN DICKEY et al.,

Plaintiffs and Appellants,

v.

CITY OF LA HABRA,

Defendant and Respondent.

G044486

(Super. Ct. No. 06CC12528)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert J. Moss, Judge. Affirmed.

Law Offices of Gregory F. Stannard and Gregory F. Stannard for Plaintiffs and Appellants.

Jones & Mayer and Harold W. Potter for Defendant and Respondent.

Kathleen Dickey and her husband, Charles R. Dickey,¹ appeal from a judgment in favor of the City of La Habra (the City), in this personal injury action. They alleged the crosswalk where Kathleen was struck by a car constituted a dangerous condition of public property. The jury returned a special verdict finding the crosswalk was not a dangerous condition. On appeal, the Dickeys contend: (1) the trial court erred by admitting evidence the accident was a “hit and run”; (2) testimony by a defense witness on redirect examination was inadmissible; and (3) the trial court erred by denying their new trial motion. We find no error and affirm the judgment.

FACTS & PROCEDURE

In the summer of 2005, the City sponsored a summer concert series in a park. Charles, who worked during the day as a school crossing guard, frequently assisted with traffic control at the uncontrolled intersection of Second Street and Euclid Avenue where concert attendees crossed Euclid Avenue to get to an overflow parking area. On August 18, 2005, Kathleen accompanied her husband, as she had on three prior occasions. Although there was not a marked crosswalk at the intersection, about a dozen 24-inch traffic cones were placed where pedestrians were meant to cross Euclid Avenue at what was a normally unmarked crosswalk.

At about 7:45 p.m., when it was dusk but not yet dark, Charles realized his City-provided flashlight was not working. Kathleen agreed to go across Euclid Avenue to find the person who had given Charles the flashlight to get it fixed. Kathleen was wearing Charles’s bright yellow windbreaker jacket bearing La Habra Police Department patches. Charles went into the crosswalk first holding up his stop sign, with Kathleen right behind him. Charles crossed the northbound lanes and stopped when he got to the center of the street, where he had a clear vision of vehicles coming southbound on Euclid

¹ For convenience only we refer to the plaintiffs collectively as the Dickeys and individually by their first names only.

Avenue for hundreds of yards. Kathleen looked for traffic as she continued to cross the street and saw a southbound car coming towards her. At trial, Kathleen testified the car was about four or five car-lengths away when she stepped out into its path, but at her deposition (which was read into evidence), she testified it was about 20 car-lengths away. The car was not going particularly fast (Euclid Avenue is a 40 miles per hour street), so Kathleen thought it was going to stop. She continued to cross the street. The car did not stop—it struck Kathleen, causing her serious injuries.

The car did not stop after hitting Kathleen either. Kathleen recalled hearing her husband yelling, “[He] hit my wife. Call the police. He’s getting away.” Apparently someone followed the car, driven by 87-year-old Souchang Wang, to his nearby residence. Wang passed away before the 2010 trial.

The Dickeys presented expert testimony from David Royer, a retired traffic engineer. He testified the City should have provided warning to motorists a special event was taking place and pedestrians would be crossing the street. Royer believed the warnings should have been made of reflective material placed 500 feet in advance of the crossing area. He felt flares should have been used for pedestrian control during the day or night and parking on the street should have been prohibited within the area. Royer testified it was inappropriate for the City to use a school crossing guard for traffic control—a uniformed traffic officer should have been used.

On cross-examination, Royer testified he reviewed the California Vehicle Code and the California Manual on Uniform Traffic Control Devices (MUTCD), and no other materials, in forming his opinions. The MUTCD contained no guidelines on setting up a temporary crosswalk for a special event. Royer agreed it was appropriate for the City to have some type of crossing guard at the location. There was nothing mandating how the City should set up traffic controls for a special event, and it was all discretionary on the City’s part.

The City's expert witness, traffic engineer Weston Pringle, agreed neither the MUTCD or the Vehicle Code had guidelines on how to set up a temporary crosswalk for a special event. He opined the manner in which the crosswalk was coned off was adequate for the conditions. The placement of the cones, presence of a crossing guard, and the fact this was a visible intersection adequately notified southbound traffic a crosswalk was present. A pedestrian always has the right of way whether in a marked or unmarked crosswalk. Pringle believed the placement of the cones and presence of a crossing guard was a good plan on the City's part. The cones would be readily apparent to a motorist traveling southbound on Euclid Avenue from at least 400 to 500 feet away. The stopping distance for a vehicle traveling the speed limit of 40 miles per hour, including reaction time and braking distance, would have been about 280 feet. Neither the MUTCD nor the Vehicle Code prohibited using a school crossing guard at the location.

La Habra Police Officer Kim Razey testified she interviewed the driver, Wang, shortly after the accident. Razey had encountered Wang about a year earlier when she took a report about a noninjury traffic collision in which he was involved. Razey did not believe Wang was coherent based on his recollection of the current incident. Razey did not believe Wang was able to safely operate a vehicle, a conclusion she reached based on Wang's inability to see the pedestrians or vehicles parked along the road and his "inability to even understand what had occurred at the collision scene." The court took judicial notice, and the jury was informed, of the fact that on January 17, 2006, Wang pleaded guilty to "failure to stop at an accident, hit and run with injury"

The Dickeys filed a personal injury action against the City in December 2006. In 2007, the City filed a cross-complaint against Wang for indemnification, although there is no indication it was ever served, and the City dismissed the cross-

complaint with prejudice in April 2011.² The jury returned a special verdict and answered in the City’s favor on question No. 1, finding the crosswalk was not in a dangerous condition. Accordingly, the jury did not proceed to answer any subsequent questions on the special verdict form. Judgment was entered for the City. The Dickeys’ motion for new trial was denied.

DISCUSSION

1. Motion in Limine: “Hit and Run”

The Dickeys contend the trial court erred by allowing the City to introduce evidence Wang was a “hit and run” driver. We find no error.

Before trial, the Dickeys filed a motion to prohibit the City from making reference to Wang being a “hit and run” driver. They asserted the evidence was irrelevant, “highly inflammatory[,] and demonstrably false” The trial court denied the motion.³

The trial court’s ruling on a motion in limine is reviewed for abuse of discretion. (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1493.) It is not entirely clear what the Dickeys wanted below—to merely prohibit the City from using the term “hit and run” in reference to Wang’s driving or to exclude all evidence concerning Wang’s driving conduct and in particular that he did not stop after hitting Kathleen. We assume

² The Dickeys proceeded by way of an appellant’s appendix, which does not contain the pleadings. Although the Dickeys dispute that a cross-complaint was filed against Wang, we have reviewed the superior court file in this matter, and take judicial notice of the City’s cross-complaint filed December 13, 2007. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

³ Although on appeal, the Dickeys criticize the City’s counsel for “within minutes of [the court’s] ruling . . . instantly [standing] up, and blurting” out to the jury it was a hit and run, it was the Dickeys’ counsel who first brought it up, telling jurors in his opening statement Wang did not stop at the accident scene “because he didn’t realize he had been in an accident.” He then elicited testimony from both Kathleen and Charles on direct examination that after being struck, Charles yelled out that the car had hit Kathleen and was leaving the scene without stopping.

from the tenor of their argument on appeal that it was the latter. We cannot say the trial court abused its discretion by denying the Dickeys' motion.

Preliminarily, we reject the Dickeys' suggestion the trial court was confused about who were the parties to this litigation. They argue the court obviously thought Wang was a defendant in this case, when he was not, and for that reason ruled the evidence admissible. The Dickeys' argument is premised on the court's comment their motion was to "exclude evidence of or comment on the reference to a hit and run by the defendant." They insist the court meant the motion was to exclude evidence "the defendant" (i.e., Wang) committed a "hit and run." We reject the Dickeys' contention. If the court's reference to "the defendant" was indeed intended to refer to Wang, then the court was likely referring to Wang as a criminal defendant in the prosecution against him for hit and run driving. It is equally plausible court's intended comment was that the Dickeys' motion was to preclude evidence or comment "by the defendant" (i.e., the City) that the accident was a "hit and run." In any event, there is absolutely nothing suggesting the trial judge was not well aware of who the parties were in the action before it.

We turn to the more cogent argument put forth by the Dickeys. They assert evidence concerning Wang's driving conduct and that he fled the accident scene (i.e., was a hit and run driver), had no bearing on whether there was a dangerous condition and was therefore irrelevant to the case. (Evid. Code, § 350 [only relevant evidence is admissible].) We agree with the Dickeys' premise but not their conclusion.

A public entity is liable for injury proximately caused by a dangerous condition of its property if the dangerous condition created a reasonably foreseeable risk of the kind of injury sustained, and a negligent or wrongful act or omission of an employee of the public entity created the dangerous condition. (Gov. Code, § 835, subd. (a).) A "dangerous condition" is "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably

foreseeable that it will be used.” (Gov. Code, § 830, subd. (a).) To constitute a dangerous condition, an injured plaintiff need not prove the public “property was actually being used with due care at the time of the injury, either by himself or by a third party” (*Alexander v. State of California ex rel. Dept. of Transportation* (1984) 159 Cal.App.3d 890, 899; see also *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 153, fn. 5; *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 718-719; CACI No. 1102 (June 2010 Rev.) [whether public property is in dangerous condition to be determined without regard to whether plaintiff or third party exercised reasonable care].)⁴

The Dickeys are correct that Wang’s driving conduct was not relevant to whether the crosswalk constituted a dangerous condition. But they are wrong when they assert that was the sole issue in this case. “A plaintiff seeking recovery for a dangerous condition of public property must prove: the property was in a dangerous condition when the injury occurred; the dangerous condition was a proximate cause of the injury; the

⁴ We note that although the trial took place in August 2010, the jury was instructed with an older version of CACI No. 1102 defining dangerous condition as follows: “A ‘dangerous condition’ is a condition of public property that creates a substantial risk of injury to members of the general public who are using the property with reasonable care and in a reasonably foreseeable manner. A condition that creates only a minor risk of injury is not a dangerous condition.” The June 2010 revision contains an optional additional sentence to be used when comparative fault is at issue: “[Whether the property is in a dangerous condition is to be determined without regard to whether [[*name of plaintiff*]/[*or*] [*name of third party*]] exercised or failed to exercise reasonable care in [his/her] use of the property.]” (CACI No. 1102 (2010 rev.); see CACI No. 1102 (2010 rev.), Use Notes.)

Although the newer instruction would have been preferred, there is no claim of instructional error. Furthermore, the Dickeys have not included the written instructions in their appellant’s appendix and there is nothing in the record indicating who proposed the older version of CACI No. 1102. In the face of a silent record, we must presume the Dickeys requested the instruction and the doctrine of invited error would preclude any challenge. (See *Lynch v. Birdwell* (1955) 44 Cal.2d 839, 847; Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2010) ¶ 14:277, p. 14-69.)

dangerous condition created a reasonably foreseeable risk of the kind of injury that occurred; and the public entity had sufficient prior notice of the dangerous condition to enable it to have undertaken measures to protect against such condition. [Citation.]” (*Goebel v. City of Santa Barbara* (2001) 92 Cal.App.4th 549, 557.)

Although not relevant to proving the threshold issue of whether the crosswalk constituted a dangerous condition, evidence concerning Wang’s driving conduct and that there was a hit and run was highly relevant to causation and apportionment of fault. Indeed, the jury was instructed the City claimed Wang’s negligence was a substantial factor in causing the Dickeys’ harm. (See *Alexander, supra*, 159 Cal.App.3d at p. 901 [public entity may assert plaintiff or third-party negligence as a defense].) The jury was instructed extensively on the duty of care owed by drivers to pedestrians, including that drivers must keep a lookout for pedestrians, obstacles, and other vehicles, control the speed and movement of their vehicles, and yield to pedestrians in a marked crosswalk or *unmarked* crosswalk at an intersection. That Wang was oblivious to his surroundings as he drove, so much so that he struck a pedestrian and continued driving home completely unaware he had hit someone, was highly relevant to whether he breached the standard of care.

2. *Testimony of Officer Razey*

The Dickeys contend the trial court improperly allowed the City to elicit inadmissible testimony from its witness, Officer Razey, on redirect examination. We find no reversible error.

On direct examination, the City’s counsel asked Razey what Wang said to her with regard to the accident. The court sustained the Dickeys’ hearsay objection. The City did not further question Razey on this subject during direct examination, and it was not addressed during the Dickeys’ cross-examination. On redirect examination, over the Dickeys’ objections, the City questioned Razey about her impression Wang was not able to safely operate a vehicle. It was in the course of this questioning the City successfully

elicited testimony that Wang could not recall what was on Euclid Avenue, was unable to see the pedestrians or vehicles parked along the side of the road, and could not understand what had occurred at the collision scene. Razey indicated she believed Wang's failure to "stop for the stop sign . . . in the middle of the roadway" was the cause of the accident.

The Dickeys contend Razey's testimony constituted inadmissible hearsay and/or inadmissible expert testimony. Their argument is unsupported by any legal analysis or citation to legal authorities, and for that reason it is waived. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [appellate court not required to consider points not supported by citation to authorities or record].) The Dickeys also complain the redirect questioning impermissibly exceeded the scope of the City's original direct examination of Razey. But the extent of redirect examination is largely within the trial court's discretion (*People v. Hamilton* (2009) 45 Cal.4th 863, 921), and the court may allow redirect examination on matters not covered on cross-examination, in effect permitting the reopening of direct examination. (Evid. Code, § 772, subd. (c); Wegner et al., Cal. Practice Guide: Civil Trials and Evidence, *supra*, ¶ 9:228-9:229, pp. 9-47 to 9-48.) The Dickeys were not precluded from conducting further cross-examination of Razey, and they have not shown the court abused its discretion by permitting the additional questioning.

In any event, even if the testimony was improper, there was no prejudice. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800 [reversible error requires showing of miscarriage of justice, which occurs "only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error"]; see Evid. Code, § 353, subd. (b) [no reversal of judgment based on erroneous admission of evidence absent showing of miscarriage of justice].) The jury returned a special verdict finding in the City's favor on the threshold element of whether

the crosswalk constituted a dangerous condition. Razey's testimony concerning Wang's driving conduct went to subsequent questions of causation, which the jury never reached.

3. Denial of New Trial Motion

The Dickeys contention the trial court erred by denying their motion for a new trial is similarly without merit. They moved for a new trial on the grounds Razey's testimony on redirect examination concerning her discussions with Wang was inadmissible. "On appeal from an order denying a motion for a new trial, we review the entire record, including the evidence, and make an independent determination as to whether the claimed error was prejudicial. [Citation.]" (*Hill v. San Jose Family Housing Partners, LLC* (2011) 198 Cal.App.4th 764, 779.) As we have already explained, while evidence concerning Wang's driving conduct was not relevant to whether the crosswalk constituted a dangerous condition, it was relevant to causation and apportionment of fault. As the trial court correctly noted, because the jury returned a special verdict finding there was no dangerous condition, any error in admitting evidence concerning Razey's conversation with Wang was not prejudicial.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

ARONSON, J.