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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JANICE JARMAN,

Plaintiff and Appellant,

v.

HCR MANOR CARE., INC., et al.,

Defendants and Appellants.

G049215

(Super. Ct. No. RIC10007764)

O P I N I O N

Appeals from orders of the Superior Court of Riverside County, Mac Fisher, Judge, and Phrasel L. Shelton, Retired Judge. (Pursuant to Cal. Const., art. VI, § 21.) Order denying judgment notwithstanding the verdict affirmed; order granting new trial reversed; case remanded with directions.

Donna Bader; Lanzone Morgan and Anthony C. Lanzone for Plaintiff and Appellant.

Petrullo, John Patrick Petrullo, David Tsai Gladfelter and Lea K. Takigawa for Defendants and Appellants.

* * *

Following a jury verdict in favor of plaintiff Janice Jarman, defendants HCR Manor Care, Inc., and Manor Care of Hemet CA, LLC (Manor Care) filed a motion seeking correction of the verdict or a new trial, and a motion for judgment notwithstanding the verdict (JNOV.) The court scheduled a hearing on the JNOV, and later continued that hearing after the parties expressly “waived” the time limitation within which the court was obligated to issue a ruling. However, on the date set for the hearing, the judge assigned to hear the motion (who had not presided over the trial) concluded that only the trial judge would still have jurisdiction to hear it, and that the time within which any other judge had the power to hear it had passed. On that basis, he denied the motion. Manor Care appeals from that order, arguing the court erred because: (1) the time within which the court could rule on the JNOV had not expired; (2) even if that time had expired, Jarman expressly waived the defect; and (3) the motion was meritorious. We affirm the order.

Although we reject the court’s reasons for concluding it had lost jurisdiction to rule on the JNOV, its conclusion was nonetheless correct. The court’s window for ruling on a motion for JNOV is prescribed by statute and terminates 60 days after any party files a notice of intention to seek a new trial. Manor Care filed a motion seeking a new trial on the day after the jury rendered its verdict, and consequently the court was required to rule on the JNOV within 60 days of that date. That time period had expired before the court denied Manor Care’s motion. And because the time limitation is jurisdictional, it cannot be waived.

Janice appeals from a separate order, issued by the original trial judge more than three months later, denying her request for a signed judgment and instead spontaneously granting a new trial as to the entire case, on the court’s own motion. Janice argues this order was improper for several reasons, including that the court has no power to grant a new trial on its own motion. We agree, and consequently reverse the order granting a new trial.

We remand the case to the trial court with directions to enter a judgment forthwith and to address the parties' respective motions to strike or tax costs which were denied as moot.

FACTS

Janice sued HCR Manor Care, Inc., and Manor Care of Hemet CA, LLC (Manor Care) on behalf of her father, John L. Jarman (Jarman), alleging he sustained injuries while convalescing from a broken leg at a Manor Care facility in 2008. Janice pleaded causes of action styled "Violation of Patient's Bill of Rights," "Elder Abuse and Neglect," and "Negligence."

The complaint alleged that when Jarman was admitted to Manor Care's facility, it was aware he was "a high risk for skin breakdown," yet failed to take measures to prevent that breakdown. As a result of that neglect, Jarman suffered significant skin breakdown. It also alleges Jarman was frequently left in soiled diapers, that call lights were ignored, and that he suffered other abuse and neglect.

The first cause of action is explicitly based on "the Patient's Bill of Rights in § 72527 of the California Code of Regulations." It points out that the Patient's Bill of Rights requires facilities to: (1) have sufficient nursing staff to provide for "the highest practicable physical, mental, and psychological well being of each resident"; (2) ensure residents "remain free from physical and mental abuse"; and (3) treat residents "with consideration, respect, and full recognition of dignity in care of personal needs." The complaint sought both compensatory and punitive damages, as well as relief pursuant to the Patient's Bill of Rights.

The jury rendered a verdict in favor of Jarman, concluding Manor Care committed 382 violations of Jarman's rights while he was in its facility. The jury was instructed it could award up to \$500 for each violation of Jarman's rights, and it awarded \$250 per violation for a total award of \$95,500. The jury also found Jarman had suffered

injury as a result of Manor Care's negligence, and awarded him an additional \$100,000 in damages for that injury. Finally, the jury found that Manor Care had acted "with malice, oppression or fraud," in the conduct causing harm to Jarman, a prerequisite to awarding punitive damages, but was not asked to render a decision specifying an amount of punitive damages at that time. Immediately following the jury's verdict, defendants moved orally for (1) an order striking Janice's claim for punitive damages on the ground there was insufficient evidence to support the jury's determination that Manor Care had acted with malice oppression or fraud, and (2) for a partial judgment notwithstanding the verdict (JNOV) on the ground the jury's determination that Jarman's rights were violated was likewise unsupported by sufficient evidence. The trial judge, Phrasel L. Shelton, immediately granted the motion to strike Janice's punitive damage claim, but deferred ruling until the next day on Manor Care's motion for partial JNOV.

However, when the parties returned to court the next day, June 16, 2011, Judge Shelton did not issue any ruling on the partial JNOV. Instead, he informed the parties that "the verdict will be entered and the judgment entered accordingly," and instructed them that if they had any further post-trial motions, to "file them according to the Code of Civil Procedure, and we'll proceed on them in due course." That same day, Manor Care filed a written motion for an order either correcting the jury's verdict or setting the case for a new trial. Although the request for a new trial was ostensibly based on Code of Civil Procedure section 616 (all further statutory references are to the Code of Civil Procedure) – a statute which applies when the jury has been discharged without rendering a verdict – the motion was grounded on the same argument already expressed in favor of the partial JNOV; i.e., that the evidence had been legally insufficient to support the jury's determination that Manor Care violated Jarman's rights.

On June 20th, Manor Care filed a written motion for JNOV on the ground the evidence was insufficient to support the jury's verdict. The hearing date on the motion for JNOV was set for August 1, 2011.

On June 27, 2011, Janice served a document entitled “Notice of Entry of Judgment,” which attached a copy of *the jury verdict*, characterized it as the “Judgment,” and claimed the date the verdict was rendered was the date the “Judgment” was entered. The notice was filed with the court the next day. In response to that notice, Manor Care moved ex parte for an order shortening time on its motion for JNOV, citing sections 629 and 659 as authority requiring the motion to be heard and decided within 15 days of the service of a notice of entry of judgment.

At the ex parte hearing, the court assured Manor Care that the 15-day limitation applied only to its *filing* of the motion, and that the court had 60 days from service of the notice of entry of judgment within which to rule on the motion. The court then denied the ex parte application. However, on July 14, Manor Care successfully moved to advance the hearing date to July 29, on the ground its counsel had been ordered to appear in another court on August 1.

A week later, on July 21, Janice moved ex parte to again change the date of the JNOV, on the ground that her counsel was scheduled to be on vacation July 29. At the hearing on that ex parte motion, the court suggested resetting the JNOV hearing for August 26, and asked if both parties would “waive any objection on timeliness of that motion?” Both parties did. The court then granted the motion and reset the hearing date to August 26. Counsel for Manor Care then inquired whether arrangements had been made to bring back the original trial judge, Judge Shelton (who had been assigned to conduct the trial as a “visiting judge”) to hear the JNOV. The trial court stated it did not expect Judge Shelton to return.

On August 23, Janice filed an “objection” to the JNOV, asserting that if it was to be decided by any judge other than Judge Shelton, section 661 required it be argued or otherwise submitted for decision “not later than ten (10) days before the expiration of the time within which the court has power to pass on the same.” On that basis, Janice contended that the time within which any judge other than Judge Shelton

could hear the motion *had already expired*, and consequently that the judge then scheduled to decide it, Mac R. Fisher, “had no jurisdiction to hear the motion.” Janice asserted the motion should be denied on that basis.

On August 26, the court, per Judge Fisher, denied the motion. The court agreed with Janice’s “objection,” explaining that while the original trial judge, Shelton, would have retained jurisdiction to hear and decide the motion for the full period of 60 days after service of the notice of entry of judgment, section 661 reduced the time limitation within which a different judge could hear it by 10 days. Because more than 50 days had passed since service of the notice of entry of the judgment, Judge Fisher concluded he had no option but to deny the motion for lack of jurisdiction. Judge Fisher also noted, however, that he had already reviewed the substance of the motion prior to addressing the jurisdiction issue, and would have denied it on the merits as well.

Manor Care filed a timely appeal from the order denying the JNOV, and also purported to appeal from the “judgment entered on June 15, 2011.” Janice also purported to appeal from the same judgment. Meanwhile, the case continued in the trial court with respect to both sides’ cost memoranda and motions to strike or tax costs.

On September 28, Janice filed an *ex parte* application requesting the trial court to sign a judgment. According to the application, Janice’s counsel claimed a judgment had been “verbally entered” by the court at the time the jury returned its verdict on June 15. However, after Janice filed her appeal from that judgment, the Court of Appeal informed her the appeal would be dismissed unless she provided the court with proof, no later than October 8, that the judgment had been entered. Janice acknowledged in her application that no formal entry of judgment appeared on the trial court’s docket.

Manor Care filed objections to entry of the judgment proposed by Janice, and on October 7, the trial court denied the request to sign the judgment, without prejudice, and ordered that the issue be decided by Judge Shelton “at a date and time to be determined according to Judge Shelton[’]s availability.”

The hearing before Judge Shelton took place on December 6, 2011. In addition to Janice's request for a signed judgment, both sides' motions to strike or tax costs were on calendar. After reviewing the record and considering the parties' arguments about the substance of the proposed judgment, Judge Shelton concluded that the special verdict returned by the jury had been "incomplete and misleading" and consequently announced he was granting Manor Care a new trial "on all issues," on the court's own motion. Having done that, Judge Shelton also formally denied the request to sign the judgment and denied the motions to strike or tax costs as moot. Janice filed a timely appeal from that order.

DISCUSSION

1. Appealability

We begin by noting that despite the apparent belief of both sides, no judgment was ever entered in this case. The jury verdict rendered on June 15, 2011, was not a judgment, and although the record reflects the trial court informed the parties, *the day after* the verdict was rendered, that "the verdict *will be entered* and the judgment entered accordingly" (italics added), there is no indication the court represented that had actually been done and no suggestion that any party ever attempted to confirm the judgment had been entered.

Moreover, we reject Janice's assertion that the judgment should be, in effect, deemed entered based on section 664. Section 664 specifies that "[w]hen trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict within 24 hours after the rendition of the verdict, whether or not a motion for judgment notwithstanding the verdict be pending, unless the court order[s] the case be reserved for argument or further consideration, or grant[s] a stay of proceedings. . . ." While we would agree section 664 requires timely entry of a judgment after a jury verdict is

rendered, it does not state that a judgment is *automatically deemed entered* at the end of 24 hours if the statute is not complied with. Instead, as our Supreme Court explained way back in 1889, if the clerk fails to enter judgment in compliance with section 664, the remedy is to seek an order directing that it be done: “The injunction of the statute (Code Civ. Proc., sec. 664), in that regard is *directory only*, and does not affect the legality or validity of the judgment afterward entered. Further, *if the plaintiff felt aggrieved by the failure of the clerk to enter the judgment within the time designated by the statute, he might have moved the court for an order directing him to do so*, which no doubt would have been granted.” (*First Nat’l Bank v. Wolff* (1889) 79 Cal. 69, 73, italics added.)

However, even though no judgment was entered in this case, both of the orders appealed from are properly before us. Section 904.1, subdivision (a)(4) specifies that both an order denying a JNOV and an order granting a new trial are directly appealable orders: “An appeal, other than in a limited civil case, may be taken from any of the following: [¶] . . . [¶] (4) From an order granting a new trial or denying a motion for judgment notwithstanding the verdict.”

We now turn to the merits of the challenged orders.

2. *Order Denying JNOV*

The court denied Manor Care’s motion for JNOV on the ground that the time within which the court could hear it had expired. We agree, but based on a different analysis from the one employed by the trial court.

Section 629 governs the timing of motions for JNOV, and it provides that “[t]he power of the court to rule on a motion for [JNOV] shall not extend beyond the last date upon which it has the power to rule on a motion for a new trial.” Section 660, in turn, specifies that “the power of the court to rule on a motion for a new trial shall expire 60 days from and after the mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5 or 60 days from and after service on the moving party by any

party of written notice of the entry of the judgment, whichever is earlier, or if such notice has not theretofore been given, then 60 days after filing of the first notice of intention to move for a new trial. If such motion is not determined within said period of 60 days, or within said period as thus extended, the effect shall be a denial of the motion without further order of the court.”

This limitation on *the power of the court to rule* is jurisdictional (*Siegal v. Superior Court* (1968) 68 Cal.2d 97, 101; *Fischer v. First Internat. Bank* (2003) 109 Cal.App.4th 1433, 1450), and it cannot be waived or extended by agreement of the parties. (*Fong Chuck v. Chin Po Foon* (1947) 29 Cal.2d 552, 554; *Meskill v. Culver City Unified School Dist.* (1970) 12 Cal.App.3d 815, 825.)

Here, the trial court’s determination that it had lost the power to hear the JNOV by the August 26 hearing date was based on two assumptions, both of which were flawed. First, the court assumed *a judgment* had actually been entered in this case on June 15, 2011, and that Janice had served written notice *of the entry of that judgment* on June 27. However, as we have already explained, and despite the trial court’s stated intention to enter a judgment, no judgment was in fact entered. Thus, the document served by Janice was not, as it purported to be, a notice *of the entry of judgment*. Instead, the June 27 notice merely reflected the rendition of *the jury’s verdict* on June 15. Consequently, the 60-day time limit which would have commenced on the day Janice gave written notice of the *entry of the judgment* was never triggered.

Second, the court agreed with Janice’s assertion that, pursuant to section 661, if the original trial judge was not available to decide the JNOV, the court’s jurisdiction to hear the motion was further curtailed by 10 days. Based on the belief Janice had served a notice of the entry of judgment on June 27, the 60-day period in which the court could rule would expire on August 26, and a further subtraction of 10 days meant the last day upon which the motion could be heard by any other judge was

August 16. Because that date had already passed, the court determined it had lost jurisdiction to issue a ruling.

However, section 661 has no application to motions for JNOV. While section 629, the statute which governs motions for JNOV, specifies that such motions are required to be *made* within the time limits for filing and serving a notice of intention to move for a new trial, and that the power of the court to *rule on* the JNOV cannot extend past the time for deciding a motion for new trial, it says nothing about applying the additional time limitation for scheduling hearings, which is found in section 661. That requirement applies only to new trial motions.

But even if section 661 were applicable to motions for JNOV, our Supreme Court has long since rejected the notion that section 661's requirement of early submission of new trial motions in cases where the original trial judge is unavailable, is jurisdictional. Instead, the court concluded the requirement is "intended only to direct a wise procedure for the disposition of such motions." (*Pappadatos v. Superior Court* (1930) 209 Cal. 334, 335.) Consequently, we conclude the court below erred in determining that the court's jurisdiction to rule on the JNOV was affected by section 661.

Having said that, however, we nonetheless conclude the court's ruling on the jurisdictional issue was correct. Section 660 specifies that when neither the clerk nor a party has given notice of the entry of a judgment, the court's 60-day period to rule on a motion for new trial (and thus a JNOV) is triggered by the "filing of the first notice of intention to move for a new trial." And in this case, Manor Care filed a motion requesting the court order a new trial on June 16, 2011, the day after the jury rendered its verdict.

At oral argument, Manor Care's attorney first flatly denied any suggestion that a motion for new trial had ever been filed, but then acknowledged in rebuttal that the trial court's docket reflected both the filing and denial of such a motion. He maintained, however, that the docket entry was simply erroneous. It is not. Our record includes more

than one file-stamped copy of Manor Care’s motion seeking – as an alternative to a proposed correction of the jury’s verdict – an order granting a new trial.

While we acknowledge that the motion filed by Manor Care *cited* section 616, rather than section 659, as the basis for the requested new trial, we nonetheless conclude the motion qualified as a notice of intention to move for a new trial in accordance with the latter section. Section 616 applies specifically to cases “where the jury are discharged without having rendered a verdict, or are prevented from giving a verdict” – in other words, when a mistrial is declared. In such cases, the remedy afforded by section 616 is a “retrial.” (*Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 307, fn. 11.) But in this case it is beyond dispute that the jury *did render a verdict*. There was no mistrial declared, and section 616 was consequently inapplicable.

Instead, when a party requests that a subsequent trial be ordered in a case, after the jury has rendered its verdict in the initial trial – which is what Manor Care did here – that amounts to a motion for *a new trial* as a matter of law. Section 656 defines “[a] new trial” as “a re-examination of an issue of fact in the same court *after a trial and decision by a jury*, court, or referee. (§ 656, some italics added.) “Under our statutes, ‘new trial’ is a term of art referring only to a reexamination of an issue ‘after a trial *and decision by a jury*, court or referee.’” (*Sullivan v. Delta Air Lines, Inc., supra*, 15 Cal.4th at p. 307, fn. 11.) By contrast, when a court declares a mistrial, it “may order that the action be ‘again tried’ – i.e., it may order a ‘retrial’ – pursuant to Code of Civil Procedure section 616.” (*Ibid.*)

Moreover, Manor Care’s motion seeking a new trial was based squarely on the assertion that the verdict rendered by the jury in this case was “not supported by the ‘substantial’ evidence introduced at trial.” That is one of the seven grounds enumerated in section 657 for seeking a new trial under section 659. “The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or

further trial granted . . . for any of the following causes [¶] . . . [¶] 6. Insufficiency of the evidence to justify the verdict or other decision” (§ 657.)

Because Manor Care filed a motion actually seeking the remedy of *a new trial*, rather than a retrial under section 616, and based that motion on one of the grounds set forth in section 657, we conclude that motion operated as a “notice of intention to move for a new trial” as that term is used in section 660, and thus that Manor Care’s filing of that motion on June 16 triggered the court’s 60-day time limitation for ruling on a motion for JNOV. And because that 60-day period expired prior to the August 26 hearing at which the motion was denied, the court did not err in determining it lacked jurisdiction to grant it.

3. *Order Granting a New Trial*

Janice’s appeal challenges the trial judge’s surprise decision to grant a new trial “on all issues,” on the court’s own motion. Manor Care presents only a token opposition to this appeal. We agree the order was improper and must be reversed.

Section 657 allows the court to order a new trial “on the application of the party aggrieved” It does not authorize the court to grant a new trial on its own motion. Manor Care concedes the point, citing *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, for the proposition the court is “without power to order a new trial *sua sponte*.” (*Id.* at p. 899.) By contrast, section 629 (governing motions for JNOV) specifies that a court can grant a JNOV “of its own motion after five days’ notice.”

Manor Care nonetheless suggests, somewhat tepidly, that the new trial order is worthy of affirmance because it reflected a genuine effort by the trial court to resolve the defects in the “unenforceable judgment,” and that both sides “appeared to have accepted and adopted [the new trial option] as the only viable solution to the defective verdict.” All of that may be true, but it is irrelevant. As Manor Care expressly concedes, “[i]f the trial court attempts to order a new trial without complying with the

statutory requirements, the order *is in excess of its jurisdiction and void.*” (Italics added.) We could not have said it better. The new trial order, which was in excess of the trial court’s jurisdiction and void, is reversed.

4. *Janice’s Challenge to the Order Striking Punitive Damages*

Janice’s opening brief on her appeal also includes an argument the court erred by striking his punitive damage claim after the jury returned its initial verdict finding that Manor Care had acted with the requisite intent to support an award of punitive damages. However, our record does not include any indication Janice ever filed an appeal from that order and she does not claim she did. Instead, her brief references only her appeal from the order granting a new trial, with supporting authority establishing that order was separately appealable. Janice makes no claim the order striking the punitive damages would have been separately appealable even had she purported to file such an appeal or that it would be encompassed within the scope of any appeal currently before us.

Further, although Janice characterizes the order striking the punitive damages claim as a “nonsuit on [the] prayer” for punitive damages, it would more accurately be characterized as an order granting a partial JNOV, as it followed the jury’s verdict. And only an order *denying* a JNOV qualifies as a separately appealable order; an order *granting* a JNOV does not. (Code Civ. Proc., § 904.1, subd. (a)(4).) Consequently, we do not reach the merits of the court’s order striking the punitive damages, and we deny Janice’s motion to augment the record to include additional documents pertaining to that issue.

DISPOSITION

The order denying the JNOV is affirmed, and the order granting a new trial is reversed. The case is remanded to the trial court with directions to enter a judgment, forthwith. Janice is to recover her costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.