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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LEE S. SHIMABUKURO,

Plaintiff and Appellant,

v.

ENRIQUE OLVERA IBARRA et al.,

Defendants and Respondents.

G045697

(Super. Ct. No. 30-2009-00124354)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Gregory H. Lewis, Judge. Affirmed.

Law Offices of Eric K. Chen, Ying Xu; Esner, Chang & Boyer and Stuart
B. Esner for Plaintiff and Appellant.

Harrington, Foxx, Dubrow & Canter, Dale B. Goldfarb, Edward R. Leonard
and Edward W. Lukas, Jr., for Defendants and Respondents.

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INTRODUCTION

Plaintiff Lee S. Shimabukuro was stopped in traffic on a freeway when his car was rear-ended by the pickup truck that was stopped behind him after it was rear-ended by a big rig truck. Plaintiff filed a complaint alleging motor vehicle negligence against the driver of the big rig, Enrique Olvera Ibarra, and Ibarra's employer and the owner of the truck, Watkins and Shepard Trucking, Inc. (defendants). Defendants stipulated to liability and the case went to trial on the issues of causation and damages. The jury awarded plaintiff \$36,000 in damages. Plaintiff contends the trial court erred in ruling on motions in limine, two of which were filed by plaintiff.

We affirm. The trial court did not abuse its discretion by excluding the testimony of plaintiff's expert epidemiologist, following an Evidence Code section 402 hearing because plaintiff completely failed to demonstrate how such testimony would assist the jury. The court did not err by allowing defendants' expert in biomechanics to offer his opinion that the forces generated by the accident were inconsistent with the injuries claimed by plaintiff. Even if the court erred by precluding plaintiff from impeaching defendants' expert witness with his college transcripts, plaintiff has not explained how he was prejudiced by that ruling. The trial court properly excluded evidence of medical bills that did not reflect amounts paid by either plaintiff or a third party on plaintiff's behalf, or amounts for which plaintiff remained liable. *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 548 (*Howell*) supports the trial court's ruling. The record in this case reflects a fair trial, including testimony by an orthopedic surgeon for each side, and the exercise of sound discretion by the trial judge.

FACTS

On June 11, 2007, Ibarra was driving a "big rig 18-wheeler truck," at a rate of speed between 20 and 30 miles an hour in a southbound lane on Interstate 5, when he

first saw a pickup truck, driven by Isle Munoz, stopped in front of him. Ibarra was able to slow down the big rig to about five miles an hour before he rear-ended Munoz's truck. Ibarra testified that he was responsible for the accident, but stated the collision with Munoz's truck was "a tap, very light." The impact of that collision caused Munoz's truck to rear-end the Chevrolet Malibu plaintiff was driving; he had been stopped in traffic in front of Munoz. The airbags in Munoz's truck did not deploy. Munoz's truck sustained about \$6,000 in damages.

Following the accident, plaintiff felt tenderness and soreness in his back and neck. He sought medical treatment after the soreness and stiffness got worse; he later felt soreness in his left hand as well. Plaintiff testified about the medical treatment he received. For three months, plaintiff had physical therapy and chiropractic treatment for neck and lower back issues and numbness in his upper extremities. He had surgery on his wrist in December 2007 to relieve symptoms consistent with carpal tunnel syndrome. An MRI taken of plaintiff's cervical spine in October 2007 showed degenerative changes throughout his cervical spine.

In September 2010, plaintiff saw Dr. Thomas Dunn,¹ a spine surgeon, for an orthopedic spine consultation. Plaintiff had been referred to Dr. Dunn by his pain management physician who had given plaintiff cervical injections. Plaintiff told Dr. Dunn that he had developed chronic neck pain and upper extremity pain and numbness after a rear-end automobile accident. An MRI showed plaintiff had "age-related changes"; Dr. Dunn concluded plaintiff had a degenerative condition of his disk.

Dr. Dunn testified that a review of plaintiff's medical records showed plaintiff did not complain of any significant symptoms before the accident. Dr. Dunn

¹ Although Dr. Dunn was not designated as an expert witness by plaintiff, as described *post*, his testimony included his expert opinion.

stated that the mechanism of the injury was consistent with injury to a disk. He also stated wrist injuries can occur when people are “holding onto the steering wheel and receive an impact.” He testified that in his opinion, based on a reasonable medical probability, plaintiff’s neck injuries and “symptoms [of] wrist pain, numbness, pain and tingling” were caused by the accident. Plaintiff had neck surgery. Dr. Dunn testified that plaintiff will require additional surgery to his neck.

Defendants’ expert orthopedic surgeon testified he examined plaintiff before his neck surgery. Defendants’ expert opined that plaintiff’s carpal tunnel syndrome symptoms in his right wrist were not related to the accident. He stated the carpal tunnel syndrome affecting plaintiff’s left wrist could have been caused in part by the accident due to the mechanism of injury and the worsening of symptoms following the accident. As for plaintiff’s neck and back injuries, defendants’ expert testified that plaintiff’s preaccident symptoms worsened for a short period of time following the accident and that plaintiff’s receipt of treatment for his cervical spine during a four and one-half month period of time was appropriate. He further stated that treatment in 2008 and thereafter was not related to injuries caused by the accident.

Defendants’ expert witness in biomechanics, Mark Gomez, Ph.D., testified, “there is no mechanism to do something to the tendons and the carpal tunnel to cause inflammation and symptoms” to plaintiff’s wrist as plaintiff claimed were caused by the accident. Gomez also testified that he would not expect injury to plaintiff’s cervical disk to be caused by the accident in light of plaintiff’s “body mechanics” and movement in the car.

PROCEDURAL BACKGROUND

Plaintiff filed a form complaint against defendants, in which he asserted a claim for motor vehicle negligence. Defendants admitted liability and the issues of

causation and damages were tried to the jury. The jury returned a general verdict in favor of plaintiff, awarding him \$36,000. The trial court denied plaintiff's motions for a new trial and for modification of the verdict. The court entered judgment in favor of plaintiff in the amount of \$36,000 plus \$7,542.19 in costs. Plaintiff appealed.

DISCUSSION

I.

STANDARD OF REVIEW

We review the grant or denial of motions in limine under the same standard as any evidentiary ruling—for an abuse of discretion. (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1146 [we review contentions of evidentiary error for abuse of discretion]; *People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 639-640.) We further review whether any evidentiary errors were prejudicial in that they “resulted in a miscarriage of justice” within the meaning of Evidence Code section 353.² (*Casella v. SouthWest Dealer Services, Inc.*, *supra*, at p. 1146, citing *O’Hearn v. Hillcrest Gym & Fitness Center, Inc.* (2004) 115 Cal.App.4th 491, 500 [“In civil cases, a miscarriage of justice should be declared only when the reviewing 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”].)

² Evidence Code section 353 provides: “A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and [¶] (b) The court which passes upon the effect of the error or errors 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.”

II.

THE TRIAL COURT DID NOT ERR BY GRANTING DEFENDANTS' MOTION IN LIMINE NO. 1 AND PRECLUDING PLAINTIFF'S EPIDEMIOLOGIST EXPERT, MICHAEL FREEMAN, PH.D., FROM TESTIFYING AT TRIAL.

Plaintiff contends the trial court erred by granting defendants' motion in limine No. 1 in which defendants sought to preclude from trial the testimony of plaintiff's expert in epidemiology, Michael Freeman, Ph.D. Defendants' motion in limine was brought on the grounds Freeman was not qualified to testify as an expert in the field of biomechanics, he was not qualified to provide opinions as to the causation of plaintiff's alleged injuries, and he did not meet the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579. Citing Evidence Code sections 350 and 352, defendants asserted that "[a]llowing Plaintiff to present Freeman's unqualified opinions can only serve to confuse the jury and cannot provide the trier of fact with relevant evidence."

The trial court held a hearing under Evidence Code section 402 to determine the admissibility of Freeman's testimony. At the hearing, Freeman testified that he has a masters in epidemiology and biostatistics and a Ph.D. in public health. He stated he is not a medical doctor or "any kind of an engineer," but is a "forensic epidemiologist." Freeman also stated he was "[p]artially" testifying in the capacity of an accident reconstructionist.

Freeman explained that epidemiology is the study of a population of people with similar injury or disease characteristics. When asked how the jury would benefit from his expert knowledge as a forensic epidemiologist, Freeman stated he could tell the jury what generally happens in populations with regard to crashes and injuries. Freeman was asked how that knowledge related to this case, and he said, "[t]here's an assertion by the defense that in populations this kind of crash doesn't result in this kind of injury,

generally, and that that means that it didn't result in this injury to this man. [¶] There is a risk determination being implied by the defense that the risk of injury—and risk only comes from epidemiological study—that the risk of injury like this man has from this kind of a crash was zero to this man in this crash. [¶] There is an assertion by a non-epidemiologist that the chance of injury or risk of injury from this kind of rear-impact collision is zero. That is an epidemiologic conclusion.”

The court asked Freeman to explain what the “focus o[f his] testimony plans to be,” and Freeman stated: “I will be talking about the nature of this crash with regard to what I reconstructed about it. I will be talking about what this kind of crash means with regard to injury risk to the general population, what kind of injuries can occur from such a collision. I will talk about how injuries like [plaintiff]’s do occur from a mechanical perspective in this kind of a crash, and I’ll talk about the standards for figuring out whether or not this man actually was injured in this crash. [¶] Additionally, I will be talking about why general thresholds are not a part of accepted science. We don’t know specific thresholds for individuals until that person’s injury threshold is exceeded. We don’t know whether or not picking up a gallon of milk is going to herniate a person’s disk in their back or whether they can be in a 20-mile-an-hour crash and have no injury, because that has to do with them, not to do with the event. [¶] The fact that most people may not be injured in a certain event can never be used to say that an individual was not injured in a particular crash.”

The trial court asked Freeman, “you’re macroscopically—forgive me. You’re macroscopically viewing this on the statistical analysis of injuries related?” Freeman responded, “[w]ell, the macroscopic part is to talk about the defense theory, that somehow you can take a macroscopic view and say, oh, if you have a crash that looks like this, that person can’t get hurt and whether or not that has any application, because ultimately, that goes to what does a crash like this mean in the general population. If you take the most susceptible one percent, or five percent, or ten percent of the population,

can they get hurt in a crash like this and what do we know about that. [¶] That's the epidemiology part, because epidemiology is looking at more than just this person. Then I'm talking about how do we find out whether or not this person was injured in the crash and what are the steps required to do that." Freeman did not explain how his testimony would assist the jury in determining whether plaintiff was injured in the June 2007 accident.

Plaintiff's counsel argued, "[a]nd that's the value of epidemiology. They go out and look at the real world. They go into a situation where they study people that go in and they get involved in an activity and they determine, well, some people get injured or some people don't get injured and they figure out what the percentages are, and they find out it is possible for somebody to get injured. That is the relevance of his testimony."

Following the hearing, the court concluded Freeman's expert testimony would be excluded from trial, and explained: "The basis for his opinion is, he classifies in the context of forensic epidemiology. I have an old 1952 medical dictionary, which isn't that new any longer, but it talks about epidemiology, defines it as the study of occurrence and distribution of disease usually related to epidemiologic and endemic, but sometimes broadened to include all types of disease. I guess under that categorization Dr. Freeman's forensic epidemiology would lend itself to the study of statistics that [a]ffect these areas and the possibilities of outcome. So that's one issue. [¶] Now, in the blue ribbon panel that you talked about and in the areas that Dr. Freeman discussed with us, he was talking about, essentially, statistical analysis, dealing with risk and the possibilities of their occurrence. I was a little concerned, and if he were to testify, I certainly would not allow him to testify as to legal issues, although I think with respect to Dr. Freeman, he was attempting to use those quarries, which I thought were into the legal world, in the context of the scientific world, so I can understand that. [¶] Major problem. Major problem. As outlined in the moving papers, *Jones versus Ortho Pharmaceutical*

Corporation, a 1985 case, 163 Cal.App.3d 396, on page 402, in a personal injury action, causation must be proved within a reasonable, medical probability based on expert testimony. A mere possibility is insufficient. [¶] Dr. Freeman’s entire testimony was relegated to the areas of causation based upon possibility, his analyses of risk. That does not comport with the causation requirement for expert witnesses, therefore, under those circumstances, I think that Dr. Freeman is disallowed. I don’t think, I’m ordering that Dr. Freeman must be disallowed from testifying in this trial.” (Italics added.)

Plaintiff argues the trial court erroneously excluded Freeman’s expert testimony at trial because his opinion was not based entirely on possibility and Freeman would have testified about the mechanics of the accident and explained how it caused plaintiff’s injuries. But Freeman did not testify at the Evidence Code section 402 hearing about the mechanics of the accident or explain *how* the accident caused plaintiff’s injuries. Instead, he vaguely testified, at length, that it was possible plaintiff’s injuries were caused by the accident, without explaining how such causation was probable.

Plaintiff also argues Freeman was not simply an epidemiologist but also an accident reconstructionist and would have testified in that capacity as well. Defendants’ counsel read a portion of Freeman’s deposition testimony at the hearing, which included Freeman stating, “based on having gone back and having looked at what the rear of the Munoz vehicle was consistent with as far as damage, and then a conservation of momentum calculation which is easy to estimate because of the weight difference between the vehicles, so you’re going to see about an 85 percent or so of the impact speed that will be the result of delta-V based on just the calculation of the change of—conservation of momentum.” That excerpt from Freeman’s deposition testimony does not explain how his expert testimony would have assisted the jury in determining whether plaintiff’s alleged injuries were caused by the accident.

On this record, we cannot conclude the trial court abused its discretion. Even if the court had erred in excluding Freeman’s expert testimony, plaintiff has failed to explain how the omission of Freeman’s testimony was prejudicial.

III.

THE TRIAL COURT DID NOT ERR BY ADMITTING GOMEZ’S EXPERT TESTIMONY.

Plaintiff’s motion in limine No. 7 requested that the trial court exclude Gomez’s expert testimony because he was not qualified to offer an expert opinion on medical causation. At the hearing on the motion, the court denied the motion on the ground Gomez was not going to testify about medical causation. Plaintiff’s counsel and the court engaged in the following discussion:

“The Court: They’re testifying as expert witnesses. They’re entitled to rely upon the opinions of others. In the context of their particular testimony, they’re entitled to rely upon that. They cannot give their own diagnosis. They can’t cross the line, I agree with that. [¶]

“[Plaintiff’s counsel]: They stated in the moving papers that Mr. Gomez is going to be relying on medical opinions of medical professionals.

“The Court: That’s what I said.

“[Plaintiff’s counsel]: But he seems to be refuting medical opinions by my client’s treating physicians who all agreed—

“The Court: Well, he may refute what your medical experts say, but he cannot do it in the context of diagnosing. He can do it in the context, if he can do it at all, of accident reconstructionist and biomechanical, but that’s different. [¶] Your motion is denied, consistent with the opposition and what the opposition has stated in there.”

Plaintiff contends the trial court’s ruling was in error. Plaintiff’s argument is without merit.

During trial, Gomez testified that he had a bachelor's degree in biology and a Ph.D. in applied mechanics with a specialization in the area of biomechanics. He testified he is not a medical doctor.

In his opening brief, plaintiff cites two portions of Gomez's testimony that, he argues, constituted an impermissible expert opinion on medical causation. First, Gomez testified as follows:

"Q. What injuries did [plaintiff] claim to sustain in this incident?

"A. Well, there's [a] lot going on in terms of medical records, but I'm look at—my impression is that he's claiming injury to two of the disks in the cervical spine as well as carpal tunnel in the left wrist.

"Q. And you looked at all of the medical records in this matter, correct?

"A. Yes.

"Q. What's a cervical disk?

"A. Well—

"Q. Did you bring an anatomic model?

"A. I did. This was to hold all my tissues here, but I have a lid, too."

Gomez's testimony did not constitute a medical opinion. Gomez testified about his understanding of the nature of plaintiff's claimed injuries and showed the jury a model of a cervical disk, which did not transform his testimony into expert medical opinion testimony.

Second, plaintiff quotes another portion of Gomez's testimony in support of his argument Gomez offered a medical opinion that plaintiff did not sustain certain injuries as a result of the accident. The portion quoted by plaintiff is included in the following excerpt from Gomez's testimony, which shows that his opinion regarding plaintiff's injuries was based on a force, not medical, analysis:

“Q. And based on your overall analysis, did [plaintiff] experience a mechanism in this accident that could injure a cervical disk?

“A. I don’t believe so.

“Q. Based on your overall analysis, did [plaintiff] experience a mechanism in this accident that would injure the carpal tunnel?

“A. No, I don’t believe so.

“Q. Is the fact that he has right-sided carpal tunnel problems, is that consistent with your analysis as well?

“A. Yes. If you look at the medical reports, there is some mention that he had some EMG, nerve conduction studies that he had changes, but not symptomatic, and I assume if he has . . . preexisting conditions, the accident would have caused more symptoms and we don’t see that.

“Q. Does your analysis in this case show [plaintiff] could have experienced muscle strains in this accident?

“A. Oh, sure, yes.

“Q. Is that your opinion?

“A. Yes.

“Q. Is it your opinion that he received muscle strains in the accident that resolved over four months?

“A. Yes.

“Q. And he did not sustain any injury to the cervical disk?

“A. He did not.”

Even if Gomez’s testimony could be considered as bordering on a medical causation opinion, the admission of the above quoted testimony did not constitute prejudicial error.

IV.

THE TRIAL COURT DID NOT ERR BY PRECLUDING PLAINTIFF FROM IMPEACHING GOMEZ WITH HIS COLLEGE TRANSCRIPTS.

Defendants' motion in limine No. 3 sought to preclude plaintiff from impeaching Gomez with, or otherwise introducing evidence of, Gomez's college transcripts. Defendants asserted plaintiff violated Code of Civil Procedure section 1985.3, subdivision (g), in subpoenaing Gomez's college transcripts. At the hearing on the motion, plaintiff's counsel argued that the college transcripts showed Gomez did not take a course in anatomy, "but then he writes a book on anatomy to promote himself as an expert in biomechanics, and it's a flagrant act of plagiarism because he has no qualifications, but he makes money doing that."

The trial court ruled the college transcripts were "not coming in," although plaintiff's counsel was free to ask Gomez questions about them. We do not need to decide whether the trial court's ruling constituted prejudicial error because even if we were to assume the exclusion of Gomez's college transcript constituted an abuse of discretion, plaintiff has failed to explain how that ruling was prejudicial. He does not argue, for example, that Gomez testified he took an anatomy course in college and the court's ruling limited plaintiff's ability to impeach that testimony. We find no prejudicial error.

V.

THE TRIAL COURT DID NOT ERR BY EXCLUDING EVIDENCE OF MEDICAL BILLS FOR WHICH PLAINTIFF WAS NO LONGER LIABLE AND WHICH WERE NEVER PAID BY PLAINTIFF OR ANY OTHER PERSON ON PLAINTIFF'S BEHALF.

Plaintiff challenges the trial court's denial of his motion in limine No. 1 in which he sought "an order excluding evidence, testimony, or reference to any collateral source payment" for his injuries. In denying the motion, the court explained that plaintiff

could not recover for amounts charged to but never paid by plaintiff, or any third party on behalf of plaintiff, and for which plaintiff did not remain liable.

After trial in this case, the California Supreme Court decided *Howell*, *supra*, 52 Cal.4th at page 548, in which the Supreme Court held: “When a tortiously injured person receives medical care for his or her injuries, the provider of that care often accepts as full payment, pursuant to a preexisting contract with the insured person’s health insurer, an amount less than that stated in the provider’s bill. In that circumstance, may the injured person recover from the tortfeasor, as economic damages for past medical expenses, the undiscounted sum stated in the provider’s bill but never paid by or on behalf of the injured person? We hold no such recovery is allowed, for the simple reason that the injured plaintiff did not suffer any economic loss in that amount. (See Civ. Code, §§ 3281 [damages are awarded to compensate for detriment suffered], 3282 [detriment is a loss or harm to person or property].)”

In *Howell*, *supra*, 52 Cal.4th at pages 548-549, the Supreme Court stated: “The collateral source rule, which precludes deductions of compensation the plaintiff has received from sources independent of the tortfeasor from damages the plaintiff ‘would otherwise collect from the tortfeasor’ (*Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 6 . . . , ensures that plaintiff here may recover in damages the amounts her insurer paid for her medical care. The rule, however, has no bearing on amounts that were included in a provider’s bill but for which the plaintiff never incurred liability because the provider, by prior agreement, accepted a lesser amount as full payment. Such sums are not damages the plaintiff would otherwise have collected from the defendant. They are neither paid to the providers on the plaintiff’s behalf nor paid to the plaintiff in indemnity of his or her expenses. Because they do not represent an economic loss for the plaintiff, they are not recoverable in the first instance. The collateral source rule precludes certain deductions against otherwise recoverable damages, but does not expand the scope of economic damages to include expenses the plaintiff never incurred.”

Plaintiff cites *Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, 1295, in which the appellate court concluded the trial court erroneously excluded evidence of medical bills as the “ruling did not merely preclude plaintiffs from recovering special damages for medical expenses above the discounted rate paid by [a finance company], but kept the jurors from considering the medical bills as *evidence* of the reasonable value of the medical services.” In *Katiuzhinsky v. Perry*, although the plaintiffs’ medical providers sold some of the plaintiffs’ medical bills at a discount to a finance company, the plaintiffs remained liable to the finance company for the original amounts of the bills. (*Id.* at p. 1296.) The appellate court stated, “[t]he intervention of a third party in purchasing a medical lien does not prevent a plaintiff from recovering the amounts billed by the medical provider for care and treatment, *as long as the plaintiff legitimately incurs those expenses and remains liable for their payment.*” (*Id.* at p. 1291, italics added.)

Here, plaintiff does not argue that the medical bills he sought introduced into evidence reflected amounts paid by plaintiff or any third party on plaintiff’s behalf, or that plaintiff remained liable for the amounts set forth in those medical bills. Plaintiff does not argue he would be able to recover charges for which he was not liable.

Plaintiff argues, “under *Howell*, the amount billed remains relevant to the plaintiff’s damages unless and until there is evidence that by prior agreement, the medical service provider has agreed to accept less than the amount billed as full payment. Even the *Howell* Court left open the issue whether the amount billed would be relevant for other issues as well.” Plaintiff continues: “Here, there was no evidence that plaintiff’s health care providers, by prior agreement, had agreed to accept less than the amount billed as full payment for plaintiff’s services. Therefore, the trial court erred in refusing to allow plaintiff to introduce evidence of the amount he was billed for the myriad medical treatments he claimed were necessitated as a result of the subject collision.”

Plaintiff had the burden of demonstrating that the evidence was admissible. Plaintiff failed to carry his burden. Whether the medical bills at issue might have been relevant to the resolution of issues other than damages is not before us. The trial court did not err.

DISPOSITION

The judgment is affirmed. Respondents shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.