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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

ANIL D. GHARMALKAR, Plaintiff and Appellant, v. JOSE EVERETT FISHER et al., Defendants and Respondents.	2d Civil No. B284062 (Super. Ct. No. 15CV02595) (Santa Barbara County)

In this personal injury action arising out of a vehicular collision, Anil D. Gharmalkar appeals from the judgment entered in favor of respondents Jose Everett Fisher, Ismael Rodriguez, and Coastal Fumigation, Inc. A jury returned a special verdict finding that respondents' conduct was not a substantial factor in causing harm to appellant.

Appellant contends that the trial court abused its discretion in denying his motion for a new trial. He argues that a new trial is warranted because (1) the trial court refused to permit the jury to watch a video of a vehicular crash test, (2) the trial court refused to give a requested jury instruction, and (3)

respondents' counsel committed misconduct during closing argument. We affirm.

Facts

Appellant was driving a tractor-trailer in the right lane on a two-lane section of the southbound US 101 freeway. His speed was approximately 54 miles per hour. Fisher was driving a Mazda pickup truck in the left lane of the southbound freeway. Fisher was employed by Coastal Fumigation, Inc., and was acting in the course of his employment. His speed was approximately 65 miles per hour. His pickup truck weighed about 3,000 pounds. Appellant's tractor-trailer, including the load it was carrying, weighed about 45,000 pounds. The weight of the tractor alone was about 17,000 pounds.

Fisher "dozed off" at the wheel. When he awoke, he "was in the center median . . . headed towards the northbound lanes." While trying to get back onto the southbound freeway, Fisher "overcorrect[ed]." The right front corner of his pickup truck hit the gas tank of appellant's tractor. The gas tank was "[r]ight below the driver's side door." The impact of the collision ruptured the steel gas tank, bent steel steps leading to the driver's side door, and dented the door. Appellant "maintained control of [his] truck and trailer" and stayed in the right lane.

Appellant and Fisher pulled their vehicles over to the shoulder and stopped. Appellant got out of the tractor's cab and told Fisher that "he was okay." Appellant testified, "I wasn't thinking I was hurt, I didn't feel anything." But when he got back inside the cab, he "was in a lot of pain, just everything was sore."

Appellant drove the tractor-trailer to Oxnard to "pick up produce." He then drove to Georgia, where he "dropped off

[the] load." In Georgia he picked up another load and drove to Kansas.

Sixteen days after the collision, appellant saw a doctor but did not complain of neck, shoulder, or arm pain. About two months after the collision, he complained of pain that began in his neck and ran down his left shoulder and arm to the elbow. During the preceding month, he had been driving his tractor-trailer. Appellant continued to drive until nine months after the collision when he was diagnosed with a C5-C6 disc herniation in his cervical spine (neck). Two months later, he had surgery on his neck.

Appellant's expert, a neurosurgeon, opined that "the herniation . . . started at the time of the accident." "[T]he initial incident caused the injury, . . . and then eventually symptoms progressed to the point where he required surgery."

Respondents' first expert, Dr. Russell Nelson, is an orthopedic surgeon specializing in spine surgery. He opined that appellant's pain two months after the collision was different from the pain associated with a C5-C6 disc herniation. Dr. Nelson explained that "C5-6 pain should go down into your hand," but appellant's pain stopped at his elbow. Dr. Nelson opined that, based on his review of the medical records and films, there is no "evidence of a traumatic disc injury to [appellant's] cervical spine." Appellant did not sustain a disc herniation. His neck and arm pain was caused by bone spurs in the cervical spine. The bone spurs were "caused by degeneration over time."

Respondent's second expert, Dr. Stephen Rothman, is a neuroradiologist. He interprets "the different types of picture studies of the spine and brain." Nine months after the collision and before his neck surgery, appellant had an MRI scan of the

cervical spine. Dr. Rothman interpreted pictures taken during the scan. He opined that appellant did not have a disc herniation. Instead, he had "a diffuse disc bulge" that is "never caused by trauma." Bone spurs were "attached to that bulge, so . . . there's a combination of bone and disc as there almost always is in these cases." Dr. Rothman continued: Appellant had "a single degenerated disc, which . . . is abutting on the spinal cord, [and] it's been there for a very long time. It was not caused by this particular episode or any other single particular episode." "Disc bulge is never caused by anything other than the aging process." Disc herniations, on the other hand, "can occur from trauma."

Procedural History

Appellant filed a complaint against respondents for negligence. During closing argument at the jury trial, appellant's counsel said that his client was seeking damages based on "a herniated C5-6 disc in his cervical spine" that occurred as a result of the collision and "got progressively worse until it ultimately required surgery."

The jury returned a special verdict unanimously finding that respondents' negligence was not "a substantial factor in causing harm to [appellant]." The special verdict form noted that respondents "have admitted that they were negligent, and the sole cause of the accident." Based on the special verdict, judgment was entered in respondents' favor.

Appellant's motion for a new trial was denied.

Standard of Review

"[A] trial judge is accorded a wide discretion in ruling on a motion for new trial and . . . the exercise of this discretion is given great deference on appeal. [Citations.] . . . In our review of

[an] order *denying* a new trial . . . we must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial. [Citations.]" (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872.) "Prejudice is required: '[T]he trial court is bound by the rule of California Constitution, article VI, section 13, that prejudicial error is the basis for a new trial, and there is no discretion to grant a new trial for harmless error.' [Citation.]"[1] (*Sherman v. Kinetic Concepts*, *Inc.* (1998) 67 Cal.App.4th 1152, 1161.) An error is prejudicial if "it is reasonably probable that a result more favorable to [appellant] would have been reached" in the absence of the error. (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 491.) "Not only is the order denying a new trial supported by all presumptions of its correctness but the burden is upon appellant to show affirmatively that an order of denial is prejudicially erroneous." (*Engleman v. Malchow* (1949) 91 Cal.App.2d 341, 344; see also *Candelaria v. Avitia* (1990) 219 Cal.App.3d 1436, 1444 ["'Prejudice is not presumed and the burden is on the appellant to show its existence'"].)

Refusal to Permit Jury to Watch Video

Appellant argues that the trial court erroneously refused to permit the jury to watch a video of a crash test conducted pursuant to Federal Motor Vehicle Safety Standard

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[1] Article VI, section 13 provides: "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

(FMVSS) 214. Daniel Voss, respondents' accident reconstructionist and biomechanical engineer, relied in part on this test in forming some of his opinions. During the test, a 3,000 pound sled (about the same weight as Fisher's pickup truck) traveling at 33.5 or 38.5 miles per hour collided at a 90 degree angle into the side of a 14,200-pound stationary bus (about 2,800 pounds lighter than appellant's tractor without the trailer). Voss described the crash as a "T-bone accident." He opined that, unlike the crash test, in the instant case the angle of the collision was about 24 degrees. Although appellant was precluded from showing the video to the jury, he cross-examined Voss about the crash test and displayed still photographs from the video to both Voss and the jury.

The video issue is forfeited because the video and still photographs were not marked as exhibits and are not part of the record on appeal. The record, therefore, is inadequate for meaningful review of the trial court's order refusing to permit the jury to watch the video. "[T]he appellant has the burden of affirmatively demonstrating error by providing an adequate record. [Citations.] A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed." (*Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043, 1051, fn. 9.)

In any event, appellant has failed to carry his burden of showing that he was prejudiced by the court's refusal to permit the jury to watch the video. He has not established that, if the jury had watched the video, it is reasonably probable that the jury would have found that respondents' negligence was a substantial factor in causing him harm. Appellant claims that

the video "demonstrat[ed] the severity of the impact" of the collision between Fisher's pickup truck and appellant's tractor-trailer. But the crash test recorded in the video is completely different from the collision that occurred here. Appellant does not explain why the video was crucial to his case despite the display of still photographs from the video and his cross-examination of Voss about the crash test. Playing the video for the jury would not have affected the testimony of Drs. Nelson and Rothman that appellant's neck problems had nothing to do with the collision.

Refusal to Give Instruction Requested by Appellant

Appellant contends that the trial court erroneously refused to instruct the jury as follows pursuant to CACI No. 3928: "You must decide the full amount of money that will reasonably and fairly compensate appellant for all damages caused by the wrongful conduct of respondents, even if appellant 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."

Appellant's contention is forfeited because the record does not include the instructions given to the jury. "An appellant has the burden to provide a record sufficient to support its claim of error. [Citation.] . . . An appellant arguing instructional error must ensure that the appellate record includes the instructions given . . . ." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 678.) The reason for this requirement is that, in determining whether an alleged instructional error constitutes prejudicial reversible error, an appellate court "must consider all of the instructions given to the jury." (*Williams v. Cole* (1960) 181 Cal.App.2d 70, 75.)

If a forfeiture had not occurred, we would not need to determine whether the trial court erred in refusing to give CACI No. 3928. Such an error could not have prejudiced appellant. The instruction directs the jury to "fairly compensate" him "for all damages caused" by respondents' negligence. The jury found that respondents' negligence had not caused harm to appellant. Because of the finding of no causation, CACI No. 3928 is inapplicable. The jury did not reach the point of "decid[ing] the full amount of money that will reasonably and fairly compensate appellant for all damages." (*Ibid.*; see *Edwards v. A.L. Lease & Co.* (1996) 46 Cal.App.4th 1029, 1034 ["tort liability is dependent upon the plaintiff's ability to demonstrate that his or her damages were caused by the defendant, and this rule applies in strict liability as well as negligence cases"].)

Alleged Misconduct of Respondents' Counsel

Appellant claims that, during closing argument, respondents' counsel committed misconduct by misstating the law of damages. Respondent's counsel said, "If this accident was the straw that broke the camel's back, then you should only award damages for this one straw, not for the thousands of straws that occurred before this accident." Appellant objected and moved to "strike" counsel's "comments." The court replied, "Stricken." Appellant did not request that the court admonish the jury to disregard counsel's comments. In the absence of such a request, the misconduct claim is forfeited. "Generally a claim of misconduct is entitled to no consideration on appeal unless the record shows a timely and proper objection and a request that the jury be admonished. [Citations.] . . . 'It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to

disregard such matters, correct the impropriety of the act of counsel and remove any effect his conduct or remarks would otherwise have.' [Citation.]" (*Horn v. Atchison, Topeka and Santa Fe Railway Co.* (1964) 61 Cal.2d 602, 610.)

Even if the misconduct issue were preserved for appellate review, appellant has failed to show that counsel's comments prejudiced him. As previously discussed, the jury never reached the damages issue because it found that respondents' negligence had not caused harm to appellant. Before discussing damages and making "the straw that broke the camel's back" argument, respondents' counsel told the jury, "I don't think you're going to get here because I think there's more than enough evidence here to show that the car accident was not the substantial factor in causing the injuries; however, I'd be remiss if I didn't go through the rest of the questions [on the special verdict form] with you."

Disposition

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Colleen K. Sterne, Judge

Superior Court County of Santa Barbara

Vaziri Law Group, Siamak Vaziri and David C. Shay for Plaintiff and Appellant.

Yoka & Smith, Alice Chen Smith and Benjamin A. Davis; Greines, Martin, Stein & Richland, Robert A. Olson and Marc J. Poster for Defendants and Respondents.