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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

LISA ANNE TENT, Plaintiff and Appellant, v. EDDY LEE TAYLOR et al., Defendants and Respondents.	2d Civil No. B268100 (Super. Ct. No. 56-2014-00447628-CU-PA-VTA) (Ventura County)

Appellant Lisa Anne Tent brought this action against respondents Eddy Lee Taylor and Michael W. Anger, Jr., for damages arising out of two automobile accidents which occurred on the same day. Respondents admitted liability. The only issue before the jury was damages.

The jury awarded Tent $135,000 for past pain and suffering (noneconomic) damages, with no award for future economic or noneconomic damages. The jury implicitly found that Tent had recovered from injuries received in the accidents and that her continuing pain resulted from past or subsequent unrelated injuries. Tent filed a motion for new trial and an alternative request for additur, both of which were denied by the trial court. Tent has failed to provide an adequate record to challenge that ruling, but

even if the issue was preserved for appeal, substantial evidence supports the jury's verdict. Tent also has not demonstrated instructional error. We affirm.

FACTS AND PROCEDURAL BACKGROUND

On February 3, 2012, Tent was employed as a code enforcement officer for the City of Malibu. As Tent was traveling for work from Malibu to Oxnard, her vehicle was rear-ended by one of the respondents. A short time later, on her way back to Malibu, Tent's vehicle was rear-ended by the other respondent. Both respondents admitted liability for the accidents.

Tent sued respondents for damages arising from neck and back injuries allegedly suffered during the collisions. At trial, Tent waived her claim for past medical expenses. The issue was her entitlement, if any, to damages for (1) past lost earnings, (2) future lost earnings, (3) future medical expenses, (4) past noneconomic loss and (5) future noneconomic loss, including physical pain/mental suffering.

Tent offered the testimony of three medical experts: Payam Vahedifar, M.D., Alen Arakelian, D.C. and Sally Frankl, M.D. Dr. Vahedifar is a non-surgical orthopedist who has treated Tent since 2008. He first treated her in connection with a compression fracture to her back. Prior to that first visit, Tent had fusion surgery at the T-11 to L-2 levels of her spine.

Tent was experiencing chronic pain when she first saw Dr. Vahedifar. She was having difficulty driving, sitting, standing and gardening. On February 28, 2011, Dr. Vahedifar administered a sacroiliac injection to Tent for severe buttock pain.

After Tent fell from a horse in 2011, her condition worsened. She complained to Dr. Vahedifar of injury to her neck and shoulder and severe pain in her lower back. On July 28, 2011, Dr. Vahedifar fitted Tent for a back brace and, one month before the accidents, he recommended that she undergo

a vertebroplasty. He testified that vertebroplasty is recommended when pain is relentless and cannot be controlled by narcotics.

When Dr. Vahedifar recommended that Tent be allowed to take family leave, he listed the date of her disability as February 27, 2013, not February 3, 2012, the date of the accidents. In another document prepared for disability purposes, Dr. Vahedifar recommended that Tent stop working on March 27, 2014, and noted that her symptoms first appeared on February 27, 2014.

In March 2014, Dr. Vahedifar treated Tent for injuries she sustained in a fall several weeks earlier. He ordered a magnetic resonance imaging (MRI) of her lumbar spine. The MRI showed evidence of a new traumatic injury occurring at or around the time of the MRI.

Tent began seeing her chiropractor, Dr. Arakelian, on March 26, 2012, approximately six weeks after the accidents. Tent filled out a questionnaire at that first visit. The reason for the visit was pain in her neck and upper back. She noted on the questionnaire that the pain interfered with her work and daily routine, but did not affect her sleep and recreation. She also did not check the boxes stating that she was suffering from "sharp, dull [pain], numbness, shooting, burning, tingling, cramps and swelling." Nor did she indicate she was having trouble "walking, bending and lying down."

Tent has been seeing Dr. Frankl, who specializes in internal medicine, since 2000. Dr. Frankl diagnosed Tent with depression and prescribed anti-depressant medication. On November 4, 2011, Tent described "'lots of health stresses'" as a reason for her depression. The following month, before the accidents, Dr. Frankl observed that Tent's pain was uncontrolled and increased her anti-depressant medication. She considered Tent a patient with "chronic pain."

Respondents offered the expert testimony of David Frecker, M.D., Peng Fan, M.D., and Lawrence Harter, M.D. In Dr. Frecker's opinion, Tent suffered a strain injury from the car accidents that lasted a few months. He believed that chiropractic treatment and physical therapy helped heal Tent's strain injury, and that no other treatment received by Tent was related to injuries sustained in the accidents. Dr. Frecker stated that she "needs to have her bones healthier so that she doesn't keep breaking bones, so that her pain level hopefully will decrease."

In February or March 2014, Tent developed spontaneous compression fractures. Dr. Frecker determined these were new fractures because the imaging showed edema or swelling. In Dr. Frecker's opinion, the imaging showed that the only change to Tent's neck from the accidents was that she had a straightened neck, which is consistent with a muscle strain injury.

Dr. Fan, a rheumatologist, testified that the accidents caused Tent to develop a sprain or a strain of her neck and shoulder girdle area. He explained "it's really the soft tissue around the neck that was injured by the whiplash . . . ." In his opinion, reasonable treatment for such a soft-tissue strain is chiropractic care and physical therapy, for a period of six to eight weeks. Dr. Fan further opined that Tent's ongoing pain is caused, at least in part, by fibromyalgia. He does not "believe that any treatment beyond chiropractic care or physical therapy was as a result of an injury caused by the accident[s]."

Dr. Harter, a radiologist, testified that before the accidents, Tent suffered a compression fracture in her spine that required stabilization surgery in 2007, and two compression fractures that occurred in 2011. Between 2007 and 2011, there was evidence of progressive degenerative disc disease. In Dr. Harter's opinion, the MRI before the accidents compared with

the MRI taken a month after the accidents showed further degenerative changes, but nothing acute. There was no acute disc herniation, no marrow edema suggesting any acute fractures, and no edema in the posterior elements or small joints at the back of the spine.

Dr. Harter also reviewed an MRI taken two years after the accidents. The MRI showed a new fracture as well as ongoing progressive degenerative changes in the lumbar spine. The imaging study taken in March 2012 did not show thoracic spine fractures, but the study taken two years later did show fractures.

With regard to Tent's neck (cervical spine), Dr. Harter testified that x-rays taken four days after the accidents revealed that Tent had a good range of motion. If there was an acute injury from the accidents, Dr. Harter would have expected to see much more restricted range of motion.

Dr. Harter compared imaging studies of Tent's neck from July 23, 2012, and December 26, 2013, and found the scans essentially identical. He said if there had been an acute injury, he would have expected to see progressive degenerative changes, which were not present. In his opinion, none of the cervical studies showed evidence of an acute injury.

Tent continued to work full time as a code enforcement officer for over two years after the accidents. During that time she was in the field responding to complaints 40 to 50 percent of the time. Her job duties included occasionally lifting boxes weighing 20 to 30 pounds. Tent missed about the same amount of time from work before and after the 2012 accidents.

The jury awarded Tent $135,000 for past noneconomic damages, with no award of future economic or noneconomic damages. Tent filed a motion for new trial or, in the alternative, a request for additur. The trial court denied the motion following a hearing. Tent appeals.

DISCUSSION

Inadequate Record on Appeal

Tent asks us to reverse the trial court's order denying her motion for new trial and to order a new trial or, alternatively, to order a new trial conditioned on respondents' consenting to an additur to compensate Tent for her future pain and suffering and medical expenses. A ruling on a motion for a new trial is reviewed under an abuse of discretion standard. (*Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 733.)

"'It is the duty of an appellant to provide an adequate record to the court establishing error. Failure to provide an adequate record on an issue requires that the issue be resolved against appellant.'" (*Hotels Nevada, LLC. v. L.A. Pacific Center, Inc.* (2012) 203 Cal.App.4th 336, 348.) Here, Tent has not provided an adequate record to challenge the ruling on the motion for new trial. Although the clerk's transcript contains copies of the oppositions to the motion, it does not contain the motion for new trial and request for additur filed by Tent on August 31, 2015, or her reply to respondents' oppositions filed on September 30, 2015. Nor does it include the trial court's minute order of October 7, 2015, the date of the hearing on the motion. The content of that minute order, which we obtained from the trial court's file, indicates that a reporter's transcript from the hearing would aid us in understanding the basis for the court's ruling. It also would allow us to determine what oral arguments were made, what concessions or stipulations were made, or what matters were the subject of objections by counsel.[1] Because the hearing was not reported, however, there is no transcript available, and Tent did not seek the

[1] The minute order states that the trial court advised counsel of its tentative decision to deny the motion, submitted the matter with argument and then denied the motion. We take judicial notice of the order pursuant to Evidence Code sections 452, subd. (d), and 459.

preparation of a settled statement to assist this court. (See *Leslie v. Roe* (1974) 41 Cal.App.3d 104, 108; Cal. Rules of Court, rules 8.134 & 8.137.) In the absence of an adequate record to assess whether the trial court abused its discretion by denying the motion for new trial, we conclude that Tent has waived her appellate challenge to that ruling. (*Hotels Nevada, LLC*, at p. 348.)

Substantial Evidence Supports Jury's Verdict

Even if Tent had preserved her challenge to the trial court's ruling, she would not prevail. "The question as to the amount of damages is a question of fact. In the first instance, it is for the jury to fix the amount of damages, and secondly, for the trial judge, on a motion for a new trial, to pass on the question of adequacy. Whether the contention is that the damages fixed by the jury are too high or too low, the determination of that question rests largely in the discretion of the trial judge. The appellate court has not seen or heard the witnesses, and has no power to pass upon their credibility. Normally, the appellate court has no power to interfere except when the facts before it suggest passion, prejudice or corruption upon the part of the jury, or where the uncontradicted evidence demonstrates that the award is insufficient as a matter of law. In determining whether there has been an abuse of discretion, the facts on the issue of damage most favorable to the respondent must be considered. [Citations.]" (*Gersick v. Shilling* (1950) 97 Cal.App.2d 641, 645 (*Gersick*).)

The record does not reflect passion, prejudice or corruption on the part of the jury. (*Gersick, supra,* 97 Cal.App.2d at p. 645.) Nor does it disclose uncontradicted evidence demonstrating that the award is insufficient as a matter of law. (*Ibid.*) To the contrary, the evidence was conflicting on the issue, and the jury, after weighing the evidence, decided that Tent's injuries from the two car accidents healed after a certain period of time and that her ongoing pain and health problems are unrelated to those accidents. This

evidence, which is summarized above, includes Dr. Frecker's and Dr. Fan's testimony that Tent suffered a strain injury from the accidents that lasted a few months. They opined that chiropractic treatment and physical therapy helped heal the strain injury and that no additional treatment was necessary to treat the neck and back injuries sustained in the accidents. It is well established that the testimony of an expert witness alone is substantial evidence. (*Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 17; see *People v. Vega* (2005) 130 Cal.App.4th 183, 190 ["[T]he testimony of a single witness, including an expert witness, is sufficient to constitute substantial evidence to support a jury's finding"].)

Moreover, the record reveals that Tent worked for over two years after the car accidents occurred and that her own doctor, Dr. Vahedifar, recommended that she be granted disability, not for symptoms stemming from the accidents, but for symptoms that first appeared on February 27, 2014. At that time, Tent had an MRI which showed evidence of a new traumatic injury in the form of spontaneous compression fractures, which apparently occurred during a fall. A jury could reasonably conclude from this evidence that any future noneconomic damages and medical expenses are necessitated by this injury and by Tent's ongoing bone condition (osteoporosis) and not by the injuries suffered in the car accidents. Because substantial evidence supports the jury's verdict, we conclude the trial court did not abuse its discretion by upholding it. (See *Miller v. San Diego Gas & Elec. Co.* (1963) 212 Cal.App.2d 555, 558-559 ["[I]n the face of substantial conflict in the evidence as to the extent of the injuries and as to whether the expenses were incurred as a result of the negligence complained of, the [trial] court was justified in denying the motion for new trial"].)

No Prejudicial Instructional Error

Tent argues that a new trial is necessary because the trial court erred by declining to instruct the jury on CACI No. 431, which states: "A person's negligence may combine with another factor to cause harm. If you find that [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s harm, then [*name of defendant*] is responsible for the harm. [*Name of defendant*] cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing [*name of plaintiff*]'s harm." The court refused the multiple causation instruction because it believed it would confuse the jury, and also because the issues being raised were covered adequately by the susceptible plaintiff (CACI No. 3928) and aggravation (CACI No. 3927) instructions.

It is not error to refuse to give an instruction requested by a party when the legal point is covered adequately by the instructions that are given. (See, e.g., *Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 343 (*Mathis*); *Arato v. Avedon* (1993) 5 Cal.4th 1172, 1189, fn. 11.) Tent has not shown that CACI Nos. 3928 and 3927 failed to adequately address the concept of multiple or concurrent causation in this case. CACI No. 3928 instructs: "You must decide the full amount of money that will reasonably and fairly compensate [*name of plaintiff*] for all damages caused by the wrongful conduct of [*name of defendant*], even if [*name of plaintiff*] was more susceptible to injury than a normally healthy person would have been, and even if a normally healthy person would not have suffered similar injury." CACI No. 3927 states: "[*Name of plaintiff*] is not entitled to damages for any physical or emotional condition that [he/she] had before [*name of defendant*]'s conduct occurred. However, if [*name of plaintiff*] had a physical or emotional condition that was made worse by [*name of defendant*]'s wrongful conduct, you must award

damages that will reasonably and fairly compensate [him/her] for the effect on that condition."

Consistent with these instructions, Tent's counsel explained to the jury that if Tent "has a physical or emotional condition . . . that was made worse by [respondents'] wrongful conduct you must award damages that will reasonably and fairly compensate her for the [e]ffect on that condition." That is precisely the point of CACI No. 431. (See *Mathis, supra*, 11 Cal.App.4th at p. 343.) In addition, the trial court was properly concerned that the inclusion of CACI No. 431 might confuse the jury rather than clarify the scope of multiple or concurrent causation as applicable to the issues in this case. (See, e.g., *Harris v. Oaks Shopping Center* (1999) 70 Cal.App.4th 206, 209 ["[i]rrelevant, confusing, incomplete or misleading instructions need not be given"].)

But even if an instructional error did occur, it was not prejudicial. A judgment will be reversed based on instructional error "only "'where it seems probable" that the error "prejudicially affected the verdict"' [citation]." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 983.) As discussed above, substantial evidence supports a finding that Tent sustained soft-tissue strain injuries in the accidents and that they healed before trial. Tent waived past medical expense damages. Hence, an award of past noneconomic damages with no future economic or noneconomic damages is consistent with the evidence.

In sum, Tent did not show that any instructional error occurred to cause any probable prejudice, in light of the state of the evidence, the effect of other instructions on causation, and the import of the arguments by counsel. (See *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580-581.) There also is no clear indication in the record that the jurors were misled about their duty to properly evaluate the evidence. (See *ibid.*)

DISPOSITION

The judgment and order denying the motion for new trial are affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Vincent J. O'Neill, Jr., Judge

Superior Court County of Ventura

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