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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JAMES A. KAY, JR.,

Plaintiff and Appellant,

v.

ROBERT MILLS,

Defendant and Respondent.

B291541

(Los Angeles County
Super. Ct. No.
BC620344)

APPEAL from a judgment of the Superior Court of
Los Angeles County. Margaret L. Oldendorf, Judge. Affirmed.

Law Offices of Timothy D. McGonigle and Timothy D.
McGonigle for Plaintiff and Appellant.

Robert Mills, in pro. per., for Defendant and Respondent.

This matter has a long history. It began in 2008 when defendant and respondent Robert Mills (Mills) joined a team of attorneys at a firm representing plaintiff and appellant James A. Kay, Jr., (Kay) in *Kay v. Silver & Freedman* (the *Silver & Freedman* action), a legal and accounting malpractice case. Mills left the firm in 2009, terminating his representation of Kay.

In 2015, Mills filed a cross-complaint against Kay and others on behalf of a new client in an unrelated fraudulent transfer action (the *Motorola* action). Arguing that Mills had obtained relevant confidential information through his representation of Kay in the *Silver & Freedman* action, Kay moved to disqualify Mills from the *Motorola* action. The trial court in the *Motorola* action did not reach the merits of the disqualification motion. Instead, the motion became moot after the court sustained Kay's demurrer to the cross-complaint without leave to amend.

This brings us to the current litigation, which Kay initiated in 2016. Kay sued Mills, alleging that Mills's conduct in the *Motorola* action breached his fiduciary duty to Kay. Early in this litigation, Kay sought a preliminary injunction prohibiting Mills from representing his client in the *Motorola* action in any case against Kay. The trial court denied Kay's motion for a preliminary injunction, and on August 1, 2017, we affirmed that order. (*Kay v. Mills* (Aug. 1, 2017) B278656 [nonpub. opn.] (*Kay I*).)

Thereafter, the case proceeded to trial. The jury found that although Mills breached his fiduciary duty to Kay, the breach was not a substantial factor in causing damage to Kay. As a

result, the jury did not award Kay any damages. Kay moved for a new trial, which the trial court denied.

Kay now appeals from the judgment against him, arguing that the trial court erred in denying his motion for a new trial on two separate grounds: (1) the jury's no causation finding was unsupported by the evidence, and (2) by awarding him no damages, the jury awarded him inadequate damages. Kay also argues that the special verdict was inconsistent.

We affirm the judgment.

BACKGROUND

I. The *Silver & Freedman* Action

For a 15-month period in 2008 and 2009, Mills was an associate attorney at the law firm Bradley & Gmelich, working as part of a team of attorneys representing Kay in the *Silver & Freedman* action. A multi-party legal and accounting malpractice case, the *Silver & Freedman* action alleged negligence involving the preparation and submission of Kay's tax returns.

Mills billed a total of 130.1 hours performing legal services on behalf of Kay in the *Silver & Freedman* action. Part of Mills's legal work involved reviewing Kay's bank records. Mills left Bradley & Gmelich in September 2009, thus ending his representation of Kay.

II. The *Motorola* Action

The *Motorola* action commenced in 2014 when Motorola Solutions, Inc. filed a fraudulent transfer action against Ann Pick (Ann)¹ and others. Mills agreed to represent Ann pro bono in the

¹ Because Ann and her son Harold Pick (Harold) share the same last name, for clarity we refer to them, individually, by

case. Ann, represented by Mills, filed a cross-complaint in December 2015 against multiple cross-defendants, including Kay.

Kay hired Bradley & Gmelich to defend him against Ann's cross-complaint. Bradley & Gmelich requested that Mills voluntarily withdraw from his representation of Ann based on his prior representation of Kay. Mills refused to withdraw, and in April 2016 Kay moved to disqualify Mills from the *Motorola* action. The basis of the motion was that, in the *Silver & Freedman* action, Mills had obtained confidential information regarding Kay's finances that was relevant to the *Motorola* action.

The trial court in the *Motorola* action never reached the merits of the disqualification motion. The motion became moot after Kay's demurrer to Ann's cross-complaint was sustained without leave to amend in June 2016.

III. The Current Litigation

In May 2016, Kay initiated the instant case by filing a complaint asserting claims against Mills for breach of fiduciary duty and injunctive relief.

A. Kay's motion for a preliminary injunction and the first appeal (Kay I)

Although Kay was no longer a party to the *Motorola* action because of his successful demurrer, in July 2016 Kay filed a motion for a preliminary injunction in the instant case, seeking an order enjoining Mills from representing the Picks in any legal action involving Kay and from sharing confidential information obtained during his prior representation of Kay. The trial court

their first names. No disrespect is intended. We refer to Ann and Harold, collectively, as "the Picks."

denied the motion, and Kay appealed. We affirmed, concluding that Kay had not shown a likelihood of prevailing on the merits because “there was no substantial relationship between the *Silver & Freedman* action and the *Motorola* action.” (*Kay I*, *supra*, B278656, at p. 5.)

B. Trial

The case was tried to a jury in May 2018.

1. Mills’s testimony

Mills testified that he agreed to represent Ann pro bono in the *Motorola* action because she “didn’t have a lot of money[.]” Mills reviewed the applicable ethics rules and determined that, because there was no substantial relationship between the *Silver & Freedman* action and the *Motorola* action, there was no conflict of interest precluding him from representing Ann against Kay. Mills refused to withdraw from his representation of Ann because she “was . . . elderly, had little funds, and [he] did not want to abandon her where no conflict existed.”

Mills acknowledged that he learned through his work on the *Silver & Freedman* action, which included reviewing bank records, that Kay was “a very wealthy man[.]” Mills did not know of the “feud or vendetta between” Kay and Ann’s son, Harold, until after the instant case was filed. Mills denied disclosing to anyone, including either Ann or Harold, “any personal, private, or confidential information” obtained during his representation of Kay in the *Silver & Freedman* action. The claim for punitive damages in Ann’s cross-complaint against the cross-defendants, including Kay, was “based on the actions of the cross-defendants and not on the net worth of any cross-defendant.”

2. Kay's testimony

Kay testified that there was “no love between” himself and Harold, and he admitted responsibility for taking the Picks’ home. Kay “was very irritated” when he learned that Mills was representing Ann, viewing it as the Picks’ attempt “to get inside information from Mills to use against [him] and get th[ei]r next attack” Kay also believed that by representing Ann in the *Motorola* action, Mills “was going after [him] as a deep pocket with inside knowledge” obtained from the prior representation.

Kay hired Bradley & Gmelich to defend him against the cross-complaint in the *Motorola* action and “to tell Mills to stop it, [and] get out of the case[.]” Since the cross-complaint had been dismissed, Kay had not suffered harm to his finances or business activities as a result of the Picks.

3. Barry Bradley's testimony

Barry Bradley (Bradley), the managing partner at Bradley & Gmelich, believed that it was a conflict of interest for Mills to represent Ann against Kay in the *Motorola* action, particularly because Mills had obtained information about Kay’s net worth through the *Silver & Freedman* action. In Bradley’s view, the *Silver & Freedman* action and the *Motorola* action were “absolutely related.”

After Mills refused to recuse himself from the *Motorola* action, Bradley & Gmelich filed a motion on behalf of Kay to disqualify Mills. Kay paid Bradley & Gmelich approximately \$50,000 to defend him against Ann’s cross-complaint, approximately \$11,000 of which was for the motion to disqualify Mills.

4. Harold's testimony

Harold testified that he was unaware that Mills had previously represented Kay until sometime after Mills began to represent his mother, Ann. When asked if Mills “ever disclosed to [him] any information regarding . . . Kay’s finances, businesses,” or personal life, Harold responded, “Nothing. Absolutely nothing.” Harold also denied having any ill will toward Kay and stated that he wished they “could bury the hatchet[.]”

5. Expert testimony

Kay retained Robert R. Sall (Sall), a legal malpractice specialist, to testify as an expert.

Sall explained that a lawyer “can represent someone adverse to [a former] client except it can’t be with respect to the same subject matter in which [the lawyer] previously represented or advised that client. [A lawyer is] always subject[-]matter barred from pursuing a claim in the future against a former client.” Mills “was subject[-]matter precluded from pursuing a claim that would involve the pursuit of a financial damage award against . . . Kay if the information that [Mills] knew about . . . Kay’s assets would be helpful to the representation of some other client against . . . Kay.”

Mills had “received substantial confidential information” regarding Kay’s finances. Because Mills would have a duty to Ann to use this confidential information against Kay, a conflict of interest existed. Thus, “[t]he mere act of agreeing to represent [Ann] in suing [Kay] for damages or for punitive damages, in [Sall’s] opinion, violated the Rules of Professional Conduct and was a breach of fiduciary duty.”

6. Jury verdict

The first question on the special verdict form submitted to the jury asked if Mills breached his fiduciary duty to Kay. The jury answered, “Yes[.]” The second question asked if the breach was “a substantial factor in causing damage to” Kay. The jury answered, “No[.]” Because of its answer to the second question, the special verdict form directed the jury to skip the third question as to the amount of damages caused by the breach.

The trial court subsequently entered judgment in favor of Mills.

C. Kay’s motion for a new trial

Kay moved for a new trial pursuant to Code of Civil Procedure section 657.² The primary basis of the motion was that the jury had awarded Kay inadequate damages. (§ 657, subd. (5).) However, at the hearing, the trial court identified what it believed to be “the real issue”: whether “there was insufficient evidence to support” the jury’s “no causation” finding on the breach of fiduciary duty cause of action. (§ 657, subd. (6).)

Based on its review of the entire record, the trial court denied the motion because it could not make a finding “that the jury clearly should have reached a different verdict.” The court thought it “entirely possible that the jury may have concluded that there was a technical violation of [Mills’s] fiduciary duties to . . . Kay, but that there was simply no causation resulting in any damage, [and] certainly not the \$50,000 . . . to \$51,000 . . . that . . . Kay argued flowed directly from that . . . violation.”

² All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

D. *The instant appeal*

This timely appeal of the judgment ensued.

DISCUSSION

I. Kay's Motion for a New Trial Was Properly Denied.

We conclude that Kay was not entitled to a new trial based on either the insufficiency of the evidence to support the jury's no causation finding or the inadequacy of the damages awarded.

A. *Relevant law and standard of review*

A trial court may vacate a jury verdict, and order a new trial, based on several enumerated statutory grounds, including "[i]nsufficiency of the evidence" and "inadequate damages." (§ 657; *Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 633.) The court may only grant a new trial on these grounds, however, if "after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the . . . jury clearly should have reached a different verdict" (§ 657.)

We generally afford great deference to the trial court's wide discretion in ruling on a motion for a new trial. (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871–872.) Still, when reviewing an order denying a new trial, we must look at the entire record and independently determine whether the alleged error was prejudicial. (*Id.* at p. 872.) "[W]e can reverse the denial of a new trial motion based on insufficiency of the evidence or [inadequate] damages only if there is no substantial conflict in the evidence and the evidence compels the conclusion that the motion should have been granted." (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 752 (*Fassberg*); accord *Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1415–1416.)

B. Analysis

Kay bore the burden of proving by a preponderance of the evidence that Mills's breach of his fiduciary duty was a substantial factor in causing Kay's alleged damages. (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1094.) Because it cannot be said that the jury clearly should have found that Kay met this burden, the trial court properly denied his new trial motion.

Given the confidential information about Kay's finances that Mills learned from his prior representation, the jury could have agreed with Sall's expert testimony that "[t]he mere act of agreeing to represent [Ann] in suing [Kay] for . . . punitive damages . . . was a breach of fiduciary duty." Regardless of whether Mills actually disclosed or used the confidential information, Sall testified that Mills exposed himself to the temptation of using that information to benefit his new client. But finding such a breach of fiduciary duty did not necessitate the additional finding that the breach was a substantial factor in causing Kay to suffer damages.

We disagree with Kay's contention that "all of the evidence was contrary to the jury's no causation finding." (Emphasis omitted.) The jury was presented with evidence of the acrimonious and litigious history between Kay and the Picks, including Kay's testimony that Harold "had been attacking [him] for 25 years and constantly harassing [him] every way possible" and that Kay had previously obtained judgments against the Picks totaling over \$1 million. Mills testified that he never disclosed confidential information obtained during his representation of Kay in the *Silver & Freedman* action, nor did he use that information when representing Ann in the *Motorola* action.

From this evidence, the jury could have reasonably inferred that Ann would have filed the cross-complaint in the *Motorola* action against Kay even if Mills had not been her attorney. Accordingly, Mills’s representation of Ann—the breach of his fiduciary duty to Kay—was not a substantial factor in causing the cross-complaint to be filed or in causing Kay to expend resources to defend himself against it. (See *Yanez v. Plummer* (2013) 221 Cal.App.4th 180, 187 “[C]onduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct. [Citations.]”.)

The jury also heard testimony that disqualification in successive representation cases is required when the first representation is substantially related to the subsequent representation. From Mills, they heard that there was no substantial relationship between the *Silver & Freedman* action and the *Motorola* action.³ From Kay’s witnesses, they heard that there was a substantial relationship.⁴ Based on the existence of

³ This testimony is consistent with our conclusion in *Kay I*, *supra*, B278656, at p. 5, that the *Silver & Freedman* action and the *Motorola* action were not substantially related, as well as cases requiring a “former client seek[ing] to disqualify his former attorney from serving as counsel to a successive client in litigation adverse to the interests of the former client” to “. . . demonstrate a “*substantial relationship*” between the subjects of the antecedent and current representations.’ [Citation.]” (*Antelope Valley Groundwater Cases* (2018) 30 Cal.App.5th 602, 617; see also *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283.)

⁴ We express no opinion on whether a question of law regarding the merits of Kay’s disqualification motion was

this “substantial conflict in the evidence[,]” we cannot say that the trial court was compelled to grant the new trial motion (*Fassberg, supra*, 152 Cal.App.4th at p. 752) on the ground that the jury “clearly should have reached a different verdict” (§ 657) on causation.

Because the jury found that Mills did not cause damage to Kay, it did not reach the issue of what amount of monetary damages was appropriate. Rather, as instructed by the special verdict form agreed upon by the parties, the jury terminated its deliberations on the breach of fiduciary duty cause of action after finding no causation. Kay cannot logically contend that the jury awarded inadequate damages without first establishing that the jury clearly should have found causation. As discussed above, we cannot conclude that the jury was compelled to make a finding of causation; as a result, Kay’s argument for a new trial on the ground of inadequate damages necessarily fails.

We affirm the denial of Kay’s new trial motion because the record does not compel the conclusion that the motion should have been granted because the jury “clearly” should have found causation and damages. (§ 657; *Fassberg, supra*, 152 Cal.App.4th at p. 752.)

II. The Special Verdict Was Not Inconsistent.

In a related argument, Kay contends that the jury’s special verdict was inconsistent because the finding that Mills breached his fiduciary duty cannot be reconciled with the finding that the breach did not cause damages. We disagree.

improperly submitted to the jury. Kay has not raised this issue on appeal.

“A special verdict is inconsistent if there is no possibility of reconciling its findings with each other. [Citation.]” (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 357.) Our review for such inconsistency is de novo. (*Id.* at p. 358.)

As explained above, the jury could reasonably have found that Mills’s breach of his fiduciary duty was not a substantial factor in causing damage to Kay. The evidence supported the inference that Ann would have filed the cross-complaint against Kay even if she had not been represented by Mills and that Kay’s disqualification motion was unnecessary. For these reasons, the special verdict findings of a breach that did not cause damages was not irreconcilably inconsistent.

Kay compares this case to *Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083 (*Zagami*), where the appellate court reversed and remanded for a new trial because the jury’s damages awards were “internally inconsistent” and “hopelessly ambiguous.” (*Id.* at pp. 1093–1094.) But *Zagami* is inapposite because, unlike here, the jury in that case explicitly found that the defendant had caused the plaintiff to suffer damages. (*Id.* at pp. 1088–1089.)

We therefore reject Kay’s argument that the special verdict was inconsistent.

DISPOSITION

The judgment is affirmed. Mills is entitled to his costs on appeal.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT