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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

VICTOR ANDREYUK et al., Plaintiffs and Respondents, v. WAL-MART TRANSPORTATION, et al., Defendants and Appellants.	C057934 (Super. Ct. No. PM051584)
VALENTINA ANISHCHENKO, Plaintiff and Respondent, v. WAL-MART TRANSPORTATION et al., Defendants and Appellants.	(Super. Ct. No. PM051619

This case arises from a roll-over accident on Interstate 5 (I-5). Plaintiffs brought an action for personal injury and wrongful death against defendants Nigel Mason and his employer

Wal-Mart Transportation, LLC (Wal-Mart). The jury found against plaintiffs on each of their causes of action. In particular, it found that "Mason/Wal-Mart" was negligent, but that "Mason/Wal-Mart's" negligence was not a substantial factor in causing plaintiffs' harm.[1] The trial court granted plaintiffs' motion for a new trial, finding "the jury should have concluded that . . . Mason's negligence (which the jury had found to be true) contributed to the plaintiffs' harm." (Code Civ. Proc., § 657.)[2]

Defendants appeal, contending "no substantial evidence exists to support [the trial court's finding] that Mason's conduct was a substantial factor in causing the accident."

We shall conclude that there is ample evidence in the record to support the trial court's ruling. Accordingly, we shall affirm the new trial order.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the relevant facts in the light most favorable to "'[the trial court's] theory.'" (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 409, 411-412 (*Lane*), quoting *Jones v. Citrus Motors Ontario, Inc.* (1973) 8 Cal.3d 706, 710 (*Jones*).)

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[1] As Mason's employer, Wal-Mart was responsible for any harm caused by Mason's negligence committed within the scope of his employment. (See *Lisa M. v. Henry Mayo Newhall Memorial Hosp.* (1995) 12 Cal.4th 291, 296.) It is undisputed that Mason was acting within the scope of his employment at the time of the accident.

[2] Further undesignated statutory references are to the Code of Civil Procedure.

Plaintiffs were the occupants of a Chevrolet Tahoe that was travelling northbound on I-5 in lane 1 (the fast lane) near the Dunnigan rest stop.[3] That section of I-5 consisted of two northbound lanes of traffic that were separated from the southbound lanes by a dirt median.

The on-ramp from the rest stop to northbound I-5 consisted of a single acceleration lane that ran parallel to lane 2 (the slow lane) of northbound I-5 for several hundred feet before merging with it. The acceleration lane and lane 2 of I-5 were separated by a triangular area known as "the gore area."

Mason was entering the acceleration lane of northbound I-5 from the truck exit from the north end of the Dunnigan rest stop and was driving a tractor-trailer. Valerie McGrath also was entering northbound I-5 from the car exit from the south end of the Dunnigan rest stop via a road that merged with the acceleration lane. She was driving a Subaru Legacy. She was accompanied by her friend Dana Cash, the Subaru's owner.[4]

Mason entered the acceleration lane first, followed by the Subaru. The Subaru attempted to pass Mason on the left, travelling in the gore area, but Mason began merging onto I-5,

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[3] The SUV was occupied by adult siblings Victor Andreyuk, Valentina Anishchenko, and Anna Poulson; Anishchenko's two minor children, Vanessa and Anthony; and Poulson's minor daughter, Sasha.

[4] McGrath, Cash, Cash's father, and the State of California were also named as defendants. McGrath, Cash, and Cash's father settled with plaintiffs prior to trial, and the jury found in favor of the State.

so the Subaru moved into lane 2. The Subaru was parallel with Mason's trailer as Mason merged into lane 2. It was not far enough along to get ahead of Mason, so it merged into lane 1, ahead of plaintiffs' SUV, forcing the SUV off the road. The SUV swerved left onto the median, then drove back onto the road, ahead of Mason and the Subaru, and rolled over several times.

Plaintiffs sued defendants for negligence and wrongful death. Following a seven week trial, the jury found against plaintiffs and in favor of defendants on each cause of action. More specifically, the jury found that Mason was negligent, but that his negligence was not "a substantial factor in causing harm to plaintiffs."

Plaintiffs moved for a new trial, arguing inter alia that there was insufficient evidence to justify the verdict that Mason's negligence was not a substantial factor in causing plaintiffs' harm. (§ 657.) The trial court granted the motion. In its written order, the court stated: "The trial testimony of Dana Cash, Valerie McGrath, Maynard Mills, Nigel Mason, and Paul Herbert and the reasonable inferences to be drawn from that testimony support the following findings:

"The Subaru was at least halfway up the left side of the Wal-Mart truck trailer, Nigel Mason's vehicle, and did not have enough room and time to fall behind Mr. Mason's truck when Mr. Mason merged onto [l]ane 2. Mr. Mason either negligently failed to see the Subaru when he merged onto [l]ane 2, or he saw the Subaru but negligently chose not to slow down his truck, use the remainder of the on-ramp, or move to the right side of the ramp

to allow the Subaru to move ahead of the truck. The weight of the evidence is for the second scenario.

"Based [on] the evidence, the jury should have concluded that Mr. Mason's negligence (which the jury had found to be true) contributed to the plaintiffs' harm. Mr. Mason's negligence was in not staying to the right and allowing the Subaru to take [l]ane 2 first. Mr. Mason's negligence thus forced the Subaru into [l]ane 1 in front of the plaintiffs' vehicle. If Mr. Mason had not caused the Subaru to enter [l]ane 1, there would have been no accident."

DISCUSSION

Defendants contend there is no substantial evidence to support the trial court's finding that Mason's negligence was a substantial factor in causing the accident. As we shall explain, there is ample evidence to support the trial court's finding, and given the deference accorded the trial court's ruling, this appeal borders on the frivolous.

Section 657 provides in pertinent part: "A new trial shall not be granted upon the ground of insufficiency of the evidence . . . unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the . . . jury clearly should have reached a different verdict . . . ."

"The considerable deference . . . section 657 affords the jury when a trial judge is considering a new trial motion is exceeded only by the deference afforded the trial judge when the appellate court reviews an order granting a new trial." (*Mokler*

v. County of Orange (2007) 157 Cal.App.4th 121, 146.) "On appeal from an order granting a new trial [on the ground of insufficiency of the evidence]. . . it shall be conclusively presumed that said order . . . was made only for the reasons specified [therein] . . ., and such order shall be reversed . . . *only if there is no substantial basis in the record for any of such reasons*." (§ 657, italics added.) In other words, "an order granting a new trial under section 657 'must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on [the trial court's] theory.'" (*Lane, supra,* 22 Cal.4th at p. 412.)

As detailed below, McGrath, Cash, and Mills each testified that Mason continued to merge onto I-5 while the Subaru was beside his trailer, thereby forcing the Subaru into lane 1, in front of plaintiffs' SUV. This testimony supports the trial court's finding that Mason's negligence was a substantial factor in causing plaintiffs' harm.

McGrath testified that she had to "g[e]t over twice." "I was behind the truck, then I got over. I was gaining on the truck, and the lane I was in was becoming one with the truck.[5] The lane the truck was in. So then I had to get over again. So I got over a second time." When she got over the second time, the Subaru was "[a]lmost level with" the back of Mason's cab.

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5 McGrath believed that she was in a second merge lane when she first got over but later realized she was in the gore area.

She was not in that position very long before the SUV went off the road. "I had enough time to get over, hit the gas, and then I heard the screeching tires behind me and to the side. And then I saw the SUV roll over in front of me." "I was too far up on the truck to get behind him. I didn't have enough room or time." She got over the second time because she believed Mason was going to collide with the Subaru if she did not. McGrath wrote about the incident the following day in her diary. The entry, which was read to the jury, stated in pertinent part: "As I was pulling out to the . . . on-ramp, I was behind a semi truck, I pulled to the side to try to pass him, but I wasn't going fast enough . . . . I didn't have time or room to slow behind him, because the two lanes were becoming one. And he was going to merge into me. So I looked over my shoulder. Didn't see any cars. And got over into the first lane. Then I heard screeching tires behind me. [¶]. . . [¶] I know it's not a hundred percent my fault. The semi was merging into me, and the other car was going really fast, but I still feel responsible."[6]

Cash testified that the Subaru was "more or less parallel" with Mason as they entered the acceleration lane. The Subaru

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[6] During cross-examination, McGrath testified that she was in lane 2 when the SUV went off the road and did not enter lane 1 until she pulled over after the accident. The trial court reasonably could have concluded that she was confused or mistaken in stating that she did not enter lane 1 before the accident based upon her earlier testimony, the entry she made in her diary the day after the accident, and the testimony of Cash and Mills, which is summarized below.

proceeded into the gore area, which at the time, Cash believed was another lane. As it was travelling in the gore area, the Subaru was "getting farther along next to [Mason]" and was "[a]bout level with [his] trailer." "But then [Mason] started to merge into [lane 2]." McGrath asked if she could get over, and Cash said, "Yes, you can get over." McGrath "got into [lane 2]. Sped up a little more," but "she wasn't far enough to get around [Mason] in [lane 2]. . . . [H]e was . . . starting to take up too much room in the lane. . . . [S]o we needed to . . . get over." McGrath looked and said, "[C]an I go?" Cash responded, "You can go. Speed up a little." McGrath moved into lane 1, and Cash heard screeching tires and saw the SUV come around them and roll over. At the point when the Subaru "had to turn into lane . . . 1, the front bumper of [the] Subaru . . . was just about even with the rear most portion of the cab of the truck[.]" The Subaru was "too far forward" to drop "back to the rear of the trailer to get behind . . . ." It "needed to merge."

Mills testified that he was driving northbound on I-5 in lane 1 and was about 100 yards behind plaintiffs' SUV at the time of the accident. He saw the truck come out of the rest area and into the acceleration lane. The Subaru "followed the truck for two or three seconds, then it . . . jerked out [to the left] to pass the truck and came out . . . of the acceleration lane early . . . ." "[E]ventually, . . . the Subaru . . . [was] in lane . . . 2, with the truck along side of it. They were both essentially in that same lane, the truck hadn't come out

all the way into the lane yet. But there wasn't room for both of them to be there. And so at that point, the Subaru was about halfway up the trailer of the truck . . . ." "The truck was coming into lane 2, and the Subaru was right on the edge of lane 2, because there was no more lane. No more room . . . for that Subaru to be there." The Subaru "had to get into lane . . . 1, at that point in time," and the SUV drove off the road onto the median.

Mason testified that he first saw the Subaru as he was about to enter the acceleration lane and "knew it was going to come out and merge onto the freeway . . . ." He next noticed the Subaru as he was merging onto I-5. He saw it come out from behind his trailer "as a flash." He then took his eyes off of it as he scanned to the right, back, forward, and left. That is when the accident occurred. He checked his mirrors prior to merging into lane 2, and there was nothing there. The trial court was not required to accept Mason's testimony that the Subaru was not next to him as he merged into lane 2. It reasonably could infer that the Subaru was next to Mason's trailer when Mason was merging into lane 2, as testified to by McGrath, Cash, and Mills, and that Mason failed to see it. It also could reasonably conclude that, contrary to Mason's testimony, he saw the Subaru, yet continued to merge left. In any event, "'[a]n abuse of discretion cannot be found in cases in which the evidence is in conflict and a verdict for the moving party could have been reached . . . .'" (*Lane, supra,* 22 Cal.4th at p. 412, quoting *Jones, supra,* 8 Cal.3d at p. 711.)

There was ample evidence to support the trial court's finding that Mason's negligence was a substantial factor in causing plaintiffs' harm.

Defendants argue that the "the trial testimony of [the witnesses named in trial court's order] prove that the Subaru moved from behind Mason's tractor-trailer to pass it on the left *after* Mason had already begun his merge into [l]ane 2. Therefore, his merge, even if negligent, was not a substantial factor in causing [plaintiffs'] damages." (Italics added.) Defendants' argument is off base. First, the trial court's order was not predicated on a finding that the Subaru entered lane 2 first. Rather, the trial court found that "Mason's negligence was in not staying to the right and allowing the Subaru *to take [l]ane 2 first*." (Italics added.) Thus, even assuming Mason entered lane 2 first, the trial court could reasonably conclude that he was negligent in continuing to merge into that lane while the Subaru was along side of him. Moreover, who entered lane 2 first goes to the issue of negligence -- i.e. who had the right of way -- not causation. As the trial court's order indicates, the relevant question is whether Mason's negligence was a substantial factor in causing the Subaru to go into lane 1; thus, forcing the SUV off the road. The trial court answered that question in the affirmative, and substantial evidence supports its conclusion.

DISPOSITION

The order granting a new trial is affirmed. Plaintiffs are awarded their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

BLEASE, Acting P. J.

We concur:

ROBIE, J.

BUTZ, J.