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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

LIBERTI McDONALD,

Plaintiff and Respondent,

v.

DAVID CARL BIGGS,

Defendant and Appellant.

F061040

(Super. Ct. No. CV261306)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. William D. Palmer, Judge.

Sedgwick, Christina J. Imre and Douglas J. Collodel; Hanger, Steinberg, Shapiro & Ash and John A. Demarest for Defendant and Appellant.

Reed Smith, Margaret M. Grignon and Wendy S. Albers; R. Rex Parris Law Firm, R. Rex Parris, Jason P. Fowler and Alexander R. Wheeler for Plaintiff and Respondent.

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Defendant David Carl Biggs appeals from a judgment entered on a jury verdict in favor of plaintiff Liberti McDonald. He contends the jury's answers on the special verdict form are fatally inconsistent and that the court prejudicially erred in permitting plaintiff to reopen her case-in-chief during presentation of defendant's case. In addition, he contends the court erred in awarding prejudgment interest pursuant to Code of Civil Procedure section 998. We affirm the judgment.

FACTS AND PROCEDURAL HISTORY

In August 2005 defendant rear-ended plaintiff's vehicle. The impact of the collision drove plaintiff's left shoulder into the door pillar beside her seat. Although she did not feel the injury at the scene of the accident, within a few hours plaintiff experienced pain in her shoulder and down her left arm. (Defendant acknowledged the accident was his fault and admitted liability; the trial concerned only the issues of injury and damages.)

Over the course of the next 18 months, plaintiff received treatment from several doctors. Because plaintiff's pain persisted beyond the normal healing period for the bruising of her shoulder, one of her treating physicians referred plaintiff to an orthopedist who, unable to resolve plaintiff's persistent (and worsening) pain symptoms, then referred plaintiff to a neurologist. The neurologist diagnosed plaintiff as having complex regional pain syndrome, also known as reflex sympathetic dystrophy or RSD. (The parties and most of the witnesses used the RSD terminology and, while the expert witnesses testified that this terminology was outdated, we will adopt the parties' usage.) During this time, plaintiff testified, she had pain, swelling and discoloration in her arm, which continued throughout, with minor intervals during which some attempts at treatment by the physicians resulted in temporary relief. She presented evidence concerning the poor prognosis for full recovery and the need for long-term care and possible corrective surgery in the future. Defense evidence suggested the pain resulted

from subsequent injuries unrelated to the automobile accident and that the pain was not as severe as plaintiff described it.

Plaintiff waived any claim for past economic damages. The jury was instructed on past and future noneconomic damages and on future economic damages. The jury returned a special verdict on these three damages issues. It placed “0” in the blank for “[p]ast non-economic loss,” \$350,000 in the blank for “[f]uture non-economic loss,” and \$5,808,083.40 in the blank for “[f]uture economic loss.” The court entered judgment on June 10, 2010, in accordance with the verdict. Thereafter, the court denied defendant’s motion for new trial. The court granted plaintiff’s motion for prejudgment interest on the grounds that defendant had rejected plaintiff’s settlement offer made pursuant to Code of Civil Procedure section 998. (See Civ. Code, § 3291.) Defendant appealed.

DISCUSSION

A. The Special Verdicts Were Not Inconsistent

Defendant contends that the jury’s award of damages for future economic and noneconomic loss is irreconcilably inconsistent with the jury’s award of no damages for past noneconomic loss. Defendant contends that pain is the defining characteristic of RSD, that plaintiff was only entitled to compensation for injury arising from the automobile accident, and there was no evidence that would have supported a finding of onset of compensable pain at a date on or after the verdict in 2010 (instead of within, at most, a few weeks after the accident in 2005). As a result, defendant contends, the jury’s conclusion that plaintiff suffered no compensable noneconomic loss in the “past” (i.e., before trial) is wholly and necessarily inconsistent with the jury’s conclusion that plaintiff would suffer compensable loss, arising from the accident, after the trial. Although defendant did not raise any issues concerning the verdicts before the jury was discharged, he raised the claim of inconsistent verdicts as a part of his new trial motion, which the court denied.

Plaintiff contends the verdicts are not inconsistent on, essentially, two theories. First, plaintiff says the jury may simply have determined that while plaintiff indeed had pain and other symptoms sufficient to support a diagnosis of RSD, the level of such pain in the past was not disabling (or otherwise, in the jury's estimation, worthy of compensation); nevertheless, the jury credited the evidence that plaintiff's condition was likely to worsen over time, and would result in future pain and the necessity for future medical care. Second, as the trial court concluded, the jury was unable or unwilling to assign a specific value to past and future pain and, under the jury's interpretation of the damages instructions, simply made a single award of damages for past and future noneconomic loss.

On appeal, we review the issue of inconsistent verdicts de novo. (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1092.) When, as here, neither party requests that an ambiguous verdict be returned to the jury for clarification, "it falls to 'the trial judge to interpret the verdict from its language considered in connection with the pleadings, evidence and instructions.' [Citations.] Where the trial judge does not interpret the verdict or interprets it erroneously, an appellate court will interpret the verdict if it is possible to give a correct interpretation. [Citations.] If the verdict is hopelessly ambiguous, a reversal is required, although retrial may be limited to the issue of damages." (*Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456-457.)

The most analogous appellate cases dealing with inconsistent special verdicts involve circumstances in which a jury has awarded punitive damages after not awarding compensatory damages.¹ Thus, in *Haydel v. Morton* (1935) 8 Cal.App.2d 730 (*Haydel*),

¹ The remaining "inconsistent verdict" cases generally arise where the jury has, at different points in the verdict form, either placed different values on the same property based on the same evidence (see *Zagami, Inc. v. James A. Crone, Inc.*, *supra*, 160 Cal.App.4th at p. 1093; *City of San Diego v. D.R. Horton San Diego Holding Co., Inc.*

the jury returned verdicts on slander causes of action awarding compensatory damages “in the sum of \$00” and punitive damages in the amount of \$10,000. (*Id.* at p. 736.) Because punitive damages are not authorized unless the plaintiff suffered at least nominal actual damages, the court was required to determine whether the award of “\$00” constituted a finding that the plaintiff did not suffer actual damages or, instead, merely indicated that the jury “inadvertently or by some mischance” (*id.* at p. 737 quoting from *Clark v. McClurg* (1932) 215 Cal. 279, 284 (*Clark*), discussed *post*) omitted to assess compensatory damages. (8 Cal.App.2d at p. 737.) In the circumstances before it, the court concluded that the jury’s award of “\$00” constituted an express finding that the jury found no actual damages: “[W]e believe it impossible to place any other construction upon said verdicts” (*Ibid.*) Accordingly, the trial court’s order for a new trial was affirmed. (*Ibid.*; see also *Costerisan v. Melendy* (1967) 255 Cal.App.2d 57, 60.)

By contrast, in *Clark, supra*, 215 Cal. 279, the jury left blank the space provided on the verdict form for an award of compensatory damages and awarded \$5,000 punitive damages. (*Id.* at p. 281.) Observing that the jury in that case was instructed that it could “render a verdict in favor of the plaintiff, even though she has not proved any special damage,” (*id.* at p. 283) the Supreme Court concluded that the jury’s award of punitive damages implied that the jury had found the underlying defamation, for which at least nominal damages are presumed (*id.* at p. 284). The court concluded that the jury’s failure, “inadvertently or by some mischance, [to assess] the entire damages as

(2005) 126 Cal.App.4th 668, 683), or has made a finding of fact that contradicts a finding elsewhere in the verdict (see *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 359). Accordingly, these cases provide limited guidance in the circumstances presented in the case before us.

exemplary, instead of segregating them, constitutes an error of form rather than of substance,” not requiring reversal of the judgment of the plaintiff. (*Ibid.*)²

Appellate courts have disagreed about the meaning of the two cases (see *Jackson v. Johnson* (1992) 5 Cal.App.4th 1350, 1357-1358; *James v. Public Finance Corp.* (1975) 47 Cal.App.3d 995, 1002-1003.) 7 Witkin, California Procedure (5th ed. 2008) Trial, section 363, page 423, describes any distinction between *Clark* and *Haydel* based only on the absence of zeros in one case and their presence in the other to be “thin.” There were other factors in the two cases, however, that are germane to consideration of the issues in the present case. In *Clark* the underlying defamation was clear from the evidence, and the instruction on punitive damages created ambiguity that the jury apparently resolved by awarding a verdict for plaintiff, as phrased by the instruction, “even though she has not proved any special damage.” (*Clark, supra*, 215 Cal. at p. 283.) In *Haydel*, by contrast, there was no such evidence and the jury’s award of damages on a related count indicated that the jury consciously decided against liability on the defamation count. (See *James v. Public Finance Corp., supra*, 47 Cal.App.3d at p. 1004.)

We agree with *James v. Public Finance Corp., supra*, 47 Cal.App.3d at page 1004, that inconsistent verdict cases must be decided on their own facts. In the present case, there was overwhelming evidence that plaintiff suffered the same kinds of pain before the verdict that she would be expected to suffer after the verdict. The significant question was whether RSD was a result of the accident or resulted from a different cause, such as plaintiff’s bicycle accident. The jury here was instructed with CACI Nos. 3902 and 3905A. CACI No. 3902, as given here, states: “The damages claimed by Liberti McDonald for the harm caused by David Biggs fall into *two categories* called economic

² As to the requirement for an express finding of compensatory damages as a predicate to an award of punitive damages, the Supreme Court subsequently stated a different rule in *Mother Cobb’s Chicken T., Inc. v. Fox* (1937) 10 Cal.2d 203, 205-206.

damages and noneconomic damages. You will be asked on the verdict form to state the two categories of damages separately.” (Italics added.) The jury was then instructed on economic damages, followed by CACI No. 3905A on noneconomic damages, which, as given, states, in relevant part: “[Noneconomic damages include] *Past and future* physical pain/mental suffering/loss of enjoyment of life/disfigurement/dependency/physical impairment/grief/anxiety/humiliation/emotional distress/disability.” (Italics added.) Thus, the concepts of past and future damages were somewhat blurred by the instructions. Further, the evidence provided no clear basis for a determination that plaintiff’s past pain and suffering differed in kind or degree from her likely future pain and suffering.³ When combined with the “inherent difficulties in valuing” noneconomic damages (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 163) and the instruction that the damages were to be awarded in two categories—rather than the three categories actually set forth on the verdict form—the ambiguity here appears to have resulted from an unwillingness or inability of the jury to allocate its award of noneconomic damages into the further categories of “past” and “future” loss. We conclude that the verdicts in the present case are ambiguous, as found in *Clark*, and that the verdict on past noneconomic damages does not, in light of the evidence and the instructions, constitute an express finding (*Haydel, supra*, 8 Cal.App.2d at p. 737) that plaintiff had no compensable pain in the period between the accident and the trial. (See, e.g., *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157

³ One witness, Monica Haskell, testified for the defense about activities of plaintiff that were inconsistent with plaintiff’s claims of chronic, severe pain but that testimony, while it might have provided a basis for the jury to determine that plaintiff did not suffer from chronic pain, did not provide a basis upon which the jury could have distinguished between past pain and the likelihood of future pain. To the contrary, Haskell’s testimony, if believed by the jury, would have provided a basis for determining that plaintiff suffered from pain during the first few months after the accident, but had suffered no recurring symptoms since that time.

Cal.App.4th 835, 882-883.) The failure to segregate the noneconomic damages “constitutes an error of form rather than of substance” (*Clark, supra*, 215 Cal. at p. 284) and does not require reversal.

B. Permitting Plaintiff To Reopen Her Case-in-Chief Was Not Prejudicial Error

The defense called plaintiff as its last live witness (that is, only deposition testimony of experts was read to the jury by the defense thereafter). At the beginning of plaintiff’s cross-examination by her own counsel, her counsel moved, in effect, to permit him to exceed the scope of cross-examination in order to introduce rebuttal evidence from plaintiff “while she’s on the stand,” and to reopen plaintiff’s case-in-chief to the extent plaintiff’s further testimony exceeded the proper scope of cross-examination and rebuttal. Over defense objections, the court tentatively granted plaintiff’s motion, indicating that it, too, preferred that all questioning of plaintiff be concluded while she was already on the witness stand. The court indicated that the defense still could pose objections to individual questions. Defendant objected to many of the ensuing questions; some objections were sustained and some were denied. In his new trial motion, defendant contended the court erred in permitting plaintiff to reopen without a showing of good cause. The court denied the motion.

On appeal, defendant renews the contention that plaintiff failed to demonstrate “good reason, in furtherance of justice,” as required by Code of Civil Procedure section 607, paragraph 6, for reopening her case-in-chief.⁴ Defendant’s presentation of this argument in his opening brief, however, treats plaintiff’s testimony as if it was all

⁴ Code of Civil Procedure section 607 requires that, after the jury has been sworn, a “trial must proceed in the following order, unless the court, for special reasons otherwise directs:” After each party has presented “evidence on his part” (see *id.* at pars. 3, 5), section 607, paragraph 6 provides that “[t]he parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit [*sic*] them to offer evidence upon their original case[.]”

case-in-chief evidence received without a finding of good cause. In reality, the evidence overwhelmingly was proper rebuttal testimony, and in the two instances of new evidence, the good cause for permitting the testimony is apparent. We will discuss the evidence only briefly.

First, most of the testimony, despite defendant's characterization of it, clearly was offered as rebuttal to testimony presented during defendant's case. Since defendant did not contend in the trial court, and does not contend on appeal, that the trial court abused its very broad discretion in permitting plaintiff to testify in rebuttal while she was already on the witness stand (see Evid. Code, § 320; Code Civ. Proc., § 128), admission of the rebuttal testimony was not error. Defendant called plaintiff's family physician and questioned her extensively about whether plaintiff showed any signs of RSD, in particular, discoloration of her hand, during any of the numerous office visits by plaintiff in the years after the accident. Much of the testimony about which defendant complains was simply rebuttal to the doctor's testimony, attempting to show that plaintiff indeed had suffered pain and discoloration of her hand during the periods in which her family physician testified that she had not seen such discoloration. Defendant also questioned the family doctor about plaintiff's history of depression, and a portion of plaintiff's testimony offered a rebuttal account on that subject. In sum, all plaintiff's testimony about her condition prior to trial was relevant as rebuttal to defense testimony elicited from the family physician and during the course of defense questioning of plaintiff herself on direct examination. In other instances, plaintiff testified to other circumstances relevant to her examination by doctors retained by the defense, offered in rebuttal to certain observations about which those doctors had testified and, more generally, to rebut

the overall picture painted by the defense case, to the effect that defendant was a malingerer and was exaggerating her symptoms.⁵

Second, plaintiff was permitted to testify that she had been late to court the morning of her testimony because of difficulty clearing courthouse security due to a surgically-implanted pain-blocking device, about which there had been previous testimony. She explained that she was “not supposed to be around large magnets or no MRIs, no -- nothing that has a strong magnetic force.” Defense objections to further questioning on this subject were sustained. Plaintiff also testified that the previous Thursday she had a further spinal block procedure for pain on her right side. All this testimony occurred on Monday, June 7, 2010, and concerned matters that occurred after plaintiff rested her case-in-chief on Wednesday, June 2, 2010. Good cause existed to permit plaintiff to reopen her case for new evidence that could not have been presented earlier. Defendant has not shown that this relatively minor evidence was prejudicial. (Cal. Const., art. VI, § 13.)

Finally, defendant contends plaintiff “was allowed to testify about the opinions of an expert whom Plaintiff never designated as an expert and who was never mentioned in [the defense] case.” While it is apparently true that the doctor about whom plaintiff

⁵ Some of this testimony by plaintiff consisted of her version of her interaction with defendant’s expert witnesses who had performed physical examinations of plaintiff. Defendant complains that this was not proper rebuttal of those witnesses, because they had been called to testify not by defendant, but by plaintiff. The trial court ruled that plaintiff was entitled to rebut the testimony of the defense experts regardless of who called those experts at trial. While this ruling was correct with respect to the right to offer rebuttal testimony against adverse witnesses, it does not address the separate question whether plaintiff was required to introduce her impeachment of the expert’s testimony during her case-in-chief, instead of during rebuttal. Nevertheless, our own review of the testimony convinces us that it was primarily directed to the evaluation and characterization of plaintiff as presented by defense witnesses, and not to the prior testimony of the experts during plaintiff’s case. As such, it was proper rebuttal testimony.

testified was neither designated nor named, defense counsel extensively examined one of his own witnesses (one of plaintiff's treating physicians) about the opinions and reports from the doctor in question, Dr. Ciresi. In such questioning by the defense, Ciresi was only identified as the surgeon who operated on plaintiff's hand. But defendant elicited the opinions of the unnamed Ciresi through defendant's examination of his own witness. Plaintiff's testimony about which defendant now complains merely clarified the opinions of Ciresi previously put before the jury by defendant. In any event, plaintiff's brief testimony in this regard clearly was not prejudicial.

In summary, we conclude the trial court did not abuse its discretion in permitting plaintiff to conclude her testimony while she was already on the witness stand, nor in ruling on individual evidentiary objections to that testimony. Further, having reviewed the trial record, we conclude the evidence elicited from plaintiff during the testimony in question did not prejudice defendant.

C. The Court Did Not Err in Awarding Prejudgment Interest

Plaintiff served several offers to settle the case for \$100,000, apparently the limit of defendant's liability insurance policy. Defendant did not accept those offers. On October 8, 2008, which was shortly before the originally scheduled trial date, plaintiff served an offer to settle the case for \$1,099,999.99. (See Code Civ. Proc., § 998 (hereafter § 998).) Defendant did not accept that offer. After the jury returned its verdict far in excess of the settlement offer, plaintiff moved for an award of prejudgment interest pursuant to Civil Code section 3291 (hereafter § 3291), based on the October 8, 2008, offer.⁶ Over defendant's opposition, the court awarded interest from the date of the offer.

⁶ Section 3291 provides, in relevant part: "If the plaintiff makes an offer pursuant to Section 998 of the Code of Civil Procedure which the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to Section 998 of the

On appeal, defendant asserts three reasons why the court erred in granting prejudgment interest. First, defendant contends the section 998 offer was not made in good faith, that is, that it was “realistically reasonable under the circumstances of the particular case.” (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262.) Accordingly, he contends, his rejection of the offer does not support an award of prejudgment interest under section 3291.

The determination whether a section 998 offer was reasonable and made in good faith is entrusted to the discretion of the trial court. (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 700.) When the judgment exceeds the settlement offer, “the judgment constitutes prima facie evidence showing the offer was reasonable” (*Ibid.*) Here, defendant contends the offer was unreasonable because the amount of the judgment was based primarily upon the evidence of a permanent injury and the necessity for lifetime medical care, and plaintiff did not provide the life care plan to defendant along with the settlement offer. The question, in such circumstances, however, is not whether the plaintiff has supplied the information necessary to evaluate the settlement offer but, instead, whether the defendant has had an opportunity to obtain the necessary information. (*Ibid.*) Here, plaintiff’s experts, including the life care plan expert, had been designated, but defendant had not deposed them. Defendant does not contend plaintiff prevented him from conducting discovery; he simply contends plaintiff is required to provide the information necessary to fully evaluate the section 998 offer. That is not the law. (195 Cal.App.3d at p. 700.) In addition, as plaintiff notes, defendant had his own life care expert, who testified at trial concerning the necessity for lifetime care for plaintiff and his own participation in developing an extensive life care plan for her. This was not a case like *Najera v. Huerta* (2011) 191 Cal.App.4th 872, 879, in

Code of Civil Procedure which is exceeded by the judgment, and interest shall accrue until the satisfaction of judgment.”

which the section 998 offer was served and expired long before discovery could have been accomplished and there had been no informal, prelitigation exchange of information. We conclude the trial court correctly determined defendant had ample opportunity to discover the information necessary to evaluate the section 998 offer. (*Elrod v. Oregon Cummins Diesel, Inc.*, *supra*, 195 Cal.App.3d at p. 700.)

Next, defendant contends prejudgment interest should not be awarded on damages for expenses to be incurred in the future or for pain and suffering plaintiff has not yet experienced. The law is to the contrary. (*Deocampo v. Ahn* (2002) 101 Cal.App.4th 758, 775; see *Hrimnak v. Watkins* (1995) 38 Cal.App.4th 964, 980-981.) Defendant has presented no reason to depart from the settled law in this area and we decline to do so. To the extent defendant contends there should be a special rule limiting prejudgment interest in cases in which *only* future damages are awarded, we do not reach that question here: As we have held in section A, *ante*, the jury made an undifferentiated award of past and future economic damages.

Defendant's final contention is that the court impermissibly awarded prejudgment interest as part of the judgment, thereby providing that postjudgment interest would be assessed on both the unpaid judgment and the prejudgment interest. The trial court expressly denied plaintiff's motion to the extent the motion sought to include prejudgment interest in the judgment. Plaintiff, in her brief on appeal, agrees that inclusion of that interest in the judgment, as opposed to a separate lump-sum award apart from the judgment, would be improper. (See *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 531.) As plaintiff points out in her brief, and defendant does not dispute in his reply brief, no amended judgment including the prejudgment interest has been sought or entered. Accordingly, while we agree with defendant that plaintiff is not entitled to postjudgment interest on the award of prejudgment interest, the record does not establish that she has been awarded such compounded interest and the judgment therefore does not require modification.

DISPOSITION

The judgment is affirmed. Respondent is awarded costs.

DETJEN, J.

WE CONCUR:

LEVY, Acting P.J.

POOCHIGIAN, J.