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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

NORMAN ESPINO GARRIDO, Plaintiff and Respondent, v. REGINA W. ROMEO, Defendant and Appellant.	B278394 Los Angeles County Super. Ct. No. BC499683

APPEAL from an order of the Superior Court of Los Angeles County, Bobbi Tillmon, Judge. Reversed.

Mark R. Weiner & Associates and Kathryn Albarian for Defendant and Appellant.

Khorshidi Law Firm, Omid Khorshidi and Robert L. Bastian, Jr., for Plaintiff and Respondent.

INTRODUCTION

Defendant Regina Romeo appeals from an order granting a new trial in a personal injury action brought by Plaintiff Norman Espino Garrido. After Defendant rejected a proposed additur, the trial court entered an order granting Plaintiff's motion for new trial "on the issue of non-economic damages," without specifying the reasons for its decision. Defendant contends the order fails to satisfy the jurisdictional requirements set forth in Code of Civil Procedure section 657 for granting a new trial on the ground of inadequate damages.[1] We agree and reverse.[2]

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[1] Statutory references are to the Code of Civil Procedure unless otherwise specified.

[2] Plaintiff argues the appeal should be dismissed as untimely because it was filed more than 30 days after Defendant rejected the proposed additur. Under California Rules of Court, rule 8.108(b)(2)(B), if the trial court makes a finding of inadequate damages and grants a motion for a new trial subject to the condition that the motion is denied if a party consents to the additur of damages, and the party rejects the additur, the time to appeal is extended until "30 days after the date the party serves the rejection." Rule 8.108 "operates only to extend the time to appeal otherwise prescribed in rule 8.104(a); it does not shorten the time to appeal. If the normal time to appeal stated in rule 8.104(a) is longer than the time provided in this rule, the time to appeal stated in rule 8.104(a) governs." (Cal Rules of Court, rule 8.108(a).) Under rule 8.104(a)(1)(A), a notice of appeal must be filed within 60 days after the superior court clerk serves notice of entry of judgment or an appealable order. Here, the clerk served the appealable order granting a new trial on September 16, 2016. Defendant filed her notice of appeal from the order on October 18—well within the 60-day period to file an appeal under the normal time.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff sued Defendant for personal injuries he allegedly suffered in an automobile accident caused by Defendant's negligence. The front bumper of Defendant's vehicle struck the passenger side of Plaintiff's vehicle after Defendant exited a commercial driveway, slowly crept past a stopped truck, and entered Plaintiff's lane. Defendant was traveling approximately one mile per hour and Plaintiff was traveling about 20 miles per hour at the point of collision. Defendant admitted fault, and a jury trial was held on the question of damages.

Plaintiff testified that he had no pain at the accident scene, but he began to experience soreness in his neck and lower back when he returned home later that day. He saw a pain management doctor the next day, and then saw a chiropractor. He later saw a different doctor who recommended that he receive epidural injections. Plaintiff, a physical therapist by profession, performed home exercises and jogged three times a week both before and after the epidural injections.

Plaintiff's medical experts testified that he suffered soft-tissue injuries and aggravating injuries to a preexisting degenerative condition of his lumbar and cervical spine. His pain management expert testified the epidural injections were indicated for the radiating and ongoing back pain Plaintiff experienced after the accident. The expert testified Plaintiff's past medical expenses were reasonably incurred and totaled $30,895, including $13,000 for the epidural injections.

Defendant's experts opined that Plaintiff's medical records at most indicated "a possible strain . . . like a muscle pull," but there was no evidence that he tore any ligaments, compromised any bony structures or that he suffered a disk injury. They

testified that nothing in Plaintiff's MRI showed a trauma induced injury, and the MRI findings were consistent with what one would expect to see for a man of Plaintiff's age. Even if Plaintiff suffered soft tissue damage, Defendant's orthopedic expert testified that four to six weeks of chiropractic treatment would have been reasonable, but there was no clinical indication for anything longer. He also testified that the epidural injections were not warranted.

The jury returned a verdict awarding Plaintiff only economic damages for past medical expenses totaling $17,803. The jury awarded Plaintiff nothing for past noneconomic damages and nothing for future economic or noneconomic damages.

After the jury was polled, Plaintiff's counsel requested a sidebar, which was held off the record. The trial court then asked the jurors to return to the deliberation room and consider their verdict again, particularly with respect to noneconomic damages. The court instructed the jury as follows: "This is by stipulation of the parties as an additional instruction. Where common experience dictates that a person has suffered from pain requiring treatment, a verdict of zero dollars for past pain and suffering may be inadequate. You're directed to return to the jury deliberation room to consider an award that includes pain and suffering." After deliberating, the jury returned a verdict with no changes.

Plaintiff moved for a new trial, seeking an additur of $56,700, or a limited new trial on past noneconomic damages only. After hearing argument, the trial court orally stated it was conditionally granting the new trial on the issue of noneconomic damages only, unless Defendant consented to "the addition of

noneconomic damages in the amount of $17,000." Defendant rejected the proposed additur later that day.

On September 15, 2016, the trial court issued a written minute order, stating:

> "NOTICE OF TRANSFERRING THE CASE BACK TO DEPARTMENT 92
>
> "The Court has been informed, via e-mail, as directed earlier this date by the court, that Defendant is not accepting the Court's ruling on the additur to the Judgment.
>
> "Accordingly, the Court having grant[ed] Plaintiff's Motion for New Trial on the issue of non-economic damages, the Case is ordered transferred back to Department 92."

The superior court clerk served the minute order granting a limited new trial the same day. The trial court did not file a written specification of reasons for granting the new trial. On October 18, 2016, Defendant filed and served her notice of appeal from the order.

DISCUSSION

Defendant argues the trial court's order fails to satisfy the jurisdictional requirements specified in section 657 for granting a new trial on the ground of inadequate damages. She further maintains the verdict is supported by substantial evidence and does not present an error in law warranting a new trial. We agree on both counts.

1. *The Absence of a Written Statement of Reasons Precludes Affirmance of the New Trial Order on the Ground of Inadequate Damages*

The trial court's authority to grant a new trial is established and circumscribed by statute. (*Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 633 (*Oakland Raiders*).) Section 657 sets out seven grounds for such a motion: (1) "Irregularity in the proceedings"; (2) "Misconduct of the jury"; (3) "Accident or surprise"; (4) "Newly discovered evidence"; (5) "Excessive or inadequate damages"; (6) "Insufficiency of the evidence"; and (7) "Error in law."

"Before 1965, section 657 only required the trial court to specify whether it was granting the new trial motion on the ground of insufficiency of the evidence. [Citations.] Amendments enacted in 1965 (modified slightly in 1967) require the trial court to state not only the ground upon which the motion is granted but also *the reasons* for granting the motion on that ground." (*Oakland Raiders, supra,* 41 Cal.4th at p. 633, italics added.)

Section 657 now provides: "When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated. [¶] . . . [¶] . . . [I]f the motion is granted [the order] must state the ground or grounds relied upon by the court, and may contain the specification of reasons. If an order granting such motion does not contain such specification of reasons, the court must, within 10 days after filing such order, prepare, sign and file such specification of reasons in writing with the clerk. The court shall not direct the attorney for a party to prepare either or both said order and said specification of reasons."

As our Supreme Court reaffirmed in *Oakland Raiders*, " 'in the context of this statute the words "ground" and "reason" have different meanings.' [Citation.] The word 'ground' refers to any of the seven grounds listed in section 657. [Citation.] A statement of grounds that reasonably approximates the statutory language is sufficient. [Citations.] The statement of 'reasons,' on the other hand, should be specific enough to facilitate appellate review and avoid any need for the appellate court to rely on inference or speculation." (*Oakland Raiders, supra,* 41 Cal.4th at p. 634.) To satisfy the latter requirement, "[t]he statement of reasons must refer to *evidence*, not ultimate facts." (*Id.* at p. 635, italics added.)

Strict compliance with section 657 is required. (*Oakland Raiders, supra,* 41 Cal.4th at p. 634.) The statute's mandate that the statement of reasons be filed no later than 10 days after the order granting a new trial is "*jurisdictional*, and a statement of reasons filed more than 10 days after the order is ineffective." (*Ibid.*, italics added.) Consequently, "[s]ubstantial compliance with the statute is not sufficient," and an "oral statement of reasons set down in [the] reporter's transcript does not comply with [the] statute." (*Ibid.*, citing *La Manna v. Stewart* (1975) 13 Cal.3d 413, 419-423 (*La Manna*); see *Steinhart v. South Coast Area Transit* (1986) 183 Cal.App.3d 770, 773-774 [minute order referring to oral statement insufficient].) Further, "the appellate court cannot remand the case to permit the trial court to correct an insufficient statement of reasons." (*Oakland Raiders,* at p. 635.)

Although the trial court's authority to grant a new trial is circumscribed by the requirement of strict compliance, section 657 provides that "[o]n appeal from an order granting a new trial

the order shall be affirmed if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons, *except* that (a) the order shall not be affirmed upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or *inadequate damages*, unless such ground is stated in the order granting the motion and (b) on appeal from an order granting a new trial upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, it shall be conclusively presumed that said order as to such ground was made *only for the reasons specified in said order or said specification of reasons*, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons." (Italics added.) Thus, notwithstanding a trial court's failure to state its reasons for granting a new trial, the order may still be sustained if it should have been granted on any ground set out in the motion "except the grounds of insufficiency of the evidence or inadequate or excessive damages." (*Oakland Raiders, supra,* 41 Cal.4th at p. 636; *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 905 (*Sanchez-Corea*).)

Plaintiff does not dispute that the trial court failed to file a written statement of reasons as mandated by section 657. Rather, Plaintiff argues defense counsel waived the requirement for a written statement by "waiving notice" of the court's ruling. The argument fails for multiple reasons.

First, the record is clear that defense counsel waived notice only with respect to the time and method for advising the court whether Defendant accepted the proposed additur—not as to section 657's requirement that the court give a written account of

its reasons for finding the jury's damages award was inadequate.[3] Moreover, even had defense counsel intended to waive the requirement, the waiver would have been ineffective, because the trial court's *jurisdiction* to grant a new trial is circumscribed by section 657's requirements, and a party cannot grant to the trial court authority that the Legislature has expressly withheld. (See *Oakland Raiders, supra,* 41 Cal.4th at p. 635 [observing in

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[3] The relevant exchange leaves no doubt about the extent of Defendant's intended "waiver," and there is no mention of the mandatory written statement of reasons:

> "THE COURT: On the record. After a discussion with counsel off the record, the process will be as follows: The court has issued its order and ruling on Plaintiff's motion. Counsel for defense will have an opportunity to consider whether or not, on behalf of his client, he will proceed to new trial or accept the additur. In order for the court to be informed of that, defense counsel will later today e-mail the judicial assistant and Plaintiff's counsel regarding his firm's or office's decision by 3:00 p.m. today.
>
> "[DEFENDANT'S COUNSEL]: Okay.
>
> "THE COURT: Okay.
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> "[PLAINTIFF'S COUNSEL]: Yes.
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> "THE COURT: So notice waived of *that portion*? You can obtain a copy of the minute order, which is the court's order, which, as I indicated to you before, is that pursuant to [section] 662.5(a)(1), the court is issuing a conditional order granting the new trial on the issue of noneconomic damages only unless the Defendant, as the party against whom the verdict has been rendered, consents to the addition of noneconomic damages in the amount of $17,000 as an additur to the judgment. Okay. So notice waived *to that*?
>
> [DEFENDANT'S COUNSEL]: Notice waived." (Italics added.)

response to criticism that strict interpretation of section 657 has created " 'a "procedural minefield" for trial judges who issue new trial orders' " that " ' "[t]he power of the legislature [in] specifying procedural steps for new trials is exclusive and unlimited. [Citations.] The wisdom of or necessity for certain requirements are matters for legislative and not judicial consideration" ' "].) And, because strict compliance is required, we cannot treat the court's oral statements as a substitute for the statutorily mandated written statement of reasons. (*Id.* at p. 634; *La Manna, supra,* 13 Cal.3d at pp. 419-423.) As such, the new trial order cannot be affirmed on the ground of inadequate damages.

2. *The Verdict Was Supported by Substantial Evidence and Is Not Against the Law*

While the lack of a written statement of reasons precludes affirmance on the ground of inadequate damages or insufficiency of the evidence (*Sanchez-Corea, supra,* 38 Cal.3d at p. 905), we still must affirm the order if it should have been granted on any other ground stated in Plaintiff's motion for new trial. (§ 657; *Oakland Raiders, supra,* 41 Cal.4th at p. 636; *Sanchez-Corea,* at p. 905.) However, when there is no statement of reasons, we cannot review the order under the usual, deferential abuse of discretion standard, as doing so would subvert the purposes underlying section 657's mandate. (*Oakland Raiders,* at p. 636 [the purposes of a written statement of reasons are twofold— " 'to promote judicial deliberation before judicial action' " and " 'to make the right to appeal from the order more meaningful' "]; *Mercer v. Perez* (1968) 68 Cal.2d 104, 113.) Rather, we must review the order under the independent, de novo standard of review, giving no deference to the trial court's ruling, and shifting

the burden of persuasion to the respondent to advance any grounds stated in the motion upon which the order should be affirmed, and a record and argument to support it. (*Oakland Raiders,* at pp. 628, 641; *Sanchez-Corea,* at p. 906.)

Plaintiff appears to argue, as he asserted in his motion for new trial, that the award of zero noneconomic damages constitutes an error in law or a verdict against the law, given the jury's award of some past economic damages. In advancing this ground for new trial, Plaintiff relies entirely upon *Dodson v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931 (*Dodson*). The case, like Plaintiff's argument, does not satisfy Plaintiff's burden of persuasion.

A jury's verdict is " 'against law' only if it was 'unsupported by any substantial evidence, i.e., [if] the entire evidence [was] such as would justify a directed verdict against the part[ies] in whose favor the verdict [was] returned.' [Citations.] '[T]he function of the trial court on a motion for a directed verdict is analogous to and practically the same as that of a reviewing court in determining, on appeal, whether there is evidence in the record of sufficient substance to support a verdict.' " (*Sanchez-Corea, supra,* 38 Cal.3d at p. 906.) Accordingly, we must examine the record to determine whether the verdict awarding zero noneconomic damages was, as a matter of law, unsupported by substantial evidence. (*Id.* at p. 907.) In doing so, we consider the evidence in the light most favorable to the prevailing party (Defendant, with respect to this issue), and indulge all legitimate and reasonable inferences to uphold the jury verdict if possible. (*Ibid.*)

In *Dodson*, the plaintiff underwent surgery to have a herniated disc removed and a metal plate inserted after suffering

personal injuries in connection with the defendant's efforts to load heavy pieces of scrap metal onto the plaintiff's truck. (*Dodson, supra,* 154 Cal.App.4th at p. 933.) The jury found the plaintiff, who presented his surgical bills as the principal item of economic damages, suffered damages caused by defendant's negligence, but declined to award the plaintiff noneconomic damages for pain and suffering. (*Ibid.*) The trial court denied the plaintiff's motion for new trial, but the appellate court reversed, holding "the failure to award any damages for pain and suffering [constituted] a damage award that [was] inadequate as a matter of law." (*Ibid.*) In reaching this conclusion, the *Dodson* court reasoned that "[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. While the extent of the plaintiff's pain and suffering is for the jury to decide, common experience tells us it cannot be zero." (*Id.* at p. 938.)

Contrary to the argument Plaintiff advances here, *Dodson* does not state a categorical rule requiring an award of noneconomic damages whenever economic damages are awarded for medical bills. On the contrary, as the *Dodson* court acknowledged, "[t]he controlling rule . . . was best stated in *Miller* [*v. San Diego Gas & Elec. Co.* (1963) 212 Cal.App.2d 555 (*Miller*)], which affirmed a jury verdict that made *no allowance for pain and suffering*." (*Dodson, supra,* 154 Cal.App.4th at p. 936, italics added.)

In *Miller*, the plaintiff sued the San Diego Gas & Electric Company after receiving an electric shock from faulty wiring while lifting the lid to her mail box. (*Miller, supra,* 212 Cal.App.2d at p. 556.) The plaintiff claimed she suffered severe

and prolonged injuries from the shock, as evidenced by medical bills showing she received treatment from several doctors over various periods. The jury returned a verdict in favor of the plaintiff, but awarded her only the exact amount of her medical expenses. The plaintiff claimed the verdict was inadequate as a matter of law, because no allowance was made for "the injury received or the pain and suffering incidental thereto." (*Id.* at p. 557.) The *Miller* court disagreed. Stating the controlling rule, the court explained: "An examination of the cases relied upon by appellant demonstrates that they involved situations where the right to recover was established and that there was also proof that the medical expenses were incurred because of defendant's negligent act. It is of course clear that in such situation a judgment for no more than the actual medical expenses occasioned by the tort would be inadequate. *It cannot be said, however, that because a verdict is rendered for the amount of medical expenses or for a less amount the verdict is inadequate as a matter of law. Every case depends upon the facts involved*." (*Id.* at p. 558, italics added.)

As for the facts involved in the plaintiff's case, the *Miller* court observed: "It would serve no useful purpose for this court to recite the evidence of the witnesses in detail. It is sufficient to point out that as a result of examining the records we are compelled to conclude that there was a *substantial conflict* as to whether plaintiff received any substantial injury and as to whether bills incurred for medical examinations and treatment were rendered necessary by reason of the shock or whether they were necessary at all. The evidence would here amply support a finding that plaintiff received no injury whatever. It is not for this court to weigh the evidence. Our province goes no further

than a determination that there was substantial evidence to support the verdict. Faced by this *conflict in testimony* and with evidence that there was negligence on the part of the defendant, it seems entirely probable that the jury felt that although plaintiff was entitled to no more than nominal damages, the kindest disposition of the case was to award to her an amount at least equivalent to her medical bills." (*Miller, supra,* 212 Cal.App.2d at p. 560, italics added; *Haskins v. Holmes* (1967) 252 Cal.App.2d 580, 586 [an 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"].)

The record in this case tracks the facts presented in *Miller*. As in *Miller*, there was conflicting expert testimony regarding the severity of Plaintiff's injuries and the necessity of the medical treatments he received. While Defendant's orthopedic expert opined that Plaintiff had suffered no more than "a possible strain," the expert also testified that, at most, four to six weeks of chiropractic treatment was all that might have been reasonable, and there was no clinical indication for any of the other treatment Plaintiff received. Critically, the jury appears to have accepted that opinion. In awarding Plaintiff only $17,803 of the $30,895 that Plaintiff claimed for past medical expenses, the jury compensated Plaintiff for almost all of the doctor and chiropractic visits he had following the accident, but seemingly rejected the $13,000 for epidural injections Plaintiff claimed to manage his pain. Consistent with that determination, Defendant's experts

testified Plaintiff's pain was likely occasioned by his preexisting degenerative spine condition and *not* the accident.[4] On this record, the jury could reasonably accept that opinion and award no damages for pain and suffering. (See *Miller, supra,* 212 Cal.App.2d at p. 560.) The verdict does not constitute an error in law warranting a new trial on the issue of noneconomic damages.

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[4] Plaintiff maintains his case is like *Dodson*, where the plaintiff underwent an indisputably painful surgical procedure, because, here, "the entire purpose of the medical care [P]laintiff sought, including epidural steroid injections[,] was that he was experiencing pain from injuries he suffered due to the accident." However, given the conflicting testimony, it is reasonable to infer that the jury viewed the medical visits and MRI expenses as simply a means for evaluating whether the accident actually caused a spinal or other physical injury. It is also reasonable to infer that, in denying compensation for the epidural injections, the jury ultimately determined that whatever pain Plaintiff experienced was not caused by the accident, but rather by his preexisting spinal condition, as Defendant's experts opined.

DISPOSITION

The order is reversed. The judgment of August 9, 2016 is reinstated. Defendant is entitled to her costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

LAVIN, J.