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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

STEVEN AISPURO, Plaintiff and Appellant, v. CHARYLE HERRERA et al., Defendants and Respondents.	B272345 Los Angeles County Super. Ct. No. BC531241

APPEAL from a judgment and order of the Superior Court of Los Angeles County, C. Edward Simpson, Judge. Affirmed.

Khorshidi Law Firm and Omid Khorshidi for Plaintiff and Appellant.

Law Offices of Jeffrey C. Sparks and Jeffrey C. Sparks for Defendant and Respondent Charyle Herrera.

Tyson & Mendes, Robert F. Tyson, Jr., Susan L. Oliver and Megan Isserman for Defendants and Respondents Christian Villanueva Pastrana and Claudia Quintero.

INTRODUCTION

Plaintiff and appellant Steven Aispuro (plaintiff) sustained a mild neck whiplash injury in a three-car automobile accident. A jury allocated the fault for the accident equally between the other two drivers and awarded plaintiff economic damages roughly representing the cost of medical care. Plaintiff contends here, as he did in his unsuccessful motion for new trial, that the damages award is inadequate as a matter of law because it does not include any compensation for pain and suffering related to the injury.

In limited circumstances, a damages award may be inadequate as a matter of law due to the failure to award damages for pain and suffering. However, those circumstances generally involve a plaintiff who has suffered a very severe injury which requires significant medical intervention (surgery, lengthy hospital stay) and/or ongoing or permanent pain and disability. Here, plaintiff received chiropractic adjustments, massage therapy, hot and cold packs, and electrostimulation several times a week for six months. The defense medical expert testified plaintiff suffered a mild strain and sprain in his neck due to a whiplash injury, which would typically resolve in four to six weeks. Plaintiff complains of a stiff neck once or twice a week on an ongoing basis, which the jury could reasonably have determined is normal for a man of 53 years of age. We conclude the facts before us do not compel an award of damages for pain and suffering. Accordingly, we affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff was injured in an accident involving three cars traveling in the same direction on a major thoroughfare in Whittier. Christian Villanueva Pastrana (Pastrana) was driving a Kia Spectra in the lane next to plaintiff, who was driving his Ford F150 pickup truck. As the two cars approached an intersection traveling at approximately 35 miles per hour, the Kia crossed into plaintiff's lane, directly in front of his truck. Although plaintiff applied his brakes forcefully, the front of his truck hit the rear of the Kia, leaving a few scratches on the Kia's bumper. Pastrana's wife, the owner of the Kia, later replaced the bumper at a cost of $680.[1] Pastrana described the collision as "insignificant" and initially thought the car simply had a flat tire. There is no evidence Pastrana or his three daughters, who were passengers in the car, were injured.

After plaintiff's truck hit the Kia, the car traveling directly behind plaintiff, a Honda Accord, struck the rear of plaintiff's truck. The Honda sustained damage to the front hood and bumper. The driver, Charyle Herrera, later paid $900 to repair the damage to the car. There is no evidence Herrera was injured in the collision.

The investigating officer described the damage to plaintiff's truck as minor in the front and moderate in the rear. The photographs admitted at trial show what appears to be relatively minor damage to plaintiff's truck's rear bumper. And although plaintiff testified the cost to repair the damage was $4,000, he

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[1] Pastrana's wife, Claudia Quintero, was also named as a defendant in plaintiff's suit.

offered no documentary evidence to support that estimate and did not ask the jury to award any amount for property damage.

At the scene of the accident, plaintiff told the investigating CHP officer he was experiencing pain in his neck, upper back, and middle back. Plaintiff did not seek medical attention after the accident and testified he was able to work without interruption, using only Motrin to relieve pain and stiffness in his neck and upper back. Approximately one week after the accident, Herrera saw plaintiff on the street.[2] During a brief conversation, plaintiff told Herrera he was feeling fine. And a few weeks later, Herrera saw plaintiff adjusting some boxes that were sitting on top of a trailer attached to plaintiff's truck. Herrera observed plaintiff moving without restriction and said it looked like "his regular day at work."

Approximately one month after the accident, plaintiff met with an attorney (his trial counsel) and a pain management specialist, Dr. Weitzman. Plaintiff presented with headaches as well as pain in his neck, back, and leg. According to the defense medical expert, Dr. Forman, plaintiff suffered a mild sprain and strain in the lower cervical spine (C5–C6, C6–C7) and lower back, consistent with a mild whiplash injury. Dr. Forman testified that most mild whiplash injuries resolve within four to six weeks. Consistent with the general prognosis, Dr. Weitzman prescribed 12 to 18 physical therapy sessions (two to three times per week for four to six weeks.) Plaintiff had 61 sessions with various modalities (chiropractic, electrostimulation, hot and cold packs, and massage) during the subsequent six months. When plaintiff returned to Dr. Weitzman six months after the accident, he

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[2] Coincidentally, plaintiff and Herrera worked near each other.

complained of neck pain in a different location, this time in the upper cervical spine (C2–C3, C3–C4). At that time, an MRI study revealed 2–3 millimeter disc protrusions, considered normal for a person of plaintiff's age. Dr. Weitzman administered two facet joint block injections, one at C2–C3 and the other at C3–C4, designed to numb the small nerves near the painful joints. But in Dr. Forman's opinion, the injections were not indicated because the pain plaintiff complained of was at a different site than the site of his initial injury and, in any event, the MRI study did not show any significant degeneration or injury to those joints. After the second injection, plaintiff required no further treatment. Plaintiff sought $35,379 in economic damages, representing the value of the medical treatment he received.

Plaintiff complained of pain throughout the entire course of treatment with Dr. Weitzman, ranging from 5 out of 10 to 8 out of 10, depending on the time period and his movements. Throughout the period of treatment, however, plaintiff worked normally.

After completing his treatment, plaintiff filed the present negligence action naming Herrera, Pastrana, and Quintero as defendants. The matter proceeded to trial before a jury which found Herrera and Pastrana negligent and equally at fault in causing the accident. The jury also found plaintiff was not at fault and awarded him economic damages of $32,148. Although plaintiff's counsel asked the jury to award approximately $75,000 for plaintiff's past and future pain and suffering, the jury did not make any award of noneconomic damages. Plaintiff filed a motion for new trial on the ground that the absence of an award for pain and suffering rendered the damages inadequate as a matter of law. The court denied the motion and plaintiff timely appeals.

DISCUSSION

Plaintiff contends the jury award failing to compensate him for pain and suffering is inadequate as a matter of law, and the court abused its discretion in denying his motion for new trial on that issue. We disagree.

Code of Civil Procedure section 657 provides that a court may order a new trial on the ground that damages are inadequate. (Code Civ. Proc., § 657, subd. (5).) We review the denial of a motion for new trial based on the damages verdict following a thorough review of "all the evidence and the entire record." (*Abbott v. Taz Express* (1998) 67 Cal.App.4th 853, 856 (*Abbott*); *Haskins v. Holmes* (1967) 252 Cal.App.2d 580, 584 (*Haskins*).) "The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. ... As a result, all presumptions are in favor of the decision of the trial court [Citation]." (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 506–507.) Given the difficulty of measuring damages in personal injury cases, "[w]e do not question the discretionary determinations of jury and judge, so long as they fall within a reasonable range permitted by the evidence." (*Abbott, supra*, 67 Cal.App.4th at p. 857.) In limited circumstances, however, "[t]he uncontradicted evidence may demonstrate that the damages awarded are so inadequate as to justify appellate intervention." (*Smith v. Moffat* (1977) 73 Cal.App.3d 86, 94.)

Pertinent here, some courts have held the failure to award damages for pain and suffering requires reversal of the judgment where the plaintiff's injury, or subsequent treatment, is so severe that it necessarily causes substantial pain and suffering on the part of the plaintiff. In considering whether damages for pain and

suffering could be awarded to an infant in a medical malpractice case, our Supreme Court commented not only that lay testimony (as opposed to medical expert testimony) could sufficiently establish a basis for such an award, but also that "even in the absence of any explicit evidence showing pain, the jury may infer such pain, if the injury is such that the jury in its common experience knows it is normally accompanied by pain. [Citation.] Indeed, for certain injuries the inference of pain may be so compelling that the trial judge would be justified in ordering a new trial if the jury declines to draw it. '[T]he items of pain, suffering and inconvenience … are inevitable concomitants with grave injuries. … A jury may not eliminate pain from wounds when all human experience proves the existence of pain ... .' [Citation.]" (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 896.) And in the case before it, the court concluded the infant's condition—a salmonella infection which required repeated hospitalizations due to severe diarrhea, projectile vomiting, shock, and dehydration beginning when the infant was two weeks old and lasting for months—compelled an award of damages for pain and suffering. (*Id*. at pp. 896–897.)

The appellate courts have also, in limited circumstances, reversed a judgment on a jury's verdict on the grounds of inadequate damages where the uncontradicted evidence establishes significant pain and suffering on the part of the plaintiff. In *Wilson v. R. D. Werner Co.* (1980) 108 Cal.App.3d 878 (*Wilson*), for example, the plaintiff maintained an action against a ladder manufacturer after sustaining injuries in a fall from an extension ladder. The undisputed evidence established the plaintiff fractured one elbow and both wrists in the fall and required significant medical intervention as a result: surgery to

remove a bone fragment, reattachment of muscles, insertion of wires to hold bone fragments in place, placement of casts on both arms from fingers to shoulders, and a 10-day hospitalization. (*Id.* at p. 880.) In addition, the plaintiff "suffered substantial and permanent impairment of function as a result of his injuries." (*Ibid.*) The court held the jury's award, which compensated the plaintiff for temporary loss of income and medical expenses but failed to compensate him at all for pain and suffering, was inadequate as a matter of law. (*Id.* at p. 883.) Similarly, in *Haskins*, *supra*, 252 Cal.App.2d at p. 580, the appellate court found inadequate an award that did not include damages for pain and suffering where it was plain that the plaintiff, the victim of an assault and battery, suffered a traumatic injury to his head and face consisting of fractures to the cheek and jawbone that caused a depressed cheekbone and required surgery. (*Id.* at pp. 587–588.) The court noted it was "obvious" that "pain, suffering, and inconvenience … inevitably accompany the type of injuries and surgery involved." (*Id.* at p. 587.)

Plaintiff relies exclusively on a case taking a similar approach, *Dodson v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931 (*Dodson*). There, the court of appeal held "that where a plaintiff has undergone surgery in which a herniated disc is removed and a metallic plate inserted, and the jury has expressly found that the defendant's negligence was a cause of plaintiff's injury, the failure to award any damages for pain and suffering results in a damage award that is inadequate as a matter of law." (*Id.* at p. 933.) With respect to the plaintiff's condition and treatment, the evidence established that after a workplace accident, the plaintiff experienced pain and weakness so severe it caused him to fall on several occasions. (*Id.* at pp. 933–934.) A neurosurgeon

subsequently observed arthritis in the neck, a central disc rupture, bruising of the spinal cord, and weakness in all four extremities due to spinal cord injury. (*Id.* at p. 934.) And after the surgery, the plaintiff experienced a loss of equilibrium and a great deal of pain in his arms, knees, neck and back. (*Ibid.*) He used a walker for about nine months after the surgery, continued to use a cane up to the time of trial, and received physical therapy for at least one year. (*Ibid.*) In holding that the damages award was inadequate as a matter of law, the court of appeal acknowledged, importantly for our purposes, that "an award that does not account for pain and suffering is 'not necessarily inadequate as a matter of law' [citation], and that '[e]very case depends upon the facts involved.' [Citation.]" (*Id.* at p. 936.) On the facts before it, the court concluded that "[a] plaintiff who is subjected to a serious surgical procedure must necessarily have endured at least some pain and suffering in connection with the surgery. While the extent of the plaintiff's pain and suffering is for the jury to decide, common experience tells us it cannot be zero." (*Id.* at p. 938.)

Relying on *Dodson*, plaintiff contends the jury's damages award here was inadequate as a matter of law because it awarded damages related to his medical expenses (thus finding that his injury was caused by the accident and the medical treatment was reasonable and necessary) but did not also compensate him for pain and suffering. More particularly, he reads *Dodson* as holding that if a jury awards damages for medical costs related to an injury caused by the defendant, it must—in every case—award damages for pain and suffering relating to the injury. Plaintiff overstates *Dodson*'s holding and we decline his implicit invitation to create such an expansive

rule. As we have said, the court in *Dodson* was careful to couch its holding in terms of the specific circumstances of that case—such as spinal cord trauma requiring surgery and resulting in permanent disability—not present here. Moreover, the court impliedly rejected plaintiff's proposed rule, in that the court expressly stated not all awards failing to compensate for pain and suffering are inadequate as a matter of law. (*Dodson, supra*, 154 Cal.App.4th at p. 936 ["[A]n award that does not account for pain and suffering is 'not necessarily inadequate as a matter of law' [citation], and that '[e]very case depends upon the facts involved.' [Citation.]"].)

In any event, in *Dodson*, the court relied on another case, *Miller v. San Diego Gas & Elec. Co.* (1963) 212 Cal.App.2d 555, 558 (*Miller*), as the basis for its opinion. (*Dodson, supra,* 154 Cal.App.4th at pp. 936–937.) In *Miller*, the court affirmed the jury verdict awarding the plaintiff only the bare amount of her medical expenses after she suffered an electrical shock. The jury denied the plaintiff her claims for more extensive medical damages as well as pain and suffering. The court explained that the record revealed a "substantial conflict" in evidence regarding the extent of the plaintiff's injuries and whether the medical treatments and bills incurred "were rendered necessary by reason of the shock or whether they were necessary at all." (*Miller,* at p. 560.) The court further explained that based on the jury's finding of negligence, and the weaker evidence supporting the plaintiff's injuries and medical treatment, it was "entirely probable that the jury felt that although plaintiff was entitled to no more than nominal damages, the kindest disposition of the case was to award to her an amount at least equivalent to her medical bills." (*Ibid.*) On the facts before it, the appellate court

rejected the argument that the trial court abused its discretion in allowing the judgment to stand even though the jury did not award plaintiff any noneconomic damages. (*Id*. at p. 562.)

The facts of the case before us sit somewhere between *Miller* and *Dodson*. No one seriously disputed that plaintiff was injured as a result of the accident, or that the bulk of the medical treatment he received was reasonable and necessary. To the extent the evidence was in conflict, it centered on the degree of plaintiff's injury (mild vs. moderate), the required length of treatment (four to six weeks vs. six months), and the appropriateness of the facet block injections in the absence of objective findings that the injections were indicated. In that sense, the present case is distinguishable from *Miller*. And here, the jury could reasonably have made a modest award of damages for plaintiff's pain and suffering. But we cannot say, as would be required to reverse the trial court's denial of plaintiff's motion for new trial, that the jury's failure to award such damages for pain and suffering is outside the "reasonable range permitted by the evidence." (*Abbott, supra*, 67 Cal.App.4th at p. 857.)

The defense medical expert testified the plaintiff's injury was mild and, based in no small part upon the fact that the location of plaintiff's neck pain at the six-month follow-up visit with Dr. Weitzman was inconsistent with his initial presentation, suggested that at least some of the treatment (specifically, the facet block injections) was not indicated—or at least was not related to the injury caused by the automobile accident. Further, and contrary to plaintiff's suggestion, there is a qualitative difference between the main treatments he received (chiropractic adjustments, application of hot and cold packs, and massage therapy) and the treatments found to compel an award of

damages for pain and suffering in *Dodson* (spinal cord injury, surgery, and permanent impairment) and *Wilson* (finger to shoulder casts on both arms, removal and stabilization of bone fragments, and ongoing impairment). None of the other people involved in the accident required any medical treatment and plaintiff was driving the largest vehicle, by far, of the three vehicles involved in the accident. In addition, plaintiff waited one month before seeking any medical treatment and continued to work normally after the accident. In light of that evidence, the jury could reasonably have inferred that plaintiff's injury was minor and did not cause the sort of pain and suffering that compels an award of noneconomic damages.

DISPOSITION

The judgment is affirmed. Respondents to recover their costs on appeal.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.