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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ROSEMARY GONZALEZ,

Plaintiff and Appellant,

v.

LUZ MARIA SARABIA et al.,

Defendants and Respondents.

G045389

(Super. Ct. No. 30-2010-00356975)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,  
Derek W. Hunt, Judge. Affirmed.

Law Offices of Kyle Scott and Kyle J. Scott for Plaintiff and Appellant.

Archer Norris, W. Eric Blumhardt and Ioana R. Mondescu for Defendants  
and Respondents.

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## INTRODUCTION

Plaintiff Rosemary Gonzalez was riding in the front passenger seat of the car driven by her friend, Kimberly Furry, when the car collided with a van that was driven by defendant Luz Maria Sarabia and owned by defendant SuperShuttle Los Angeles, Inc. (SuperShuttle). (We refer to Sarabia and SuperShuttle collectively as defendants.) A jury awarded plaintiff \$1,200 in economic damages and \$880 in noneconomic damages against defendants for negligence. The trial court denied plaintiff's motion for new trial.

Plaintiff contends the trial court erred by allowing defendants' expert witness, an accident reconstructionist and mechanical and biomechanical engineer, to offer an opinion regarding the medical causation of plaintiff's injuries. Plaintiff also contends, for the first time, in this appeal, that the expert witness's testimony was inadmissible because it was unreliable and lacked foundation under the rule set forth in *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*).

We affirm. The trial court did not err by allowing defendants' expert witness to offer his opinion that the forces generated by the accident were inconsistent with certain injuries claimed by plaintiff. Plaintiff did not object to the expert witness's testimony on grounds it was unreliable or lacked foundation pursuant to *Kelly, supra*, 17 Cal.3d 24. Plaintiff, therefore, has not preserved that argument for appeal.

## FACTS

On April 29, 2008, in Fullerton, Furry drove a Honda in which plaintiff was seated in the front passenger seat. Furry slowed the Honda and "almost came to a complete stop" as she approached an intersection. Realizing she had entered a crosswalk at the intersection, Furry hit the accelerator to drive through the intersection instead of coming to a complete stop. The Honda was struck by a van driven by Sarabia who was attempting to make a left turn.

Officer Ryan Warner of the Fullerton Police Department responded to the scene of the accident within 15 minutes of its occurrence. He observed that neither vehicle's airbags had deployed. Plaintiff stated to him that she had been wearing a seatbelt and complained of pain in her right arm and neck; she did not complain of pain in her knees, buttocks, or lower back area. No one was transported to the hospital.

Five days after the accident, a friend of plaintiff's took a photograph of a large bruise on the right side of plaintiff's buttocks. Furry was "pretty sure" plaintiff had fallen on a cement stairway before the accident. Furry stated she was not sure whether plaintiff's bruise was caused by the accident or the fall.

On May 6, 2008, plaintiff went to see a chiropractor, Dr. Gregory Valentine. Plaintiff filled out forms in which she reported that she was experiencing various symptoms including neck pain and stiffness, back pain, and pain in her legs, stomach, and upper and lower buttocks. Plaintiff told Valentine that she had been in a "violent collision" in which she was thrown back and forth and hit the passenger side door with her right buttock, causing bruising. She did not complain about pain in her knees to Valentine. She saw Valentine five more times and was billed \$1,120 for all the treatment Valentine provided.

In November 2008, plaintiff went to see Dr. Ramnik Singh, a medical doctor who is board certified in physical medicine, rehabilitation, and pain management. She complained to Singh that she was suffering pain in her spine that had begun on April 29. MRI's of plaintiff's knees showed chronic strains and tears in the right knee and "a fissure in the patellar cartilage and a synovial cyst in the posterior joint" of the left knee. Singh charged plaintiff \$19,650.40 for treatment rendered from November 2008 through February 2011.

David Ingebretsen, a mechanical and biomechanical engineer and accident reconstructionist, testified as defendants' expert witness, regarding the forces involved in the accident and whether they were consistent with plaintiff's claimed injuries. (A full

summary of Ingebretsen’s testimony is set forth in the Discussion, *post.*) Ingebretsen opined the impact speed of the SuperShuttle van was about four to five miles per hour and the impact speed of the Honda was two to four miles per hour. He stated that the accident did not involve a violent collision and that the impact was not beyond the range permitted for amusement park rides. He testified that the bruise on the right side of plaintiff’s buttocks could not have been caused by the accident because the forces generated in the accident would not have caused her to strike the front passenger door. Instead, she would have moved left and possibly lifted up out of the seat no more than two inches. Ingebretsen also testified that the forces would not have caused plaintiff’s knees to strike the dashboard or caused damage to her spine other than minor soft tissue injury. He testified that some injury to plaintiff’s neck might have occurred.

Dr. Kevin Ehrhart, an orthopedic surgeon who examined plaintiff in March 2011, also testified as an expert witness for the defense. He interviewed plaintiff and noted some inconsistencies as to her claimed injuries and conduct. For example, when Ehrhart examined plaintiff’s neck, he observed she had very stiff motion. When he spoke with her, however, she moved her head very smoothly and freely. Similarly, when Ehrhart tried to move her knees, she had very limited motion. He later observed her to easily and freely alight from the examining table and walk around the room.

During direct examination by defendants’ counsel, Ehrhart was asked, “[d]o you believe that [plaintiff] sustained any injuries from this car accident?” Ehrhart responded: “I think she had subjective complaints of neck pain. And she saw the chiropractor for that in the first few weeks, and I think that was reasonable, based on her saying her neck hurt. And you know, that’s typical, to have neck pain for two to four weeks after that kind of injury.” He stated that he was “99 percent-plus certain” that the bruise on the right side of plaintiff’s buttocks was not caused by the accident. He explained, “[t]here’s no way one could be in a car accident like was described to me—and I saw in the police report of the accident—and have that kind of bruising. That’s

from a direct blow, right in the center of the right buttock and just above it, and that something very forceful hit that patient there or struck that patient there. That's not from hitting the back of a car seat or a side of a door. There's no way that could happen." He further stated it could have been caused by falling down cement stairs if the person had "landed on their butt." Ehrhart reiterated, "[t]hat bruise wasn't caused by that accident; that, I'm certain of."

Ehrhart further testified that nothing in the MRI report showed plaintiff suffered a traumatic event. In his expert opinion, plaintiff did not suffer significant injury to her lumbar spine as a result of the accident, based on the MRI report. He did not find any objective evidence that there was an injury to her back on the MRI report. He also testified plaintiff's cervical X-ray was "essentially normal" as it showed a little wear and tear and only disc bulges that were typical for a 35 year old, which could not have been caused by the accident. Had the disc bulges been caused by the accident, they would not have been diffused throughout the entire spine as shown by plaintiff's medical reports.

Ehrhart testified that since the accident, plaintiff had arthroscopic surgery on both knees, which revealed moderate degenerative changes throughout all three compartments of each knee. He explained that none of the findings showed trauma to the knees. He testified that traumatic injury does not affect all compartments of the knee unless there has been a significant injury accompanied with "a knee full of blood." Ehrhart stated that in such a case the whole knee would be shattered, and there would be "post-traumatic arthritis in all three compartments." He stated that the arthroscopic knee surgeries performed on plaintiff were not necessary as a result of the car accident.

## PROCEDURAL BACKGROUND

Plaintiff filed a form complaint against defendants and Furry, in which she asserted claims for motor vehicle negligence and general negligence. The complaint alleged that on April 29, 2008, Sarabia, while acting in the course and scope of her

employment with SuperShuttle, made an unsafe left turn and that Furry entered the intersection when it was unsafe to do so. The complaint also alleged defendants' and Furry's negligence caused plaintiff harm, including abdominal trauma and bleeding, the premature birth of her child, and knee surgeries. Plaintiff sought damages for lost wages, loss of the use of property, hospital and medical expenses, general damages, property damages, and loss of earning capacity.

Furry filed a cross-complaint for indemnity against defendants. Plaintiff filed a request to dismiss the complaint with prejudice as to Furry only and the court clerk entered the dismissal as requested. Furry thereafter filed a request to dismiss her cross-complaint without prejudice.

Plaintiff filed a motion in limine seeking to exclude defendants' expert, Ingebretsen, "from offering any opinions as to whether the forces in the subject automobile incident could cause injury to Plaintiff or any other individual." The record does not show the trial court ruled on that motion. Plaintiff does not contend in this appeal the trial court erred in failing to rule on that motion.

The jury awarded plaintiff \$1,120 in economic damages and \$880 in noneconomic damages. Judgment was entered. Plaintiff filed a motion for a new trial on grounds, including, as pertinent to this appeal, that the trial court erroneously allowed Ingebretsen to offer an expert opinion on the medical causation of plaintiff's claimed injuries. The court denied the motion.

Plaintiff filed a notice of appeal, stating she was appealing from the judgment and from the order denying the motion for a new trial.<sup>1</sup> An amended judgment was entered, stating, inter alia, the court had determined plaintiff was not entitled to an award of costs under Code of Civil Procedure sections 1033, subdivision (a) and 998,

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<sup>1</sup> An order denying a motion for a new trial is not directly appealable but is reviewable on appeal from the underlying judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 18.)

subdivision (c)(1) because “plaintiff should have brought this case in limited jurisdiction and failed to obtain judgment more favorable than Defendants’ Offer to Compromise.” The amended judgment further stated, “Defendants have been awarded costs in the amount of \$3,908.78” and, thus, they “are entitled to judgment against Plaintiff . . . for the difference between the total verdict and costs award in the amount of \$1,908.78.”

## DISCUSSION

Plaintiff contends the trial court erred by allowing Ingebretsen to testify on the issue of the medical causation of plaintiff’s claimed injuries. Citing, *inter alia*, *Kelly*, *supra*, 17 Cal.3d 24, plaintiff further contends, for the first time, on appeal, that Ingebretsen’s testimony was “not based upon an accepted scientific method under California Law.” We address and reject plaintiff’s arguments, in turn.

### I.

#### THE TRIAL COURT DID NOT ERR BY ADMITTING INGEBRETSEN’S EXPERT TESTIMONY.

Plaintiff’s first argument fails because the record shows Ingebretsen did not render a medical opinion. During trial, Ingebretsen testified that he was a mechanical and biomechanical engineer and also an accident reconstructionist. He explained that he was not a doctor and thus did not treat, diagnose, or examine people, but instead analyzed whether claimed damages from an event were consistent with the forces involved in that event. We begin our analysis of plaintiff’s argument by reviewing Ingebretsen’s trial testimony, plaintiff’s counsel’s objections to portions of that testimony, and the trial court’s rulings on those objections.

Ingebretsen testified that based on his analysis of the information provided to him, the impact speed of the van was about four to five miles per hour, and the impact speed of the Honda was two to four miles per hour. He further testified that the impact was “not beyond a range of what we would allow at an amusement park ride[;] . . . there are amusement park rides that are worse than this.”

During direct examination, defendants' counsel asked Ingebretsen whether "the forces in this accident were consistent with . . . causing the types of injuries [plaintiff] was diagnosed with." Plaintiff's counsel objected to that question on the grounds it was vague and "beyond the scope of a biomechanical expert"; the trial court overruled plaintiff's counsel's objections and Ingebretsen testified that the forces involved during the accident were not consistent with the claimed injuries.

Ingebretsen described "the body movements that [plaintiff] would have experienced" in the accident, stating: "Seated in that right-front passenger seat, slightly turned to the driver . . . the Honda—experienced a change in direction—primarily velocity. . . . [¶] . . . So the vehicle rotated clockwise. [Plaintiff] was still trying to move eastward, basically. So as the vehicle turned and she moved mostly to her left, and just a little bit forward. [¶] Given this speed, her pelvis would have moved about 1, maybe 2 inches on the seat with—with a lap belt attached. So her pelvis could move, but her knees—because they were slightly turned—really kind of just slid along that center console. And it's highly unlikely there was any contact with the under-dash. [¶] So her torso would move forward again an inch or so. Because of the change in direction and speed, her neck would probably bend forward a little bit and she would actually lift a little bit up off the seat. . . . So she's moving away from the door and away from the seat-back and a little bit up. And so she would come into contact with her shoulder harness across her chest and then her lapbelt."

Ingebretsen further testified during direct examination, as follows:

"Q. And based on the bodily movements, is it scientifically likely that [plaintiff] struck her buttock area on the side door?

"A. Oh, absolutely not. It's not scientifically likely at all.

"Q. And what about is it scientifically likely that she would have hit her buttocks on the side door over and over?

“A. Oh, no. No. There’s—the impact is over in a quarter of a second. And during that, she’s actually moving up and away. And so her buttock is being unloaded, if anything.

“Q. Okay. Is it scientifically likely that [plaintiff] struck her knees on the dashboard?

“A. Absolutely not.”

Ingebretsen reiterated that plaintiff’s buttocks moved, at most, to the left and forward a couple of inches. He stated that plaintiff’s claim she hit her rear end on the door with significant force could not have happened.

Defendants’ counsel specifically asked whether the bruise on the right side of plaintiff’s buttocks could have been caused by the accident. Plaintiff’s counsel objected that the question called for speculation. The trial court overruled the objection, stating “he’s an expert witness. He’s here for opinion.” Ingebretsen answered the question, stating: “Not biomechanically. It—it isn’t the right shape, size, or area. I mean, it—I eliminate it on every aspect of it. It can’t happen in this accident.”

Defendants’ counsel asked Ingebretsen whether the type of bruise plaintiff had on the right side of her buttocks could “have been caused by a fall down cement stairs.” After the trial court overruled plaintiff’s counsel’s objection that the question called for speculation, Ingebretsen testified: “Absolutely. It’s—it’s a—it’s a hard fall onto a bottom. I mean, that’s something that you get from being slapped with a paddle or falling down onto a very hard surface.”

Ingebretsen testified the bruising on plaintiff’s arm was not consistent with typical bruising patterns caused by seatbelts. Ingebretsen also testified that the impact of the vehicles could have created a sufficient force to cause some neck pain. He further stated that the pain would be “nothing significant” and “[s]omething that would . . . be expected to resolve readily, and really on its own”; the trial court sustained plaintiff’s

counsel's objection to this statement because it was beyond Ingebretsen's expertise and struck that testimony.

Defendant's counsel asked Ingebretsen whether the forces and impact involved in the accident were "sufficient to create multiple disk bulges in the cervical area," and Ingebretsen answered, "[t]o create them, absolutely not." In response to the question whether it was scientifically reasonable plaintiff hit both of her knees on the dashboard with significant force, Ingebretsen testified, "[n]ot in this accident." He further stated: "I don't see how there's any reasonable way to hit both knees, especially both knees on the dashboard. And if anything, if she touched it, it would have been a sideways motion. It wouldn't have been pushing the knees backwards. It wouldn't have been like falling on your knees. It would have been like pushing the knees sideways."

Defendants' counsel asked whether "the wearing of the knee cartilage" was caused by the accident. The trial court sustained plaintiff's counsel's objection that the question sought testimony beyond Ingebretsen's expertise.

Defendants' counsel's direct examination of Ingebretsen ended with the following colloquy:

"[Defendants' counsel]: In your opinion, Mr. Ingebretsen, could this accident have caused any injuries?"

"[Plaintiff's counsel]: Objection; beyond the scope of this expert's expertise."

"The Court: That's a little different. I think I'll just permit you to cross-examine about that one, [plaintiff's counsel]."

"[Plaintiff's counsel]: Okay."

"The Court: Overruled."

"The witness: No. No. No knee injuries."

“[Defendants’ counsel]: Mr. Ingebretsen, just to summarize now—I’m at the end of my questioning—based on the forces and evaluation of this accident, what kind of injuries would be scientifically reasonable to see?”

“[Plaintiff’s counsel]: Objection; beyond the scope of his expertise, Your Honor.

“The Court: I think I’m going to permit an answer and again leave you to cross-examine.

“The witness: The type of injuries are where we’ve got forces actually causing relative motion over the joints and striking tissues. So the—the reasonable injuries—biomechanically speaking—would be some neck pain. We wouldn’t see really any other type of injury, because there’s no other mechanism to cause an introduction of forces into the body that would break the tissue, fail—cause the tissue to fail. We aren’t striking the knees. We aren’t striking the buttocks. We aren’t bending or twisting any other joints really. And even at these levels, I wouldn’t expect to see seatbelt bruising. I mean, I would expect to see maybe some complaints of minor soft tissue injury in the cervical spine.”

Plaintiff argues Ingebretsen’s testimony improperly included a medical opinion as to the cause of her claimed injuries. Our review of Ingebretsen’s entire testimony shows his opinion that most of plaintiff’s claimed injuries were not caused by the accident was based on a force analysis, not a medical analysis. For example, Ingebretsen testified the bruise on the right side of plaintiff’s buttocks could not have been caused by the accident because the forces involved would have caused plaintiff to move to the left and lift out of her seat no more than two inches. The right side of her buttocks, therefore, could not have repeatedly struck the front passenger door of the Honda as she claimed. Similarly, Ingebretsen testified that the accident did not cause plaintiff’s claimed knee injuries because, based on his force analysis, her knees simply

could not have struck the dashboard. His testimony was not based on any purported expertise in physiology or anatomy.

Ingebretsen also testified the bruises on plaintiff's arm were inconsistent with the pattern of bruising that was typically caused by seatbelts in accidents. Ingebretsen did acknowledge that the forces involved might cause an injury to the neck. The trial court properly struck his testimony that any such neck injury would not be significant and would resolve on its own.

In support of her argument that Ingebretsen's testimony was improper, plaintiff cites Business and Professions Code section 2052, subdivision (a), which provides: "Notwithstanding Section 146, any person who practices or attempts to practice, or who advertises or holds himself or herself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other physical or mental condition of any person, without having at the time of so doing a valid, unrevoked, or unsuspended certificate as provided in this chapter or without being authorized to perform the act pursuant to a certificate obtained in accordance with some other provision of law is guilty of a public offense, punishable by a fine not exceeding ten thousand dollars (\$10,000), by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code, by imprisonment in a county jail not exceeding one year, or by both the fine and either imprisonment." Plaintiff argues Ingebretsen's testimony included a diagnosis of plaintiff's injuries and thus violated section 2052, subdivision (a). Plaintiff's argument is meritless. Even if Ingebretsen's testimony verged on offering a medical opinion as to the cause of plaintiff's injuries, which it did not, there is no legal basis supporting plaintiff's argument that such testimony would constitute a violation of section 2052, subdivision (a).

We find no error.

## II.

### PLAINTIFF FORFEITED THE ARGUMENT THAT INGEBRETSEN'S TESTIMONY WAS NOT BASED ON AN "ACCEPTED SCIENTIFIC METHODOLOGY."

For the first time, on appeal, plaintiff argues Ingebretsen's testimony should have been excluded as unreliable and without foundation under the rule set forth in *Kelly*, *supra*, 17 Cal.3d 24, which is alternatively referred to as the *Kelly/Frye* rule in reference to *Frye v. U.S.* (D.C. Cir. 1923) 293 Fed. 1013. (See *People v. Eubanks* (2011) 53 Cal.4th 110, 137, fn. 12.) "Under the *Kelly/Frye* rule, a new scientific technique must be ". . . sufficiently established to have gained general acceptance in the particular field in which it belongs[,]'" in order to be admissible in evidence. [Citation.] The proponent of the evidence bears the burden of proving a consensus of opinion and must establish (1) the reliability of the method, usually by expert testimony; (2) the qualifications of the witness providing the testimony; and (3) that correct scientific procedures were used in the particular case. [Citation.]" (*People v. Morris* (1988) 199 Cal.App.3d 377, 386.)

Plaintiff argues Ingebretsen's testimony failed all three prongs of the *Kelly/Frye* rule because Ingebretsen (1) "provided no accepted scientific methodology that was the basis of his opinions that established what injuries a person would suffer when the forces of the collision are transferred to the occupants"; (2) "has no medical background or experience in diagnosing bruises, knee injuries, neck injuries or back injuries"; and (3) "never provided any scientific procedures upon which he bases his conclusions of speed and forces, let alone the medical causation testimony."

Plaintiff, however, failed to object to Ingebretsen's testimony pursuant to the *Kelly/Frye* rule in the trial court and thus has failed to preserve this issue for appellate review. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 414 [a party's failure to object to scientific evidence on *Kelly/Frye* grounds in the trial court results in the forfeiture of the argument on appeal that the evidence was improperly admitted without an adequate

*Kelly/Frye* foundation]; *People v. Kaurish* (1990) 52 Cal.3d 648, 688 [same].) We find no error.

DISPOSITION

The judgment is affirmed. Respondents shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.