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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

DAVID M. MILLER et al.,

Plaintiffs and Appellants,

v.

RON TAYLOR DRILLING ,

Defendant and Respondent.

2d Civil No. B225621
(Super. Ct. No. 1250617)
(Santa Barbara County)

David M. Miller and Rochelle Miller appeal from the judgment after a jury returned a defense verdict on their complaint for personal injuries and loss of consortium. Appellants contend the evidence is insufficient to support the jury finding that respondent's, Ron Taylor Drilling, negligence was not a substantial factor in causing appellants' injuries. We affirm.

Facts

On May 11, 2007, David Miller (David) was "rear-ended" at a traffic light. Respondent's employee accelerated after the light turned green, striking the rear of David's BMW at 3 to 4.2 miles per hour. The BMW moved slightly forward but did not enter the intersection.

David was wearing a seatbelt, had no trouble getting out of his car, and suffered no cuts, bruises, or swelling. He spoke to an officer but did not complain about back or neck pain.

David drove to the Arroyo Grande Community Hospital Emergency Room, was examined, x-rayed, and released. The emergency room doctor found no visible signs of injury. Although David complained of tenderness of the neck and upper back, the doctor noted that "examination shows no specific bony point tenderness in the cervical, thoracic or lumbar spine."

David visited a chiropractor and returned to work two or three days later. He worked through August 2007 until he was laid off.

In October 2007, David worked as a concierge/bellman and continued working until January 2008. The job required lifting.

David and his wife Rochelle sued for damages on December 26, 2007. Respondent admitted negligence but contested causation and damages. A month before trial, David and Rochelle rejected a $126,000 settlement offer. (Code Civ. Proc., § 998.)[1]

At trial, David's treating physicians opined that the traffic accident required David to undergo an August 2008 back surgery (disc replacement) and a September 2008 neck surgery to correct a thoracic outlet syndrome. But the evidence, however, showed that David had a history of back, neck and shoulder problems dating back to 1994. Before the accident, David was treated for head, neck, shoulder, back, and groin pain; chest tightness; burning sensations in the chest, back, and shoulder blades; numbness and tingling in the hands and fingers; pain radiating from the back to the legs; and pain from the neck to the shoulders. David reported the same symptoms after the May 2007 accident.

MRI studies taken two months after the accident revealed no recent injuries to the spine but did show ruptured discs near the L4 vertebrae and a bony protruding herniation capable of compressing spinal nerves. A neuroradiologist opined that the lumbar injury existed "years to decades" before the accident, which was consistent with David's medical records. Before the 2007 accident, David was involved in two other car accidents, one in which he hit a wall head-on driving 35 to 40 miles per hour.

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[1] All statutory references are to the Code of Civil Procedure.

Another medical expert opined that the thoracic outlet syndrome[2] was caused by factors unrelated to the accident: David was born with an extra rib, frequently lifted weights, and worked jobs requiring heavy physical labor causing the scalene muscles in the neck to be over-developed. The thoracic outlet syndrome symptoms (neck pain, arm and shoulder pain, and finger tingling and numbness) were documented in David's medical records well before the 2007 accident.

The jury returned a 11-1 special verdict that respondent's negligence was not a substantial factor in causing David's injuries. The trial court denied a motion for new trial and awarded respondent costs including expert witness fees ($21,612.25) pursuant to section 998.

Substantial Evidence

On appeal, we view the evidence in the light most favorable to the judgment, drawing every reasonable inference and resolving every conflict to support the judgment. (*Jonkey v. Carignan Construction Co.* (2006) 139 Cal.App.4th 20, 25.) Citing isolated bits of evidence, appellants assert the traffic accident injured David's back and neck or may have aggravated a pre-existing condition. Appellants are merely rearguing the "facts" as they would have them. This "elaborate factual presentation is but an attempt to reargue on appeal those factual issues decided adversely to [appellants] at the trial level, contrary to established precepts of appellate review. As such, it is doomed to fail." (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 398-399.)

Viewing the record as a whole, the evidence supports the jury finding that respondent's negligence was not a substantial factor in causing David's injuries. Doctor Jai Singh, a biomechanical engineer and accident reconstruction expert, testified that the impact was minor, equivalent to a driver's foot slipping off the clutch, and caused the

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[2] "Thoracic outlet syndrome is a group of disorders that occur when the blood vessels or nerves in the thoracic outlet – the space between the collarbone (clavicle) and your first rib – become compressed. This can cause pain in your shoulders and neck and numbness in your fingers." (Mayo Clinic definition, found at http://www.mayoclinic.com/health /thoracic-outlet-syndrome/DS00800 (as of May 9, 2011.)

BMW to lurch forward 2.7 to 3.7 miles per hour. Doctor Singh opined that the low speed collision lacked "the mechanism. . . required for the mechanical causation" of a lumbar disc injury, neck injury, or injury to the thoracic outlet.

Appellants assert the testimony is not substantial evidence because Singh is not a medical doctor. We disagree. A biomechanical engineer determines the effect of physical forces on the human anatomy. "Qualifications, other than a license to practice medicine may serve to qualify a witness to give a medical opinion. [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 131-132; see e.g., *Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 267-268 [microbiologist].)

Doctor Singh opined that the mechanical force required to produce David's back and neck injuries were absent. In a rear end collision such as this the vertebra would break "before the [intervertebral] disc does." Singh stated there is a difference between "structural failure in the anatomy that requires that the tissue be pulled apart" and structural failure that requires that the tissue be "squished" or compressed. The rear-end collision pushed the BMW, similar to an amusement park bumper car ride but with less force. "As the vehicle gets pushed forward, the seat back applies force equally and evenly across the back of the person that's seated in that seat. So you don't have the force applied in the correct way to have the mechanism" required to herniate a disc or cause a thoracic outlet injury.

Doctor Singh's testimony, in conjunction with the medical expert testimony, was sufficient to support the jury's verdict.

Medical Expert Testimony

Three medical experts opined that it was highly unlikely that David's injuries or surgery was caused by the May 2007 accident. Doctor Stephen Rothman, a neuroradiologist, testified that MRI scans taken two months after the accident depicted a disc injury that was years to decades old. The MRI images showed two dark spinal discs and a protruding herniation indicative of a long term injury. Doctor Rothman stated that it takes two to two and half years for a lumbar disc to darken and it would take five to six months for the disc fragments to shrivel down to the size depicted in the MRI scans.

Had David ruptured a lumbar disc in the traffic accident, it would like "like a little grape hanging off the side, but that's not present here."

Doctor Larry Herron, an orthopedist specializing in spine injuries, testified that the disc injury was "not something that happened a month or two ago." David had a history of neck, back, and leg pain dating back to 1998. After the 2007 traffic accident, David had disc replacement surgery which is customarily "done for patients who have long-standing chronic back pain."

Doctor David Frecker, a neurologist, testified that David had a degenerative spine disease going back years before the accident. It was manifested by "drying of discs and bony abnormalities that don't occur right away when someone has an accident." David's thoracic outlet syndrome and back, spine and neck symptoms were the same before and after the accident.

Doctor Frecker opined that the back and neck surgeries were unrelated to the accident because the spinal abnormalities depicted in the MRI scans "indicate, *without* question, that the changes were not a month or two old. . . but were much older. [¶] In fact, dating back perhaps a decade or so. . . ." (Emphasis added.) Had David herniated a lumbar disc in the accident, the pain would have been excruciating and David would not have been able to return to work two or three days after the accident.

Appellants argue that respondent failed "to negate" causation but the burden of proof was on appellants. (*See e.g., Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1384-1385.) A plaintiff in a personal injury action must prove causation of injury to a reasonable medical probability. (*Jones v. Ortho Pharmaceutical Corp*. (1985) 163 Cal.App.3d 396, 402.) "Mere possibility alone is insufficient to establish a prima facie case. [Citations.] That there is a distinction between a reasonable medical 'probability' and a medical 'possibility' needs little discussion." (*Id.* at pp. 402-403.)

The jury had ample evidence to conclude that David's back, spine, neck, and thoracic outlet injuries were not caused by the traffic accident. A single expert medical opinion is sufficient, even if it conflicts with other medical opinions. (*Place v.*

Workmen's Comp. App. Bd. (1970) 3 Cal.3d 372, 378.) It is not our task to reweigh the evidence or determine which expert was more credible. (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 544.)

Aggravated Pre-Existing Injury

Appellants argue that the collision may have aggravated a pre-existing injury requiring David to undergo back and neck surgery. The jury was instructed to award damages if David had a physical condition that was made worse by respondent's wrongful conduct. (CACI 3927; see *Ng. v. Hudson* (1977) 75 Cal.App.3d 250, 255 ["Plaintiff may recover to the full extent that his condition has worsened as a result of defendant's tortious conduct"].)

David claims the jury "ignored" the instruction and that he is entitled to damages as a matter of law. The jury did not ignore the instruction. It considered and rejected David's testimony that he had no back or neck injuries before the accident.[3] Appellants' trial counsel argued that "causation is a big issue" but the evidence is "pretty clear that Dave Miller ha[d] no prior complaints or symptoms of this nature. He's never seen by a doctor, no M.R.I.'s, any of that stuff." Trial counsel argued that David was "fine" before the accident and "you have, zero information, that [David] was in that kind of condition before [the accident], absolutely nothing."

The medical expert testimony and medical records clearly support the jury finding that the traffic accident did not injure David or aggravate a pre-existing injury. David had a long history of back, spine, and neck problems as reflected in the medical records. He was treated by a chiropractor more than 400 times between 1998 and May 2007. David also treated at an orthopedic clinic between July 2006 and March 2007, two months before the accident. The pain was so chronic and severe that he was prescribed Demerol and Vicodin at various times. Before the accident, David complained about

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[3] The medical records impeached Rochelle who testified that, before the accident, David never complained about injury to his back or neck. Rochelle claimed that David had no physical limitations and that David never indicated that he couldn't bend or lift objects.

pain radiating from the L4 disc to the leg; pain and tingling in the hands and fingers; upper back and spine pain; chronic neck and shoulder pain; popping subluxation in the clavicle region; and foot, leg, foot, back, shoulder, and chest pain.

David also had trouble walking, bending, and lying down before the accident. In 1999, he complained of chronic low back pain shooting into his leg, pain through the entire spine, severe lumbar spine neuritis, neck and shoulder problems, and old "acute trauma" as well as a worsening of injury. In 1994, David rated the pain in his neck and clavicle area as an "8" on a pain scale of 1 to 10. In September 1999, David wrote on a chiropractic intake form that "everything" hurts and that his lower back had been hurting four to five years.

Appellants argue that the jury did not "have the right to disbelieve" David's physicians. Jurors have the right to reject testimony. (See *Ortzman v. Van Der Waal* (1952) 114 Cal.App.2d 167, 170-171 [jury not required to accept the opinion expressed by plaintiff's medical experts].) The jury was free to reject the testimony of David's physicians and surgeons. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 633.) Well before the accident, David suffered the same symptoms that necessitated the post-accident back and neck surgeries. It was persuasive evidence. Based on the medical records, the biomechanical expert testimony, and the medical expert testimony, the jury reasonably concluded that David's post-accident symptoms, treatment, and surgeries were not causally connected to the accident. (See e.g., *Sumpter v. Matteson* (2008) 158 Cal.App.4th 928, 934-935.) On review, we have no power to reweigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence. (*Overton v. Vita-Food Corp.* (1949) 94 Cal.App.2d 367, 370.)

Representation of Rochelle at Trial

Appellants argue that the trial court erred in not permitting Attorney Roger Dreyer to examine and cross-examine witnesses on Rochelle's behalf. A week before trial, Dreyer wrote to the court stating that he would appear as Rochelle's trial attorney to examine witnesses and argue the case. Respondent objected because Christopher Wood,

Dreyer's law partner, was the attorney of record for David and Rochelle, had appeared at all pretrial proceedings, and had told the trial court that he would be trying the case.

The trial court discussed the letter before jury selection, noting that Dreyer did not attend the mandatory settlement conference as required by a local rule of court. (Santa Barbara Super. Ct. rule 1305; adopting Cal. Rules of Court, rule 3.1380(b).) "We have a rule here that trial counsel is to be here at [the] mandatory settlement conference. Mr. Dreyer was not, so you can choose to associate, and you can choose to have one of you be lead counsel. The other one will be second chair, and we'll proceed in that fashion."

Appellants argue that the trial court erred "in not allowing counsel for each Appellant to ask questions of each witness." Appellants, however, did not object to the order or say they wanted two lawyers to cumulatively examine or cross-examine each witness.

The assertion that the trial judge intimidated counsel and forced Dreyer to act as "second chair" is equally without merit. The trial court stated that only one attorney, either Wood or Dreyer, would be permitted to examine each witness. Dreyer replied: "We totally plan on doing that. Mr. Wood is lead counsel, and I'm here to assist . . ." Dreyer assured the court: "We have no intention whatsoever to do any[thing] duplicative, no intention of doing anything relative to slowing down the process at all. My intention would be to represent Rochelle's interest. I would be examining Rochelle, and it would be dealing with Rochelle."

The trial court stated: "I will allow that. I will allow counsel to question on direct, Rochelle Miller . . . and redirect in that order, unless [Wood] would like Mr. Dreyer to handle the case as lead counsel." After Dreyer declined to act as lead counsel, the trial court clarified the order: "So it will be one counsel per witness. That counsel will be Mr. Wood for all the witnesses except Rochelle Miller."

Appellants cite no authority that they had the right to have two attorneys separately examine or cross-examine each witness. It is settled that a trial court has the power - indeed, the duty - to conduct the proceedings to effect an orderly disposition of

the issues presented. (§ 128; *Santandrea v. Siltec Corp.* (1976) 56 Cal.App.3d 525, 529.) The trial court must "exercise reasonable control over the mode of interrogation of a witness so as to make such interrogation as rapid, as distinct and as effective for the ascertainment of truth," and to protect witnesses from undue harassment or embarrassment. (Evid. Code, § 765, subd. (a).)

The order directing Dreyer not to ask duplicate questions was not error. Dreyer and Wood worked as a trial team and jointly represented appellants. The jury returned a defense verdict on David's personal injury action which bars Rochelle from recovering loss of consortium. (*Mueller v. J.C. Penny Co.* (1985) 173 Cal.App.3d 713, 723-724.) It would be an idle act to reverse and grant Rochelle a new trial. Respondent is not liable for David's injuries. He is not liable to Rochelle for loss of her husband's consortium. (*Id*., at p. 723; see *Brittel v. Young* (1979) 90 Cal.App.3d 400, 407, fn. 5.)

$126,000 Settlement Offer

Respondent was awarded $21,612.25 expert witness fees based on appellants' failure to obtain a verdict more favorable than the pretrial settlement offer. (§ 998.) Citing *Wear v. Calderon* (1981) 121 Cal.App.3d 818, appellants argue that the $126,000 settlement offer was too low and the trial court erred in awarding section 998 costs. Had appellants accepted the settlement offer, it would have resulted in a zero recovery because David's medical expenses and liens exceeded $200,000.

In *Culbertson v. R.D. Werner Co,. Inc.* (1987) 190 Cal.App.3d 704, plaintiff rejected a $5,000 settlement offer that would have resulted in zero recovery due to a workers' compensation insurance lien. Plaintiff demanded $1.5 million personal injury damages, lost at trial, and was ordered to pay section 998 expert witness fees. The Court of Appeal rejected the argument that the settlement offer was unreasonable. "Plaintiff does not cite, nor do we find, any authority holding that a defendant must take into consideration any liens pending against a possible settlement or judgment when evaluating his case for the purpose of making a settlement offer. Defendant's duty under section 998 is to make a reasonable offer under the circumstances. To hold otherwise

could lead to absurd results, especially when such offer is contemplated by a liability-free defendant." (*Id*., at p. 708.)

Respondent's $126,000 settlement offer is presumed reasonable because the jury awarded no damages. (See e.g., *Barba v. Perez* (2008) 166 Cal.App.4th 444, 450.) Appellants argue that it was a token offer, followed up by unfruitful discussions concerning a "high-low" recovery of $700,000 to $100,000, irrespective of the jury's verdict. From a settlement perspective, the record shows that causation would be difficult to prove and $126,000 was "in the ballpark." (See e.g., *Long Beach Memorial Medical Center v. Superior Court* (2009) 172 Cal.App.4th 865, 873.) "If an experienced attorney or judge, standing in defendant's shoes, would place the prediction within a range of reasonably possible results, the prediction is reasonable. [Citation.]" (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 699.)

Appellants argue that the timing and amount of the offer does not further the purpose of section 998. We disagree. "When a defendant perceives himself to be fault free and has concluded that he has a very significant likelihood of prevailing at trial, it is consistent with the legislative purpose of section 998 for the defendant to make a modest settlement offer. If the offer is refused, it is also consistent with the legislative intent for the defendant to engage the services of experts to assist him in establishing that he is not liable to the plaintiff. It is also consistent with the legislative purpose under such circumstances to require the plaintiff to reimburse the defendant for the costs thus incurred." (*Culbertson v. R.D. Werner Co,. Inc., supra,* 190 Cal.App.3d at pp. 710-711.)

Appellants make no showing that the that the award of section 998 costs was arbitrary, capricious, or so absurd that it resulted in a manifest miscarriage of justice. (*Id*., at p. 710.)

Conclusion

Appellants remaining arguments have been considered and merit no further discussion. As this case illustrates, causation is a question of fact on which reasonable minds can differ. Where " 'substantial' evidence is present, no matter how slight it may

appear in comparison with the contradictory evidence, the judgment must be upheld." (*Howard v. Owens Corning*, *supra*, 72 Cal.App.4th at p. 631.)

The judgment is affirmed. Respondent is awarded costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Timothy Staffel, Judge

Superior Court County of Santa Barbara

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Dreyer Babich Buccola Wood; Roger A. Dreyer and Christopher W. Wood, for Appellants.

Stub Boeddinghaus & Velasco; Russell D Boeddinghaus and David N. Tedesc. Greines, Martin, Stein & Richland; Robert A Olson and Gary D. Rowe, for Respondent.