Filed 3/30/17 Hinds v. Nguyen CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JACK HINDS III, Plaintiff and Respondent, v. DANNY NGUYEN, Defendant and Appellant.	G052634, G053200 (Super. Ct. No. 30-2014-00732721) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frederick P. Aguirre, Judge. Affirmed.

Law Office of Cleidin Z. Atanous and Cleidin Z. Atanous for Defendant and Appellant.

Dimarco, Araujo and Montevideo and Brooke L. Bove for Plaintiff and Respondent.

* * *

It is well established that the primary function of an appellate court is to review the record of the trial court for errors of law. (*Tupman v. Haberkern* (1929) 208 Cal. 256, 262.) Consequently, we generally review "the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration." (*In re James V.* (1979) 90 Cal.App.3d 300, 304.)

Here, Jack Hinds III sued Danny Nguyen for injuries arising from a traffic collision. Before trial, the trial court excluded a recorded statement Hinds had made to his own insurance carrier. The court found Hinds' statement was protected under the attorney-client privilege and the privilege had not been waived. The jury later found Nguyen negligent and awarded Hinds damages.

On appeal, Nguyen contends that the trial court erroneously excluded Hinds' statement. But Nguyen's arguments, as well as the recorded statement itself, were not properly brought before the court for its consideration. Thus, we cannot find that the court committed error.[1]

I

FACTUAL AND PROCEDURAL BACKGROUND

On January 18, 2013, at about 7: 45 p.m., Hinds was riding a Harley-Davidson motorcycle on Beach Boulevard. Hinds was in the No. 3 lane (the third lane from the median). To Hinds' right was the No. 4 lane, then the curb. Hinds was travelling at about 40 miles per hour approaching an intersection when Nguyen's car suddenly came into his lane from his left.[2] Due to the lack of space, Hinds applied the brakes. "I was either going to go through the back of his window, you know, or take my

[1] Nguyen appealed from the judgment in Case Nos. G053200 and G052634. We ordered consolidated on appeal as both appeals were from the same judgment.

[2] Our statement of the facts is based on the evidence that was presented at trial viewed in a light most favorable to the successful plaintiff. (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 667, fn. 2.)

chances on the ground and that's what I did . . . ." The motorcyle and Nguyen's vehicle collided into each other.

The next thing that Hinds remembered was trying to get out of the roadway and onto the curb. Hinds tried to stand up, but he fell over. His left leg hurt and was "misaligned." Hinds was eventually able to "hobble" to the curb. Within two or three minutes, police and paramedics arrived. Hinds spoke to Orange County Sheriff 's Deputy William West. Hinds eventually had surgery on his leg.

Deputy West noticed that there were skid marks and fresh gouges in the No. 3 lane. The marks were more towards the right side of the lane. When West arrived at the scene, Nguyen's car had already been moved to a nearby gas station. West noticed minor damage to the right rear of Nguyen's car.

At trial, a traffic collision expert relied on photographs and other evidence and testified that the damages to the motorcycle (the left foot peg and gear shifter), as well as the damages to Hinds' left leg, were consistent with the damages on the right rear of Nguyen's car. The expert also testified that there were damages to the right side of Hinds' motorcycle. The expert testified that these damages were consistent with gouges he had recently observed and measured on the right side of lane No. 3 on Beach Boulevard. "If you think about a car coming from your left cutting you off, the reaction is going to be to swerve right and brake, so the bike is going to start to go down more towards the right side."

On the day of the collision, Deputy West briefly spoke to Nguyen. Another deputy, who is no longer with the department, did a more thorough interview. Nguyen claimed that he was in the No. 4 lane, intending to turn into the gas station, at the time of the collision. However, West determined that Nguyen had made an unsafe lane change in violation of the Vehicle Code.

Hinds' Statement to His Insurance Carrier

Ten days after the collision, Hinds spoke to an adjuster from his own insurance carrier in a recorded conversation.[3] The adjuster initially asked Hinds about the extent of his injuries, and then spoke to him about the collision. Hinds told the adjuster that he was in the No. 3 lane on Beach Boulevard when a car came into his lane from his right (the No. 4 lane). Hinds said that as a result, he locked up the brakes on his motorcycle, which sent him into a skid. Hinds said that "when my bike came to a complete stop after it slid, . . . it hit the bumper of a car."

The adjustor asked Hinds, "The initial vehicle that was in the No. 4 lane and merged in front of you in the No. 3 lane, did you ever make contact with that vehicle?" Hinds responded, "No." Toward the end of the conversation, the adjustor asked, "Um, in the event that the insurance carrier for the vehicle that was in front of you, um, if they ask for a copy of the recording, um, would you be okay if I share it with them?" Hinds said, "Sure."

Trial Proceedings

Hinds filed a personal injury lawsuit. Hinds alleged that Nguyen had negligently operated his motor vehicle and caused the collision.

Nguyen served a deposition subpoena on Hinds' insurance carrier.[4] Nguyen requested: "all claim files and statements submitted regarding . . . the property damage arbitration handled [by the arbitrator]. Records pertaining to Jack Hinds, III, . . .

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[3] A transcript and a declaration were attached to Nguyen's motion for new trial. Nguyen's attorney declared that Hinds had provided his statement "under oath." However, no oath is included within the text of the transcript.

[4] Information regarding discovery proceedings comes from the declaration of Nguyen's attorney and other documents attached to Nguyen's motion for new trial, which the trial court ruled was untimely. Thus, this evidence was not presented to the court.

from any and all dates." A consumer notice of the subpoena was sent to Hinds' attorney, which included the following language: "If you are a party to the above-entitled action, you must file a motion pursuant to Code of Civil Procedure section 1987.1 to quash or modify the subpoena . . . . [¶] . . . [¶] WARNING: IF YOUR OBJECTION IS NOT RECEIVED BEFORE THE DATE SPECIFIED . . . , YOUR RECORDS MAY BE PRODUCED AND MADE AVAILABLE TO ALL PARTIES."

Hinds filed a motion in limine to exclude the recorded statement he had made to his insurance company. Hinds argued that the statement: 1) contained multiple levels of hearsay; and 2) if the statement was to be admitted, then Nguyen first needed to lay a proper foundation. Three days later, Nguyen filed an opposition to the motion in limine. The next day, just prior to jury selection, Hinds filed a reply brief. For the first time, Hinds argued that his recorded statement to his insurance company was privileged under the attorney-client privilege and he had not waived the privilege. (Evid. Code, § 954.)[5]

At the hearing on the motion in limine, the trial court gave an indicated ruling: "My intent is to grant it. First of all, it is a statement to an insurance company and, of course, under CACI [No.] 105[6] no information can be shared regarding insurance. And, second, I find it is a privileged statement under Evidence Code section 954 [attorney-client privilege]. [¶] If you would like to speak to [*sic*] it, I would be more than happy to hear your views on it."

Nguyen's counsel was the first to speak. He said: "Well, your honor, first of all, I'll just point out that I only became aware of the reply an hour or two ago. I haven't had a chance to research it." Nguyen's counsel then went on to orally argue the

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[5] Further undesignated statutory references are to the Evidence Code.

[6] "You must not consider whether any of the parties in this case has insurance. The presence or absence of insurance is totally irrelevant." (CACI No. 105.)

motion. After hearing further argument from Hinds' counsel, the trial court found that, "there is information that may be shared, obviously, with arbitrators that definitely does not get shared with jurors. [¶] And so let -- the court does find that -- that these statements are privileged, there was no waiver and the motion in limine . . . is granted."

During the trial, Nguyen testified that he was in the No. 3 lane of Beach Boulevard when he stopped at a red light. Nguyen said that after about 30 seconds he felt an impact to the rear of his vehicle. Hinds' expert testified that the gouge marks were inconsistent with Nguyen's testimony. The jury found Nguyen negligent and awarded Hinds damages.

II

DISCUSSION

Nguyen contends that the trial court erroneously excluded Hinds' recorded statement to his insurance carrier. He advances three alternative arguments in support of this claim: 1) the trial court should not have considered Hinds' claim of attorney-client privilege because he first asserted it in a reply brief; 2) Hinds waived the privilege either within the conversation itself or by not objecting to its disclosure during discovery; or 3) the exclusion of the evidence amounted to the subornation of perjury.

We shall address each of Nguyen's arguments in turn. But fundamentally, Nguyen did not raise these issues at trial and give the trial court an opportunity to rule on them. Nguyen attempted to raise these issues in a motion for new trial, but that motion was untimely filed. This is also part of the reason Nguyen's has forfeited his arguments on appeal. (See Code Civ. Proc., § 657; *Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 633-635 [section 657 requires a written order from the judge specifying the grounds and reasons for granting a new trial].)

Again, Nguyen contends the trial court erred in considering Hinds' attorney-client privilege claim. But he does not argue, or even mention the court's alternative indicated reason for exclusion, that Hinds' statement was to his insurance

carrier and information regarding insurance is not properly placed before the jury. We likely would have affirmed the lower court's ruling on that ground as well.

A. Nguyen failed to object at trial on the grounds that Hinds' claim of privilege was first raised in a reply brief; therefore, Nguyen has forfeited this argument on appeal.

Generally, in order to preserve an issue for review, the appealing party is required to have made a timely and meaningful objection in the trial court. (See, e.g., § 353, subd. (a).) This rule not only applies to the introduction of evidence, but also to matters relating to procedure. (See also *Scott v. C. R. Bard, Inc*. (2014) 231 Cal.App.4th 763, 786; *Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1410.)

An objection will be deemed sufficient so long as it "fairly apprises the trial court of the issue it is being called upon to decide. [Citations.]" (*People v. Scott* (1978) 21 Cal.3d 284, 290.) "The party aggrieved by an error in procedure should seek relief at the earliest possible moment, as by an objection, a request for a mistrial, or a continuance." (8 Witkin & Epstein, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 21, pp. 602-603.) Counsel "must act at the earliest possible moment" to make an error known to the court and seek appropriate relief. (*Kauffman v. De Mutiis* (1948) 31 Cal.2d 429, 432.)

Nguyen argues that the trial court should never have considered Hinds' claim of privilege because it was raised for the first time in a reply brief. But we need not resolve that issue in this appeal. Nguyen has forfeited this claim because he did not properly raise it in the lower court. At the hearing on the motion, Nguyen's counsel told the court that he "only became aware of the reply an hour or two ago." But then counsel went on to orally contest Hinds' claim of privilege. The court was, of course, not obligated to stop counsel from proceeding or to object on Nguyen's behalf. Counsel did not object, nor did he request a continuance (even after the court gave its indicated ruling). The first time Nguyen objected to the issue concerning the reply brief was in his

motion for new trial. But the trial court dismissed that motion because it was not timely filed. Therefore, the court never reached the merits of Nguyen's claim.

Again, our primary task as an appellate court is to review the underlying record for legal error. But we cannot find that a trial court committed a legal error when it was never given the opportunity to rule on the legality of a particular matter. Thus, Nguyen's claim in this regard has been forfeited.

B. Nguyen has forfeited his arguments concerning Hinds' waiver of his privilege because Nguyen did not make known to the trial court the substance, purpose, and relevance of the excluded evidence by an offer of proof or by any other means.

The parties do not dispute that Hinds' recorded statement was a communication protected from disclosure under the attorney-client privilege. (§ 954.) Rather, in this appeal Nguyen contends that Hinds waived the privilege by consenting to its disclosure either: 1) during the recorded conversation itself; or 2) by failing to assert the attorney-client privilege during discovery.

Nguyen is correct that a party may waive the lawyer-client privilege by consenting to its disclosure. (§ 912, subd. (a) [a privilege is waived when the holder has "consented to disclosure"].) He is also correct that a waiver can occur during discovery proceedings. (§ 912, subd. (a) ["Consent to disclosure is manifested by . . . failure to claim the privilege in any proceeding in which the holder has legal standing and the opportunity to claim the privilege"].) But Nguyen failed to adequately raise and litigate these issues in the trial court in order to have them reviewed on appeal.

The rules of appellate forfeiture are designed to encourage parties to bring any errors to the attention of the trial court so it may correct or avoid them. (See *Avalos v. Perez* (2011) 196 Cal.App.4th 773, 776.) "'If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an

appeal.'" (*Sommer v. Martin* (1921) 55 Cal.App. 603, 610.) And while appellate courts may, on occasion, reach "a question that has not been preserved for review by a party," appellate courts are "barred [from doing so] when the issue involves the admission . . . or exclusion . . . of evidence." (*People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6.)

Thus, when a party in an appeal argues that a trial court improperly *admitted* evidence, that party is required to have made a specific objection to the admission of the evidence in the trial court. (See § 353, subd. (a).)[7] Similarly, if a party in an appeal is claiming that a court improperly *excluded* evidence, that party is required to have made known to the court the "substance, purpose, and relevance" of the proffered evidence by way of "an offer of proof, or by any other means" in order to preserve the issue for appeal. (See also § 354, subd. (a).)[8]

"An offer of proof is a statement by counsel describing proposed evidence and what he or she intends to prove if such evidence is admitted." (*Gordon v. Nissan Motor Co., Ltd.* (2009) 170 Cal.App.4th 1103, 1113.) "An offer of proof should give the trial court an opportunity to change or clarify its ruling and in the event of appeal would provide the reviewing court with the means of determining error and assessing prejudice. [Citation.] To accomplish these purposes an offer of proof must be specific. It must set

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[7] "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of *the erroneous admission of evidence* unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion . . . ." (§ 353, italics added.)

[8] "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that: [¶] (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means; [¶] (b) The rulings of the court made compliance with subdivision (a) futile; or [¶] (c) The evidence was sought by questions asked during cross-examination or recross-examination." (§ 354.)

forth the actual evidence to be produced and not merely the facts or issues to be addressed and argued." (*People v. Schmies* (1996) 44 Cal.App.4th 38, 53.) Thus, an appellate court's review is limited to the "specific evidentiary matters identified [by the appellant] to the trial court." (*Id.* at p. 54.)

Here, Hinds claimed in a pretrial reply brief that his recorded conversation to his insurance carrier was privileged. In response, Nguyen's counsel chose to orally argue the matter: "The one point I would make is that this statement has already been introduced in a proceeding. It was introduced in the arbitration proceeding . . . . That's how I became aware of it. [¶] It was introduced. It was given to the arbitrator. All I had to do was, you know, get them to cough up a copy of it. . . . [¶] It is obviously important in a case such as this because it completely contradicts the statements Mr. Hinds has made outside of it." Nguyen's counsel added: "There is no evidence in the recording that he's under the influence of drugs or in great pain. He's very clear and lucid when he gives this statement. [¶] And he's even asked by the adjuster twice, 'Let's go over it again,' and he goes over it again."

Arguably, Nguyen's counsel made clear that the purpose of introducing the statement would be to impeach Hinds' trial testimony. And, to the extent there was an offer of proof, counsel asserted that Hinds was "clear and lucid" during his conversation with his insurance adjuster. But what is notably absent is that Nguyen's counsel never made an offer of proof as to the substance of the recorded statement in order to establish a waiver. (§ 354, subd. (a).) For instance, the offer of proof could have included the fact that during the recorded conversation, Hinds agreed that his adjuster could "share" a copy of his statement with Nguyen's insurance carrier. But Nguyen's counsel never made that fact known to the trial court. That is, not until Nguyen's untimely motion for new trial.

Moreover, while Nguyen's counsel told the trial court that Hinds' statement had been "introduced in the arbitration proceeding" and that he had gotten the insurance company to "cough up" a copy of the statement, counsel never made an offer of proof as

to how those subpoenaed documents supported his waiver argument. For instance, Nguyen's offer of proof could have included the fact that a consumer notice of the subpoena to Hind's insurance carrier was sent to Hinds' attorney, and the consumer notice included the following language: "If you are a party to the above-entitled action, you must file a motion pursuant to Code of Civil Procedure section 1987.1 to quash or modify the subpoena . . . . [¶] . . . [¶] WARNING: IF YOUR OBJECTION IS NOT RECEIVED BEFORE THE DATE SPECIFIED . . . , YOUR RECORDS MAY BE PRODUCED AND MADE AVAILABLE TO ALL PARTIES." Therefore, the offer of proof could have included the fact that Hinds never objected to the subpoena, which arguably acted as a waiver of his privileged communication with his insurance carrier. And although the trial lasted for three more days, Nguyen never made any additional offers of proof, nor did he ask the trial court to reconsider its ruling. Again, all of the documents supporting Nguyen's argument—in particular the consumer notice of the subpoena—were only attached to Nguyen's untimely motion for new trial.

"[T]he privilege-claimant 'has the *initial burden* of proving the *preliminary facts* to show the privilege applies.'" (*Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th 417, 442.) Once the claimant of the privilege establishes preliminary facts, it is presumed that the matter sought to be disclosed was a communication made in the course of the privileged relationship. (§ 917.) The burden of proof shifts to the party opposing the privilege claim. (*Roman Catholic Archbishop*, *supra*, 131 Cal.App.4th at p. 442.) Generally, a trial court's evidentiary rulings are reviewed for an abuse of its discretion. (*Zhou v. Unisource Worlwide* (2007) 157 Cal.App.4th 1471, 1476.) But whether a waiver of the attorney-client privilege has occurred is a question of fact, which we review under the substantial evidence standard, unless the facts are undisputed and can support only one reasonable conclusion. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196.)

Here, based on the preliminary facts known to the trial court at the time of

its evidentiary ruling, the court found that Hinds' recorded statement was privileged. This fact was undisputed. But due to Nguyen's counsel's failure to make an adequate offer of proof concerning the statement itself and what had occurred during discovery, the evidence supports the court's factual finding that Hinds' attorney-client privilege had not been waived. Thus, the court did not commit error when it granted Hinds' motion and excluded his recorded statement.

In any event, even if we were to find that the trial court improperly excluded Hinds' statement, based on the totality of the evidence, we cannot say that the effect of "the error or errors complained of resulted in a miscarriage of justice." (§ 354.) A "miscarriage of justice" occurs only when the reviewing court is convinced "it is reasonably probable a result more favorable to the appellant would have been reached absent the error." (*In re Marriage of Smith* (1978) 79 Cal.App.3d 725, 750–751.) "As a general rule, 'evidence which merely impeaches a witness is not significant enough to make a different result probable . . . .'" (*People v. Green* (1982) 130 Cal.App.3d 1, 11.)

Here, Hinds told his insurance company that the vehicle that caused the accident came from his right and therefore his statement might have been used for impeachment purposes. But Hinds had also said that he had taken medication for pain. Further, Deputy West determined that Nguyen made an unsafe lane change. And, most importantly in our estimation, the testimony of Hinds' accident reconstruction expert, which was largely based on physical evidence introduced at the trial, was that Nguyen's vehicle had come from Hinds' left and had caused the collision. Notably, Nguyen did not call his own expert to rebut the testimony of Hinds' expert.

In sum, we do not find that the trial court committed error by excluding Hinds' recorded statement. And even if we did find error, we do not find it probable that the exclusion of evidence resulted in a "miscarriage of justice."

C. Nguyen failed to litigate the subornation of perjury issue; therefore, Nguyen has forfeited this argument on appeal.

Once again, in order to raise an issue on appeal, the appealing party is generally required to have made a timely and meaningful objection or otherwise properly brought the issue before the trial court for a ruling. (§§ 353, 354; *Scott v. C. R. Bard, Inc*., *supra*, 231 Cal.App.4th at p. 786; *Rayii v. Gatica*, *supra*, 218 Cal.App.4th at p. 1410.) Nguyen now claims that Hinds' recorded statement falls under the crime/fraud exception to the attorney-client privilege for subornation of perjury. (Pen. Code, § 127; § 956 ["There is no privilege . . . if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud"].)

For reasons we need not belabor any further, the crime/fraud exception issue has also been forfeited because it was not litigated in the trial court. Further, we note that the crime/fraud exception is "a very limited exception" and "the *proponent* of the exception bears the burden of proof of the existence of crime or fraud." (*Geilim v. Superior Court* (1991) 234 Cal.App.3d 166, 174.) This court is certainly not in a position to make any factual findings regarding an allegation of perjury on appeal. Thus, Nguyen has not met his burden.

III

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.