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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

OFELIA MALDONADO,

Plaintiff and Appellant,

v.

PARKER FREELAND,

Defendant and Respondent.

B266997

(Los Angeles County
Super. Ct. No. BC526797)

APPEAL from a judgment of the Superior Court of Los Angeles County. Stephen M. Moloney, Judge. Affirmed.

Law Offices of Tabone and Derek L. Tabone for Plaintiff and Appellant.

Law Office of Cleidin Z. Atanous and Cleidin Z. Atanous for Defendant and Respondent.

This appeal arises from a vehicle collision in which causation of the plaintiff's claimed injuries was the critical issue at trial. A jury returned a verdict finding the defendant's admitted negligence was not a substantial factor in causing harm to the plaintiff. Plaintiff asserts the trial court erred in admitting certain parts of an expert witness' testimony for which he was not designated and in denying her motion for new trial. We affirm the judgment.

FACTS

The Accident

Examined in the light of the long-settled, substantial evidence test standard of review (see, e.g., *State Farm Fire & Casualty Co. v. Jioras* (1994) 24 Cal.App.4th 1619, 1625-1626) the evidence presented at trial established the following facts: On April 10, 2012, defendant Parker Freeland drove his Ford F-150 pick-up truck into a left turn lane at the intersection at Balboa Boulevard and Lassen Street, and stopped about 10 to 12 feet behind a Honda Civic driven by plaintiff Ofelia Maldonado. When Freeland stopped his vehicle, a bag of groceries "fell off the front seat," and he reached to grab a bottle of milk so it would not spill. As Freeland was reaching for the milk, his foot "slipped off the brake," and his truck moved forward and "went right into the back" of Maldonado's car. Freeland did not "put [his] foot on the accelerator in any manner." Maldonado and Freeland stopped on Lassen after completing the left turn. After stopping, Maldonado and Freeland looked at their vehicles. Freeland saw "no damage whatsoever" to his truck and saw "like, a crack" on the rear bumper of Maldonado's car. No emergency services were called, no tow trucks were called, and Maldonado exhibited no signs of injury. During the stop, Freeland gave Maldonado his insurance

information. They then both drove their vehicles away from the scene.

The Personal Injury Case and Trial

Maldonado filed a motor vehicle personal injury complaint against Freeland. Freeland answered, conceding liability for the collision and resulting property damage (which was paid), but denying that the accident caused Maldonado to suffer any personal injuries.

The issues of causation and damages as to Maldonado's assertion of personal injuries were tried to a jury. Here, Maldonado claims on appeal predominantly implicate only the testimony of Freeland's designated medical expert (Code Civ. Proc., § 2034.260, subd. (c)), Douglas Keister, M.D., and we circumscribe our review of the evidence accordingly.

Dr. Keister is a professor of orthopedic surgery at University of California, Irvine. He specializes in spinal surgery, and is involved in approximately one-third of the spinal trauma cases that come through the school's hospital. His daily duties include consideration of the nature of the injury-causing events in assessing spinal trauma. He performs roughly 150 spinal surgeries per year. In the course of describing his background on direct examination during his trial testimony, Dr. Keister testified, without an objection by Maldonado, that he is also "certified as a traffic accident reconstructionist." Here, Dr. Keister explained, again without an objection, that this means he has "been through the training and certified to go out and look at the skid marks and look at the damage to the vehicles, look at the deposition testimony, look at the other different factors and reconstruct what happened with the accident."

After the review of his background, Dr. Keister testified that he had reviewed Maldonado's medical records from a number of doctors who had treated her at different times, including her treating physicians after the accident, Ali Dini, M.D., and Frank Balderrama, M.D. Dr. Keister also reviewed records from a medical group before the accident (including x-rays and MRI scans of her lower back), and from an orthopedist before the accident. In addition, Dr. Keister had reviewed depositions given by Maldonado and Drs. Dini and Balderrama.

Based on his review of the materials summarized above, Dr. Keister concluded that Maldonado was not injured in the accident with Freeland. The description of the facts of the accident showed that the accident was a mild-to-low-moderate-impact collision, which limited the type of injuries that she could have sustained. Dr. Keister concluded that, at most, Maldonado may have suffered some mild strains that would have lasted two or three weeks, but his review of the records showed no such injuries. Dr. Keister explained that Maldonado's complaints at the time of her presentation for treatment after the accident did not fit with a patient who had been in a rear-end vehicular collision, and noted in particular that there was no description of force that would explain Maldonado's complaint about elbow pain. He opined that the force from the accident precluded neck and back pain caused as a result of the accident. Dr. Keister opined that Maldonado's pain complaints were not consistent with a rear-end collision. Further, that Dr. Balderama's calculations regarding her purported loss of range of motion were inaccurate and not quantifiable.

Dr. Keister noted that Dr. Dini noted damage to Maldonado's sacroiliac joint (the joint between the pelvis and the sacrum) several months after the accident, but that Dr. Balderama did not mention such an injury. Further, Dr. Keister explained that it was unheard of for the sacroiliac at the joint to be injured in a rear-end collision. Dr. Dini also failed to perform even one of the five tests that should have all been done to make his diagnosis. Dr. Keister opined that Maldonado's claimed injuries did not "even loosely approximate the pattern you would expect from someone who has been in a low-moderate . . . rear-end accident."

Finally, Dr. Keister also noted that Maldonado had been seen by a "Dr. Alonso" at a medical group about two weeks after the accident for treatment of a urinary tract infection. Dr. Keister explained that lower and middle back pain is a common symptom associated with a urinary tract infection. Also, Dr. Keister noted that MRI and x-ray scans taken at the time of Maldonado's treatment for low-back pain complaints in 2006 and 2007, before the car accident, indicated an "ossified disc," as well as dehydration and a "disc osteophyte complex." Dr. Keister noted that these indications "would be read by a lot of doctors as a disk herniation," and that the preexisting lesion was the same size and location as the lesion that the post-accident doctors were treating as a bulge.

This brings us to the parts of Dr. Keister that are at issue in Maldonado's present appeal. *On cross-examination by Maldonado's counsel*, Dr. Keister agreed that he never physically examined Maldonado or spoke to her treating doctors. During ensuing questioning, counsel challenged the thoroughness of Dr. Keister's review of the case, particularly his review of

Maldonado's medical history. Then, counsel asked, "By the way, did you actually ever look at . . . either of the vehicles . . . involved in the accident?" and Dr. Keister answered, "I had no accident reconstruction materials at all in this accident." Counsel then continued in this line of questioning, asking Dr. Keister about his conclusion that the accident was a "mild to moderate speed rear-end collision." Dr. Keister referred to Maldonado's deposition, and explained that he concluded the accident was low to moderate speed collision because Maldonado was in traffic, and had stopped or was traveling five miles-per-hour or less, that she did not strike the vehicle in front of her as she had been able to put her foot on the brake. Because Maldonado's own deposition testimony confirmed the approximate distance that her vehicle traveled (since it did not hit the car in front of her), he was able to ascertain its approximate speed during the impact. Counsel continued: "Did you make any analysis of how fast the vehicle was going that was behind her?" and Dr. Keister answered, "I did not have any accident reconstruction materials." Counsel then asked, "So you didn't know the weight of the relative vehicles?" at which point Dr. Keister answered, "Again, sir, you can belabor the point as much as you want, the answer is the same."

At this point during his cross-examination, Maldonado's counsel asked Dr. Keister whether it would make a difference in his analysis if he "were to discover" that the accident had bent the Honda's frame. Dr. Keister replied that he "ha[d]n't seen any of the accident materials, and that, taking a bent frame "out of context wouldn't make that much difference" to his opinion. Counsel then asked Dr. Keister to examine the repair bill for the Honda and see if it altered his opinion. After looking at the repair bill, Dr. Keister said that nothing on the bill changed his

mind. When asked if the trunk being popped by the impact made a difference, Dr. Keister answered no, explaining that the trunk popping would have acted like a shock absorber and actually reduce the force to which Maldonado was exposed. At no point during the cross-examination testimony summarized above did Maldonado's counsel lodge a single objection.

The trial court instructed the jury, the lawyers made their arguments to the jury, and the jury began deliberating. As noted above, the jury returned a verdict in favor of Freeland. Specifically, the jury returned a finding that Freeland's negligence was not a substantial factor in causing harm to Maldonado. The jurors were polled and answered 9 to 3 as to the verdict.

The court entered judgment in favor of Freeland in accord with the jury's verdict.

Maldonado filed a motion for new trial based on the ground that Dr. Keister's trial testimony exceeded the area of medical issues for which he had been designated an expert. The trial court denied the motion for new trial.

Maldonado filed a timely notice of appeal.

DISCUSSION

I. Expert Testimony

Maldonado contends the jury's verdict in favor of Freeland must be reversed because Dr. Keister gave testimony of a nature that was outside the scope of his expert designation and which should only have been offered by an accident reconstruction expert. Maldonado argues that where a party fails to submit an expert witness designation, "or submits and [*sic*] inaccurate one, the correct sanction is exclusion of the expert's undisclosed

opinions. [Citation.]” Maldonado further argues: “[B]ecause the non-disclosed opinions were literally sprung on [her] without warning [during trial], there was no opportunity to have there [sic] excluded before the jury heard them”

We disagree with Maldonado’s claim of expert testimony error because the record shows that she did not make an objection at any point to any part of Dr. Keister’s testimony. As stated in Evidence Code section 353: “A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion”

Further, the parts of Dr. Keister’s testimony which Maldonado challenges on appeal were, for the most part, elicited by Maldonado’s own cross-examination of the doctor. “Where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal’ on appeal. [Citation.]” (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.)

Finally, we do not agree that Dr. Keister’s trial testimony necessarily exceeded the scope of the designation of him as an expert. All of the doctors who testified at trial — Dr. Keister for Freeland and Drs. Balderrama and Dini for Maldonado — necessarily had to give some measure of testimony about the nature of the accident. That is, the forces to which Maldonado was exposed, in order to explain their medical conclusion that the accident caused Maldonado to suffer personal injuries.¹

¹ For example, during direct examination by Maldonado’s counsel, Dr. Dini was asked to explain “Were the injuries [that

II. Motion for New Trial

Maldonado contends judgment in favor of Freeland must be reversed because the trial court abused its discretion in denying his motion for new trial. Maldonado's motion for new trial was based on the claim that Dr. Keister gave improper expert accident reconstruction testimony. We find no error.

Code of Civil Procedure section 657 vests a trial court with discretion to grant a new trial on seven grounds: (1) irregularity in the proceedings that prevented a party from having a fair trial; (2) jury misconduct; (3) accident or surprise, which ordinary prudence could not have guarded against; (4) newly discovered evidence; (5) excessive or inadequate damages; (6) insufficiency of the evidence to justify a verdict, or verdict that is against law; and (7) error in law, occurring at the trial and excepted to by the party seeking a new trial. A trial court's order denying a new trial is reviewed under the deferential abuse of discretion standard. (See, e.g., *ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832.) Under this standard, we will not reverse a trial court decision unless it is shown to be arbitrary, capricious or beyond the bounds of reason. (*Blackman v. Burrows* (1987) 193 Cal.App.3d 889, 893.)

Maldonado] described to you consistent with the type of accident she described?" In summing up his examination of Maldonado, Dr. Dini testified: "[M]y causation was the accident caused [her injuries]," and that the Maldonado's condition "was consistent with an automobile accident." During direct examination of Dr. Balderrama, counsel asked, "Did Ms. Maldonado describe for you what she thought was the mechanism of her injury." As did Dr. Dini, Dr. Balderrama testified that Maldonado's symptoms and injuries were "consistent" with being in an accident.

Maldonado's motion for new trial sought relief on all grounds under section 657 except for jury misconduct, newly discovered evidence, and error in law. As noted above, all of the grounds asserted in the new trial motion were premised on a claim that Dr. Keister's gave "improper" expert testimony at trial on the subject of accident reconstruction.

We cannot find irrationality in the trial court's decision to deny a new trial. As we have already pointed out, Dr. Keister's trial testimony was not measurably different from any of the other doctors who testified at trial about the nature of the accident. Each needed to consider the force of the accident to explain their medical opinion about causation. As we have also indicated, Dr. Keister testified without any objection from Maldonado. In addition, Dr. Keister repeatedly stated that he had not done any accident reconstruction analysis. Finally, and perhaps most importantly, the bulk of Dr. Keister's purported accident reconstruction testimony challenged in the new trial motion and in the present appeal was elicited by Maldonado's counsel in an attempt to show some inadequacy in Dr. Keister's preparation of the case for his trial testimony.

Given all of the above, it was reasonable for the trial court not to see any "irregularity" in the trial, or any "surprise." Further, given that Dr. Keister's testimony was not demonstrably improper, it was reasonable for the trial court not to see any insufficiency of evidence in support of the jury's verdict, nor a judgment "against the law." This case came down to a battle of experts, and the jury decided that Dr. Keister's testimony rang the more persuasive. A new trial was not required, and denial of a new trial plainly was not an abuse of discretion. Maldonado's

assertion that she was “sandbagged” by Dr. Keister’s testimony is belied by the record.

III. Substantial Evidence

Last, Maldonado contends judgment in favor of Freeland must be reversed because “[t]he evidence does not support the [jury’s] verdict.” Maldonado argues here that “the wayward opinions of Dr. Keister must be excluded” in reviewing the record for evidence in support of the jury’s verdict, and that this leaves only her and her treating physicians’ “unequivocal” testimony that she suffered injuries as a result of the accident. We disagree.

Inasmuch as we have found above that Dr. Keister’s testimony was not improper, it follows that there is substantial evidence in support of the jury’s verdict in the form of his testimony. We reiterate: this case came down to a battle of experts, and the jury decided that Dr. Keister’s properly admitted testimony was more persuasive. No more needs to be said.

IV. Sanctions

Freeland filed a motion against Maldonado in our court requesting sanctions for a frivolous appeal. While Maldonado’s arguments on appeal may lack a certain vitality, we are not persuaded that sanctions should be awarded in this case. (See *Young v. Rosenthal* (1989) 212 Cal.App.3d 96, 131.)

DISPOSITION

The judgment is affirmed. Respondent to recover costs on appeal.

BIGELOW, P.J.

We concur:

FLIER, J.

SORTINO, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.