Filed 10/17/08

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

RICHARD ALCALA et al., Plaintiffs and Appellants, v. VAZMAR CORPORATION, Defendant and Respondent.	B191514 (c/w B192883) (Los Angeles County Super. Ct. No. PC034028)

APPEAL from a judgment of the Superior Court of Los Angeles County. Melvin Sandvig, Judge Presiding. Reversed and remanded.

Ourfalian & Ourfalian and Rafi Ourfalian for Plaintiffs and Appellants.

Tropio & Morlan, Scott T. Tropio, Christopher J. Hammond and Jon M. Kasimov for Defendant and Respondent.

---

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts I, III, IV, and V.

Plaintiffs Richard and Angie Alcala appeal from a defense verdict rendered in favor of defendant Earthbound Tire Center in a wrongful death action. In the published portion of this opinion, we conclude that the trial court did not commit error when it declined to instruct the jury on negligence per se. In the unpublished portion of this opinion, we conclude that the verdict was supported by substantial evidence, but that the trial court committed prejudicial error by refusing to admit a highly relevant and admissible statement made by defendant. Accordingly, we reverse the judgment in favor of defendant and order a new trial.

BACKGROUND

A. The accident.

On November 30, 2002, Andrew Alcala, who was 18 years old at the time, sustained fatal injuries after losing control of his vehicle (a P.T. Cruiser) in the rain and colliding with another vehicle going the opposite direction on Sierra Highway in Santa Clarita, California.

B. The trial.

Richard and Angie Alcala, the decedent's parents, brought a wrongful death action against Earthbound Tire Center (Earthbound), which had serviced the P.T. Cruiser just two weeks before the accident.[1] They alleged that it negligently repaired, approved, authorized, maintained, inspected, and serviced the P.T. Cruiser.

At trial, the parties presented starkly different versions of the events leading up to the accident.

1. The June 17, 2002 service.

Richard Alcala testified that he had known the owner of Earthbound, Vic Minassian, for 10 years and regularly brought his family's cars to Earthbound for new

---

[1] Vazmar Corporation, the entity named as defendant in the underlying complaint, does business as Earthbound Tire Center.

tires and service. Richard believed Minassian was knowledgeable about the services he performed and usually followed Minassian's recommendations.[2] On June 17, 2002, approximately six months before the accident, Richard brought the P.T. Cruiser to Earthbound with the intention of buying four new wheels. Along with the new wheels, Minassian recommended four new tires and a front-end alignment. Richard testified that he agreed with Minassian's recommendations and instructed him to "do it all at one time." Richard left the car, returned some time later in the afternoon, and paid, believing that Minassian had performed the front-end alignment and that the new tires were under warranty.

Minassian testified that when Richard initially brought the P.T. Cruiser into Earthbound in June 2002, Richard only agreed to pay for four new wheels and tires. After Richard left the car for service, Minassian inspected the car and saw that the front two tires had exposed steel due to extensive wear. He disposed of these worn front tires, along with the rear tires, and installed four new tires (manufactured by Dunlop) on the car. According to Minassian, when Richard came to pick up the car, Minassian warned him of the following: (1) it was dangerous driving on tires with exposed steel, (2) the front axle required an alignment, (3) if Richard did not get a front-end alignment, the new front tires would suffer the same wear as the tires Minassian had just removed, and (4) if Richard did not get an alignment that day, the new tires he had just purchased would not come with a warranty. Minassian testified that despite these warnings, Richard elected not to have the alignment at that time. Minassian, however, did not make any notations in the work order or invoice documenting his warnings to the Alcalas.

2. The November 16, 2002 service.

Richard testified that on November 16, 2002, he and his wife brought the P.T. Cruiser to Earthbound again because he "didn't like the way it was driving" and he wanted Minassian to check the tires. The Alcalas left the car at Earthbound and when they returned to pay for the service, Minassian informed Richard that he had rotated the

---

[2] We refer to Richard Alcala as "Richard" and Angie Alcala as "Angie" for clarity, and not out of disrespect for the parties.

tires and performed a front end alignment. According to Richard, Minassian did not inform him that the front tires (which Minassian had rotated to the rear) were extremely worn, did not recommend that he buy new tires, and did not warn him it was dangerous to leave the worn tires on the car. Richard testified that had Minassian advised him he needed new tires, Richard would have purchased them without hesitation or questions. According to Richard, "[a]s long as he told me I needed tires, that was good enough for me." Angie testified that she used her credit card to pay for the service, but she never spoke to Minassian on that date.

In contrast, Minassian testified that he did not remember seeing Richard on November 16. According to Minassian, Angie brought the P.T. Cruiser to Earthbound and instructed Minassian to perform an alignment, rotate the tires, and change the oil. After Angie left and service on the P.T. Cruiser began, Minassian saw that the car's two front tires were severely worn and "unsafe." The damage extended beyond the "secondary rubber" and "was almost to the steel." Minassian testified that he went to the fast food restaurant next door to find Angie and when he could not find her, he called the phone number contained in his records for the Alcalas. After no one picked up, Minassian went ahead and rotated the tires by moving the front worn tires to the rear, and the rear tires to the front. He performed the rotation despite his belief that the worn tires posed a danger to the occupants of the vehicle, possibly a danger to the public, and "were bad [under] any standards."

According to Minassian, when Angie returned to pay for the service, he informed her that she needed two new tires to replace the worn tires and she responded "I will tell [Richard], and we will do it later." Minassian admitted that he did not explain to Angie that the tires were bald, nor did he warn her of the dangers associated with driving on tires with such extensive wear. Again, Minassian did not document the fact that he recommended two new tires in the work order or invoice.

3. The expert testimony on tire placement.

Harold Herzlich, the tire industry expert retained by the Alcalas, testified that by 2002, there was a "consensus growing" in the tire industry that newer tires (i.e., tires with

less wear) should be installed on the rear wheels. As early as 1994, Dunlop, the manufacturer of the tires Minassian sold to the plaintiffs, issued regular bulletins instructing service providers to install newer tires on the rear wheels. Not all manufacturers, however, believed that newer tires should be installed in the rear and in 2002, the Rubber Manufacturers Association did not have a standard recommendation on the issue.

Additionally, Herzlich examined the worn tires on the P.T. Cruiser and identified areas on the tires "that go down to less than 1/32nd" of an inch and other areas with "exposed fabric." According to Herzlich, this extensive wear "strongly" affected the traction of the tires, especially on wet roadways. Herzlich further testified that when a tire retailer encounters dangerously worn tires, such as the tires Minassian found on the P.T. Cruiser, the retailer should convince the customer to "get rid" of the tires, warn the customer about the "danger" associated with driving on worn tires, and if the customer rejects the advice, the retailer should refuse "to touch the vehicle" and document his warnings to the customer.

4. The expert testimony on causation.

Michael Varat, the accident reconstructionist retained by the Alcalas, testified that their son lost control of the vehicle because the rear tires, which were worn down to the steel, lost traction with the road and caused the entire vehicle to fishtail and spin. Varat also testified that when a service provider rotates damaged or worn tires from the front axle to the rear axle, like Minassian had done two weeks before the accident, the provider decreases the safety of the vehicle on both wet and dry roadways. According to Varat, placing worn tires on the rear axle of a vehicle increases the chances that the vehicle will lose control due to inadequate traction or suffer a tire blowout.

Paul Guthorn, the accident reconstructionist retained by Earthbound, testified that the Alcalas' son lost control of the car because he was driving at an excessive speed over a wet roadway, which caused the tires to hydroplane. Guthorn agreed that the tires on the P.T. Cruiser had worn down to such an extent that they should have been replaced under

industry standards, but maintained that the accident would have occurred, given the speed and the water conditions, even if the tires had a tread depth of 6/32 of an inch.

5. The verdict and subsequent appeal.

The jury unanimously found that Earthbound was not negligent. The Alcalas moved for a new trial asserting numerous errors. The trial court denied the motion for new trial and the Alcalas timely appealed.

DISCUSSION

I. Substantial evidence.

The Alcalas contend insufficient evidence supports the jury's finding that Minassian was not negligent.

A. Standard of review.

The standard of review utilized by an appellate court addressing an argument of insufficiency of the evidence is well established. "In reviewing the evidence on such an appeal[,] all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury." (*Crawford v. Southern Pac. Co*. (1935) 3 Cal.2d 427, 429.) Substantial evidence is evidence of "'ponderable legal significance . . . reasonable in nature, credible, and of solid value.'" (*Ofsevit v. Trustees of Cal. State University & Colleges* (1978) 21 Cal.3d 763, 773, fn. 9.)

B. Substantial evidence supports the jury's finding of no negligence.

The jury concluded Minassian was not negligent. Substantial evidence supports this finding. Minassian testified that when the P.T. Cruiser was brought to Earthbound for service on June 17, Minassian warned the Alcalas that the vehicle required an immediate front end alignment and without an alignment, the front tires would suffer a

severe and dangerous level of wear. He also testified that when the P.T. Cruiser was returned to Earthbound for service on November 16, he concluded that the two front tires needed to be replaced but that he could not reach either of the Alcalas at the time. Therefore, he rotated the tires as requested by Angie and when she returned to pick up the car, he told her she needed two new tires to replace the worn ones. She said she would tell her husband and they would replace the tires later. Although the Alcalas testified that Minassian did not warn them of the need for a front end alignment or new tires, and that they would have unquestionably paid for such services if Minassian had simply recommended them, under the applicable standard of review, we must assume the jury believed Minassian's testimony and disbelieved the Alcalas' testimony. Accordingly, substantial evidence supported the jury's finding that Minassian did not act negligently. We now turn to the Alcalas' remaining claims of error.

II. Instructional error.

A. Standard of review.

Upon request, a party is entitled to correct, non-argumentative instructions on every theory of the case advanced by the party that is supported by substantial evidence. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 (*Soule*).) "The trial court may not force the litigant to rely on abstract generalities, but must instruct in specific terms that relate the party's theory to the particular case." (*Ibid*.)

On an appeal claiming jury instructional error, including claims that the court improperly refused an instruction, we view the evidence in the light most favorable to the appellant. In such cases, we assume that the jury might have believed the evidence upon which the instruction favorable to the appellant was predicated. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2006) ¶ 8:149, p. 8-99, citing *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 674.)

"A judgment may not be reversed on appeal, even for error involving 'misdirection of the jury,' unless 'after an examination of the entire cause, including the evidence,' it appears the error caused a 'miscarriage of justice.' (Cal. Const., art. VI,

§ 13.)" (*Soule, supra,* 8 Cal.4th at p. 574.) "Instructional error in a civil case is prejudicial '[w]here it seems probable' that the error prejudicially affected the verdict. [Citation.] It is not enough that there may have been a 'mere possibility' of prejudice. [Citation]." (*Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1156.) "Thus, when deciding whether an error of instructional omission was prejudicial, the court must also evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (*Soule, supra,* 8 Cal.4th at pp. 580-581.)

B. No error was committed.

Based upon Vehicle Code sections 27465 and 27501, the Alcalas requested that the trial court instruct the jury on negligence per se. They argue the court erred by failing to so instruct.

The negligence per se doctrine is codified in Evidence Code section 669, subdivision (a), under which negligence is presumed if the plaintiff establishes four elements: (1) the defendant violated a statute, ordinance, or regulation; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence the nature of which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

"[A]pplication of the doctrine of negligence per se means that the court has adopted the conduct prescribed by the statute as the standard of care for a reasonable person in the circumstances." (*Casey v. Russell* (1982) 138 Cal.App.3d 379, 383.) "In such a case, a violation of the statute is presumed to be negligence." (*Ibid.*) A defendant may rebut the presumption of negligence with "proof" that "violating the statute, ordinance, or regulation . . . might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." (Evid. Code, § 669, subd. (b).)

With the foregoing in mind, we turn to the statutes in question. As pertinent, Vehicle Code section 27465 provides:

> "(a) No dealer or person holding a retail seller's permit shall sell, offer for sale, expose for sale, or install on a vehicle axle for use on a highway, a pneumatic tire when the tire has less than the tread depth specified in subdivision (b). This subdivision does not apply to any person who installs on a vehicle, as part of an emergency service rendered to a disabled vehicle upon a highway, a spare tire with which the disabled vehicle was equipped.
> "(b) No person shall use on a highway a pneumatic tire on a vehicle axle when the tire has less than the following tread depth, except when temporarily installed on a disabled vehicle as specified in subdivision (a):
> "(1) One thirty-second (1/32) of an inch tread depth in any two adjacent grooves at any location of the tire . . . ."

Similarly, Vehicle Code section 27501 provides:

> "(a) No dealer or person holding a retail seller's permit shall sell, offer for sale, expose for sale, or install on a vehicle for use on a highway, a pneumatic tire which is not in compliance with regulations adopted [by the Department of Transportation]. This subdivision does not apply to any person who installs on a vehicle, as part of an emergency service rendered to a disabled vehicle upon a highway, a spare tire with which the disabled vehicle was equipped.
> "(b) No person shall use on a highway a pneumatic tire which is not in conformance with such regulations."

It is clear from the language of the statutes that sections 27465 and 27501 were enacted in an attempt to remove unsafe tires from vehicles using the roadways and highways of the state. Subdivision (a) of both statutes precludes dealers and retail sellers of tires from installing such tires and subdivision (b) of both statutes prevents any person from using such tires.

The trial court concluded that neither statute was applicable under the circumstances presented because it interpreted each as requiring an installation in connection with a sale, not a tire rotation.

The Alcalas argued below, and now on appeal, that a tire rotation is no different than an "installation" and therefore sections 27465 and 27501 are applicable. Earthbound argues that both statutes are "meant only to prohibit a dealer or retail seller from

installing a worn tire as part of a sale of either the tire itself or of a vehicle equipped with the tire." Neither statute, Earthbound maintains, "prohibits a repair shop from *reinstalling* a tire that it removed from the car" even if the tire is dangerously bald.

In assessing the parties' claims, we are guided by established canons of statutory construction:

"In construing a statute, our role is to ascertain the Legislature's intent so as to effectuate the purpose of the law. [Citation.] In determining intent, we must look first to the words of the statute because they are the most reliable indicator of legislative intent. [Citation.] If the statutory language is clear and unambiguous, the plain meaning of the statute governs. [Citation.]" (*Absher v. AutoZone, Inc*. (2008) 164 Cal.App.4th 332, 339 (*Absher*).) "But the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. . . . The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act." (*Absher, supra*, 164 Cal.App.4th at p. 340.) "An interpretation that renders related provisions nugatory must be avoided [citation]; each sentence must be read not in isolation but in the light of the statutory scheme [citation]; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed [citation]." (*Ibid.*)

"When the plain meaning of the statutory text is insufficient to resolve the question of its interpretation, the courts may turn to . . . the legislative history of the enactment. 'Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent.'" (*Absher, supra,* 164 Cal.App.4th at p. 340.) "Finally, the court may consider the impact of an interpretation on public policy, for '[w]here uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation.'" (*Ibid*.)

Under the plain language of both statutes, a dealer or retailer of tires cannot "sell, offer for sale, expose for sale, or install on a vehicle" a tire that does not meet applicable tread depth requirements. There is nothing in the plain language of either statute to

suggest that the word "install" is limited only to those tire installations that are incident to a sale. Even though the word "install" is preceded three times by the word "sale" and its variations, as Earthbound points out, it is also preceded by the word "or," a disjunctive phrase that separates it from the previous words. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 622, [the "'ordinary and popular' meaning of the word 'or' is well settled. [Citation.] It has a disjunctive meaning: 'In its ordinary sense, the function of the word 'or' is to mark an alternative such as 'either this or that.'"].) Therefore, we must construe the meaning of the word "install" as intended by the Legislature.

In 1970, the Legislature added sections 27465 and 27501 to the Vehicle Code to address concerns raised by the California Highway Patrol (CHP) "that worn tires are much more likely to fail as well as hydroplane on a wet surface."[3] (Assem. Com. of Transportation, Analysis of Assem. Bill No. 733 (1970 Reg. Sess.) p. 1.) The Legislature agreed with the CHP that worn tires "constitute a definite hazard," and recognized that regulation over such tires was "grossly lacking." (Enrolled Bill Report of Assem. Bill No. 733 (1970 Reg. Sess.) p. 1.) In response, the Legislature passed both provisions to "repeal[] the present tire standards applicable to the sale of new passenger vehicle tire and permit[] the establishment of standards for tires which are sold, installed, or used on a vehicle when operated upon a highway." (Assem. Com. on Transportation, Analysis of Assem. Bill No. 733 (1970 Reg. Sess.) p. 1; see also Enrolled Bill Report of Assem. Bill. No. 733 (1970 Reg. Sess.), pp. 1-2 [legislation "would establish standards for tires which are sold, installed or used on a vehicle when operated upon a highway"].)

The Journal of the Assembly describes the intent of Bill No. 733 as follows:

> "Because worn tires are much more likely to fail and skid particularly on wet surfaces, they constitute a particular hazard to safety on the highway.
>
> "California does not now prescribe standards for vehicle tires after they have been sold or installed for the first time.

---

[3] Both provisions were contained in one bill, Assembly Bill No. 733, which was enacted as Statutes 1970, chapter 261.

"To better protect tire users, Assemblyman Jerry Lewis has submitted an Administration bill, AB 733, which will permit setting high safety standards for all tires, *resold or new*, in use on motor vehicles in the state.

"The law will define the minimum amount of tire tread and durability necessary for a vehicle to operate safely on our highways. It will also prohibit the *sale of used and recap tires* which fail to meet safety standards established by the California Highway Patrol."

(Journal of the Assembly (Vol. 1, March 9, 1970), p. 976, italics added.)

In 1971, the Legislature amended both sections 27465 and 27501 to include an express exemption for emergency roadside service providers who replace a failed tire with a spare tire that does not meet the minimum requirements of the statutes.[4] (Assem. Com. of Transportation, Rep. on Assem. Bill No. 1977 (1971 Reg. Sess.) as amended on May 24, 1971, p. 1.) Because emergency roadside service providers also have retail seller's permits, the Legislature recognized that under the 1970 legislation, those service providers would violate the law by aiding a stranded motorist. (Assem. Com. on Policy, Material on Assem. Bill No. 1977 (1971 Reg. Sess.) quoting from letter to Committee Consultant Samuel Bruce and Assemblyman Joe Gonsalves; see also Assem. Com. of Transportation, Rep. on Assem. Bill No. 1977 (1971 Reg. Sess.) as amended on May 24, 1971, p. 1 ["Under the current law, the tow truck operator violates the law if he installs such a tire"].) The amendments "would permit a person providing emergency service to install an otherwise unlawful tire in order to get a disabled vehicle off the highway." (Assem. Com. of Transportation, Rep. on Assem. Bill No. 1977 (1971 Reg. Sess.) as amended on May 24, 1971, p. 1.)

Taking into consideration the legislative history, and specifically the italicized language within the Journal of the Assembly quoted above referring to "used and recap tires," we agree with Earthbound that the statutes were not intended to apply when a tire *mounted on the vehicle is removed and remounted* thereon by the dealer or retail seller.

---

[4] The amendments to both sections 27465 and 27501 were contained in one bill, Assembly Bill No. 1977, which was enacted as Statutes 1971, chapter 510.

This construction is consistent with the intent of the 1971 amendment to protect emergency roadside service operators who remove a failed tire and replace it with a spare tire which does not meet the minimum requirements of the sections. And such a construction reflects common sense. Any other interpretation would prevent repair shops (that happen to sell tires) from performing routine service jobs that require the removal and reinstallation of tires (e.g., replacing worn brakes) on any vehicles with tires less than the required tread depth. Such a result certainly does not comport with the Legislature's stated purpose of increasing road safety.

The trial court did not err in declining to instruct the jury on negligence per se based on sections 27465 and 27501.

III. Evidentiary error.

A. Standard of review.

We review a trial court's evidentiary rulings for an abuse of discretion. (*People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 639-640.) An evidentiary ruling, even if erroneous, is not reversible absent a miscarriage of justice. (Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836.) As the Supreme Court held in *Watson* , "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*, *supra*, 46 Cal.2d at p. 836.)

B. Statement from Earthbound's website.

The Alcalas contend the trial court committed prejudicial error when it refused to admit a printout from defendant Earthbound's website containing the statement "new tires go on the rear." We agree.

On direct examination, Minassian, who had 42 years of experience in the tire industry, testified that on a front wheel drive vehicle (such as the P.T. Cruiser), it was safer to install new tires on the front axle and worn tires on the rear axle. Later on in the trial, the Alcalas attempted to impeach Minassian's testimony by introducing a printout

of Earthbound's website which contained the statement "new tires go on the rear."[5] The trial court ruled that the Alcalas could not introduce the statement because it was irrelevant. It reasoned that because Minassian's nephew had set up the website and Minassian "didn't really know what was even in it," the statement was irrelevant. The trial court noted that "if [Minassian] had testified he set it up, he did it, it was his thing, he updated it; it might be different."

The trial court erred. When asked by plaintiffs' counsel whether he recalled seeing the statement "new tires go on the rear" on Earthbound's website, Minassian testified that he was "100 percent" sure that his website did not contain such a statement. Although Minassian's nephew created the website, Minassian testified that he supplied the information for the website, looked at the final product, did not make any changes, and approved of the website and its contents. Although Minassian later backtracked from this testimony and stated he "looked" at the final website, but "didn't go through every single page and look at it and review it and make corrections and stuff like that," the Alcalas had the right to impeach his earlier testimony that he was "100 percent" sure that his website never contained the statement "new tires go in the rear." Thus, it was an abuse of discretion for the trial court not to admit a printout of the website for impeachment purposes. (See *Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1573 [printouts from internet websites are admissible to show the existence of a party's statement on the website itself].) Moreover, the printouts from Earthbound's website constituted a party admission. (See Evid. Code, § 1220 ["Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity"]; Evid. Code, § 250 ["'Writing' means . . . any form of communication or representation,

---

[5] Earthbound takes issue with the fact that the Alcalas sought to introduce the contents of this website during one of their expert's testimony without fair notice to Earthbound. We do not believe a company need be warned about the contents of its own website.

including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored"].) Thus, the trial court should have admitted the printout on this additional ground.

We further conclude the trial court's error was prejudicial. The Alcalas' key theory at trial was that Minassian acted negligently by rotating the front worn tires to the rear. The Alcalas' expert testified that by 2002, the "growing consensus" in the tire industry was that the better tires (i.e., those with less wear) should be installed in the rear. He also testified that Dunlop, the manufacturer of the tires Minassian sold to the Alcalas, recommended that newer tires go on the rear. This testimony was consistent with the statement on the website which Minassian disavowed. Had the jury been able to hear evidence that he did not follow his own recommendation on the website, it is reasonably probable the jury would have disbelieved Minassian's testimony and concluded he acted negligently by placing the worn tires on the rear.

Finally, we reject Earthbound's contention that the Alcalas waived their right to raise this error on appeal by opposing the defense's two motions for a mistrial. Earthbound's first motion for a mistrial occurred *before* the trial court excluded evidence of Earthbound's website. Thus, the Alcalas could not have predicted the trial court would exclude the website's content. Although Earthbound's second motion for mistrial occurred after the trial court's ruling, defense counsel made the motion on the seventh day of trial when plaintiffs' case was nearly complete. At that point in the trial, the Alcalas had invested considerable resources into their case (including the examination of several retained expert witnesses) and could not be expected to stipulate to a mistrial based solely on their counsel's belief that the trial court committed error.[6]

In short, the Alcalas objected vigorously to the trial court's ruling and that was sufficient to preserve the issue for appeal.

---

[6] Had the trial court granted a mistrial, it is reasonable to assume that the same trial judge would have presided over the second trial and would have made the same ruling. This situation is unlike the situation where prejudicial facts are revealed to the jury and the grant of a mistrial cures the error with a new trial and an admonishment that the prejudicial facts not be disclosed to the new jury.

Because the matter will be returned to the trial court for a new trial, we will further consider arguments raised on appeal that may have an impact on the new trial.

C. Minassian's deposition testimony.

In his pre-trial deposition, Minassian testified that on June 17, he sold the Alcalas four new wheels and tires, balanced the tires and installed 20 lug nuts. At trial, Minassian testified that in addition to selling the Alcalas new wheels, tires, and lug nuts, he also recommended a front-end alignment, which the Alcalas rejected. When the Alcalas attempted to read Minassian's deposition testimony to the jury, the trial court refused on the ground that the deposition testimony did not impeach Minassian's trial testimony.

California Code of Civil Procedure section 2025.620, subdivision (b) provides: "An adverse party may use *for any purpose*, a deposition of a party to the action . . . ." (Italics added.) Under the plain language of the statute, the Alcalas had the right to use Minassian's deposition testimony for any purpose. They were not limited to using it for impeachment purposes only. Thus, the trial court's ruling was erroneous.

D. The Blythe Report

The Alcalas contend the trial court prejudicially erred when it refused to allow their tire industry expert, Herzlich, to read from the Blythe Report, an authoritative scientific paper on tire traction under various road conditions, verbatim. The trial court's ruling was correct. (*Lilley v. Parkinson* (1891) 91 Cal. 655, 656 [expert witness may not be asked to read from standard works and treatises for the purpose of placing before the jury the author's views as if they were original evidence].)

IV. Alleged attorney misconduct.

The Alcalas contend defense counsel engaged in prejudicial misconduct during his closing statement.

During closing statement, Earthbound's counsel represented to the jury that Varat, plaintiffs' accident reconstructionist, testified that "it doesn't matter if the tires were rotated. In this case, the accident may have happened anyway." This came close to a

mischaracterization of Varat's actual testimony. When asked by defense counsel whether the decedent's accident would have occurred if Minassian had left the worn tires on the front axle, Varat testified: "*Not this accident*, but those tires don't belong anywhere on the vehicle. But even on the front, an accident is possible. *Not this one*, but yes, an accident is possible." (Italics added.) Upon retrial, the same issue may or may not come up. We only note our observation at this time.

Also during closing statement, Earthbound's counsel made several references to trace amounts of methamphetamines in the decedent's blood at the time of the accident. These references were supported by plaintiffs' expert, who testified that the coroner's office identified trace amounts of methamphetamine and/or amphetamine metabolites. The Alcalas raised the issue of methamphetamines first, starting with their opening statement, and defense counsel specifically stated during his closing argument that he had no opinion as to whether the decedent was impaired at the time of the accident. Thus counsel's statements were not misconduct.

V. The trial court's time limits on closing arguments.

Finally, the Alcalas contend the trial court committed prejudicial error by imposing "unreasonable time limitations" on their counsel's closing argument.

Unless there is a showing to the contrary, a reviewing court must assume the trial judge performed his or her duty without bias or prejudice. (*Rosenfield v. Vosper* (1948) 86 Cal.App.2d 687, 695.) Under California law, it is the duty of the trial judge to control the course of the trial and to confine argument within reasonable lengths. (*People v. Marshall* (1996) 13 Cal.4th 799, 854-855 ["trial court retains discretion to impose reasonable time limits and to ensure that argument does not stray unduly from the mark"].) In the absence of a showing of abuse of discretion on such matter, the trial court's designation of the limits of the argument will not be set aside on appeal. The burden is on the party complaining of the order to establish an abuse of discretion. Unless a clear case of abuse is shown and unless there has been a miscarriage of justice,

an appellate court will not substitute its opinion and thereby divest the trial court of its discretionary power. (*Eley v. Curzon* (1953) 121 Cal.App.2d 280, 286.)

Before closing arguments commenced, the trial court advised the attorneys for both parties that each would have 60 minutes to present closing argument. Plaintiffs' counsel stated: "Your honor, to be on the safe side, I think an hour and 15 minutes would be a fair assessment." In other words, plaintiffs' counsel sought the court's approval to use 75 minutes. That was five minutes less than counsel actually used during closing. The Alcalas do not cite any legal authority to support their contention that 80 minutes of closing argument, which was more than they originally requested, was insufficient for a wrongful death case. Nor do the Alcalas explain how the time limitation actually prejudiced their case. Simply asserting that their counsel could not effectively argue their case is insufficient to demonstrate prejudice. Thus, the Alcalas have failed to meet their burden of demonstrating an abuse of discretion and prejudice.

DISPOSITION

We reverse the judgment and order a new trial.[7] The plaintiffs are awarded their ordinary costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION.

HASTINGS, J.[*]

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

---

[7] Because we reverse and order a new trial, we do not reach plaintiffs' appeal from the trial court's order denying their motion to tax costs.

[*] Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.