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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

DANIELE R. MOLLE-JOHNSON, Plaintiff and Appellant, v. ALAN ALDERSON, Defendant and Respondent.	2d Civil No. B228321 (Super. Ct. No. CV088082) (San Luis Obispo County)

Daniele R. Molle-Johnson sued for personal injuries she claimed to have sustained in a low speed, rear-end motor vehicle accident. Defendant Alan Alderson admitted liability but contested damages. After a lengthy trial, the jury returned a verdict awarding Molle-Johnson $2,231 in compensatory damages and $100 in general damages. She appeals the judgment contending the trial court made erroneous evidentiary rulings, and improperly awarded costs to defendant Alderson based on an invalid settlement offer under Code of Civil Procedure section 998.[1] We will reverse the award of costs and otherwise affirm.

FACTS

On January 2, 2007, Molle-Johnson was a passenger in a vehicle driven by her husband. She was sitting in the back seat. Alan Alderson was driving his vehicle

[1] All statutory references are to the Code of Civil Procedure unless otherwise stated.

behind Molle-Johnson. When traffic slowed, Alderson "rear-ended" the Molle-Johnson vehicle. The impact from the collision was at a speed below 10 miles per hour.

Both drivers pulled over to the side of the road. A California Highway Patrol officer arrived at the scene a few minutes later. The officer concluded that no one had been seriously injured. Molle-Johnson complained of stomach pain, but did not request medical attention. The airbags did not open on her or Alderson's vehicle and both vehicles drove away.

Shortly after she left the scene of the accident, Molle-Johnson went to the Twin Cities Community Hospital emergency room where she reported disorientation, headache, nausea, dizziness and other problems. She was examined by Dr. Peter Russell who observed signs of dysnomia (difficulty in finding words), difficulty with motor manipulation, and weakness in processing auditory information. Emergency room records reveal no indication of a concussion or other head injury. Dr. Russell concluded in a May 2008 report that Molle-Johnson's cognitive and motor functions were fully intact but that she continued to complain about dysnomia.

Over a period of months, Molle-Johnson complained of cervical disc, head, rotator cuff, and lower back injury to several health care professionals. A diagnosis consistent with a head injury, however, was not made until approximately 10 months after the accident and was based solely on Molle-Johnson's verbal complaints uncorroborated by medical tests. Molle-Johnson complained of injuries attributable to other accidents occurring both before and after the collision with Alderson's vehicle, including accidents in 1994 and April 2008.

Molle-Johnson claimed serious and costly injuries to her head, cervical disc, rotator cuff, and lower back purportedly arising from the January 2007 collision with Alderson. Both Molle-Johnson and Alderson designated multiple expert witnesses to testify as to these claimed injuries at trial. Molle-Johnson's experts included emergency room physician Dr. Peter Russell, neurosurgeon Dr. Harold Segal, orthopedic surgeon Dr. Michael Laird, and PET scan expert Dr. Joseph Wu.

At trial, Dr. Laird testified that he diagnosed Molle-Johnson with a rotator cuff injury in late 2008. Dr. Segal testified that he treated Molle-Johnson for an injury suffered in 1994, later examined her in April 2008 and, based on the April 2008 examination, concluded that she had a cervical disc problem that might require surgery. Dr. Wu testified that, based on a PET scan, Molle-Johnson had suffered a mild traumatic brain injury.

Alderson's designated experts included nuclear medicine and radiology specialist Dr. Alan Waxman and neurologist Dr. David Frecker. At trial, Dr. Frecker testified that Molle-Johnson had suffered no significant head or related injury, and Dr. Waxman disputed the testimony by Dr. Wu regarding his diagnosis of a traumatic brain injury. There was also testimony regarding whether medical problems reported by Molle-Johnson could be attributed to other accidents occurring after or before the Alderson accident.

After 23 days of trial, the jury returned a verdict in favor of Molle-Johnson in the amount of $2,231 in medical expenses, and $100 in future non-economic loss including pain and suffering.

DISCUSSION

No Error in Evidentiary Rulings

Molle-Johnson contends the trial court made several errors in the admission or exclusion of testimony by expert witnesses. We disagree.

This case can be described reasonably as a "battle of the experts," and trial courts must give counsel wide latitude in the direct and cross-examination of expert witnesses. (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 796; *Dincau v. Tamayose* (1982) 131 Cal.App.3d 780, 798-799.) A broader range of evidence may be used on cross-examination to diminish the weight of the expert's opinion than is admissible on direct examination to fortify that opinion. (*People v. Coleman* (1985) 38 Cal.3d 69, 92.) "[A] party seeking to attack the credibility of the expert may bring to the attention of the jury material relevant to the issue on which the expert has offered an opinion of which the expert was unaware or which he did not consider. The purpose and

permissible scope of impeachment of an expert is to call into question the truthfulness of the witness's testimony." (*People v. Bell* (1989) 49 Cal.3d 502, 532.)

We review a trial court ruling on the admission of opinion evidence under the abuse of discretion standard. (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1598-1599; *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1168-1169.) We conclude that the trial court did not abuse its discretion in making any of the evidentiary rulings challenged by Molle-Johnson.

1. *European Association Guidelines*. Molle-Johnson claims the trial court erroneously allowed the defense to cross-examine plaintiff's PET scan expert, Dr. Joseph Wu, regarding a scientific article by the European Association of Nuclear Medicine (European Association). She argues that Dr. Wu did not rely upon the article in forming his opinion, and that the article was otherwise inadmissible.

An expert witness may be cross-examined regarding his qualifications, the subject to which his expertise relates, and the basis of his opinion. (Evid. Code, § 721, subd. (a).) And, an expert may be cross-examined regarding "the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication" if he or she "referred to, considered, or relied" on the publication or the publication has been "established as a reliable authority by the testimony or admission of the witness or by other expert testimony." (*Id.* at subd. (b).)

Use of brain PET scans by Dr. Wu in his diagnosis was a critical issue in the case. One aspect of that issue was whether the use of PET scans to diagnose mild traumatic brain injury is generally accepted in the medical community.[2] The trial court ruling challenged by Molle-Johnson concerned only a small part of the testimony on that

[2] During his testimony, Dr. Wu provided a definition of a brain PET scan. He testified that a brain PET scan involves attaching subatomic particles called positrons to sugar molecules. The sugar molecules with positrons are injected into the patient's blood stream and travel to the brain where the sugar is consumed in bodily processes. The positrons emit energy waves which are scanned and recorded by an imaging device. Changes in the positron emissions show exactly where the sugar molecules are being consumed. Areas of the brain which consume more sugar can be interpreted as areas of possible abnormality or disease.

subject. During direct examination, Dr. Wu testified that a "number of physicians" use PET scans, and that he was unaware if the European Association took a contrary position. Later, defense expert, Dr. Alan Waxman, testified that the European Association published readily-available "state of the art" guidelines stating that PET scans are not an effective method for diagnosing mild traumatic brain injuries. Molle-Johnson attempted to impeach Dr. Waxman by showing him an article by the European Association which purportedly was contrary to Dr. Waxman's opinion. Later, when Dr. Wu was cross-examined after having been recalled as a witness, Dr. Wu testified that he disagreed with the guidelines.

Molle-Johnson challenges the trial court ruling that allowed admission of one sentence from the European Association guidelines and cross-examination of Dr. Wu on that sentence. The ruling occurred when Dr. Wu was recalled as a witness after extensive prior testimony on the subject of PET scans which included references to the European Association and its guidelines. In the context of the testimony in its entirety, the challenged evidence was properly admitted to explore the expertise and qualifications of Dr. Wu. References to the European Association guidelines were also admissible because Dr. Wu referred to them and Dr. Waxman testified that the guidelines were "state of the art" reliable authority.

2. *Testimony Regarding Other Cases*. Molle-Johnson claims the trial court erred in allowing Alderson to ask Dr. Wu on cross-examination whether he advertised his services as a PET scan expert to defense counsel in criminal cases. The credibility of Dr. Wu and other experts was critical to both parties and the challenged questions fell within the broad range of permissible cross-examination. (See *People v. Coleman, supra,* 38 Cal.3d at p. 92.) It is recognized that the use of so-called "hired gun experts" and "professional testifiers" raises issues of one-sided evidence that can be explored by counsel. (See *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 635, fn. 8.)

Molle-Johnson further contends the trial court made an inconsistent ruling when it refused to allow cross-examination of defense expert Waxman regarding his prior testimony in criminal cases. The record shows that the two rulings did not concern the

same issue and were not inconsistent. Dr. Wu was questioned about his advertisements, not about any particular criminal or other case in which he testified. Dr. Waxman was questioned about his testimony in specific criminal cases after testifying that he had never been hired by a criminal defense attorney.

3. *Expert Witness Designations*. Molle-Johnson contends that the trial court erred in allowing Dr. Waxman to testify at all regarding PET scans because he was not properly designated as an expert on that subject.

The Code of Civil Procedure provides for a simultaneous exchange of expert witnesses. (§ 2034.210.) The exchange is designed to permit the parties to select experts who can respond to opposing experts in a particular subject area. (*Bonds v. Roy* (1999) 20 Cal.4th 140, 146-147.) To achieve that goal, the parties may submit a supplemental expert witness list "of any experts who will express an opinion on a subject to be covered by an expert designated by an adverse party," but only "if the party supplementing an expert witness list has not previously retained an expert to testify on that subject." (§ 2034.280, subd. (a).) A party may not use a supplemental designation to substitute a new expert to testify on the same subject as a previously-designated expert simply because that party is unhappy with the original designated expert. (*Basham v. Babcock* (1996) 44 Cal.App.4th 1717, 1723.)

Here, in the simultaneous exchange, Alderson designated Dr. David Frecker, a neurologist, to testify concerning his examination of Molle-Johnson, her medical records, her medical history, and her future medical needs and expenses. Molle-Johnson designated Dr. Joseph Wu to testify concerning the results of her PET scan as related to her claimed traumatic brain injury. In a timely supplemental designation, Alderson designated Dr. Alan Waxman, a radiologist and nuclear medicine expert, to respond to the opinions of Dr. Wu regarding the reliability of medical imaging procedures including CT, MRI, and PET scans.

Molle-Johnson asserts that Alderson had already designated Dr. Frecker as an expert on PET scans and the supplemental designation improperly substituted a new PET scan expert in place of Dr. Frecker. We disagree. Because Dr. Frecker was not

designated as a PET scan expert in the original simultaneous exchange, the supplemental addition of Dr. Waxman to fill that gap was proper. Dr. Frecker remained as a designated expert on Molle-Johnson's injuries in general.

Molle-Johnson also claims the trial court erred by allowing both Dr. Frecker and Dr. Waxman to testify regarding her PET scan. Dr. Frecker mentioned that Molle-Johnson had had a PET scan during his testimony, but did not state any opinion on the correct or incorrect use of PET scans generally or in the instant case. Dr. Waxman was the only defense expert who provided substantive testimony concerning the use of PET scans in traumatic brain injury cases. Any possible minor overlap of Dr. Frecker and Dr. Waxman's testimony was not prejudicial. (*Kalfus v. Fraze* (1955) 136 Cal.App.2d 415, 423; *Atkins v. Strayhorn* (1990) 223 Cal.App.3d 1380, 1391.)

4. *Twin Cities Patients*. Molle-Johnson claims error in the trial court's refusal to allow Dr. Frecker to testify about other emergency room patients at Twin Cities Community Hospital. Dr. Frecker testified that the medical records of Molle-Johnson's treatment at the Twin Cities emergency room did not mention any head injury or symptoms of head injury, and that the medical records were produced by competently-trained doctors.

Molle-Johnson argues that the trial court should have allowed her to cross-examine Dr. Frecker regarding a case at Twin Cities Community Hospital where doctors not involved in this case had failed to diagnose a traumatic brain injury in another patient. Molle-Johnson argues that it was "unfair" to exclude the evidence because the testimony might have supported an inference that the doctors had made mistakes in the past. There was no abuse of discretion in the trial court's ruling. It is highly unlikely that the testimony would have produced evidence relevant to Dr. Frecker's testimony that the medical records at the hospital were maintained by competently-trained doctors. Dr. Frecker did not claim the hospital's doctors were infallible, and Molle-Johnson does not claim negligence in her emergency room treatment.

5. *Hypothetical Question*. Molle-Johnson claims Alderson asked Dr. Frecker a hypothetical question which was not based on the evidence. The gist of the

question was whether it would be significant if a person came to a neurologist complaining of intermittent periods of "jumbling up words." Dr. Frecker answered that such a complaint would be significant, but unusual and questionable without clinical confirmation.

Hypothetical questions and their answers must be based on facts shown by the evidence, not speculation or conjecture. (See *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510; *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135.) Here, Molle-Johnson argues that the hypothetical was an attempt to bootstrap the notes of a non-testifying doctor into evidence. The record as a whole, however, shows considerable evidence that Molle-Johnson complained of temporary speech impediments and related ailments. The hypothetical question was properly based on facts shown by the evidence.

Improper Award of Costs

A provision in section 998 provides that a defendant may recover costs when a plaintiff rejects a statutory settlement offer and fails to obtain a more favorable judgment thereafter. (*Id*. at subd. (c)(1).) Prior to trial, Alderson made settlement offers pursuant to section 998 in the amounts of $50,000 and $100,000. These offers were not accepted by Molle-Johnson, and thereafter the trial court awarded costs to Alderson based on section 998, subdivision (c)(1). Molle-Johnson contends the trial court erred because both of Alderson's settlement offers were invalid. We agree.

As a general rule, the prevailing party in civil cases is entitled as a matter of right to recover its litigation costs. (§ 1032, subd. (b); *Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1108.) The "prevailing party" is the party who receives a net monetary recovery. (§ 1032, subd. (a)(4).) Despite her minimal recovery, Molle-Johnson is undisputedly the prevailing party in this case.

Section 998 sets forth an exception to the general rule. "[A]ny party may serve an offer in writing upon any other party to the action to allow judgment to be taken . . . in accordance with the terms and conditions stated at that time." (§ 998, subd. (b).) "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more

favorable judgment or award, the plaintiff . . . shall pay the defendant's costs from the time of the offer." (*Id.* at subd. (c)(1); see also *Scott Co. v. Blount, Inc., supra,* 20 Cal.4th at p. 1112.)

For the cost-shifting mechanism of the statute to apply, however, the settlement offer must include a written provision "that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted." (§ 998, subd. (b).) Although Alderson made two section 998 settlement offers in larger amounts than Molle-Johnson's recovery, neither included the required provision for Molle-Johnson to sign as an acknowledgment of her acceptance. The omission of this provision rendered the settlement offers invalid and prevents any award of costs to Alderson. (*Puerta v. Torres* (2011) 195 Cal.App.4th 1267, 1273.)

Alderson concedes that he cannot recover his costs under section 998, but argues that they are recoverable under section 1033, and that the cost award entered by the trial court should be affirmed on the basis of section 1033. We disagree.

Section 1033 provides another statutory exception to the general rule entitling the prevailing party to recover costs. Section 1033 subdivision (a) provides: "Costs or any portion of claimed costs shall be as determined by the court in its discretion in a case other than a limited civil case . . . where the prevailing party recovers a judgment that could have been rendered in a limited civil case." (See *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 982, 983.)

Section 1033, however, only permits the trial court to deny costs to the prevailing party. There is no legal authority for Alderson's assertion that the statute authorizes both a denial of costs to the prevailing party *and* an award of costs to the other party. Courts have consistently treated section 1033 as providing discretion to deny costs to a prevailing plaintiff, not to award costs to the defendant. (See *Chavez v. City of Los Angeles, supra,* 47 Cal.4th at pp. 982-983; *Dorman v. DWLC Corp.* (1995) 35 Cal.App.4th 1808, 1816–1817; *Valentino v. Elliott Sav–On Gas, Inc.* (1988) 201 Cal.App.3d 692, 702; *Greenberg v. Pacific Tel. & Tel. Co.* (1979) 97 Cal.App.3d 102, 108; *Young v. General Telephone Co.* (1977) 75 Cal.App.3d 177, 182.)

In addition, the trial court did not consider the application of section 1033 in this case, much less exercise the discretion required for a ruling under the statute. The trial court's ruling was based solely on section 998.

Factors that should be considered by the trial court in exercising its discretion under section 1033 include the amount of damages recovered, the amount the plaintiff could reasonably and in good faith have expected to recover, and the total amount of costs the plaintiff incurred. (See *Chavez v. City of Los Angeles*, *supra*, 47 Cal.4th at p. 984.) Here, the record shows a minimal judgment in absolute terms as well as a striking disproportion between the relief sought and the amount awarded. The trial court commented that it was a "very, very, very difficult case" for Molle-Johnson because of "the low speed and impact, the lack of apparent injury at the scene, the number of rear-end accidents [involving Molle-Johnson] afterwards and the breadth and severity of the claimed injuries."

We will vacate the award of costs to Alderson, but express no opinion as to whether the trial court, in its discretion, could deny any subsequent motion for costs by Molle-Johnson under the authority of section 1033.

The award of costs to respondent Alderson is vacated. Otherwise, the judgment is affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.*

* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Martin J. Tangeman, Judge

Superior Court County of San Luis Obispo

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