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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RENEE L. MORENO,

Plaintiff and Appellant,

v.

JOHN B. DORSEY et al.,

Defendants and Respondents.

G049536

(Super. Ct. No. 30-2010-00379067)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert J. Moss, Judge. Request to augment the record on appeal. Judgment affirmed. Request denied.

Hunt & Adams and John C. Adams, III for Plaintiff and Appellant.

Bonne, Bridges, Mueller, O’Keefe & Nichols and Margaret M. Holm for Defendant and Respondent John B. Dorsey.

Poliquin & DeGrave, Mark P. Poliquin and April Cortez Balangue for Defendant and Respondent Leonard Malin.

* * *

Plaintiff Renee L. Moreno appeals from a judgment for defendants John B. Dorsey, M.D., and Leonard L. Malin, PA-C. The judgment was based on a jury's special verdict that found defendants were negligent in the "medical diagnosis, treatment or medical care regarding plaintiff," but their negligence was not "a substantial factor in causing injury to" her. After appellate briefing was completed, Moreno filed a request to dismiss her appeal as to Malin. We granted her request and issued a partial remittitur dismissing the appeal as to him.

However, Moreno continues to argue the judgment for Dorsey must be reversed. First, she attacks the jury's special verdict findings. Moreno asserts "there were . . . two . . . assignments of medical malpractice . . . upon which the jury could have based" a negligence finding, but it is "impossible to tell" whether the jury found both or only one of these theories true. Thus, she concludes the jury's finding that Dorsey's negligence did not cause her injuries was "ambiguous and inconsistent." Second, Moreno contends the trial court committed reversible error in admitting evidence of her prior use of prescription pain medication and that Dorsey's attorney committed misconduct by relying on this evidence during closing argument.

Dorsey responds Moreno waived any error as to the first argument by agreeing to the special verdict's form and not objecting to its use until after the jury was discharged. Dorsey also argues Moreno's first contention is premised on a theory of the case not presented at trial. Finally, Dorsey claims that because of the generalized nature of the jury's negligence finding and Moreno's acknowledgement there was sufficient evidence to support a lack of causation finding as to one of the negligence theories, she cannot prevail on appeal.

As for Moreno's second appellate claim, Dorsey contends the record fails to show she objected to the introduction of evidence about her prior medication use and, in any event, it was relevant to rebut her assertion that she had no underlying health problems before he treated her.

We conclude the jury's special verdict findings are not hopelessly ambiguous or inconsistent and, in any event, Moreno did not assert the theory that there were two separate acts of negligence during trial. Further, since the issues of breach of the duty of care and causation presented questions of fact, Moreno's failure to provide a brief summary of the evidence presented during the 15-day trial waived any attack on the sufficiency of it to support the jury's findings or the judgment. For this reason we also deny Moreno's belated request to augment the record on appeal.

On the admission of evidence concerning Moreno's prior medication use and defense counsel's use of it during closing argument, we conclude the absence of a timely on the record objection to the introduction of this evidence or an assignment of misconduct during closing argument, precludes a reversal based on this ground.

FACTS

In November 2009, Moreno broke her right wrist when she fell at her apartment. The hospital's emergency room staff applied a thumb splint. A few days later, Moreno saw a physician, Dr. Cheng. According to Cheng's notes, plaintiff "Denie[d] numbness in fingers but admit[ted] to shooting pains and tingling in thumb once [the] splint was removed." Cheng's office placed a short arm spica cast on Moreno's right forearm and hand that encased and immobilized her thumb.

Cheng's office saw Moreno on two additional occasions. At a late December visit, she complained of worsening pain in her right wrist and decreased range of motion.

Moreno's next visit was scheduled for January 15, 2010. On January 8, she suffered a second fall while shopping. Moreno testified she fell on her left side, but acknowledged the cast on her right arm and hand hit the floor. At the January 15 appointment, Moreno complained of swelling in the cast, plus numbness and throbbing in

her right wrist and forearm. The cast was removed. Cheng's notes indicated Moreno had some swelling and tenderness in her right wrist, and an X-ray indicated a possible new fracture. A new short arm thumb spica cast was placed on Moreno's right forearm and wrist. Moreno was asked to return in four weeks.

Due to her lack of health insurance and inability to pay for Cheng's services, Moreno did not return to his office. She testified an attorney representing her in connection with the fall at her apartment referred her to Dorsey for a consultation on whether he would provide care on a lien basis.

Dorsey first saw Moreno on February 3. Moreno testified and Dorsey's office records reflect the initial appointment was for a consultation only. She completed a patient questionnaire that noted she was experiencing continuous pain in her wrist, plus stiffness, numbness, tingling, and decreased range of motion spreading to her elbow. But she did not mention any injury to her thumb. According to the form, Moreno estimated her level of pain to be 9 on a 1 to 10 scale.

Dorsey testified he could not recall meeting with Moreno. However, his notes confirm that he saw her and removed the cast for the purposes of examining her hand and wrist and taking an X-ray. Moreno testified that after she answered a few questions, Dorsey led her to an X-ray room where he used a cast saw to make a linear cut on one side of the cast. Dorsey then attempted to manually remove the cast. During this time, Moreno claimed she began screaming that he was hurting her thumb. Dorsey then used the cast saw to make a second linear cut, which Moreno claimed cut her thumb. At that point, Dorsey left the room, telling Moreno someone would come in to assist her.

As noted, Dorsey testified he had no recollection of treating Moreno. But he acknowledged his custom and practice in removing an arm cast was to hold a patient's arm in one hand while making linear cuts along each side of the cast. This method is contrary to the cast saw manufacturer's recommendation that a physician place the patient's arm on a firm surface and make scalloped cuts in the cast.

After Dorsey left the room, Malin, a physician's assistant in Dorsey's medical office, entered and took X-rays of Moreno's wrist. Moreno testified she showed Malin the laceration on her thumb, told him Dorsey had injured her while removing the cast, and that she was experiencing severe pain at the base of her thumb. Malin denied any recollection of this conversation or observing an injury to Moreno's thumb on February 3. Neither Dorsey's report nor Malin's notes reflect any injury to Moreno's thumb. Malin acknowledged he prescribed Vicodin for pain in Moreno's wrist, recommended she receive physical therapy twice a week, and scheduled a follow-up visit with Dorsey.

Moreno returned to Dorsey's medical office on February 5 complaining of increased pain and swelling in her right thumb. Malin saw Moreno and entered in his notes "Laceration, one centimeter without discharge, raised lesion, no fever, no bleeding." He prescribed Vicodin for Moreno's pain and Keflex, an antibiotic medication, for the raised lesion.

The notes compiled on Moreno's care also included entries by Dr. Reynolds, another office employee who provided physical therapy to her on several subsequent office visits. One of Reynolds' notes from a late February session indicated some swelling in the right thumb and included an entry that mentioned a fractured thumb. Reynolds testified he made that entry because Moreno said "she felt like her thumb was fractured." But he acknowledged that he "had no indication otherwise" of a thumb fracture. Malin took an X-ray of Moreno's right hand on at least two dates. The X-rays did not reflect a fracture in her thumb.

Dorsey saw Moreno a second time on March 9. At that time, Moreno was still receiving antibiotics for a possible infection in her hand. Four days earlier, at Dorsey's request, an MRI scan had been performed on Moreno's hand. The notes of the radiologist who conducted the MRI stated "[t]he possibility of . . . osteomyelitis [bone infection] or a septic arthritis should be a consideration."

Dorsey's notes of the March 9 consultation contained the entry "?RSD," which was a reference to Reflex Sympathetic Dystrophy. This condition, also known as Chronic Regional Pain Syndrome, was described by expert witnesses as an "enigmatic," "very complicated" debilitating, chronic pain syndrome that results in "an increased sensitivity" to ongoing pain. Dorsey testified this entry indicated a presumptive diagnosis that Moreno might be developing that condition. Dorsey testified he based this diagnosis on the level of Moreno's pain, the swelling observed at the base of her thumb, and her inability to make a fist. Dorsey prescribed Inderal to treat Moreno for RSD. He also ordered a bone scan of her hand to rule out the possibility of RSD and because the MRI indicated the possibility of osteomyelitis. Moreno admitted she did not take the Inderal that Dorsey had prescribed for her.

Dorsey acknowledged he only mentioned the possibility that Moreno was developing RSD to Malin. On March 18, Dorsey suffered a stroke while he was undergoing elective surgery and fell into a coma. He did not return to work until July.

On March 19, Moreno was seen at Dorsey's office by Malin and Dr. Limjoco, a pain management physician. They reviewed the bone scan which suggested the possibility of osteomyelitis and septic arthritis. Malin and Limjoco sent Moreno to the hospital for her to receive an intravenous injection of antibiotics.

Subsequently, Moreno had surgery performed on her thumb. In May, an orthopedic physician informed her that she was starting to develop RSD.

The expert witnesses called by both parties agreed that Moreno suffered from RSD. However, they disagreed on the magnitude of her condition and on what caused her to develop it. Moreno's experts opined that she has developed a "severe," i.e., "type 1" case of RSD, and "the cause of" her condition "were the events of [February] 3 and what followed" that "trauma." Dorsey's pain management specialist described Moreno's condition as an "[e]arly mild" or "borderline" case of RSD. His experts also disputed Moreno's claims that the purported cut on her thumb became infected and

testified that infection is generally not a cause of RSD. The pain management expert concluded the “[m]ost likely the cause” of her condition “would be the fracture she had on November 29, [20]09,” or “[a]lternatively [her] . . . fall . . . on January 8, [20]10.”

DISCUSSION

1. The Jury’s Special Verdict Findings

1.1 Background

Moreno sued Dorsey on two theories: Battery and medical negligence. The parties proposed, and the trial court gave the jury special verdicts to resolve these claims. On the first theory, the jury found Dorsey obtained Moreno’s consent to remove the cast. On the second theory, the jury found Dorsey was negligent in his “diagnosis, treatment or medical care” of Moreno, but that his negligence was not “a substantial factor in causing injury to” her.

Moreno does not dispute the jury’s adverse finding on her battery cause of action. However, in her opening brief, she argues the negligence count’s “causation and damages evidence focused on two . . . distinct types of injuries as having resulted from Dorsey’s negligence.” First, she contends “Dorsey’s . . . negligent . . . removal of her . . . cast . . . directly inflicted both a thumb laceration and a physical force trauma . . . to the joint of the base of her right thumb.” (Bold lettering omitted.) Second, she asserts the “initial . . . thumb injuries were clinically evaluated and treated as having rapidly progressed into a potentially serious bacterial bone/joint infection . . . which ultimately resulted in [her] . . . referral” to the hospital and “the cumulative effect” of the foregoing “was most likely the trigger of [her] later development of . . . RSD.” According to Moreno, it is “impossible to tell which of [these] two theories of medical negligence . . . the jury found to have been proven, or if both were found” (bold lettering omitted), and thus the jury’s finding on the medical negligence cause of action “are

hopelessly ambiguous and patently inconsistent,” and “irreconcilable in the critical context of the overwhelming medical evidence.”

Dorsey challenges Moreno’s argument on three grounds. First, he claims she waived this argument by approving the use of the special verdict form submitted to the jury. Second, he argues the jury’s special verdict findings are consistent with the evidence presented at trial. Finally he contends her appellate claim improperly seeks a reversal based on new theory of trial because at trial Moreno only argued his “negligent acts” on her “first visit” “creat[ed] a cascade of events that resulted in her CRPS/RSD.”

1.2 Analysis

Contrary to Dorsey’s first assertion, we conclude Moreno did not waive this issue by failing to object to the special verdict before the jury was discharged. In the context of special verdicts, “courts have declined to apply the waiver rule ‘where the record indicates that the failure to object was not the result of a desire to reap a “technical advantage” or engage in a “litigious strategy.”’” (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 327-328; see *Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456, fn. 2.) Here, Moreno did raise the issue in her postjudgment motions for judgment notwithstanding the verdict and for a new trial. There is no indication in the appellate record that Moreno purposely declined to seek clarification of the special verdicts as a means of obtaining advantage or resulted from some litigation strategy.

But we agree with Dorsey’s other arguments. First, the jury’s special verdict on the negligence cause of action is not inconsistent or irreconcilable. The determination of whether a special verdict’s findings are inconsistent or ambiguous is reviewed de novo. (*Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1316; *Saxena v. Goffney, supra*, 159 Cal.App.4th at p. 325.) “A special verdict is inconsistent if there is no possibility of reconciling its findings with each other.” (*David v. Hernandez* (2014) 226 Cal.App.4th 578, 585.) But “in construing an ambiguous verdict the court may use

anything in the proceeding that serves to show with some certainty what the jury intended and for this purpose reference may be had, for example, to the pleadings, the evidence, the admissions of the parties, the instructions, and the forms of verdict submitted.” (*West v. Duncan* (1962) 205 Cal.App.2d 140, 143; *Little v. Amber Hotel Co.* (2011) 202 Cal.App.4th 280, 300.)

In this case, it did not matter whether Dorsey’s negligence involved his removal of Moreno’s cast or merely his subsequent treatment of her or whether he was negligent in both circumstances. Since the jury found Dorsey’s negligence was not a substantial factor in causing injury to her, the latter finding barred recovery under either theory. (*Bermudez v. Ciolek, supra*, 237 Cal.App.4th at p. 1320 [“This is not a case in which the jury made inconsistent findings when answering two essentially identical factual questions pertaining to different theories of liability”]; *David v. Hernandez, supra*, 226 Cal.App.4th at pp. 585-586 [special verdict finding negligence, but no causation not inconsistent]; *Contreras v. Goldrich* (1992) 10 Cal.App.4th 1431 1433 [jury’s special verdict lacked agreement on negligence, but found no causation; judgment affirmed].) To the extent there is any ambiguity in the jury’s special verdict on Moreno’s medical negligence cause of action, we conclude it does not require reversal.

Second, we agree with Dorsey that Moreno did not independently seek recovery for the alleged injuries to her thumb from Dorsey’s initial cast removal at trial. Thus, to the extent she seeks to assert that claim on appeal, we reject it. “The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.” (*Ernst v. Searle* (1933) 218 Cal. 233, 240-241; *Kantlehner v. Bisceglia* (1951) 102 Cal.App.2d 1, 6 [“This rule has frequently been applied where one theory of damages was acquiesced in at the trial and appellants sought to shift to another theory of damages on appeal”].)

A review of the appellate record reflects the premise of Moreno's case was that Dorsey's actions *throughout* his treatment of her triggered her RSD. The complaint's negligence count alleged Dorsey's removal of her cast proximally caused her to "contract[] a serious trauma induced bone disease resulting in further hospitalizations and surgeries, all of which have contributed to or caused [her] to suffer . . . (RSD)."

In her trial brief, Moreno argued "[t]he critical factual/legal issue to be determined . . . is whether . . . [her] ultimate development of . . . [RSD] was caused, and/or substantially contributed to[] by" Dorsey's removal of the cast, his failure "to promptly diagnose and properly treat the . . . infection of her . . . thumb" or "to immediately refer [her] to a . . . specialist," and then "abandoning [her]" to Malin's unsupervised follow-up care. Moreno's trial counsel continued this theme in his opening statement, noting it was "uncontested and undisputed" she "has . . . what's called a . . . fully developed case of RSD" and that "the essence of the case" was Dorsey's treatment of Moreno from their initial encounter through her eventual hospitalization without disclosing the critical information that she might be suffering from RSD "ended up having this [disease] become full blown."

During closing argument Moreno's trial attorney again contended she "was treated negligently and below the standard of care by . . . Dorsey . . . , and that th[e] events [mentioned above] caused this whole condition with the thumb and . . . that was a direct cause . . . of the RSD [she] has now." The damages for which Moreno sought recovery focused on the lien for her pain management specialist treating her for RSD [Dr. Paicius], future medicals for her incurable condition, the loss of future earning capacity due to her inability to work because of her condition, plus past and future noneconomic damages. Thus, Moreno's new claim that she separately sought recovery for the injuries allegedly caused by Dorsey's initial removal of her cast is not supported by the record.

Finally, to the extent Moreno suggests the evidence supporting her case was undisputed or overwhelming, we conclude her failure to provide a summary of the

evidence presented at trial waives this assertion. “It is well established that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact.’ . . . A recitation of only [the appellant’s] evidence is not the ‘demonstration’ contemplated under the above rule. [Citation.] Accordingly, if, as [appellants] here contend, ‘some particular issue of fact is not sustained, they are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence*. Unless this is done the error is deemed to be waived.” (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229 1246 [an “appellate court is not required to search the record on its own seeking error[]”] and “an attack on the evidence without a fair statement of the evidence is entitled to no consideration when it is apparent that a substantial amount of evidence was received on behalf of the respondent”].) Because Moreno failed to provide an adequate summary of the trial evidence in her opening brief, we also deny her request to augment the record to include the trial exhibits.

Further, contrary to Moreno’s suggestion, the evidence at trial was neither undisputed nor overwhelming. Dorsey presented evidence challenging Moreno’s claims that she suffered a laceration or a thumb fracture as a result of his removal of her cast. Additionally, Dorsey presented an expert who opined the lesion Malin observed on her thumb two days after the cast removal could not have caused either a serious infection or triggered RSD. As for Dorsey’s entry of “?RSD” in his medical notes, he testified it was a presumptive diagnosis only and that he ordered a bone scan and gave Moreno a prescription for Inderal. The results of the bone scan were similar to the earlier MRI, and Moreno admitted she never took Inderal.

For the foregoing reasons we conclude Moreno’s attack on the validity of the special verdicts lacks merit.

2. Moreno's Prior Prescription Drug Use

At trial, Dorsey presented the testimony of several physicians who had previously treated Moreno for a variety of complaints of pain. These witnesses testified to Moreno's physical complaints and the treatment they recommended to relieve the pain, which included prescribing Vicodin.

During closing argument Dorsey's attorney cited this testimony: "We had some doctors come . . . in here . . . and talk[] to you about Ms. Moreno as she actually was before ever having a fall at the house. [¶] . . . And Dr. Huston was very careful to say he wasn't concerned about the Vicodin use in a mean manner or anything of that nature, but out of concern for this patient, and he wanted to make sure that the patient was going to be okay. [¶] And you see a steady pattern before the fall in 2009 of doctors recommending certain treatment, . . . and that treatment was not being followed through with [¶] . . . [B]ut the one thing that consistently is followed through with is the Vicodin. There would be reasons to seek intervention of the doctor, and the medication was prescribed, and you've heard their testimony. We've put together the chronology of events, but Dr. Huston couldn't have been more concerned, and you heard from the plaintiff that, 'No one ever told me they were concerned. I never heard from anybody that there was any concern about my Vicodin usage ever. I never had trauma. I never told anybody I had a lot of denials about the past.' [¶] That is important because they are part and parcel of the circumstances leading up to the original injury and part and parcel of what we see as a constellation of symptoms and problems that have been brought before you within the course [of] three and a half weeks."

Moreno now seeks reversal, contending the testimony of her prior treating physicians was erroneously admitted "[o]ver [her] relevance and [Evidence Code section] 352 objections," and opposing counsel committed misconduct by using it "as an

improper basis to unfairly attack her character and credibility, and to demean her as a human being.”

Again, Moreno has waived these claims because the appellate record fails to reflect she timely objected to the introduction of this evidence or to the closing argument of Dorsey’s attorney. “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.” (Evid. Code, § 353, italics added.) This rule applies in a case where an appellant complains the trial court erroneously admitted irrelevant or highly prejudicial testimony. (*Faigin v. Signature Group Holdings, Inc.* (2012) 211 Cal.App.4th 726, 749.) Although Dorsey listed each of the treating physicians as a potential trial witness, Moreno made no attempt to challenge their testimony by filing a pretrial motion in limine and no objections were made on the record during trial. Moreno contends her attorney did interpose objections to this testimony at sidebar conferences. But no effort was made to place these objections on the record or to afford the court an opportunity to explain its reasoning for overruling them. Thus, Moreno’s evidentiary claim fails.

The same analysis applies to Moreno’s complaint that Dorsey’s trial counsel committed misconduct by mentioning this testimony during closing argument. “Generally a claim of misconduct is entitled to no consideration on appeal unless the record shows a timely and proper objection and a request that the jury be admonished. [Citations.] The purpose of the rule requiring the making of timely objections is remedial in nature, and seeks to give the court the opportunity to admonish the jury, instruct counsel and forestall the accumulation of prejudice by repeating improprieties, thus

avoiding the necessity of a retrial. ‘It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove any effect his conduct or remarks would otherwise have.’ [Citation.] In the absence of a timely objection the offended party is deemed to have waived the claim of error through his participation in the atmosphere which produced the claim of prejudice.” (*Horn v. Atchison T. & S.F. Ry Co.* (1964) 61 Cal.2d 602, 610.)

Consequently, we find Moreno has waived any potential error concerning the admission of her prior prescription drug use and defense counsel’s reference to it during closing argument.

DISPOSITION

Appellant’s request to augment the appellate record to include the trial exhibits is denied. The judgment is affirmed. Respondent shall recover his costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.