NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JOSEPH LOGUDICE,

Plaintiff and Respondent,

v.

CONTINENTAL C. EXPRESS et al.,

Defendants and Appellants.

F029132

(Super. Ct. No. 229779)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Arthur E. Wallace, Judge.

Berman, Berman & Berman, Evan A. Berman, Christopher C. McNatt, Jr., and Lori A. Beccaria, for Defendants and Appellants.

Martin L. Horwitz, for Plaintiff and Respondent

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FACTS

Appellant Inderjit Singh Bhambra was employed by appellant Continental C. Express and was driving an 18-wheel tractor-trailer on Highway 58 in Mojave. Respondent Joseph Logudice, the 36-year-old manager of Village Car Wash in Westlake Village, was driving his red Chevy truck on Highway 58 in the opposite direction. Bhambra made a left turn to enter the Giant Truck Stop. Logudice was unable to stop his

Chevy truck in time and collided with Bhambra's 18-wheeler. Logudice's face hit his Chevy's steering wheel, and his four top middle front teeth were smashed in. Shortly thereafter those four teeth were removed by Dr. Gilbert Abilez. Logudice also claimed to have suffered neck and back injuries.

At the trial of Logudice's civil action against Bhambra and Continental C. Express, the issues were (1) how fault should be allocated for the accident, (2) the nature and extent of Logudice's injuries and his pain and suffering, and (3) the dollar value to be placed upon whatever injuries and pain and suffering Logudice had incurred. Logudice contended that the accident was entirely Bhambra's fault. Bhambra and Continental contended that Logudice had been inattentive and that the accident was at least partially Logudice's fault. Logudice asked the jury to award him more than a million dollars in damages, consisting of more than $16,000 of medical bills incurred prior to trial, about $60,000 in future medical expenses, $16,000 for his damaged Chevy truck, $10,500 in lost earnings for his 14 weeks of missed work following the accident, over $710,000 for an alleged loss of future earnings, and more than $310,000 in pain and suffering. The defense argued that even if the jury thought Bhambra was entirely responsible for the accident, the jury "(a)t most ... should award plaintiff the total amount of $10,000." This consisted of $6,000 for a permanent bridge for his missing teeth, $1,000 for his treatment by Dr. Abilez, and "if you believe plaintiff suffered any back or neck injury, you should give him $3,000 for that." The jury agreed with Logudice that the left-turning Bhambra was 100 percent at fault for the accident, but the jury did not award Logudice anything close to the million plus dollars he had sought. The jury instead awarded him a total of $117,114, consisting of $67,114 in economic damages plus $50,000 in non-economic damages.

A major topic of disagreement at the trial was the extent of Logudice's alleged back pain and neck pain. Appellants Continental and Bhambra contend that the trial court erred in excluding from evidence a videotape taken shortly before trial. The video shows

Logudice working at a car wash and engaging in actions such as squatting, bending over, reaching with his arms and wiping, and getting in and out of vehicles. As we shall explain, any error in excluding this video from evidence did not constitute reversible error in the circumstances of this case. This is primarily because (1) the excluded video was one of two similar videos, and the other one (Exhibit J) was admitted into evidence and was seen by the jury, and (2) the investigator who filmed the excluded video was permitted to testify, and did testify, about what he saw. His testimony about his observations was not disputed by Logudice. Other facts pertinent to this issue will be presented in our discussion below.

ANY ERROR IN EXCLUDING THE SECOND VIDEOTAPE FROM EVIDENCE WAS HARMLESS

Logudice finished his presentation of evidence on the third day of trial, a Thursday. After the first defense witness testified, the court ordered an adjournment until the following Monday. On Monday morning, the defense announced that it had two videotapes it wished to show to the jury as part of the defense case. One was a videotape of Logudice working at the Village Car Wash on November 1, 1996, two years after the accident. The other was a subsequent surveillance videotape of Logudice working at "the Pacific brushless or touchless car wash" in California City on March 22, 1997.[1] Logudice had been aware of the first videotape. Its existence had been disclosed to plaintiff's counsel about two weeks prior to the trial, and plaintiff's counsel had already viewed it. The plaintiff had been unaware of the existence of the second videotape, however, until the Monday morning of trial. Even though the second videotape had been filmed subsequent to the completion of discovery, and therefore there had been no improper

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[1] Logudice testified that the Village Car Wash, where he was filmed on November 1, 1996, was owned by his uncle. He also testified that the car wash in California City, where he was working on March 22, 1997, was owned by his father.

withholding of it during discovery, the court expressed displeasure at what it considered to be the defense tactic of having "lulled the plaintiff to sleep" by disclosing to the plaintiff the existence of the first surveillance videotape but not the second. More importantly, however, the court expressed displeasure at the fact that because the jury was waiting to hear evidence, and because the second videotape was approximately two hours long and plaintiff's counsel had not yet seen it, the court would have to keep the jury waiting for another two hours, while plaintiff's counsel exercised its right to view the second videotape, if the court was going to admit the second videotape into evidence. (See Evid,. Code, § 768.)[2] The court's displeasure appears to have been based in part upon the fact that if the defense had disclosed the existence of the second videotape even as late as at the end of the previous Thursday's testimony, plaintiff's counsel could have viewed the tape prior to the following Monday morning and thereby could have avoided inconveniencing the jury. On the previous Thursday, plaintiff's counsel told the court that he had "seen the videotape." But he had been aware only of the first videotape and was referring to the first videotape. As plaintiff's counsel told the court on Monday morning after having learned of the existence of the second videotape, "I could have watched this tape at my leisure over the weekend ...." Although the first videotape was 2 hours and 40 minutes in length, the defense desired to present, and ultimately did present, only 18 minutes of it to the jury. The second videotape was approximately two hours long, and the defense wished to present slightly more than an hour of it to the jury. In excluding the second videotape from evidence, the court stated:

> "Now what are we going to do? Show them 18 minutes of videotape, and say guess what, folks, you've got the rest of the morning off, so that Mr. Horwitz can view some evidence that was I think rather

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[2] Evidence Code section 768 allows all parties to inspect a "writing" before it is shown to a witness. The term "writing" includes a photographic recording. (Evid. Code, § 250.)

inappropriately withheld Thursday, when everybody sat around with a big grin on their face when Mr. Horwitz said he'd seen the video tapes, he knew what they were, and that was the end of it.

"Now we've got a big surprise, and you know full well what the law requires, you can't, you know, if it's — if there are — if appropriate requests have been made, you cannot withhold this kind of evidence and not allow it to be seen by counsel on one side before it is shown to the jury. That's bottom line. That's basic. That's about as basic as it can get.

"And I don't know where the hell you think you're going with it. I'm very tempted just to exclude it.

"I think this sort of conduct is unprofessional, in one respect, and it certainly has no business in this courtroom, after certainly an imposition on this jury, that is — was totally unnecessary and inappropriate.

"I'm going to exclude that evidence."

Appellants Bhambra and Continental contend that the court abused its discretion in excluding the second videotape. "[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered." (*People* v. *Giminez* (1975) 14 Cal.3d 68, 72; in accord, see also *People* v. *Stewart* (1985) 171 Cal.App.3d 59, 65, and *People* v. *Clair* (1992) 2 Cal.4th 629, 655.) "[T]he term judicial discretion 'implies absence of arbitrary determination, capricious disposition or whimsical thinking.'" (*People* v. *Giminez*, *supra*, 14 Cal.3d at p. 72; in accord, see *In re Cortez* (1971) 6 Cal.3d 78, 85.) Respondent Logudice argues that the exclusion of the second videotape was not an abuse of discretion because the court has "inherent powers ... to insure the orderly administration of justice" (*Walker* v. *Superior Court* (1991) 53 Cal.3d 257, 266-267), and that under the circumstances the court appropriately exercised its authority under Evidence Code section 352 to exclude relevant evidence when the relevance of that evidence is outweighed by other factors.

While our initial reaction is inclined toward the view of the trial judge, we need not and do not decide whether the exclusion of the second videotape was error. Even if

we assume, without deciding, that the court abused its discretion in excluding the evidence, any such error would be harmless under the circumstances of this case. "No judgment shall be set aside ... in any cause, on the ground of ... the improper ... rejection of evidence ...unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) Similarly, Evidence Code section 354 provides: "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 ...." Case law has explained that "a 'miscarriage of justice' should be declared 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." (*People* v. *Watson* (1956) 46 Cal.2d 818, 836; see also *People* v. *Stoll* (1989) 49 Cal.3d 1136, 1161-1163 (*Watson* test applied to erroneous exclusion of evidence).) Notwithstanding appellants' description of the excluded videotape as "essential to impeach the plaintiff's testimony regarding his injuries and to give the jury an accurate picture of the extent of the plaintiff's injuries and his ability to work after the accident," the second videotape does not appear to us to be drastically different than the first one. Both videotapes show Logudice bending, squatting, getting in and out of vehicles, reaching with his arms and performing wiping motions on the cars. The first (admitted) videotape was taken two years after the accident. The second (excluded) videotape was taken four and a half months after the first one, and does not appear to contain any indication of any change in Logudice's ability to wash cars or to perform any movement associated with that task. Furthermore, appellant's opening brief simply omits any mention of the fact that the investigator who filmed the second videotape was permitted to testify about his observations of Logudice on March 22, 1997, as Logudice

worked at his father's car wash. The investigator, Fred Scrott, told the jury that he observed Logudice spend two hours washing and waxing a black Mercedes Benz. Scrott also saw Logudice wash two other vehicles. Scrott explained to the jury that he observed Logudice bending, kneeling, stooping, squatting, getting in and out of the Mercedes, and wiping the windows. Logudice did not dispute any of this testimony. Rather, his argument to the jury was that he wasn't "in pain every single day all day," but rather had pain "occasionally. " The inference Logudice apparently wanted the jury to draw was that the November 1, 1996, film and the March 22, 1997, investigator's observations just happened to capture Logudice on two of his better days. Logudice had testified that he stopped working at Village Car Wash shortly after he had been filmed there on November 1, 1996, because the work was "too hard" for him to do and he could no longer work at the car wash without pain.[3] He said he instead got a job driving a forklift for the Lance Camper company. The Lance Camper job paid significantly less than his job working for his uncle at the Village Car Wash, and Logudice argued that he was entitled to more than $710,000 in loss of earnings alone because of this. The jury clearly rejected this contention. The jury apparently was persuaded, by both the November 1996 videotape and by Scrott's testimony about his March 22, 1997, observations of Logudice, that Logudice was still physically capable of working at a car wash if he really wanted to do so. Logudice also volunteered, on direct examination, that his own employer-uncle "did

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[3] Appellants have filed a motion in this court asking us to take judicial notice of a reporter's transcript of a January 28, 1998, hearing in another case in which Mr. Logudice testified that the reason why he left his job at Village Car Wash on November 4, 1996, was "to spend more time with my son." The motion is denied. The January 28, 1998, hearing took place eight months after Mr. Logudice's trial in the present personal injury action ended. Appellants had their opportunity to challenge Logudice's credibility at the trial. "[A]s a general rule the court should not take such notice if, upon examination of the entire record, it appears that the matter has not been presented to and considered by the trial court in the first instance." (*People* v. *Preslie* (1977) 70 Cal.App.3d 486, 493.)

not believe that I was in any pain ...." Logudice's entire $67,114 award of special damages was less than one-tenth of his claimed loss of earnings, and the special damages award included the cost of past and future dental treatment for the injury to his mouth.

Appellant relies on *Jones* v. *City of Los Angeles* (1993) 20 Cal.App.4th 436, and the Florida case of *Marion County* v. *Cavanaugh* (Fla. App. 1991) 577 So.2d 599. We find neither of these cases to be persuasive. In *Jones*, the court held that the trial court did not err in admitting into evidence a "Day In the Life" film of a plaintiff who had been injured in an automobile accident. The appellate court rejected the argument that the sympathy the film would elicit for the plaintiff so outweighed its probative value that its admission was an abuse of discretion. That case is not helpful to us here. The issue here is whether the assumed erroneous exclusion of the second videotape of Logudice working at a car wash was prejudicial error. The *Marion County* case is closer on its facts to the present case. In *Marion* the plaintiff was injured in an automobile accident. The plaintiff claimed to have suffered a back injury. The defense offered at the "11th hour" a videotape of the plaintiff "performing a variety of tasks in his yard, including hanging laundry, car repair, gardening or yard work, bending, and lifting." (*Marion County* v. *Los Angeles*, *supra*, 577 So.2d at p. 600.) The trial court excluded the videotape without viewing it, apparently because of what the appellate court described as the plaintiff's "tardy and weak proffer of this videotaped evidence to the trial court." (*Ibid.*) The appellate court reversed and pointed out that the videotape was relevant evidence "either to show the extent [plaintiff's] injuries have affected his ability to do physical work, to show that he is doing physical work harmful to his back in violation of his doctor's recommendations, or ... for impeachment ...." (*Ibid.*) In *Marion County*, however, there was apparently only one videotape. In the present case there are two. They are similar, and the jury saw one of them. Also, the *Marion County* case contains no mention of whether the photographer who filmed the videotape was permitted to testify about his observations of the plaintiff. Furthermore, the $400,000 jury award in *Marion County*

appears to suggest that the jury believed the plaintiff and disbelieved the defense in that case. In the present case, the jury's rejection of Logudice's $710,000-plus loss of earnings claim appears to show that the defense was largely successful in persuading the jury that Logudice did not have the severe and extensive neck and back pain he claimed. Also, the fact that Logudice requested $316,326 for pain and suffering, but was awarded $50,000 for pain and suffering, suggests that the jury compensated him largely for the physical and emotional suffering resulting from the loss of his top four front teeth at the relatively young age of 36, and not for any long-lasting neck and back pain.

The judgment is affirmed. Costs to respondent.

Ardaiz, P.J.

WE CONCUR:

Dibiaso, J.

Levy, J.