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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

GARY L. JOHNSON, Plaintiff and Appellant, v. BULK TRANSPORTATION, Defendant and Respondent.	B252289 (Los Angeles County Super. Ct. No. BC483331)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ruth Ann Kwan, Judge. Affirmed.

Law Office of David H. Greenberg and David H. Greenberg; Huarte Law Office and Anne M. Huarte for Plaintiff and Appellant.

Ferruzzo & Ferruzzo, Colleen M. McCarthy, Vasko R. Mitzev and Priya Navaratnasingham for Defendant and Respondent.

Plaintiff and appellant Gary Johnson (Johnson) sued his employer, Bulk Transportation (Bulk), for disability discrimination, failure to reasonably accommodate his medical condition, and failure to engage in the interactive process, in violation of the Fair Housing and Employment Act (FEHA) (Gov.Code, § 12940, subds. (a), (m) & (n).) After a seven day trial, the jury returned a special verdict, concluding that Bulk had not discriminated against Johnson due to his disability and had offered Johnson reasonable accommodations. The jury also found that Bulk failed to participate in an interactive process; however, following the instructions on the special verdict form, the jury did not determine whether this failure caused Johnson harm.

Johnson contends that the special verdict form returned by the jury contained irreconcilably inconsistent answers, requiring reversal of the judgment. He also argues that because the special verdict did not require the jury to determine whether Bulk's conduct harmed Johnson, it was fatally defective. Bulk maintains that there is no inconsistency in the jury's special verdict findings, and in any event, Johnson waived these contentions as his counsel approved the form and content of the special verdict and failed to raise the issues before the jury was excused, or in his motion for new trial. We conclude that the special verdict findings are not inconsistent, and that any error in the special verdict form was invited and thus not cognizable on appeal. Consequently, we affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Bulk, with its two wholly-owned subsidiaries, West Coast Bulk and D.T.I., operates a trucking business which employs 200 to 300 employees at seven terminals in the southwest United States. Bulk hired Johnson, an experienced commercial truck driver, in August 2009 to haul bulk chemicals, liquids, and dry commodities from its Victorville terminal; loads of silica sand, hydrated lime and quicklime constituted a significant portion of Bulk's business. Thereafter, the Victorville terminal closed and its operations were moved to nearby Adelanto, California.

At trial, Brett Richardson, Bulk's Vice President of Operations, testified to how Bulk conducted its business operations. A trailer was loaded at Point A, driven and unloaded at Point B, and reloaded as close to Point B as possible before driving to Point C; the pattern continued until the driver returned to his or her home terminal. In this way, Bulk sought to avoid putting empty trailers on the road. Bulk requires all of its drivers to perform the same functions, so that the assigned work is interchangeable. The company does not employ a "buddy system," but requires its drivers to drive alone, act as the safety gatekeeper of their truck and trailer, and respond to spills as they occur. Debby Orr, the dispatcher at the Adelanto terminal, was responsible for assigning schedules and dispatching drivers and equipment daily to meet Bulk's customers' demands. During the first 18 months of his employment with Bulk, Johnson worked full-time, an average of five days per week, transporting mostly rice and lime.

In February 2011, Johnson was diagnosed with bullous emphysema. On or about March 1, 2011, Johnson presented a letter from his physician, Dr. Michio Abe, to Orr, which restricted Johnson from loading, unloading and hauling lime and sand for an indefinite period of time because doing so could aggravate and worsen the symptoms of his disease.[1] At that time, Johnson requested an accommodation, and thereafter, he was no longer assigned work hauling lime or sand. James Conrad, the manager of the Adelante terminal and Orr's supervisor, instructed Bulk to assign poultry fat and rice hauls to Johnson if they did not require transport of sand or lime on the return haul or a linking leg. Johnson was also assigned hauls of brine water when they did not require linking return runs of sand or lime. Johnson was instructed by Conrad to call into dispatch by 8:30 each morning to speak to Orr, who would assign him work runs. When he did so, Orr would say, "If you can't haul lime, we have no loads." Consequently, Johnson's hours were sharply reduced.

In July 2011, Johnson and Conrad met to discuss the work restrictions. At that time, Johnson indicated that he did not know if his medical restrictions would be

[1] Johnson testified that Orr's response to this was, "The company can't make any money if you're being restricted on loads."

temporary or permanent. Because Bulk was about to lose its poultry fat contract, which constituted a major portion of Johnson's work, Conrad was concerned that there would not be sufficient work for Johnson. Conrad offered Johnson an alternative full-time truck driving job, working at Bulk's Walnut, California, terminal, approximately 60 miles away from the Adelanto terminal. Johnson declined the job offer because, due to the loads transported out of Walnut, he would likely be required to wear a respirator, which his medical condition prevented him from doing. Shortly thereafter, Conrad notified Johnson that his status was being changed to part-time. Johnson testified that he was not informed at that time that the change in status to part-time meant that he would lose his health insurance benefits.

In October 2011, Bulk began assigning Johnson to drive an empty truck to Mountain Pass, fill it with brine water, transport it to either Santa Paula or Corona, and return the empty truck to Adelanto. Johnson stated that he "was staying busy with that load." Johnson consistently worked hauling brine water through January 2012.

In November 2011, Conrad offered Johnson a driver position at West Coast Bulk, which would not require him to transfer to another facility, but would result in a different compensation formula. While Bulk drivers were paid a combination of an hourly wage and mileage, West Coast Bulk's drivers received a "commission on cargo," that is, 27 percent of the amount that the company billed the customer for the work. Conrad explained to Johnson that the two pay plans resulted in no practical difference to the drivers. However, Johnson objected to the compensation scheme, as he would not be paid for driving an empty trailer. He also inquired about the continuation of his health insurance but was given no information.

On January 30, 2012, Johnson was scheduled for a CT scan to determine if nodules on his lungs were cancerous. When he reported to the doctor's office, the receptionist informed him that his medical insurance had been canceled. Johnson immediately drove to Bulk's terminal and told Orr what had happened. Orr confirmed that his insurance had been canceled because he was part-time.

Also in January 2012, Johnson hired workers' compensation attorneys in an attempt to resolve his employment situation. In a letter dated February 1, 2012, the attorneys notified Bulk that they were filing a workers' compensation claim on Johnson's behalf, for the injury of inhalation of hydrated lime and silica incurred during his employment at Bulk. They further demanded that Bulk engage in the interactive process and requested "reasonable accommodation" of Johnson's "known physical or mental disabilities" in accordance with FEHA, and demanded that Bulk "follow the interactive process . . . when applicant is permitted by his treating/evaluating doctor to return to work with restrictions/limitations." The letter concluded, "Please direct all correspondence to this office. You may not contact our client."

Bulk responded to this letter by forwarding the necessary documents to its workers' compensation insurer. Subsequent to receipt of this letter, however, Bulk ceased all communications with Johnson. Orr told Johnson that neither she nor dispatch could talk to him any longer, and that all contact must go through his attorney. When appeals to Bulk's safety director proved fruitless, Johnson contacted an employment law attorney to help him get back to work. In a letter to Orr dated February 27, 2012, the Law Offices of David H. Greenberg notified Bulk of its obligation under FEHA to meet with Johnson to discuss possible accommodations of his disability. No response was forthcoming. According to Bulk, Johnson remains a Bulk employee; he has been on a medical leave of absence since February 2, 2012.

On April 23, 2012, Johnson filed this lawsuit, alleging four causes of action: Discrimination on the basis of disability; failure to accommodate disability; failure to engage in timely good faith interactive process; and failure to take reasonable steps to prevent discrimination, all in violation of FEHA. The first three of these causes of action were tried to a jury,[2] which returned a special verdict containing various factual findings. Based upon those findings, the trial court entered judgment in favor of Bulk on all three causes of action.

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[2] Johnson dismissed with prejudice his cause of action for failure to prevent discrimination.

Johnson timely appealed the judgment, claiming that the special verdict rendered in this case was defection, for two reasons: The jury's answers to two questions are irreconcilably inconsistent, and the verdict omits a necessary finding with respect to the cause of action for failure to engage in the interactive process. We consider each contention below.

DISCUSSION

"[A] special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law." (Code Civ. Proc., § 624.) "Unlike a general verdict (which merely *implies* findings on all issues in favor of the plaintiff or defendant), a special verdict presents to the jury each ultimate fact in the case. The jury must resolve all of the ultimate facts presented to it in the special verdict, so that 'nothing shall remain to the court but to draw from them conclusions of law.' (Code Civ. Proc., § 624.) [¶] The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. '[The] possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings. . . .' [Citation.]" (*Falls v. Superior Court* (1987) 194 Cal.App.3d 851, 854-855, italics in original.)

"We analyze the special verdict form de novo. (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 678 ['[A] special verdict[']s correctness must be analyzed as a matter of law'].)" (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 325; see also *Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1242 ["When a special verdict is involved as here, a reviewing court does not imply findings in favor of the prevailing party. . . ."].)

Johnson maintains that the jury's answers to two special verdict questions are irreconcilably inconsistent. Question no. 13 asked, "Was a reasonable accommodation

offered by Bulk and refused by Johnson?" Question no. 14 asked, "Did Bulk refuse to provide work to Johnson?" The jury answered "yes" to both of these questions. Johnson asserts that "it is impossible that both facts could be true" because "[t]he only accommodation at issue in this case was ***work***." We do not agree.

We note that some of the questions posed to the jury were not designed to resolve a disputed question of fact, but simply to satisfy an element of a cause of action. For instance, there was no dispute concerning the status of Bulk and Johnson as employer and employee, respectively, yet because the claims at issue were based on discrimination in employment, the special verdict asked "Was Bulk Transportation an employer?" and "Was Gary Johnson an employee of Bulk Transportation?"

The same can be said of question no. 16, "Did Bulk refuse to provide work to Johnson?" It was undisputed that Bulk gave Johnson no work, i.e., "refused to provide work to Johnson," after receiving correspondence from Johnson's workers' compensation attorneys in early February 2012.[3] Yet Johnson maintains that the jury's affirmative answer to this question conflicted with its affirmative answer to question no. 13, "Was a reasonable accommodation offered by Bulk and refused by Johnson?" Johnson argues: "[I]t is impossible that both facts could be true. The only accommodation at issue in this case was ***work***. The jury therefore cannot find both that Bulk offered reasonable work to Johnson but he refused it, *and* that Bulk refused to provide work to Johnson." This conclusion would be true only if both of these questions limited the timeframe within which Bulk both "offered" and "refused to provide" work to Johnson. The jury clearly found that one or more of Bulk's attempts to accommodate Johnson's disability (the offer of a transfer to the Walnut facility or to West Coast Bulk, or Conrad's instructions to assign Johnson hauls meeting his medical restrictions whenever possible) constituted a

[3] In explaining the elements of disparate treatment disability discrimination in her closing argument, Johnson's counsel stated: "We have to prove that Bulk Transportation did not return him to work, which is uncontroverted in this case."

reasonable accommodation under the jury instructions.[4] All of these proposed accommodations occurred prior to February 2012. Consequently, contrary to Johnson's contention, it is not impossible that "a reasonable accommodation [was] offered by Bulk and refused by Johnson" (prior to February 2012) and that "Bulk refuse[d] to provide work to Johnson" (after January 2012). In short, the jury's special verdict answers were not inconsistent.

Johnson may have wanted the jury specifically to determine whether Bulk failed to engage in the interactive process, and to offer him reasonable accommodation, after the filing of his workers' compensation claim. However, he did not request that this question be presented to the jury. The parties together prepared the special verdict form. When the trial court indicated that the form was complete, counsel for Johnson objected to question no. 11, which asked, "Was Johnson willing to participate in an interactive process to determine whether reasonable accommodation could be made so that he would be able to perform the essential job requirements?" Johnson's attorney claimed that this question should have omitted the last part of the sentence, "whether reasonable accommodation could be made," arguing that the term "reasonable accommodation" went beyond the essential job functions and was therefore improper. The objection was overruled by the trial court, a ruling which is not challenged in this appeal. Johnson's attorney lodged no further objections to the special verdict form. He can therefore claim no error based on the absence of a particular question, the answer to which is essential for a verdict in his client's favor, from the special verdict form.

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[4] We note that Richard Andersen, a vocational rehabilitation counselor called by Johnson to testify regarding damages for loss of earning capacity, described the accommodations Bulk provided from February 2011 through January 2012 "as perfect and consistent with the interactive process, with the employer working hand in hand with the employee." Johnson's counsel agreed with the court that there was no dispute that Bulk accommodated Johnson prior to January 2012; the "dispute is what happened after they stopped . . . [¶] . . . post January 2012. . . ."

"The 'doctrine of invited error' is an 'application of the estoppel principle': 'Where a party by his conduct induces the commission of an error, he is estopped from asserting it as a ground for reversal' on appeal. (9 Witkin, Cal. Procedure [4th ed. 1996] Appeal, § 383, p. 434, italics omitted.)" (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.) "Similarly an appellant may waive his right to attack error by expressly or impliedly agreeing at trial to the ruling or procedure objected to on appeal. [Citations.]" (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1685-1686.) Moreover, "[a] civil litigant must propose complete [jury] instructions in accordance with his or her theory of the litigation and a trial court is not 'obligated to seek out theories [a party] might have advanced, or to articulate for him that which he has left unspoken.' (*Finn v. G.D. Searle & Co.* (1984) 35 Cal.3d 691, 701-702; see *Gagosian v. Burdick's Television & Appliances* (1967) 254 Cal.App.2d 316, 318 ['there is neither reason nor justification for compelling a trial judge to act as a sort of advisory or "backup" counsel, with all the frustration of the employed attorneys' trial strategy and tactics which such a holding could encompass.'].)" (*Mesecher v. County of San Diego*, *supra*, 9 Cal.App.4th at p. 1686.)

Johnson's additional contention, that the judgment must be reversed because the special verdict failed to ask the jury if Bulk's conduct caused Johnson harm, fails for the same reason. This contention is based on the jury's answer to question no. 12, "Did Bulk fail to participate in a timely, good-faith interactive process with Johnson to determine whether reasonable accommodation could be made?" Johnson argues that after the jury responded affirmatively to this question, it "should have been directed to answer the question of harm in question #15. Instead, question #13 of the special verdict form asked whether a reasonable accommodation had been offered by Bulk and refused by Johnson, and if so, to **skip the question of harm** in #15." ~(AOB 46)~ Johnson relies on two cases, *Vanderpol v. Starr* (2011) 194 Cal.App.4th 385 and *Falls v. Superior Court, supra,* 194 Cal.App.3d 851 to argue that "Where a special jury verdict fails to ask the jury to determine key elements of a cause of action, retrial of that cause of action is required."

We determine that neither of the cited opinions supports the reversal of the judgment in this case.

In *Vanderpol v. Starr, supra,* 194 Cal.App.4th 385, the Vanderpols sued the Starrs for nuisance, alleging that their planting and maintenance of trees on their common property line constituted a spite fence under Civil Code section 841.1, entitling them to damages and an injunction. In answer to a special verdict form, the jury made findings that the Starrs maliciously maintained trees exceeding 10 feet in height in order to annoy the Vanderpols. However, the jury "was never asked to determine whether the Vanderpols sustained injury in their 'comfort or the enjoyment of [their] estate by such nuisance' as required by the plain language of section 841.1." (*Id.* at p. 394.) The court concluded that the special verdict form was defective on its face. (*Id*. at p. 396.) It rejected the Vanderpols' suggestion that the appellate court could imply the necessary finding of injury: "Unlike a general verdict (which merely *implies* findings on all issues in favor of the plaintiff or defendant), a special verdict presents to the jury each ultimate fact in the case. The jury must resolve all of the ultimate facts presented to it in the special verdict, so that 'nothing shall remain to the court but to draw from them conclusions of law.' (Code Civ. Proc., § 624.) [¶] The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. '[T]he possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings. . . .' [Citation.]" (*Id.* at p. 396.) Consequently, the court reversed the judgment and remanded the matter for a new trial. (*Id.* at p. 396, 398.)

Johnson takes from the opinion in *Vanderpol v. Starr, supra,* 194 Cal.App.4th 385 a per se rule of reversal when a special verdict form fails to instruct the jury to determine an essential element of a cause of action. We do not agree with this conclusion. In the cited case, the trial court entered judgment and issued an injunction against the defendant, even though, due to a defect in the special verdict form, the jury had not made the requisite factual findings which would support the judgment and injunctive relief. The appellate court rightly held that the judgment was improperly entered. (Accord *Saxena v.*

Goffney, supra, 159 Cal.App.4th 316, 324, fn. 3 [" . . . the jury made no findings supporting a battery claim, and thus a judgment could not have been entered for battery."].) The doctrine of invited error did not apply, because the findings made by the jury did not satisfy the elements of the plaintiff's claim, and therefore did not support the judgment in the plaintiff's favor. No similar problem is present in this case.

Vanderpol v. Starr, supra, 194 Cal.App.4th 385 stands for a simple proposition: If an essential element of a plaintiff's cause of action is omitted from a special verdict form, a judgment in favor of the plaintiff must be reversed. (But see *Taylor v. Nabors Drilling USA, LP, supra,* 222 Cal.App.4th 1228 ["a defective special verdict form is subject to harmless error analysis"].) The same does not hold true, however, if a special verdict form, prepared or approved by the plaintiff, omits a finding as to an element of the plaintiff's case, and judgment is entered for the defendant. In that instance, because the party's conduct induced the error, and because the judgment is supported by the jury's findings, "'he is estopped from asserting it as a ground for reversal' on appeal." (*Norgart v. Upjohn Co., supra,* 21 Cal.4th at 403, quoting 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 383, p. 434, italics omitted.)

Johnson also argues that the holding in *Falls v. Superior Court, supra,* 194 Cal.App.3d 851 mandates reversal of the judgment in this case. It does not. There, the jury failed to complete a special verdict form when it deadlocked on the amount of damages. There was no issue of an omitted element of a cause of action, or indeed any purported defect in the form of the special verdict. The case has no application to the facts before us.

In sum, because Johnson "expressly . . . agree[d] at trial" to the "procedure objected to on appeal" (*Mesecher v. County of San Diego, supra,* 9 Cal.App.4th at p. 1685), "'he is estopped from a asserting it as a ground for reversal' on appeal. [Citation.]" (*Norgart v. Upjohn Co., supra,* 21 Cal.4th at p. 403.)

DISPOSITION

The judgment is affirmed. Defendant is awarded its costs on appeal.

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GOODMAN, J.*

We concur:

TURNER, P.J.

MOSK, J.

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