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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

CHRISTINA GARCIA, Plaintiff and Appellant, v. OSCAR ORTIZ, Defendant and Respondent.	B287974 (Los Angeles County Super. Ct. No. BC544425)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael B. Harwin, Judge. Affirmed.

The Milner Firm, and Timothy V. Milner for Plaintiff and Appellant.

Hansen & Rutherford, Thomas M. Rutherford, Jr., and James M. Hansen for Defendant and Respondent.

Christina Garcia sued Oscar Ortiz for injuries she sustained due to Ortiz's negligence. After a jury trial limited to the issue of damages, the jury awarded Garcia only $2,000 in past economic damages. The trial court denied Garcia's post-trial motion for a new trial predicated on inadequate damages, and entered judgment accordingly. Garcia contends the court made prejudicial evidentiary errors, and no substantial evidence supports the low award. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 12, 2012, Garcia was stopped in the drive-through lane of a McDonald's restaurant in Los Angeles when Ortiz, driving a box truck, hit the right front corner of her car. Garcia filed a complaint nearly two years later, on May 1, 2014, alleging she suffered multiple injuries in the accident. Ortiz admitted having struck Garcia's vehicle but denied that the collision caused her injuries. Hence, the only issue at trial was the amount of damages.

Evidence at trial revealed that Garcia had been involved in a motor vehicle accident in April 2009, three years before the current accident. She testified she was "very healthy" prior to the 2009 accident, and would go jogging several times a week—which she had been doing consistently for 11 or 12 years—and bicycling approximately three times a month. Although she sustained injuries to her neck and lower back in the 2009 accident, by the time of the 2012 accident she was "99.9%" pain-free, and could jog and bicycle as before.

Garcia testified that after the 2012 accident she experienced severe neck pain that radiated down her arm, low back pain that radiated to her left hip, and pain in her left leg. She introduced evidence that she was given an epidural steroid

injection, underwent physical therapy, consulted with several physicians including a knee specialist, underwent extensive diagnostic testing, and had arthroscopic knee surgery two years after the current accident to repair "problems with the medial meniscus" and address "a thickened and partial tear of the medial plica."

Dr. Kendall Wagner, Garcia's medical expert who had examined her and reviewed her medical records, testified that as a result of the 2012 accident she sustained injuries to her neck, back, and left knee. He opined that Garcia's knee pain was caused by a "plica injury," and further opined that the initial treatment for her back pain having failed, the only remaining treatment options were spinal fusion and/or decompression surgery, either of which would costs tens of thousands of dollars. However, Dr. Wagner acknowledged that Garcia also suffered from degenerative disc disease at "multiple levels" in her cervical and lumbar spine, which could be one source of her neck pain, and further acknowledged that as late as March 2012 she experienced cervical and lumbar pain stemming from injuries sustained in the 2009 accident. Finally, Dr. Wagner opined that the treatment Garcia had received to date, including the arthroscopic knee surgery, was medically reasonable and appropriate.

Dr. Michael Weinstein, an orthopedic surgeon, testified as a medical expert for the defense. He stated that when he examined Garcia in September 2015, more than three years after the 2012 accident, she complained of intermittent neck pain radiating to her fingers and lower back pain radiating down her left leg. However, Dr. Weinstein testified that nothing in Garcia's treatment records showed a current cervical or lumbar condition

attributable to the 2012 accident, nothing about her degenerative spine would have made her unusually susceptible to injury during the accident, and nothing indicated her current pain was a result of it. Dr. Weinstein testified that no medical evidence supported Garcia's need for back surgery, and stressed that back surgery would only make her pain worse.

Dr. Weinstein testified that had Garcia suffered a cervical or lumbar sprain in the 2012 accident, such injuries would most likely have been "almost all better by six to eight weeks."

Dr. Weinstein further found no evidence that Garcia suffered an injury to her knee in the 2012 accident or that such an injury would have required arthroscopic surgery. He specifically disagreed with Dr. Wagner's opinion that a torn plica in Garcia's left knee was related to the 2012 accident, testifying that pain related to a plica in a knee joint was most "commonly [found] in runners because of the repetitive impact over time." Such a condition was unlikely to have been caused in the 2012 accident because Garcia did not strike her knee in the accident, and a direct injury would have produced visible swelling and blood in the knee, which had not been reported.

The jury found that Ortiz's negligence was "a substantial factor in causing injury to [Garcia]," but awarded her only $2,000 for "[p]ast economic loss for medical and health care related expenses," expressly awarding nothing for future economic loss or past or future noneconomic loss.

Garcia moved for a new trial, arguing the damages award was inadequate. The court denied the motion and entered judgment according to the verdict.

Garcia timely appealed.

DISCUSSION

A. Preclusion of Expert Testimony

Garcia contends the trial court erred in precluding Dr. Wagner from testifying at trial about the reasonableness of her medical expenses. We disagree.

1. Background

Garcia designated Dr. Wagner as her expert "on the issues [of] damages, including, but not limited to, the cause, nature and extent of [her] injuries, the treatment of such injuries, the prognosis of such injuries, future medical treatments, and the reasonableness and necessity of the medical charges."

At deposition, Dr. Wagner testified that Garcia's medical treatment following the 2012 accident included consultation with a neurosurgeon and knee specialists, an EMG/NCV study, an arthrogram/MRI of her knee, an epidural steroid injection, arthroscopic knee surgery to repair "problems with the medial meniscus" and address "a thickened and partial tear of the medial plica," and physical therapy.

Dr. Wagner declined to offer an opinion about the reasonableness of the cost of Garcia's medical treatment, testifying he would "probably" comment on the matter if asked at trial but was unprepared to do so at deposition because Garcia's attorney had provided him no information about her medical bills, and he had no independent recollection of them.[1] Dr.

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[1] Dr. Wagner testified that appellant's medical treatment following the May 2012 accident included physical therapy with Dr. Varela, consultation with Dr. Pacquette, a neurosurgeon, EMG/NCV study by Dr. Jilani, an epidural steroid injection by Dr. Farahmand, consultation with knee specialists, an arthrogram/MRI of her knee, arthroscopic knee surgery on April

Wagner stated, "if I'm provided with the charges that have been incurred thus far and I look at them and I think they're reasonable, I would probably try to give that testimony."

Before trial the parties stipulated to an in limine order barring expert "opinions that were not testified to at [the expert's] deposition."

At trial, Dr. Wagner testified that Garcia's medical treatment was reasonable, but the court sustained a defense objection to any testimony concerning whether the cost was reasonable. The court found that because Dr. Wagner declined to provide such an opinion at his deposition he could not offer it at trial.

2. Standards Governing Expert Opinion Evidence

Under Code of Civil Procedure section 2034.210, subdivision (a), any party may demand the mutual exchange of information regarding expert witnesses. For retained experts, a party must provide an expert witness declaration containing a "brief narrative statement of the general substance of the testimony that the expert is expected to give." (Code Civ. Proc., § 2034.260, subd. (c)(2).) Section 2034.210 requires each party to disclose "the *substance* of the facts and the opinions to which the expert will testify, either in his witness exchange list, or in his deposition, or both." (*Easterby v. Clark* (2009) 171 Cal.App.4th 772, 778 (*Easterby*).) A party is entitled to depose any individual identified on an opposing party's expert witness list. (Code Civ. Proc., § 2034.410.)

"[T]he very purpose of the expert witness discovery statute is to give fair notice of what an expert will say at trial." (*Bonds v.*

14, 2014, to repair "problems with the medial meniscus" and address "a thickened and partial tear of the medial plica."

Roy (1999) 20 Cal.4th 140, 146.) To that end, in appropriate circumstances a trial court may exclude from evidence "the expert opinion of any witness that is offered by any party who has unreasonably failed to . . . [¶] . . . [¶] [m]ake that expert available for a deposition . . . ." (Code Civ. Proc., § 2034.300, subd. (d); see *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1504.)

We review a ruling on the admissibility of expert opinion evidence for abuse of discretion. (*Easterby*, *supra*, 171 Cal.App.4th at p. 780.)

Here, Dr. Wagner testified at deposition that he would "try" to give an opinion about Garcia's medical expenses "if" her attorney provided him with "the charges that have been incurred," and if he thought any such charges were, in fact, reasonable. An expert disclosure must minimally provide "reasonable notice of the specific areas of investigation by the expert, the opinions he has reached and the reasons supporting the opinions." (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 919 (*Kennemur*).) Dr. Wagner's preliminary statement in deposition that he might reach an opinion at some future point is clearly inadequate to disclose the substance of an opinion actually reached. Because Garcia afforded the defense no reasonable notice of Dr. Wagner's opinion about her expenses nor any reasons supporting it, the trial court reasonably excluded the opinion at trial.

Garcia appears to suggest Dr. Wagner was reasonably available for a second deposition before trial but the defense declined to avail itself of the opportunity. Nothing in the record supports the assertion.

Garcia argues that Ortiz failed to object to Dr. Wagner's anticipated trial testimony in a timely fashion. But when a party's expert witness testifies at deposition that he has not reached an opinion on a particular issue, the proffering party must notify the opposing party when the expert reaches an opinion. (*Kennemur*, *supra*, 133 Cal.App.3d at p. 920.) Until then, the opposing party is entitled to rely on the witness's initial representation that no opinion has been reached. (*Ibid*.) Failure to apprise the opposing party of the changed circumstance deprives it of adequate notice of the postdeposition opinion, rendering the expert witness effectively unavailable for examination. (*Jones v. Moore* (2000) 80 Cal.App.4th 557, 565.)

Garcia asserts in conclusory fashion that the trial court erroneously excluded her medical bills, but offers no argument or legal authority supporting the point. We thus deem the argument forfeited. (See *Strutt v. Ontario Sav. & Loan Assn.* (1972) 28 Cal.App.3d 866, 873 [mere assertion of error without pertinent argument may be ignored]; see also *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 ["We are not bound to develop appellants' argument for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived"].)

B. Exclusion of the Testimony of Brad Avrit

Before trial the parties stipulated to exclusion of the testimony of Brad Avrit, Garcia's accident reconstruction expert, during her case-in-chief. Garcia argues the court erred in denying her request to offer Mr. Avrit as a rebuttal witness. But the record reveals no such request.

C. New Trial Motion

Garcia argues the court erred in denying her motion for new trial challenging the adequacy of the damages award. We disagree.

In general, a tortfeasor is liable for all damage, economic and noneconomic, proximately caused by his or her tort. (Civ. Code, § 3333; see *Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal.App.4th 439, 446 ["Tort damages are awarded to fully compensate the victim for all the injury suffered"].) Economic damages are "objectively verifiable monetary losses," such as medical expenses. (Civ. Code, § 1431.2, subd. (b)(1).) Noneconomic damages are "subjective, non-monetary losses" such as physical pain and mental suffering. (Civ. Code, § 1431.2, subd. (b)(2).) Full compensation of a victim includes recovery for past harm as well as those economic and noneconomic harms reasonably certain to occur in the future. (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892-893; *Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 587.) Recovery of medical expenses as past damages requires proof that the plaintiff has actually incurred necessary and reasonable medical expenses. (*Graf v. Marvin Engh Truck Co.* (1962) 207 Cal.App.2d 550, 555; see also *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 551, 555 ["To be recoverable, a medical expense must be both incurred *and* reasonable"].)

"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." (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 506.) On a motion for new trial challenging the adequacy of a jury's damages award, the trial

court has a duty to reweigh the evidence and evaluate the credibility of witnesses, and may grant a new trial due to inadequate damages only if "after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." (Code Civ. Proc., § 657, subd. (7); see *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872; *Ryan v. Crown Castle NG Networks, Inc.* (2016) 6 Cal.App.5th 775, 784.) A court has broad discretion when ruling on such a motion, and the exercise of that discretion is accorded great deference on appeal. (*Decker*, at pp. 871-872; see also *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 61 ["reviewing court must uphold an award of damages whenever possible [citation] and all presumptions are in favor of the judgment"].)

Because the amount of damages is a question of fact, it is subject to our substantial evidence standard of review. (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 531-532.) We will reverse the denial of a new trial motion based on 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.) We view "the facts on the issue of damage[s] most favorable to the respondent[,]" and draw all reasonable inferences in favor of the judgment. (*Gersick v. Shilling* (1950) 97 Cal.App.2d 641, 645.)

Here, substantial evidence supported a low damages award, first because Garcia failed to adduce evidence that she incurred or paid any specific medical expense. This lack of evidence alone would justify awarding no past economic damages.

(Cf., e.g., *Uspenskaya v. Meline* (2015) 241 Cal.App.4th 996, 1001 [personal injury plaintiff "cannot recover more than the amount of medical expenses he or she paid or incurred"].)

In any event the evidence regarding past economic damages was conflicting, as substantial evidence indicated the 2012 accident was a minor collision that did not proximately cause Garcia's injuries, and any limitation, impairment or pain she suffered was actually related to other factors such as injuries from the April 2009 accident, natural spinal degeneration, or repetitive knee stress from years of jogging. Further, Dr. Weinstein testified that although the accident may have caused Garcia minor neck and back pain, it was appropriately treated with physical therapy at a cost of $2,000 (the amount of the only medical bill Dr. Weinstein saw in Garcia's medical records), and resolved within a few months.

Similarly, the jury could reasonably award nothing for future economic or noneconomic damages based on Dr. Weinstein's testimony that Garcia required no future medical treatment for her cervical spine, that back surgery would only make things worse, and that Garcia's knee pain was unrelated to the 2012 accident.

Because a substantial conflict in the evidence exists, Garcia's motion for a new trial was properly denied.

DISPOSITION

The judgment is affirmed. Ortiz is to recover his costs on appeal.

NOT TO BE PUBLISHED

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.