

JILLA HASID, Plaintiff and Appellant,
v.
SHARON ROJHANI, et al., Defendants and Respondents.

B194506

Court of Appeals of California, Second Appellate District, Division Seven

January 2, 2008

NOT TO BE PUBLISHED

Appeal from a judgment and order of the Superior Court of Los Angeles County,
No. BC320507, Joseph R. Kalin, Judge. Affirmed.

Law Offices of Nico N. Tabibi, Nico N. Tabibi and Charles Gardner for Plaintiff and
Appellant.

Law Offices of Priscilla Slocum and Priscilla Slocum for Defendants and
Respondents.

WOODS, J.

SUMMARY

This is an appeal from a judgment after jury verdict and an order denying a subsequent motion for new trial. The plaintiff appeals, raising multiple claims of prejudicial misconduct in defense counsel's closing argument among other errors. We affirm.

FACTUAL AND PROCEDURAL SYNOPSIS

According to Jilla Hasid's first amended complaint, Sharon Rojhani allowed her unleashed dog to enter a parking area where both Rojhani and Hasid lived. Sharon allowed the dog to come into "close proximity with [Hasid's] person," and, as a result, the dog "lunged at and attacked [Hasid]." She asserted causes of action for negligence and strict liability (claiming Sharon owned a vicious and dangerous dog and knew or should have known of its inclination to attack people without provocation). Based on these same allegations, she also alleged causes of action for premises liability and general negligence against Avi Rojhani, asserting he knew of the dog's vicious nature, the dog had previously attacked others but was allowed into the common area without a leash and he had a duty to control access to the common area and to prohibit the entry of unleashed dogs.

Sharon and Avi answered, and the parties conducted discovery.

At trial, Hasid testified that on October 9, 2003, she was behind the building where she was a tenant, building what she described as a makeshift tent (a temporary shelter for the Jewish holiday "Sukkot") with a neighbor when Sharon's dog ("Bella") "charged" at her. Immediately after seeing Bella, Hasid panicked and took a few steps backward. The next thing she knew she felt she was "flying in the air, and [her] body came down to

the floor very hard." She could not remember whether the dog touched her because she could not "remember exactly what happened." She had no visible injuries. Other than complaining about Bella barking, she never complained to Sharon, Avi or the building manager about any problem with the dog's behavior. She had seen Bella on numerous occasions but had never seen her attack or injure anyone. Hasid did not miss any work from her job in a school office.

Sharon testified that Bella had never attacked, scratched or injured anyone. Bella was friendly with guests and frequently played with children who would kiss her. On the date of the incident, Sharon held Bella by the collar as she proceeded through the garage but let go as she opened the door. As Bella approached Sharon's car, Bella walked or trotted toward Hasid, wagging her tail. Bella knew Hasid and played with Hasid's children. Bella did not touch Hasid or make any noise; she did nothing but move in Hasid's direction. Sharon saw Hasid walk backwards, trip on her own two feet and fall. She was not hunched over or holding her back. Hasid's husband told Sharon he was going to sue her.

According to videotaped testimony from the apartment manager (Bridgette Salem), she received and took care of a tenant complaint that Sharon's dog was barking in July 2003. She had not heard any complaints of attacks or threatening behavior involving Sharon's dog prior to Hasid's lawsuit.¹

Avi testified he had heard about the incident and Hasid "panicked for no reason." He had never heard of any other incident involving his daughter Sharon's dog at the property.

A Los Angeles Department of Animal Services animal control officer (Armando Navarette) testified dogs must be kept on leashes in public places but need not be on leashes on private property, including the common area of a private apartment complex.

A medical assistant from one of Hasid's treating physicians (Rosalie Trejo) testified she completed a handicapped parking application at Hasid's request in 2004 in which she indicated that Hasid suffered a "significant limitation" which substantially impaired her mobility or required the aid of an assistance device such as a cane, walker or crutches. She wrote that the limitation was due to "severe pain in lower back and buttocks due to auto accident and dog attack."² Dr. Zahiri certified under penalty of perjury that this information was correct. Trejo testified that Dr. Zahiri reviewed all reports before signing them and made any necessary corrections.

Counsel agreed to three special verdict forms which were submitted to the jury. Question 2 of Special Verdict No. One asked whether Bella had unusually dangerous tendencies. If the jury answered "no" to this question, then the jury was required only to answer question 5 and then sign and submit the remaining special verdict forms regarding premises liability and damages without answering the remaining questions.

The jury returned a unanimous verdict in favor of Sharon and Avi. On the special verdict forms, the jury found Bella did not have unusually dangerous tendencies and Sharon was not negligent. The trial court entered judgment in Sharon and Avi's favor.

The trial court denied Hasid's subsequent motion for new trial, indicating the "problem" in the case was Hasid's lack of credibility, and not an insufficiency in the

evidence. She "just wasn't a very believable person." Further, defense counsel's argument was merely argument and not an admission of liability as Hasid argued.

Hasid appeals.³

DISCUSSION

I. Hasid Has Failed to Demonstrate Misconduct in Defense Counsel's Recitation of the Elements of Negligence or that the Jury Failed to Follow CACI No. 401.

According to Hasid, defense counsel misled the jury regarding the "test for negligence." "[D]espite the structure of the special verdict forms," defense counsel told the jury in closing argument that a negligence claim has "four elements. That's duty, breach of duty, causation and damages." This statement as to an "alleged" four elements, Hasid says, is a "substantial and material misstatement of the law" as, "[i]n contrast to said purported statement of counsel, CACI [No.] 401 . . . in fact defines negligence as follows:

"Negligence is the failure to use reasonable care to prevent harm to oneself or to others.

"A person can be negligent by acting or by failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation.

"You must decide how a reasonably careful person would have acted in each defendant's situation."

She says this "jumbling of the concepts of substantial factor and damages into the very definition of the term 'negligence'" thwarted the entire purpose of the special verdict forms "by preventing the jury from reaching any specific requests for findings set forth in Question 6 of Special Verdict No. 1 and in Special Verdict No. 3, and instead improperly misleading the jury into attempting to decide the entire issues of this entire action in one question (Question 5 of Special Verdict No. 1)"

Hasid misses the point. First, defense counsel did not misstate the law.⁴ Even if he had (which he did not), Hasid did not object. Where the party asserting misconduct fails to object to the alleged misconduct or request an admonishment from the judge, the error is waived unless it is clear a proper objection and admonition would have been ineffectual; in addition, only in extreme cases of misconduct will an appellate court reverse on this ground. (*Hilliard v. A.H. Robins Co.* (1983) 148 Cal.App.3d 374, 407-408.) Moreover, the parties agreed to the wording of the special verdict forms, so to the extent Hasid claims error in the wording of the forms, she has waived that claim as well.

In any event, there is nothing in the record to suggest that the jury was misled or misunderstood the law or the special verdict forms. To the contrary, in connection with her motion for new trial, the trial court specifically cited Hasid's lack of credibility as the problem with her case rather than any claim of misconduct, insufficiency of the evidence or irregularity in the proceedings. (*Hilliard v. A.H. Robins Co.*, *supra*, 148 Cal.App.3d at

p. 407 ["a trial judge is in a better position than an appellate court to determine whether a verdict resulted, wholly, or in part, from the asserted misconduct of counsel and his conclusion in the matter will not be disturbed unless, under all the circumstances, it is plainly wrong"].) On this record, the fact that the jury stopped at question No. 5 of Special Verdict No. 1 simply indicates that the jury rejected the plaintiff's testimony and credited the defendants' testimony—nothing more. As summarized above, the verdict was supported by substantial evidence.

II. Hasid Has Failed to Demonstrate Prejudicial Misconduct in Defense Counsel's Closing Argument about Bella.

Hasid says defense counsel misstated the facts and the law and improperly appealed to sympathy for Sharon and her dog Bella in arguing: "What does a dog [with an unusually dangerous nature or tendency] do? Well, it bites people, doesn't it? It mauls people. It rips them apart. . . . [L]ike a pit bull that rips some kid apart. They put those dogs down. That's what they're saying should be done here. They're saying, 'Make a ruling this dog is dangerous.' It's just not the case." Hasid objects that she never suggested putting Bella to sleep and cites authority for the proposition that a possessor of a domestic animal that he knows or has reason to know has dangerous propensities abnormal to its class, is subject to liability for harm done by the animal to another so, for example, the owner of a dog accustomed to "fawn[ing] violently" may be held liable for its "dangerous playfulness or over-demonstrative affection." (Drake v. Dean (1993) 15 Cal.App.4th 915, 921-922.)

Hasid submitted no special instruction in this regard. Her counsel raised no objection at the time of defense counsel's argument, waiving any claim of error as a result. (Hilliard, supra, 148 Cal.App.3d at pp. 407-408.) Moreover, the argument does not rise to the level of prejudicial misconduct in any event. (Balding v. D.B. Stutsman, Inc. (1966) 246 Cal.App.2d 559, 565 [though extravagant or hyperbolic, no prejudicial misconduct where counsel referred to hazardous activity (blasting) as "bombing" and referred to the brains of a small child being spilled out on the sidewalk as a result which everyone including the jury was aware did not occur].) Furthermore, the jury expressly found Bella did not have any dangerous tendency, apparently disbelieving Hasid's testimony.

III. Hasid Has Failed to Demonstrate Prejudicial Misconduct in Defense Counsel's Argument as to Hasid's Conduct and as to her Health Care Providers.

In Hasid's view, defense counsel's closing argument amounted to improper and unfounded character attacks. However, Hasid waived any claim of error by failing to object, and, in any event, as Sharon and Avi respond, counsel may "vigorously argue his case and is not limited to 'Chesterfieldian politeness.'" (Grimshaw v. Ford Motor Co. (1981) 119 Cal.App.3d 757, 799.) For example, counsel asked the jury to consider whether Hasid was actually hurt or using the incident as a "family college fund." According to one of her doctor's reports, Hasid said on two occasions that she had lost four weeks of work, but her employer testified to the contrary. Hasid had no visible injuries and, according to the building manager, continued to build the temporary shelter and used the stairs after the incident.

Hasid had obtained a handicapped placard based on information that she had also been involved in an auto accident. She reported pain in one hip and then in another. Her

treating physicians admitted the "objective" tests, including two MRIs, nerve conduction studies and x-rays were normal. Her medical bills were sent to her attorney, not to her. Defense counsel pointed out that her treating physicians had an interest in the outcome; in fact, one (Dr. Hekmat) admitted he had an ownership interest in the facility where Hasid had a single injection and charged her \$10,575. The anesthesiologist was his sister-in-law who charged an additional \$1,150 for the visit.

Hasid's economist never interviewed Hasid and had no idea whether or to what extent she had provided such services prior to the incident, but testified as to her damages for the loss of household services. Based on evidence including but not limited to the foregoing, defense counsel's argument that Hasid was not seeking compensation for damages actually suffered as a result of the incident she described but instead because of a preexisting condition or for injuries that were fabricated was not improper.

IV. We Find No Prejudicial Misconduct in Defense Counsel's References in his Closing Argument to the Absence of Hasid's Employment Records.

When defense counsel asked Hasid's employer about records he (defense counsel) said he had subpoenaed, Hasid's employer said he had never received the subpoena but said he would produce the records by the afternoon following his May 17, 2006, testimony or by the following day. Hasid's employer failed to do so, and when the records still had not been produced as of the time of his closing argument, defense counsel argued the possibility this information was being withheld as it might establish Hasid's preexisting condition. Again, any error was waived by the failure to object, and in any event, Hasid has failed to demonstrate prejudicial error.

V. Hasid Has Failed to Demonstrate Prejudicial Error in the Trial Court's Failure to Instruct the Jury with her Proposed Negligence Per Se Instruction.

Hasid says she requested a modified form of CACI No. 418 (presumption of negligence per se), providing, in pertinent part, as follows: "Los Angeles Municipal Code Section 53.06.2 provides in part that every person in the City of Los Angeles owning or having charge, care, custody or control of any dog to keep such dog exclusively upon his/her own premises, unless such dog is under the control of a competent person and restrained by a substantial chain or leash not exceeding six feet in length." If the jury concluded Sharon had violated this ordinance and further the violation was a substantial factor in causing harm to Hasid, the jury was to find Sharon negligent.

Leaving to one side the fact that the conference regarding the proposed jury instructions was not reported so it is not clear whether Hasid's counsel agreed to forego this instruction, Hasid's own witness in this regard testified that no leash was required in the area where this incident occurred and there was no evidence to the contrary. Accordingly, Hasid has failed to demonstrate prejudicial error.

VI. Hasid Has Failed to Demonstrate Prejudicial Error in Connection with Defense Counsel's Argument Regarding the Apartment Manager's Deposition.

Defense counsel argued that there was a point in the apartment manager's testimony where she stated that, in complaining about a motorcycle being parked next to her parking spot, instead of saying the situation could be dangerous, Hasid said,

"Hey, if I fall, who do I sue?" He cited to this testimony as evidence of Hasid's "mindset." Hasid says the actual testimony was not that Hasid had made this statement, but rather another tenant who had said so. In fact, in this case, Hasid's counsel did object, defense counsel identified the transcript page and the court told the jury: "[Y]ou've heard the testimony. And you're the ones to judge what it was." Further, Hasid's counsel argued the interpretation was inaccurate in rebuttal. Hasid has failed to demonstrate conduct so egregious as to support a finding of prejudicial misconduct.⁵ (Hilliard, supra, 148 Cal.App.3d at p. 407.)

DISPOSITION

The judgment and order denying the motion for new trial are affirmed. Sharon and Avi Rojhani are entitled to their costs of appeal.

We concur:

PERLUSS, P.J.

ZELON, J.

Notes:

1. Two of Hasid's neighbors (Nazanin Dadfarin and Rebecca Yasharel) signed identical statements Hasid presented to them in connection with her lawsuit. Dadfarin testified that Bella had jumped on her or attacked her in July 2002 or 2003 and she told Salem; she did not know why she had not mentioned she had been attacked by Bella or that she had reported this attack to Salem in her statement. Yasharel testified that at some time prior to October 2003, Bella approached her "very fast" and she became frightened and screamed.
2. Thereafter, another medical assistant ("Marjorie") completed a subsequent application from Hasid (requesting the placard until April 6, 2005) providing the same information.
3. The complaint was dismissed as to all parties other than Sharon and Avi (in his individual capacity), and only Sharon and Avi are parties to this appeal.
4. Hasid also says defense counsel "admitted" in closing argument Sharon had breached her duty to Hasid by letting go of Bella's collar so the only answer the jury could give to Question 5 of Special Verdict No. 1 was "yes" had they applied CACI No. 401. Again, as the trial court indicated, argument is not evidence.
5. In light of our determination that Hasid has failed to demonstrate prejudicial error in any of the issues she raises, it follows that her claim of cumulative error must fail as well.
