Not Reported in Cal.Rptr.3d, 2008 WL 2574434 (Cal.App. 4 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2008 WL 2574434 (Cal.App. 4 Dist.))

Court of Appeal, Fourth District, Division 3, California.
Jessica RUTAN, Plaintiff and Appellant,
v.
Scott Douglas SCOVILLE, Defendant and Respondent.

No. G037921.
(Super.Ct.No. 05CC08216).
June 25, 2008.

Appeal from a judgment of the Superior Court of Orange County, H. Warren Siegel, Judge. Motion for sanctions. Judgment affirmed. Motion denied.
Law Office of E. Thomas Dunn, Jr., and E. Thomas Dunn, Jr., for Plaintiff and Appellant.

Michael G. Hogan & Associates, Michael G. Hogan ; Dunn **Koes**, Pamela E. Dunn and Mayo L. Makarczyk for Defendant and Respondent.

OPINION

RYLAARSDAM, Acting P.J.

***1** Plaintiff Jessica Rutan appeals from a judgment in favor of defendant Scott Douglas Scoville in her action for personal injury and battery. Her sole claim is that the court erred in allowing police officer Gregory Brintle, who did not witness defendant allegedly striking plaintiff with his truck, to testify that there had been no collision and that she was therefore not injured. We disagree and affirm. We also deny defendant's motion for sanctions for a frivolous appeal.

FACTS

Plaintiff sued defendant for negligence and battery after he allegedly hit her with his truck in January 2005. The jury returned a special verdict unanimously finding in defendant's favor on both causes of action and judgment was entered in his favor. Plaintiff challenges admission of the testimony of Brintle, as set out below. The following facts come from the trial testimony.

One evening plaintiff was in a parking lot with her 17-year-old stepson, Phillip Bedard, and three young sons. Plaintiff noticed defendant's truck parked next to her van. She testified defendant hit her three times with his truck, the first time accidentally as he was backing out of his space, and the next two times intentionally. After the third time, defendant threatened to kill her; she panicked and began pounding on the truck. Defendant then left the scene and plaintiff called 911.

When police arrived plaintiff requested she be taken by ambulance to an emergency room, claiming head and neck pain. When examined at the hospital no injuries were found although she was given medication for nausea. She gave conflicting testimony at trial and her deposition about where she told the doctor she had pain. Her testimony at both conflicted with the hospital's records.

A few days after the incident, complaining of headaches and muscle tension, plaintiff visited a chiropractor for four months and then a spine specialist. She had x-rays taken and an MRI, cortisone shots, between 10 and 15 physical therapy sessions, and surgery to fuse vertebrae and to insert a titanium plate. Treatment went on for about 14 months after the accident. Plaintiff testified she still suffers from pain on the right side, including numbness in her right arm. Defendant had been in a car accident seven or eight years before this incident and treated for back and neck injuries.

Plaintiff's stepson, Bedard, testified he never saw the truck hit plaintiff. During the incident he kicked defendant's truck.

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Defendant testified he never hit plaintiff. He said at one point plaintiff tapped the truck with her arm or hand and then accused him of hitting her, which he denied. Thereafter, when he stopped the truck, plaintiff started stabbing it with a pen. He never threatened to kill her.

An engineer specializing in biomedical engineering and accident reconstruction testified for defendant and was of the opinion that had the collision occurred as plaintiff described it would not have injured her.

***2** An orthopedic surgeon also testified for the defense. He reviewed plaintiff's medical records beginning in 1998. Plaintiff had been in an auto accident in 1998 and for most of the time beginning in 1999 through 2004 suffered from depression. Many of the symptoms she exhibited were the same as those she claimed resulted from the incident at bar.

Emergency room records for the incident at issue showed plaintiff said a car had brushed her right shoulder in the parking lot and then hit her shoulder a second time. She did not complain of neck pain and had no head trauma. Examination revealed some tenderness above her right shoulder and pre-existing weakness in her right arm. According to the surgeon, plaintiff had no injury resulting from the incident that would require her to visit the emergency room. Moreover, her physical complaints postaccident were not caused by the incident but by stress and depression. Her surgery was not the result of the incident and it "absolutely [did] not" cause injury to her neck.

The testimony of Brintle, who testified as an expert, is what is challenged on appeal. When he arrived he saw plaintiff sitting in her car. He did not see signs she had been physically injured; she appeared to be only "dazed." Plaintiff told him defendant had "pinched her" between her car and defendant's truck. She originally said she did not believe she was injured but later in their conversation complained of pain in her left side and shoulder.

Brintle spoke to Bedard, who told him he saw defendant's truck back out and plaintiff yelled to him to get the license plate. He then saw the truck "inch forward," and plaintiff stumbled. Bedard kicked the truck, putting a dent into the side.

Defendant told Brintle he had not hit plaintiff. He also described plaintiff stabbing his truck with a pen. When Brintle examined defendant's truck, he found it uniformly covered with a thin layer of dust. There were no marks showing any contact as plaintiff described the accident; the dust was not disturbed. He did find the dent where Bedard had kicked the truck and the small marks consistent with plaintiff stabbing the truck with a pen. Plaintiff never told him about the stabbing; when he mentioned it to her she stated she had not finished her statement but never did admit it.

Brintle testified defendant "never contacted [plaintiff]" and "his opinion and conclusion was that there was no traffic collision ."

DISCUSSION

1. Admission of Brintle's Opinion

Plaintiff claims the court erred by allowing Brintle to testify to the ultimate issues the jury should have decided, i.e., whether there was a collision and whether plaintiff was injured, and that the testimony was prejudicial because Brintle, "a respected person of authority," "unduly influenced the jury's special verdicts...." Thus, plaintiff concludes, Brintle provided "a false aura of credibility" and "a false foundation for [defendant's]" other expert witnesses. We disagree.

***3** First, when Brintle testified, plaintiff failed to object on these grounds. As defendant argues, this forfeited any right she has to raise the claim on appeal. According to Evidence Code section 353, a judgment may not be reversed unless: "(a) There appears of record an objection to ... the evidence that was timely made and so stated as to make clear the specific ground of the objection ...; and [¶] (b) The [appellate court] is of the opinion that the admitted evidence should have been excluded on the

ground stated and that the error or errors complained of resulted in a miscarriage of justice."

Plaintiff relies on her motion in limine to exclude the testimony of Brintle and a second officer on the basis that, according to their deposition testimony, they did not have an independent recollection of the facts of the case but relied solely on the police report. The court ruled that officers could refresh their recollections using the police report and testify as to any admissions and could also testify to impeach other witnesses. It denied the motion without prejudice.

Had the basis of plaintiff's motion been the same as grounds raised on appeal, the motion might have sufficed because, as plaintiff states, it would have been futile to object again on the same grounds. (See *People v. Abilez* (2007) 41 Cal.4th 472, 494.) But it was not. Moreover, the court denied the motion in limine without prejudice and it is not clear it would have been futile to object during the testimony. The purpose of the rule requiring a timely objection is to allow the trial court to correct any errors, consider the admissibility of the evidence, and give the party seeking to introduce the evidence the opportunity to lay a foundation or otherwise have the testimony admitted. (*People v. Partida* (2005) 37 Cal.4th 428, 434.) That did not occur here.

Even on the merits plaintiff's argument fails. Evidence Code section 801 provides that an expert witness may testify to his opinion if it is "[r]elated to a subject that is sufficiently beyond common experience" so that the opinion aids the jury and is "[b]ased on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known ... or made known to him ..., whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion ..." unless the expert is legally prohibited from relying on that matter. "[T]raffic officers whose duties include investigations of automobile accidents are qualified experts and may properly testify concerning their opinions as to the various factors involved in such accidents, based upon their own observations [citations]" (*Hart v. Wielt* (1970) 4 Cal.App.3d 224, 229), including the circumstances of a collision (*Wells Truckways, Ltd. v. Cebrian* (1954) 122 Cal.App.2d 666, 676-677). Brintle's testimony fell within this framework.

We reject plaintiff's implied claim that Brintle testified as to a question of law and we find nothing in the record, and no record references in plaintiff's brief, supporting her assertion that Brintle testified she sustained no injury. The court did not err in admitting the testimony.

2. Motion for Sanctions

***4** Defendant filed a motion for sanctions, claiming the appeal was frivolous, both subjectively and objectively. (Code Civ. Proc., § 907; Cal. Rules of Court, rule 8.276(a); *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649-650.) Under the subjective standard, the court considers the motives of the party and the party's attorney, in other words, their good faith. (*In re Marriage of Flaherty, supra,* 31 Cal.3d at p. 649.) Under the objective standard, the merits of the appeal are considered from the perspective of a reasonable person, i.e., would one conclude the appeal is "totally and completely devoid of merit." (*Ibid.*)

In opposition, plaintiff's lawyer filed a declaration setting out the process he used in determining whether the appeal had merit. He declared that after reviewing the record, he believed the objection to Brintle's testimony in the motion in limine was sufficient to preserve the issue for appeal, and that if he had not, he would not have filed the appeal. He also stated his belief that Brintle's testimony was erroneously admitted and highly prejudicial.

We are aware that a lawyer's subjective belief in the validity of an appeal is not the test. But "[c]ounsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is *not* by defini-

tion frivolous and should not incur sanctions." (*In re Marriage of Flaherty, supra,* 31 Cal.3d at p. 650.) We are also cognizant of the need to "avoid a serious chilling effect on the assertion of litigants' rights on appeal." (*Ibid.*)

As discussed above, the appeal had no merit and bordered on being frivolous. But we cannot say with confidence that no reasonable attorney would have filed it or that it had no merit whatsoever.

Moreover, despite defendant's argument, the record does not show the appeal is frivolous using a subjective standard. There is no evidence plaintiff would gain anything from delay and, except for defendant's unsubstantiated claim, nothing supports a conclusion she filed the appeal merely to harass him. (*In re Marriage of Flaherty, supra,* 31 Cal.3d at p. 651.) While it is true lack of merit can be evidence of an appellant's bad faith, we do not consider it so here.

DISPOSITION

The judgment is affirmed. The motion for sanctions is denied. Respondent is entitled to costs on appeal.

WE CONCUR: O'LEARY and IKOLA, JJ.

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