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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

IN RE INFUSION PUMP CASES.

G048732

(Super. Ct. No. JCCP 4615)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gail A. Andler, Judge. Affirmed.

Hodes Milman Liebeck, Jeffrey A. Milman, Jason M. Caruso, and Thomas B. Powers for Plaintiffs, Appellants, and Cross-defendants.

Bowman and Brooke, Robert K. Miller, Robert L. Wise, Holly S. Dutton and Eric R. Cioffi for Defendant, Respondent, and Cross-appellant.

* * *

Plaintiffs Scott and Melissa McKenna’s product liability action against defendant Breg, Inc., alleged Scott McKenna was harmed by a pain pump manufactured and sold by defendant.¹ The jury found in defendant’s favor.

On appeal plaintiffs contend the court abused its discretion by excluding certain evidence concerning defendant’s submission to, and contact with, the Food and Drug Administration (FDA) for clearance to market defendant’s pain pump. We do not address the challenged evidentiary rulings. Even if the court’s evidentiary rulings were erroneous (which we do not assume), we would nevertheless affirm the judgment on the ground that the jury’s general verdict was supported by substantial evidence that defendant’s pain pump did not cause injury — a finding not affected by the evidentiary rulings.

Accordingly, we affirm the judgment.²

FACTS

In 1998, plaintiff injured his left shoulder while loading cases of beer at work. This resulted in recurrent episodes of deep achy pain. In 2002, he injured his left shoulder again while swinging a baseball bat.

In July 2002, Dr. Mark Luker performed surgery on plaintiff’s shoulder and used defendant’s Pain Care 3000 pain pump to control plaintiff’s post-operative pain.

¹ We refer to Scott and Melissa McKenna collectively as “plaintiffs,” and to Scott McKenna individually as “plaintiff.”

This action is one of many cases coordinated under Code of Civil Procedure section 404 in the Orange County Superior Court.

² Because we affirm the judgment, defendant’s protective cross-appeal concerning the statute of limitations is moot.

The pain pump was connected by a catheter to plaintiff's shoulder for about two days after the surgery.

Between 2002 and 2008, plaintiff rode dirt bikes and all-terrain-vehicles, played golf, and went snowboarding and skiing.

In 2008, after he could not finish painting a room in his house due to shoulder pain, he visited several physicians. One orthopedist diagnosed him with arthritis. Another orthopedist believed he required shoulder replacement surgery, but "wouldn't touch" him because plaintiff was then only 35 years old. That orthopedist suggested plaintiff contact Dr. David Bailie.

Plaintiff e-mailed Dr. Bailie. That same day, Dr. Bailie, after receiving plaintiff's medical file and photos of his 2002 surgery, but before seeing plaintiff in person, e-mailed him the following message: "Your shoulder had a simple posterior labral repair BUT you had a pain pump that caused chondrolysis — a very destructive problem from the local anesthetic used in the pain pump which essentially dissolved your joint — will know for sure after I see you. . . . Enclosed is an article (. . . to be published . . . in the next few months) that we wrote on this." Dr. Bailie subsequently performed several procedures and surgeries on plaintiff, but plaintiff continued to experience pain.

In November 2010, plaintiffs sued defendant. In 2011, the court granted plaintiffs' petition to add their case to the Judicial Council coordinated proceeding, *In Re Infusion Pump Cases*. Plaintiffs' complaint (consisting of a master long form complaint and an individual short form one) alleged, inter alia, causes of action for strict product liability and negligence. They alleged defendant manufactured and sold a pain pump, which is a device that continuously delivers anesthetic directly into the shoulder for two or more days, and that such continuous infusion of anesthetic into the shoulder can cause permanent damage, "such as chondrolysis, a complete or nearly complete loss of cartilage in the shoulder." Plaintiffs alleged defendant did not warn them or their surgeon about

the unreasonable risks of using a pain pump in the shoulder joint. They alleged defendant tried to secure the FDA's clearance to include orthopedic use in the pain pump's indication for use statement, but the FDA refused due to safety concerns.

At trial plaintiff testified he continued to experience pain and limited range of motion. The parties' expert orthopedic surgeons disagreed on the cause of plaintiff's problems. Plaintiff's expert, Dr. Bailie, opined plaintiff had chondrolysis. Defendant's expert, Dr. Damon Petty, opined that plaintiff had needed a shoulder replacement due to arthritis.

The jury returned a general verdict in defendant's favor on all of plaintiffs' claims.

DISCUSSION

Plaintiffs contend defendant should have warned physicians that its pain pump had not been cleared for intra-articular or orthopedic uses. Plaintiffs further contend defendant should not have marketed the device to orthopedic surgeons without such warnings. They contend the court erred by excluding evidence of defendant's communications with the FDA, "communications that should have put [defendant] on notice of potential safety risks associated with the use of its pumps in orthopedic surgeries, and particularly of use inside the shoulder joint." They contend the improperly excluded evidence included (1) documents exchanged between defendant and the FDA during the regulatory clearance process, and (2) the deposition testimony of Irene Naveau, an FDA staff person who reviewed defendant's regulatory submissions.

But plaintiffs have ignored a fundamental rule of appellate procedure: "A judgment or order of the lower court is *presumed correct*." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) It is appellant's burden to affirmatively establish error. (*Ibid.*) The excluded evidence was relevant *only* to defendant's alleged failure to warn of

the risk of developing chondrolysis when the pain pump was used in connection with plaintiff's shoulder surgery in 2002. Plaintiffs do not address, much less analyze, the substantial evidence adduced at trial that supports a finding that defendant's pain pump did not cause any injury whatsoever. If the jury based its verdict on a lack of causation, the failure to warn is irrelevant.

Here, the jury returned a *general verdict* with, as relevant here, two findings: (1) "On Scott and Melissa McKenna's claim for Negligence — Manufacturer or Supplier — Duty to Warn:" "We find in favor of Breg and against Scott and Melissa McKenna"; (2) "On Scott and Melissa McKenna's claim for Strict Liability — Failure to Warn"; "We find in favor of Breg and against Scott and Melissa McKenna."

Appellate review of a judgment based on a general verdict is subject to certain well established rules. "Where no special findings are made, the reviewing court may infer that "the jury by its general verdict found for respondent on every issue submitted." [Citation.] Specifically, the jury's general verdict "imports findings in favor of the prevailing party on all material issues; and if the evidence supports implied findings on any set of issues which will sustain the verdict, it will be assumed that the jury so found. The court on appeal does not have to speculate on what particular ground the jury may have found in favor of the prevailing party." (Wilson v. County of Orange (2009) 169 Cal.App.4th 1185, 1193.)

One of defendant's principal contentions at trial was lack of causation — its pain pump did not cause any harm to plaintiff. In support of that contention, defendant presented substantial evidence that supports a finding plaintiff did not suffer from chondrolysis, and thus the failure to warn of the risk of chondrolysis was not a substantial factor in causing plaintiff's harm. This evidence included the expert opinion of Dr. Petty that: (1) plaintiff never had chondrolysis; (2) that plaintiff's eventual total shoulder replacement was made necessary because he developed secondary arthritis, which in turn was caused by "the initial instability pattern established in his shoulder somewhere

around 1998, the additional injury he sustained [when swinging a bat] in 2002, the subsequent surgical procedure that tightened his posterior capsule and then simply the ensuing time that it took for the wear to start to significantly change and damage his joint.” Except for Dr. Bailie, no doctor that rendered a diagnosis of plaintiff’s condition concluded he had chondrolysis. And between 2002, when plaintiff underwent the surgery in which defendant’s pain pump was used, and 2008, when he sought medical help after being unable to finish painting a room, plaintiff engaged in a variety of activities, such as riding dirt bikes and all-terrain-vehicles, playing golf, snowboarding and skiing. In Dr. Petty’s expert opinion, engaging in these activities by a person suffering from chondrolysis “would be a painful experience.”

Early on in defendant’s counsel’s closing argument to the jury counsel stated: “[T]his may be obvious, but I’m going to say it anyway. If the plaintiffs haven’t proven that Scott McKenna had chondrolysis, then they haven’t proven that anything Breg did at all was related to any harm of Scott McKenna. [¶] So let’s talk about that first issue — which is actually the last one, but we’re gonna talk about it first – *and that is our first theme, as you will recall, that Mr. McKenna did not have chondrolysis.*” (Italics added.) Thus, lack of causation was a primary theory of defendant’s defense at trial. The defense based on lack of causation was supported by substantial evidence, and because a general verdict was returned, we must infer that the jury returned a defense verdict on that ground. Accordingly, we need not decide whether the court erred in excluding the evidence regarding the FDA regulatory communications and the deposition testimony of Naveau. Even if the court had erred (which we do not conclude), it would not change the inference we must draw from the general verdict, i.e., defendant’s pain pump did not cause chondrolysis for the simple reason that plaintiff did not have chondrolysis.

It does not matter that there was also substantial contrary evidence. Because the judgment is presumed to be correct, we must affirm the judgment if it is supported by substantial evidence. As noted, the evidence supporting a finding of lack of causation was substantial, and accordingly, we affirm the judgment.

DISPOSITION

The judgment is affirmed. Defendant shall recover its costs on appeal.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.