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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

SAMUEL GALLAGHER, Plaintiff and Appellant, v. REBECCA LATHAM, Defendant and Appellant.	B270972 (Los Angeles County Super. Ct. No. BC523191)

APPEALS from an order and a judgment of the Superior Court of Los Angeles County, Paul A. Bacigalupo, Judge. Order reversed, judgment affirmed.

Wesierski & Zurek, Ronald Zurek and Lynne Rasmussen for Defendant and Appellant Rebecca Latham.

Greene, Broillet & Wheeler, Bruce A. Broillet, Scott H. Carr and Alan Van Gelder; Esner, Chang & Boyer, Stuart B. Esner and Andrew N. Chang for Plaintiff and Appellant Samuel Gallagher.

INTRODUCTION

This appeal and cross-appeal arise out of a car accident in which Rebecca Latham hit Samuel Gallagher as he was walking in a crosswalk. A jury found Latham negligent and awarded Gallagher future economic damages, including medical expenses, past noneconomic damages, but no future noneconomic damages. Gallagher filed a motion for a new trial, arguing the jury's award was inadequate and inconsistent. The trial court failed to rule on the motion within the 60-day statutory deadline, but subsequently issued an order nunc pro tunc purporting to grant the motion for a new trial.

In her appeal, Latham argues the trial court lacked jurisdiction to grant a new trial after the expiration of the 60-day period. In his cross-appeal, Gallagher argues that, if the nunc pro tunc order was not effective and his motion for a new trial was denied as a matter of law, the jury's verdict was inadequate and inconsistent. We reverse the trial court's nunc pro tunc order granting Gallagher's motion for a new trial, and affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. *The Accident*

One evening, when Gallagher was 14 years old, he was walking home when Latham hit him in a crosswalk with her car. Latham got out of her car and stated to witnesses at the scene that Gallagher had "cut her off" and "jumped in front" of her. As Gallagher lay on the ground unconscious with his head bleeding, his body "began convulsing." Gallagher sustained a mild traumatic brain injury and a broken arm. Gallagher sued

Latham for negligence, seeking economic and noneconomic damages.

B. *The Evidence of Gallagher's Damages*

Gallagher presented evidence he suffered orthopedic injuries in the accident, including a broken arm and pain in his shoulder and back. Gallagher did not have surgery but wore a cast on his arm for two months. Gallagher's orthopedic surgeon eventually cleared him to engage in all activities, including "full sports," and Gallagher participated in a cross-fit class for physical education at his high school. By the time of trial, Gallagher's arm had healed, with the exception of some pain he experienced when he tried to perform certain tasks. Gallagher also had occasional shoulder and back pain, for which Dr. Richard Emmanuel "projected" Gallagher would need six epidural shots "for his lifetime" and 60 sessions of physical therapy over three years to manage the pain. Dr. Emmanuel testified that the shots would be necessary "in case he has a major flare-up which would not be responsive to the physical therapy" but that the physical therapy was the "first line of treatment." Latham did not present any evidence disputing the nature of these injuries or their effect on Gallagher.

Gallagher also suffered a concussion and a wound in the back of his head that required staples. The nature and extent of these head injuries, and their effect on Gallagher, were disputed. Specifically, although it was undisputed that Gallagher had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) in 2006, approximately six years before the accident, and that Gallagher suffered a concussion as a result of the accident, the parties disputed the extent of Gallagher's mental and emotional disabilities and whether those disabilities resulted from the accident or from his preexisting ADHD.

Gallagher presented evidence the accident caused lasting psychological injury. Dr. Jeffrey Max, a child and adolescent psychiatrist, testified Gallagher's "pre-injury ADHD" became "worse." Dr. Max also testified that, while Gallagher "tended to be a bit anxious before his injury," he developed a generalized anxiety disorder after the accident and now "worries excessively," has "associated muscle tension and aches," frequently feels "on edge," and is "irritable." Dr. Max also stated Gallagher's "mind would go blank under pressure." Dr. Max testified Gallagher suffered from post-traumatic stress disorder after the accident, although at the time of trial it was in "partial remission." Dr. Max recommended Gallagher take anti-depressant and anti-anxiety medication and undergo cognitive behavior therapy weekly for three months, biweekly for two months, and then monthly for three months.

Dr. Carlos Saucedo, an expert in neuropsychological testing, testified that, one month before the accident, Gallagher performed at the 78th percentile for decisionmaking speed, which is a measure of how quickly one can put two seemingly unrelated pictures together in a conceptually meaningful way. After the accident, Gallagher performed at the 11th percentile, a "huge" decrease of two standard deviations.

Gallagher testified about his increased difficulty in learning, retaining information, and getting good grades in school after the accident. He said his inability to keep up with his peers academically also affected his social relationships. Gallagher testified he felt like "damaged goods" in terms of his ability to think, but he added, "Part of succeeding is just overlooking that and trying to remove that and just like continuing, so I'm not going to look at it that way."

In contrast, Latham presented evidence that any injuries Gallagher suffered in the accident had essentially resolved and

that Gallagher's ongoing problems with attention stemmed from his pre-existing ADHD. Dr. Van Dyke DeGolia, the psychiatrist who treated Gallagher for ADHD, testified there was no indication in his records Gallagher's ADHD worsened after the accident. His records showed that, six months prior to the accident, Gallagher "continue[d] to struggle with decreased attention in school despite the [medication]." When Dr. DeGolia learned about the accident over a year after it occurred, he "had no reason to think that [Gallagher's] ADHD was made worse by the accident." In his notes, Dr. Degolia made "no mention of anxiety at all" in his treatment of Gallagher. Dr. DeGolia also testified that, prior to the accident, Gallagher was "very bright and creative," and after the accident he was "really no different on that score." Latham also presented evidence that 10 months after the accident Gallagher achieved a composite score of 23 on the ACT (American College Testing) examination, a timed test used by colleges as a factor in admissions, which put him above 93 percent of students at his school.

With respect to Gallagher's decrease in decisionmaking speed, Dr. Kyle Boone, a neuropsychologist, testified that scores on individual subtests can fluctuate over time and that "decisional speed" was a subtest of the "overall processing speed index." Dr. Boone testified Gallagher scored in the same percentile (46th) on the "overall index" before and after the accident, which indicated the accident did not affect his processing abilities. Dr. Boone also testified that "dozens of studies" have demonstrated there are "no long-term consequences from a concussion" and "no permanent changes in thinking skills from a concussion." Finally, Dr. Boone testified there was no research showing individuals with ADHD who sustain a concussion have a "worse outcome" after an accident.

Gallagher sought $3 million in damages. Of that amount, an economist testified Gallagher's future economic damages, including loss of earning capacity, would range from $824,060 to $1,434,422, of which $97,156 to $112,514 would be for medical treatment, psychotherapy, and educational assistance, depending on the level of education Gallagher chose to pursue (with more assistance required for more advanced degrees).[1] Gallagher did not seek compensation for his past medical bills because insurance had covered those costs.

C. *The Verdict*

The jury awarded Gallagher $172,500 in past noneconomic damages, "including physical pain/mental suffering." The jury awarded $46,000 in future medical expenses and $0 for loss of earning capacity. The jury also awarded $0 in future noneconomic damages, "including physical pain/mental suffering."[2] The jury found Latham was 60 percent negligent and Gallagher 40 percent negligent.

The trial court entered judgment in favor of Gallagher in the amount of $131,100, after discounting the jury's award by 40 percent. The court entered judgment on the jury verdict on December 11, 2015, and counsel for Latham filed and served notice of entry of judgment on December 18, 2015.

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[1] The projected cost of the six epidural shots was $42,000. The projected cost of Gallagher's total future orthopedic treatment was $51,527.

[2] The trial court instructed the jury, "To recover for future physical pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, anxiety, humiliation, emotional distress, Samuel Gallagher must prove that he is reasonably certain to suffer that harm . . . ."

D. *The Motion for a New Trial*

Gallagher filed on December 28, 2015 a notice of intent to move for a new trial, and on December 29, 2015 a motion for a new trial or, in the alternative, for an additur. Gallagher argued the jury's verdict was not supported by the evidence and was inconsistent.

The court held a hearing on the motion for a new trial on February 5, 2016. After hearing argument by counsel, the court stated, "The tentative [ruling] is to grant the motion." After further argument, the court stated it would "suspend" the motion and "take it under submission." The court stated, "I'm going to invite the parties now, if they'd like, to go into the jury room and have some candid discussions." The court further stated, "I don't know what those prior discussions were with respect to, hey, let's see if we can resolve this short of adjudicating all these motions, but I think it's a ripe opportunity to revisit that, and perhaps something can be mutually satisfactory." After a break in the proceedings, the court went back on the record and stated, "The parties have agreed to participate in some negotiations about potential resolution of all these matters. They're requesting a continuance of the matter to February 19th." The court continued the hearing on Gallagher's motion for a new trial, and a pending motion to tax costs, to February 19, 2016. The February 5, 2016 minute order states: "The matters are argued and continued to 2/19/16 at 9:00 a.m. in this department."

For the hearing on February 19, 2016 Latham filed a memorandum of points and authorities arguing the trial court no longer had jurisdiction to rule on Gallagher's motion for a new trial because the motion had been denied by operation of law on February 16, 2016, 60 days after service of notice of entry of judgment. The trial court stated that counsel for Latham had

"participated in extending the period" and "consented" to the February 19, 2016 hearing date. Counsel for Gallagher argued the court could enter a nunc pro tunc order "back to the day that the court made the original ruling." Counsel for Latham argued that, although the court issued a tentative ruling, the court did not make a final ruling and did not have jurisdiction to issue an order nunc pro tunc.

On March 2, 2016 the trial court issued an order stating: "Due to inadvertence and clerical error, the minute order of 2/5/16 does not accurately reflect the order of the Court . . . . Said minute order is hereby corrected nunc pro tunc" to add the following language: "The Court received and reviewed plaintiff's Motion for New Trial, or in the alternative, an Additur . . . . The Court conducted a full hearing on the motion on February 5, 2016. The Court found that the Plaintiff had established that the verdict of zero future non-economic damages is factually inconsistent and not supported by the evidence and thus is inadequate as a matter of law [and] that a new trial is the proper remedy for an inconsistent verdict. [Citations.] [¶] The Court weighed the evidence and is convinced from the entire record, including reasonable inferences therefrom, that the jury should have reached a different verdict. [¶] While the motion asks for a new trial, the relief the Court grants shall be on the issue of damages only, and not on the issue of liability." Latham timely appealed the trial court's March 2, 2016 order.

DISCUSSION

A. *The Trial Court Erred in Granting Gallagher's Motion for a New Trial Nunc Pro Tunc*

Code of Civil Procedure section 660 provides that "the power of the court to rule on a motion for a new trial shall expire

60 days from and after the mailing of notice of entry of judgment by the clerk of the court . . . or 60 days from and after service on the moving party by any party of written notice of the entry of the judgment, whichever is earlier . . . . If such motion is not determined within said period of 60 days, . . . the effect shall be a denial of the motion without further order of the court."[3] Section 660 further provides: "A motion for a new trial is not determined within the meaning of this section until an order ruling on the motion (1) is entered in the permanent minutes of the court or (2) is signed by the judge and filed with the clerk."

"The 60-day period under section 660 is mandatory and jurisdictional. [Citations.] The period may not be enlarged under the rubric of mistake, inadvertence, surprise, excusable neglect under section 473 or by means of a nunc pro tunc order. [Citation.] '[A]n order made after the 60-day period purporting to rule on a motion for new trial is in excess of the court's jurisdiction and void.'" (*Dodge v. Superior Court* (2000) 77 Cal.App.4th 513, 517 (*Dodge*); accord *Dakota Payphone, LLC v. Alcaraz* (2011) 192 Cal.App.4th 493, 500; see *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56, 64 [motion for a new trial is deemed denied by operation of law 60 days after the clerk mails notice of entry of judgment]; see, e.g., *Siegal v. Superior Court* (1968) 68 Cal.2d 97, 101 [nunc pro tunc order purporting to grant a new trial after the court had lost jurisdiction was void]; *Westrec Marina Management, Inc. v. Jardine Ins. Brokers Orange County, Inc.* (2000) 85 Cal.App.4th 1042, 1048 [court lacked jurisdiction to rule on the motion for a new trial after expiration of the 60-day

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[3] Undesignated statutory references are to the Code of Civil Procedure.

period, and section 1013, which provides for extension of certain deadlines for service by mail, does not extend the deadline for the court to act under section 660].)

There is no dispute that the trial court's order on February 5, 2016 was before the 60-day period expired. There is also no dispute that the trial court's order on March 2, 2016 was after the 60-day period expired. The question is whether the trial court could avoid the consequences of not ruling on the motion for a new trial within 60 days by purporting, on March 2, 2016, to correct the February 5, 2016 order nunc pro tunc.

The answer is no. In *Dodge*, *supra*, 77 Cal.App.4th at page 516, the trial court heard argument on the defendants' motion for a new trial but reserved ruling "due to pending settlement discussions." On the 60th day after service of entry of judgment, the trial court stated it was granting the motions for new trial, and on the 61st day the court entered a minute order reflecting its ruling the prior day. The court in *Dodge* held that, because the trial court failed to enter its order in the minutes, the motion for a new trial was denied by operation of law on the 60th day after service of the judgment, and the entry of the minute order on the 61st day "was insufficient to grant the new trial motions." (*Id*. at p. 524.)

As in *Dodge*, the trial court here continued the hearing on the Gallagher's motion for a new trial to give the parties an opportunity to discuss settlement. The trial court's tentative ruling, which the court did not enter into the minutes, sign and file with the clerk, or even adopt on the record, was not a ruling within the meaning of section 661. Nor did the trial court have authority to issue an order nunc pro tunc on March 2, 2016 to "correct" its February 5, 2016 order because on February 16, 2016 the court lost jurisdiction. As the court stated in *Dakota Payphone, LLC v. Alcaraz*, *supra*, 192 Cal.App.4th 593, in words

equally applicable to this case, "'when counsel for both parties consent to a continuance without considering that the extension will be beyond the time the court can act on the motion, the effect is to deprive the court of the power to act. It effectively denies the motion without further order.'" (*Id.* at p. 500; accord, *Garibotti v. Hinkle* (2015) 243 Cal.App.4th 470, 482; see *id.* at p. 480 ["[e]stoppel . . . may not extend a trial court's jurisdiction to rule on . . . a new trial motion"]; *Meskell v. Culver City Unified School Dist.* (1970) 12 Cal.App.3d 815, 824 [if a "motion for a new trial is set for hearing within the statutory period," and "has been inadvertently continued by the court to a date too late under the statute the party should move the court to advance the matter on the calendar"].) The court's March 2, 2016 order was void and the court could not correct, nunc pro tunc or otherwise, its February 5, 2016 order continuing the hearing on Gallagher's motion for a new trial.

B. *The Jury's Award Was Neither Legally Inadequate Nor Inconsistent*

Gallagher contends "the jury's award of zero damages for future non-economic damages is inconsistent and inadequate as a matter of law." We have no basis for disturbing the jury's award, however, because the evidence does not compel a contrary result.

1. *Standard of Review*

Because noneconomic damages are subjective, "the determination of the amount of damages by the trier of fact is equally subjective. [Citation.] There is no fixed standard to determine the amount of noneconomic damages. Instead, the determination is committed to the discretion of the trier of fact." (*Corebaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1332, fn. omitted; see *Capelouto v. Kaiser Foundation Hospitals* (1972)

7 Cal.3d 889, 892-893 [issue of noneconomic damages "generally must be resolved by the 'impartial conscience and judgment of jurors who may be expected to act reasonably, intelligently and in harmony with the evidence'"].) "[T]he jury, as the trier of fact, is in the best position to determine just compensation for emotional and mental distress." (*Peralta Community College Dist. v. Fair Employment & Housing Com*. (1990) 52 Cal.3d 40, 57; see *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 299 ["'[t]he 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'" because "'[t]hey see and hear the witnesses and frequently, as in this case, see the injury and the impairment that has resulted therefrom'"]; *Abelson v. National Union Fire Ins. Co.* (1994) 28 Cal.App.4th 776, 789 ["[t]he amount and severity of damages for emotional distress is a question of fact for the jury to decide based on all the evidence before it"].)

In reviewing an award of noneconomic damages, "'[t]he duty of an appellate court is to uphold the jury and trial judge whenever possible. . . . Basically, the question that should be decided by the appellate courts is whether or not the verdict is so out of line with reason that it shocks the conscience and necessarily implies that the verdict must have been the result of passion and prejudice.'" (*Janice H. v. 696 North Robertson, LLC* (2016) 1 Cal.App.5th 586, 602-603; see *Torres v. Los Angeles* (1962) 58 Cal.2d 35, 53 ["[b]ecause injuries are rarely identical in nature and the amount of pain and suffering endured . . . varies greatly, the extent of damages suffered cannot be measured by an absolute monetary standard," and the "determination of the jury and trial court are therefore entitled to great weight and should be upheld wherever reasonably possible"]; *Haskins v. Holme*s (1967) 252 Cal.App.2d 580, 584 ["t]he determination of the element of damages to be awarded as compensation for personal

injuries is a matter within the province of the jury and will not be disturbed unless an abuse of discretion clearly appears"].) We may reverse the denial (here, by operation of law) of a motion for new trial for insufficient 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.'" (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1416; accord, *Toste v. Calportland Construction* (2016) 245 Cal.App.4th 362, 368-369; *Holguin v. DISH Network LLC* (2014) 229 Cal.App.4th 1310, 1325; *Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 752.) Where, as here, the party appealing the judgment had the burden of proof at trial, "'the question becomes whether [that party's] evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding."'" (*Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 838; accord, *Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 734.)

2. *The Jury's Award Was Not Inadequate as a Matter of Law*

The measure of damages in a tort action "is the amount which will compensate for all the detriment proximately caused" by the defendant. (Civ. Code, § 3333; see *Metz v. Soares* (2006) 142 Cal.App.4th 1250, 1255 ["'[t]ort damages are awarded to fully compensate the victim for all the injury suffered'"].) "'[E]conomic damages'" are "'objectively verifiable monetary losses including medical expenses, loss of earnings, . . . loss of employment and loss of business or employment opportunities.'" (*Colombo v. BRP US Inc.* (2014) 230 Cal.App.4th 1442, 1472, fn. 17, quoting Civ. Code, § 1431.2, subd. (b)(1); see *DaFonte v. Up-Right, Inc.*

(1992) 2 Cal.4th 593, 600.) "'Non-economic' damages are such 'subjective, non-monetary losses [as] pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.'" (*DaFonte v. Up-Right, Inc.*, *supra*, at p. 600; see Civ. Code, § 1431.2, subd. (b)(2); *Henry v. Superior Court* (2008) 160 Cal.App.4th 440, 450.) And "a tort plaintiff may recover prospective damages, as long as it is sufficiently certain that the detriment will occur." (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 799.)

A judgment for "'no more than the actual medical expenses occasioned by the tort'" may be "inadequate as a matter of law" "where the right to recover is established, and there is also proof that the medical expenses were incurred because of the defendant's negligent act." (*Dodson v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931, 938 (*Dodson*); see *Capelouto v. Kaiser Foundation Hospitals*, *supra*, 7 Cal.3d at p. 893 ["awards which fail to compensate for pain and suffering have been held inadequate as a matter of law"].) However, "an award that does not account for pain and suffering is 'not necessarily inadequate as a matter of law,'" and "'[e]very case depends upon the facts involved.'" (*Dodson*, at p. 936; see *Haskins v. Holmes*, *supra*, 252 Cal.App.2d at p. 586 ["[a]n award for the exact amount of, or even less than, the medical expenses is not necessarily inadequate as a matter of law, because in the majority of cases there is conflict on a variety of factual issues—whether plaintiff received any substantial injury or suffered any substantial pain, or whether the medical treatment was actually given or given as a result of the injuries, or reasonable or necessary"].)

Gallagher acknowledges there is no "hardline rule that any and all verdicts awarding some measure of damages for economic loss in a personal injury case without a concomitant award for

pain and suffering is inadequate as a matter of law." Nonetheless, Gallagher argues the verdict was inadequate in this case under *Dodson*, *supra*, 154 Cal.App.4th 931, which Gallagher argues "is dispositive here."

In *Dodson* the jury found the defendant's negligence caused injury to the plaintiff's back, which required surgery to remove a herniated disk and insert a metallic plate. The plaintiff presented evidence of medical bills of approximately $14,000 and physical therapy bills in excess of $10,000. (*Dodson*, *supra*, 154 Cal.App.4th at p. 931.) The jury awarded the plaintiff $16,679 in economic damages, but no noneconomic damages. (*Id*. at p. 935.) The court held the verdict was "inadequate as a matter of law" because the jury found the defendant's negligence caused the plaintiff's injury, the jury awarded economic damages that included costs of a surgery, and "[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." (*Id.* at p. 938.)

Dodson is distinguishable for several reasons. First, in *Dodson* the medical treatment was certain and substantial: The plaintiff had already had back surgery. In contrast, Gallagher's arm had healed, leaving only occasional pain and mild discomfort in his back and shoulder. Dr. Emmanuel testified the epidural shots would only be necessary in case the pain flared up and did not respond to physical therapy.

In addition, the experts disagreed on whether Gallagher would need any, let alone all, of the physical, psychological, and educational therapies Gallagher claimed he would need. Dr. DeGolia, Gallagher's treating psychiatrist, did not observe any change in Gallagher's ADHD after the accident and the record shows he did not note any anxiety before or after the accident. Dr. Boone testified that a concussion does not cause

permanent brain injury and that Gallagher's overall processing speed index remained the same after the accident. Gallagher even scored in the 93rd percentile for his school on a college admissions test after the accident. Thus, here, unlike in *Dodson*, there was evidence Gallagher would not need all the treatment his witnesses testified he would need, as well as substantial conflict in the evidence regarding the nature and extent of his injuries. (See *Randles v. Lowry* (1970) 4 Cal.App.3d 68, 73 [jury award for the precise amount of medical expenses the plaintiff sought but no noneconomic damages was not inadequate as a matter of law because there was no evidence the plaintiff experienced any discomfort after the date of the accident]; *Haskins v. Holmes*, *supra*, 252 Cal.App.2d at p. 584 [cases "in which the award is upheld involve insufficient or conflicting evidence on the elements of damage"]; *Miller v. San Diego Gas & Electric Co.* (1963) 212 Cal.App.2d 555, 558 [jury award of no noneconomic damages was not inadequate as matter of law where the defendant disputed causation and the extent of the plaintiff's injuries].) The modest amount of future economic damages the jury awarded (compared to the total amount Gallagher sought) also suggests the jury did not believe Gallagher would need substantial future medical care, and there was no evidence Gallagher needed the kind of "serious surgical procedure" the plaintiff in *Dodson* endured. (See *Dodson*, *supra*, 154 Cal.App.4th at p. 938; cf. *Capelouto v. Kaiser Foundation Hospitals*, *supra*, 7 Cal.3d at p. 896 [the "'items of pain, suffering and inconvenience . . . are inevitable concomitants with grave injuries'"]; *Haskins v. Holmes*, *supra*, 252 Cal.App.2d at p. 586 ["it is patently obvious that necessarily and inevitably accompanying [plaintiff's] injuries, surgery and medical and hospital care were substantial pain, suffering, shock and inconvenience"].)

Second, because in *Dodson* medical expenses were the "principal item of economic damages" (*Dodson*, *supra*, 154 Cal.App.4th at p. 932), the court in that case was able to state "the jury awarded damages, at least in part, for [the plaintiff's] surgical expenses." (*Id.* at p. 938.) In contrast, here the evidence does not compel the conclusion that the jury awarded the $46,000 for the epidural shots. To the contrary, the evidence suggests the jury awarded future economic damages for psychotherapy and educational assistance, not for the shots. The award of $46,000 is approximately the amount of damages (based on Gallagher obtaining an undergraduate degree) Gallagher sought in future medical expenses *other* than for shots and physical therapy ($97,000 – $51,000 = $46,000). Moreover, Gallagher's parents both stated their principal concern was Gallagher's emotional, behavioral, and cognitive issues, and not his arm, which had almost entirely healed, and most of Gallagher's direct testimony was about his mental impairment, not his arm.

Even assuming the jury included the epidural shots as part of its award, the total cost of the six epidural shots Dr. Emmanuel recommended to help Gallagher manage his future back and shoulder pain was $42,000. Gallagher sought future economic damages for medical treatment, psychotherapy, and educational assistance in the amount of $97,156 (for an undergraduate degree), and $112,514 (for a graduate degree). Thus, more than half of Gallagher's claimed future economic damages consisted of psychotherapy sessions, vocational and physical therapy, and educational assistance, not surgical or similar procedures that would "necessarily" (*id.* at p. 938) or "inevitably" (*Haskins v. Holmes*, *supra*, 252 Cal.App.2d at p. 586) involve pain. As Gallagher concedes, "it is uncertain whether [the jury] award for future medical expenses was to [Gallagher's]

cognitive impairment or orthopedic injuries or both." (See *Abbott v. Taz Express* (1998) 67 Cal.App.4th 853, 857 [where the verdict form "broadly" asked the jurors to return a single award for all economic losses, "[a]ny number of permutations support the jury's special verdict on economic damages"]; see also *Da Silva v. Pacific King, Inc.* (1987) 195 Cal.App.3d 1, 11 [jury could have found the plaintiff's injuries necessitated future medical treatment without any future lost earnings].)

Thus, the evidence showed Gallagher sustained substantial injuries immediately after the accident, for which the jury awarded him $172,500 in noneconomic damages. But the evidence also showed that, within three years of the accident, Gallagher had largely recovered. Even though the jury awarded Gallagher some of the expenses he sought as future economic damages, it was reasonable for the jury to conclude, given the substantial conflict in the evidence regarding the nature and extent of Gallagher's injuries and the uncertain need for epidural shots, Gallagher would not suffer appreciable physical pain or mental suffering associated with the treatment for which it awarded future economic damages. Because the evidence did not compel an award of future noneconomic damages, the verdict awarding Gallagher past noneconomic damages, a modest amount of future economic damages, and no future noneconomic damages was not inadequate as a matter of law.

3. *The Jury's Verdict Was Not Inconsistent*

Gallagher includes in his argument that the jury's verdict was inadequate as a matter of law an argument that the verdict was inconsistent. This argument fails too.

"'A special verdict is inconsistent if there is no possibility of reconciling its findings with each other [Citation.]' [Citation.] 'On appeal, we review a special verdict de novo to determine

whether its findings are inconsistent. [Citation.] . . . ""'Where the findings are contradictory on material issues, and the correct determination of such issues is necessary to sustain the judgment, the inconsistency is reversible error.'" [Citations.]" [Citation.] . . . The proper remedy for an inconsistent special verdict is a new trial.'" (*David v. Hernandez* (2014) 226 Cal.App.4th 578, 585.) "Where special verdicts appear inconsistent, if any conclusions could be drawn which would explain the apparent conflict, the jury will be deemed to have drawn them." (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424; see *Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 716 ["'[i]f any conclusions could be drawn thereunder which would explain the apparent conflict, the jury will be deemed to have drawn them'"].)

We can readily reconcile the jury's finding that Gallagher proved he would suffer some future economic damage but failed to prove he would suffer compensable future pain, suffering, or other noneconomic damage. As noted, the regimen of six epidural injections Gallagher's orthopedic expert recommended was only a portion of the future economic damages Gallagher claimed. The testimony was that Gallagher would only need those injections if he experienced a "major flare up," which might never occur. The conclusion is easily drawn from the jury's decision to award Gallagher less than half of his claimed future economic damages for medical treatment that the jury did not believe he would need substantial future medical treatment or experience future pain. The jury's verdict was not inconsistent. (See *David v. Hernandez*, *supra*, 226 Cal.App.4th at pp. 587-588 [jury's findings that the defendant was negligent but that the negligence was not a substantial factor in causing harm to the plaintiff were not inconsistent because the jury could have concluded the plaintiff's inattentiveness caused the collision].) The cases on which

Gallagher relies are distinguishable because the courts in those cases could not, as we can, reconcile the jury's findings. (See *Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 721 ["a careful review of the record . . . discloses no explanation of how the jury might have found defendant negligent for failure to warn while also finding that the product was not defective with respect to its warnings"]; *Stillwell v. The Salvation Army* (2008) 167 Cal.App.4th 360, 374-375 [the jury's finding that the plaintiff was an at-will employee was inconsistent with jury's finding that the plaintiff could only be discharged for cause]; *Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1344 [the jury's finding that there was no breach of contract was irreconcilable with its finding that the defendant breached the implied covenant of good faith and fair dealing implied into the contract].)

DISPOSITION

The trial court's order granting the motion for a new trial nunc pro tunc is reversed. The judgment is affirmed. The parties are to bear their costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.