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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JAY LEVITES, Plaintiff, Respondent and Cross-Appellant. v. JACQUELYN MISTER, Defendant, Appellant and Cross-Respondent.	2d Civ. No. B265822 (Super. Ct. No. 56-2013-00442703-CU-PA-VTA) (Ventura County)

Jay Levites (Levites) sued Jacqueline Mister for damages allegedly sustained during an automobile accident.[1] The jury returned a verdict in Mister's favor. Mister appeals from an order granting a limited new trial to Levites on the issues of causation and damages. We conclude the trial court did not abuse its discretion by granting Levites's motion for a new trial after the jury found, contrary to the expert medical testimony,

[1] The action was brought by Levites and his passenger, Steven Levites. Steven Levites is not a party to this appeal.

that Mister's negligence was not a substantial factor in causing Levites any harm. We affirm the order and dismiss Levites's protective cross-appeal from the judgment as moot. (See *Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 60 ["[A]ffirmance of the new trial order means that there is no judgment in effect and that the appeal from the judgment is moot"].)

FACTS AND PROCEDURAL BACKGROUND

The Accident

On June 15, 2013, Mister was driving her 2005 Toyota Camry northbound on South Ventura Road in Port Hueneme. Levites, who was driving a 2002 Land Rover, was stopped at a red light at the intersection of South Ventura Road and West Wooley Road. There were two vehicles in front of him. After passing another vehicle in the right lane on South Ventura Road, Mister cut into the left lane, where Levites was stopped, and struck his vehicle in the rear. Levites, who was wearing his seatbelt, felt a sudden, strong jolt. His vehicle was pushed about three feet forward, and Levites instinctively put both feet on the brake pedal to avoid hitting the vehicle in front of him. According to Levites, his left foot then slid off the brake pedal and struck the floorboard, causing him to twist his ankle.

Levites and Mister drove their vehicles to a nearby gas station, where they exchanged information. When the police responded to the scene, the officer asked Levites if he was injured. Levites replied that he "was not sure of any pains that [he] was feeling immediately other than the pain[] that [he] was already in." The officer noticed that Levites's left leg was wrapped.

Before leaving the gas station, Levites pulled damaged plastic from the front of Mister's automobile and placed it in her

trunk. He testified that he was limping and unable to get down on his knees to perform this task. Mister claimed that Levites knelt on his right knee with his left leg straight out.

Accident Injuries and Prior Injuries

Following the accident, Levites dropped off his passenger and drove to Ron Rheingold's house for a planned visit. Upon arriving at his friend's house, Levites complained he was "progressively hurting." Rheingold referred him to Dr. Jacob Tauber, an orthopedic surgeon. Rheingold also referred Levites to a personal injury attorney, whom Levites retained that day.

Levites stayed at Rheingold's house until he was able to see Dr. Tauber on June 18, 2013. Levites did not seek emergency care because he did not believe he was experiencing a medical emergency. When he saw Dr. Tauber, Levites complained of increasing pain in his knees, neck and back and of instability in his left knee.

Levites had a total left knee replacement in 2008. He had no left knee instability following the surgery. Levites did have left leg nerve pain and a drop foot and also some arthritis in his right knee. He took pain medication, including Oxycontin, for chronic pain. Levites was told that if the pain in his right knee substantially increased, he would be a candidate for a right knee replacement.

Before the accident, Levites experienced some neck pain which required chiropractic treatment. Levites occasionally used a cane or walker because of his drop foot. After the accident, he used the cane and walker for stability. Levites fell several times on his right side because his left knee would give way while walking.

Expert Opinion Regarding Injuries and Causation

At trial, three medical experts, Dr. Tauber, Dr. Logan Osland and Dr. H. David Lyons, testified on Levites's behalf. Dr. Jeffrey I. Korchek, an orthopedic surgeon, testified for the defense. Each medical expert agreed that the accident caused soft tissue injuries to Levites's neck and back. Significantly, Dr. Korchek conceded "that . . . Levites sustained limited strain or muscle strain injury to his neck and back region as a result of [the] accident of June 15, 2013." Dr. Peter R. Francis, Levites's biomechanics expert, also observed that "[f]rom a biomechanical perspective, the movements of [Levites's] neck and low back during the collision sequence are consistent with soft tissue injuries to the neck and back." In light of this testimony, defense counsel proposed during closing argument that the jury award Levites $3,500 for those injuries -- $2,500 for chiropractic care and $1,000 for noneconomic damages.

The medical experts disagreed regarding whether the accident caused injury to Levites's knees. When Dr. Tauber examined Levites three days after the accident, he tested the ligaments of Levites's left knee and found that the knee was "grossly unstable." Dr. Tauber advised Levites that he would need a revision left knee replacement, as the ligaments surrounding his knee had been torn during the accident. Dr. Tauber based his opinion on both his physical examination of Levites and a review of Levites's extensive medical records.

Dr. Tauber performed the revision left knee replacement surgery on October 15, 2014. The surgery confirmed the gross instability of Levites's left knee. Matt Scott, a medical sales representative who was present during the surgery, testified that he and the others in the operating room observed the instability.

Dr. Tauber further testified that Levites injured his right knee as a result of the accident. Dr. Tauber stated that because Levites's left knee was unstable, Levites had to compensate by putting more weight on his right knee. Levites also injured his right knee during falls caused by his unstable left knee. Dr. Tauber opined that the automobile accident was a substantial factor in Levites's need for a total right knee replacement.

Dr. Osland, a chiropractor, began seeing Levites for neck pain in 2011. During eight pre-accident visits, Levites never complained of pain or instability in his knees. After the accident, Levites complained of pain in his left knee, neck, mid-back and lower back. Levites's neck pain was different than his prior neck pain. Dr. Osland diagnosed Levites with cervical sprain/strain, thoracic sprain/strain (mid-back), lumbar sprain/strain and knee sprain/strain. Dr. Osland's notes indicate that Levites had left knee instability after the accident, and that the instability improved post-surgery.

Dr. Lyons, Levites's treating physician, examined Levites on June 27, 2013. Levites told Dr. Lyons that the accident caused him to slam both feet against the brake pedal, which resulted in an increased injury to his left knee. Dr. Lyons noted that there was no left knee instability before the accident, but that there was instability after the accident. He opined that it was reasonable, as a result of the injury, for Levites to have a revision left knee replacement. Although the instability in the left knee and the post-accident falls could have injured Levites's right knee, Dr. Lyons declined to speculate as to whether a total right knee replacement was necessary.

Dr. Francis testified regarding whether the mechanics of the accident caused the injuries claimed by Levites. Dr. Francis determined that the accident itself did not cause Levites's knee

injuries. Those injuries were caused by Levites's reaction to being suddenly rear-ended.

Dr. Francis explained that once the collision occurred, Levites engaged in "panic mode braking." Levites slammed both feet on the brake pedal so he would not be pushed into the vehicle in front of him. Levites's left foot then came off the pedal and hit the floor. According to Dr. Francis, it was the foot's violent impact with the floor that injured Levites's left knee. Dr. Francis testified that the sudden and violent stretching of the ligaments overstretched them to the point where the left knee was no longer stable.

In contrast, Thomas Fugger, Mister's accident reconstruction and biomechanics consultant, testified that the type of force involved was equivalent to Levites's "stepping off a curb" or "stepping up and down stairs." Dr. Francis disagreed with this conclusion, but opined that even with the force claimed by Fugger, the left knee injury still could have occurred.

Dr. Korchek examined Levites on February 25, 2014. Dr. Korchek found limited ligament laxity in the left knee. He conceded that any total knee replacement would have some laxity, but concluded that the left knee was not "grossly unstable." Dr. Korchek opined that the revision surgery was not indicated as a result of traumatic ligament injury. He further testified that the need for right knee replacement surgery was not caused by traumatic injury.

Directed Verdict and Jury Verdict

The trial court directed a verdict in Levites's favor on the issue of Mister's negligence. It denied the motion for a directed verdict as to causation. The court recognized that the medical experts agreed that the accident caused some injury to Levites's neck and back, but noted that the evidence was contradictory

with respect to Levites's claimed knee injuries. It further stated, "I don't know how you grant that kind of motion [as to causation] as to some of the claim of injury and not the other."

The first question on the special verdict form asked, "Was the negligence of [Mister] a substantial factor in causing harm to [Levites]?" The jurors unanimously answered "No." The trial court accordingly entered judgment in favor of Mister and against Levites.

Motion for New Trial

Levites moved for a new trial and for judgment notwithstanding the verdict. He argued, among other things, that the evidence was insufficient to support the jury's verdict of no causation. (Code Civ. Proc., § 657, subd. 6.)[2]

During the hearing, the trial court referenced both Dr. Korchek's testimony that the accident caused strains in Levites's neck and back and defense counsel's argument that the damages for such injuries should be limited to $3,500.[3] The court asked how those items could be reconciled with a defense verdict. After hearing argument on the issue, the court took the matter under submission.

In a written ruling, the trial court granted the motion for new trial and denied the motion for judgment notwithstanding the verdict as moot. The court explained, "Defense evidence . . . included testimony from Dr. Jeffrey Korchek, who had performed a[n] . . . examination of the plaintiff, and concluded that there

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[2] All further statutory references are to the Code of Civil Procedure.

[3] During closing argument, Levites's counsel requested that the jury award $139,248.07 for Levites's past medical expenses, $124,547.40 for future medical expenses, $417,744.21 for past pain and suffering and $373,642.20 for future pain and suffering.

was no injury to the left knee, no injury to the right knee, but that there was strain injury to the neck and back. [¶] Based on the above, the court finds that the verdict of no injury is contrary to the evidence. Had the jury awarded a low amount of damages, the court would likely have concluded that [the jurors] rejected the claim of knee injuries, and based their decision on a finding of a soft tissue injury. That would have been consistent with the evidence, albeit a result which rejected the credibility of plaintiff's medical testimony and evidence. In finding, however, that there was no injury, the court concludes that the jury was motivated by factors extraneous to the evidence."

Mister appeals from the limited new trial order. Levites filed a protective cross-appeal from the judgment. (See *Grobeson v. City of Los Angeles* (2010) 190 Cal.App.4th 778, 798-799.)

DISCUSSION

Standard of Review

Section 657 provides that the verdict may be vacated and a new trial granted upon the motion of an aggrieved party on the ground of "[i]nsufficiency of the evidence to justify the verdict or other decision . . . ." (§ 657, subd. 6.) When ruling on a motion for new trial, the trial court has the power to "sit[] '"as a thirteenth juror,"' asking whether '"the weight of the evidence appears to be contrary to the jury's determination"'; in so doing, the court is free to '"disbelieve witnesses, reweigh the evidence, and draw reasonable inferences therefrom contrary to those of the trier of fact."' [Citation.]" (*Licudine v. Cedars-Sinai Medical Center* (2016) 3 Cal.App.5th 881, 900; *David v. Hernandez* (2014) 226 Cal.App.4th 578, 588.) '"The determination of a motion for new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.' . . ." (*Sandco American, Inc.*

v. Notrica (1990) 216 Cal.App.3d 1495, 1506.) The considerations favoring affirmance are greater where the trial court grants a new trial because it is not a final disposition of the case. (*Ibid.*) Moreover, as we observed in *David*, the "well-known rules" governing review of orders granting or denying a new trial motion "are designed to affirm the trial court's ruling." (*David*, at p. 581.)

Mister argues that the standard of review is whether there is substantial evidence to uphold the jury's verdict. But, as Levites correctly notes, that standard does not apply after the trial court grants a motion for a new trial. "'[T]he presumption of correctness normally accorded on appeal to the jury's verdict is replaced by a presumption in favor of the [new trial] order.'" (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412.) An order granting a new trial must be affirmed unless "'no reasonable finder of fact could have found for the movant on [the trial court's] theory.'" (*Ibid.*) In other words, "so long as the evidence can support a verdict in favor of *either* party -- a properly constructed new trial order is not subject to reversal on appeal." (*Id.* at p. 414.) The rationale for the deferential abuse of discretion standard is that "[t]he trial court sits much closer to the evidence than an appellate court." (*Id.* at p. 412.)

No Abuse of Judicial Discretion

Mister contends the trial court abused its discretion in granting the motion for new trial because there is no substantial basis for the court's finding that the automobile accident was a substantial factor in causing harm to Levites. (See § 657.) Alternatively, Mister contends the new trial should be limited to the issue of damages for Levites's neck and back injuries.

As to the first contention, Mister has the burden of demonstrating that "no reasonable finder of fact" could have

made a finding in Levites's favor on the issue of causation. (*Jones v. Citrus Motors Ontario, Inc.* (1973) 8 Cal.3d 706, 710.) Mister has not met this burden. The medical experts for both parties concluded that Levites was injured in the automobile accident. Although the defense's medical expert, Dr. Korchek, testified on direct examination that the accident caused Levites to sustain "a possible" limited strain to his neck and back, he clarified on cross-examination that Levites "sustained limited strain or muscle strain injury to his neck and back region as a result of [the] accident." Dr. Korchek's testimony was consistent with the testimony of Levites's medical experts, who agreed that Levites had suffered neck and back injuries as a result of the accident. It also was supported by Dr. Francis's opinion that "[f]rom a biomechanical perspective, the movements of [Levites's] neck and low back during the collision sequence are consistent with soft tissue injuries to the neck and back." In light of this evidence, a reasonable trier of fact could have found for Levites on the trial court's theory that the accident did cause injury. (*Jones,* at p. 710.) As the court observed, the jury's "verdict of no injury is contrary to the evidence."

Mister's next contention is that, assuming the new trial order is upheld, it should be limited to damages for the injuries to Levites's neck and back. Section 657 provides that a verdict may be set aside "in whole or in part, and a new or further trial granted on all or part of the issues . . . ." Thus, "[i]t is within the trial court's power to order a new trial on only one issue in a case where the issues are distinct and severable. Such an order will not be reversed in the absence of a showing of an abuse of discretion." (*Stegmann v. Holder* (1963) 223 Cal.App.2d 531, 536.)

Here, the trial court ordered a new trial on the issues of causation and damages. It did not limit the new trial to the amount of damages for Levites's neck and back injuries. Nothing in the record suggests, however, that Mister asked the court to so limit any new trial order. As a general rule, we do not consider claims made for the first time on appeal. (*Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 972.) "Appellate courts are loathe to reverse a judgment [or order] on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider. [Citation.]" (*JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 178.) "'We will therefore "ignore arguments, authority, and facts not presented and litigated in the trial court." [Citation.] Such arguments raised for the first time on appeal are generally deemed forfeited. [Citation.]'" (*Lauron*, at p. 972.)

Even if the issue were not forfeited, Mister would not prevail. In essence, Mister is requesting that we (1) uphold the jury's verdict on the issue of causation as to Levites's knee injuries, (2) grant judgment on the issue of causation as to his neck and back injuries and (3) remand the matter for a new trial on damages for the neck and back injuries.[4] Mister cites no persuasive authority for this request. When a trial court finds insufficient evidence to support a verdict, the remedy under

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[4] Mister also requests that, in lieu of ordering a new trial on the issue of damages for the neck and back injuries, that we issue a conditional additur setting forth the amount of damages to be awarded for such injuries. As Levites points out, only the trial court has authority to issue a conditional additur. (§ 662.5; *Pacific Group Holdings, LLC v. Keck* (2014) 232 Cal.App.4th 294, 318.)

section 657, subdivision 6, is a new trial on the issue or issues for which there was insufficient evidence. Here, the jury was asked whether Mister's negligence was "a substantial factor in causing harm to [Levites]?" The trial court found there was insufficient evidence to support the jury's finding that Mister's negligence did not cause "harm" to Levites. This is the "distinct and severable" issue that is subject to a new trial, along with the issue of damages. (*Stegmann v. Holder*, *supra*, 223 Cal.App.2d at p. 536; see *Barrese v. Murray* (2011) 198 Cal.App.4th 494, 503 ["The trial judge has 'to be satisfied that the evidence, as a whole, was sufficient to sustain the verdict; if he was not, it was not only the proper exercise of a legal discretion, but his duty, to grant a new trial'"].

Where, as here, an order grants a new trial on certain issues, "'it opens for examination all of the facts and circumstances relative to [those issues] and as to other issues there shall be no retrial or examination of the facts.' [Citation.]" (*Ayyad v. Sprint Spectrum, L.P.* (2012) 210 Cal.App.4th 851, 861 (*Ayyad*).) In other words, "[a] new trial order limited to certain issues vacates only the portion of the judgment pertaining to those issues, while 'the portion of the judgment pertaining to the unaffected issues remains in place and becomes final once the time for appeal passes.' [Citation.]" (*Ibid.*)

Two analogous New York cases illustrate this point. In *Browne v. Pikula* (1998) 682 N.Y.S.2d 750 [256 A.D.2d 1139] (*Browne*), the jury found that the defendant negligently caused an automobile accident, but determined the negligence was not a proximate cause of the plaintiff's injuries. (*Ibid.*) The trial court set aside the verdict as against the weight of evidence on the issue of proximate cause. (*Ibid.*) "Although the medical experts disagreed concerning the extent to which the accident caused

[the] plaintiff's injuries, it was undisputed that at least some of [the] plaintiff's injuries were attributable to the accident." (*Id.* at p. 751.) Consequently, "the jury verdict finding that [the] defendant's negligence did not proximately cause [the] plaintiff's injuries could not have been reached on any fair interpretation of the evidence." (*Ibid.*)

The appellate court concluded that the trial court erred by directing judgment as a matter of law on the issue of proximate cause. (*Browne*, *supra*, 682 N.Y.S.2d at p. 751.) The court noted that "'[a] determination setting aside a jury verdict as against the weight of the evidence "results only in a new trial and does not deprive the parties of their right to ultimately have all disputed issues of fact resolved by a jury."' [Citations.]" (*Ibid.*) The court therefore modified the order to grant a new trial on proximate cause and damages. (*Ibid.*)

Similarly, in *Zecher v. Backus* (2001) 730 N.Y.S.2d 898 [286 A.D.2d 884] (*Zecher*), the jury found both negligence and injury, but determined that the defendant's negligence was not "'a substantial factor in causing the plaintiff's injury.'" (*Id.* at p. 899.) The trial court concluded this finding was against the weight of the evidence because "[t]he testimony of [the] plaintiff's treating physicians established that the accident was at least a substantial factor in causing [the] plaintiff's injury." (*Ibid.*) The court properly set aside the verdict but erred in ordering a new trial with respect to damages only. (*Ibid.*) Citing the rule in *Browne*, the appellate court modified the order to grant a new trial on both proximate cause and damages. (*Ibid.*)

The reasoning in *Browne* and *Zecher* applies here. Having found that at least some of Levites's injuries were caused by the automobile accident, the trial court properly exercised its discretion to order a new trial on the issues of causation and

damages. (*Barrese v. Murra*, *supra*, 198 Cal.App.4th at p. 503.) This limited new trial entitles the parties to have the jury resolve all disputed issues of fact regarding causation, including whether Mister's negligence was a substantial factor in causing harm to Levites's knees. (See *Ayyad*, *supra*, 210 Cal.App.4th at p. 861.) Of course, if the new jury finds causation as to any of the alleged harm, it will then reach the issue of damages.

DISPOSITION

The order granting Levites a limited new trial is affirmed. Levites's protective cross-appeal from the judgment is dismissed as moot. Levites shall recover his costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Henry J. Walsh, Judge
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