Filed 10/30/13 Maseba v. Mosqueda CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MAMORU MASEBA,

Plaintiff and Respondent,

v.

ROBERT RAFAEL MOSQUEDA et al.,

Defendants, Cross-complainants and Appellants;

JOE MARTINEZ,

Cross-defendant and Respondent.

F063239

(Super. Ct. No. 09CECG03125)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Jeffrey Y. Hamilton, Jr., Judge.

Sedgwick, Christina J. Imre, Douglas J. Collodel and Brian R. Thompson for Defendants, Cross-complainants and Appellants Robert Rafael Mosqueda and Interstate Home Services, Inc.

Greenberg Traurig, Francis Citera, Gregory Ostfeld, Tanisha R. Reed, Scott D. Bertzyk, Karin L. Bohmholdt and Denise M. Mayo for Defendant and Appellant Sears Logistics Services, Inc.

Baradat & Paboojian, Warren R. Paboojian, Jason S. Bell; Dowing Aaron Incorporated and Lynne Thaxter Brown for Plaintiff and Respondent Mamoru Maseba.

Emerson, Corey, Sorensen, Church & Libke, James D. Emerson and Ryan D. Libke for Cross-defendant and Respondent Joe Martinez.

-ooOoo-

Mamoru Maseba was injured when his vehicle was struck in an intersection by an Interstate Home Services, Inc. (IHS) truck. The truck's driver, Robert Mosqueda, an IHS employee, ran a stop sign. At the time of the accident, IHS and Mosqueda were delivering merchandise to Sears, Roebuck and Co. (Sears) customers pursuant to an agreement with Sears Logistic Services, Inc. (SLS). There is no dispute that Mosqueda ran the stop sign. However, Mosqueda and IHS claim that Joe Martinez was also at fault because he parked his tractor-trailer truck where it obstructed Mosqueda's view of the stop sign.

Maseba filed the underlying personal injury complaint against IHS, Mosqueda, and SLS. IHS and Mosqueda filed a cross-complaint against Martinez.

A jury awarded Maseba approximately $3.75 million in damages. The jury found that Martinez was not at fault and that IHS and Mosqueda were agents of SLS.

IHS, Mosqueda and SLS appealed. All appellants contend that the damages are excessive. Additionally, IHS and Mosqueda argue that the trial court erred when it refused to instruct the jury that Martinez had a duty to park his truck safely and when it excluded an accident reconstruction video prepared by IHS and Mosqueda. SLS further argues that the agency finding is not supported by substantial evidence and that the trial court erroneously awarded sanctions against SLS.

With the exception of imposing sanctions against SLS, the trial court did not err as alleged. Moreover, the noneconomic damage award and agency finding are supported by the record. However, because Maseba did not demonstrate that the expenses incurred for past medical care as reflected in the providers' bills were both reasonable and actually

incurred, that part of the damage award must be reversed. Accordingly, the judgment will be reversed in part and affirmed in part. The order imposing sanctions against SLS will be reversed.

BACKGROUND

The accident occurred at the intersection of Grantland Avenue and Shields Avenue, which is controlled by a four-way stop. Maseba was driving his pickup truck southbound on Grantland. When Maseba reached the intersection, he came to a complete stop at the posted stop sign, looked both ways, and then proceeded south through the intersection.

Mosqueda was driving an IHS box truck eastbound on Shields on his way to deliver merchandise to a Sears customer. This was the third out of 19 deliveries that Mosqueda was scheduled to make that day. Mosqueda entered the intersection without stopping and collided with Maseba's truck. Mosqueda was traveling at about 45 miles per hour. The accident was recorded by a surveillance camera at a convenience store located on the southeast corner of Shields and Grantland.

Mosqueda did not notice either the "stop ahead" sign or the words "stop ahead" painted on the road when approaching the intersection. Following the accident, Mosqueda claimed that he could not see the Shields stop sign because it was blocked by Martinez's truck. Martinez's unloaded tractor-trailer truck was parked on the south shoulder of Shields, approximately 80 feet west of the intersection.

Within a few minutes of the accident, Martinez was preparing to leave and backed his truck up approximately five feet. Mosqueda ran over to the truck and asked Martinez not to leave, telling Martinez that his truck had obscured the stop sign. Martinez then moved his truck back to the position it had been in at the time of the accident.

When the investigating officers arrived, Mosqueda told California Highway Patrol Officer Lisa Morgan that he did not see the stop sign because the "big rig" truck was in the way. Based on Mosqueda's statement, Officer Morgan drove along Shields as part of

her investigation. Officer Morgan testified that, as she approached the intersection, Martinez's truck did not block her view of the stop sign.

Maseba suffered multiple injuries in the accident. He had a laceration above his eye, a fractured rib, and his pelvic bone was fractured in three places. Maseba's fractures were stable and he was treated without surgery. He was hospitalized for three days and the fractures healed in about four and half months.

However, a few weeks after the accident, Maseba started to have severe headaches and developed a hand tremor. A scan showed that Maseba had a subdural hematoma, i.e., a brain bleed. Maseba was readmitted to the hospital and a minimally invasive procedure was tried to correct the problem. When that did not work, a craniotomy successfully treated the subdural hematoma. Maseba was in the hospital for about 10 days for treatment relating to this brain injury.

While recovering from the pelvic fractures, Maseba experienced low back pain and numbness in his legs. Maseba had had occasional low back and leg pain before but it had never interfered with his work and activities. An MRI revealed spinal stenosis or narrowing of the spinal column, a degenerative disease associated with aging. Although Maseba's spinal stenosis existed before the accident, one expert testified that the accident may have aggravated the condition, causing the symptoms to become more pronounced at a younger age. Eventually, Maseba had back surgery to relieve the pressure on the nerve roots caused by the stenosis.

Maseba was 73 years old at the time of the accident. Before the accident, Maseba was actively involved in his 30-acre farming operation. Maseba drove his tractor and was able to prune, shovel and dig his fields. He was able to do all the work himself except during the harvest. Maseba had also been studying a stylized form of Chinese poetry and was actively involved in a poetry club where he participated in competitions and recitals from memory. In general, Maseba was independent and did not have to rely on other people.

Since the accident, Maseba has suffered from weakness, headaches and lower back pain. Although Maseba still goes out to the farm, he can no longer do any of the physical labor or drive a tractor. Maseba has difficulty walking and cannot walk for more than 30 minutes at a time.

The medical experts testified Maseba suffered a traumatic brain injury that has affected his memory, attention, cognitive speed, and complex problem solving. It is now difficult for Maseba to memorize poetry and this frustrates and saddens him. Additionally, he no longer remembers directions to places he used to drive or the names of people he knows. The brain injury has also caused trembling and headaches. Maseba's diminished mental capacities will remain the same for the rest of his life.

Maseba's emotional state also changed after the accident. He is depressed, frustrated, angry, short-tempered and under stress from chronic pain. Maseba was very frightened and thought he might die during the craniotomy. He has anxiety about driving cars and avoids having to do so, if possible.

Maseba filed the underlying personal injury complaint against IHS, Mosqueda and SLS. The claim against SLS is based on the theory that IHS and its employee, Mosqueda, were SLS's agents at the time of the accident. Mosqueda and IHS filed a cross-complaint against Martinez for indemnity and apportionment of fault on the theory that Martinez was negligent when he parked his truck where it could block Mosqueda's view of the stop sign.

The jury returned a verdict in favor of Maseba and against IHS, Mosqueda and SLS and awarded approximately $3.75 million in total damages. The damages were broken down as follows: approximately $214,000 for past medical expenses; approximately $39,000 for future medical expenses; $1.5 million for past noneconomic loss; and $2 million for future noneconomic loss. The jury found Mosqueda was negligent, Martinez was not negligent, and IHS was SLS's agent.

IHS and SLS each filed a new trial motion. Both argued that there was insufficient evidence to support the award for past medical expenses and that the general damages were excessive. IHS additionally argued the jury was not properly instructed on Martinez's duty of care and SLS argued the agency finding was error. IHS also filed a partial motion for judgment notwithstanding the verdict (JNOV) on the ground that Maseba did not introduce any competent evidence to support the jury's award of special damages. SLS joined in this partial JNOV motion. The trial court denied the posttrial motions.

DISCUSSION

1. *Damages.*

Appellants argue the damages are excessive. They contend the evidence of Maseba's past medical expenses was insufficient. Appellants further assert that the $3.5 million awarded in noneconomic damages is so grossly disproportionate to the injuries sustained as to suggest the jury was incited by passion and prejudice.

A jury's damage award is subject to very narrow review on appeal. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 614.) Being a fact question, the amount of damages is first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 820.)

The contention that the evidence does not support the verdict is reviewed under the substantial evidence standard. Accordingly, the appellate court must consider the whole record, view the evidence in the light most favorable to the judgment, presume every fact the trier of fact could reasonably deduce from the evidence, and defer to the trier of fact's determination of the weight and credibility of the evidence. (*Rufo v. Simpson, supra,* 86 Cal.App.4th at p. 614.)

The reviewing court can act on a claim that the damages are excessive only where the recovery is so grossly disproportionate to the injury that the award may be presumed

to have been the result of passion or prejudice. (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1470-1471.) In other words, the award is so large that, at first blush, it shocks the conscience. (*Iwekaogwu v. City of Los Angeles*, *supra*, 75 Cal.App.4th at p. 820.)

There is no fixed standard. Rather, the appellate court usually defers to the jury's discretion unless the record shows inflammatory evidence, misleading instructions, or improper argument by counsel that would suggest the jury relied on improper considerations. (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 720-721.) Moreover, if the trial court denied a motion for a new trial concluding that the damages were not excessive, the appellate court gives great weight to that conclusion. (*Rufo v. Simpson, supra,* 86 Cal.App.4th at p. 614.) The trial judge has greater familiarity with the case and is bound by the demanding test of weighing conflicting evidence. (*Sommer v. Gabor, supra,* 40 Cal.App.4th at p. 1471; *Mendoza v. City of West Covina, supra,* 206 Cal.App.4th at p. 720.)

a. Damages for past medical expenses.

In general, the burden of proof is on the plaintiff to prove his or her damages with reasonable certainty. (*Fields v. Riley* (1969) 1 Cal.App.3d 308, 313.) Further, the party bearing the burden of proof on the issue must present sufficient evidence to establish a requisite degree of belief in the mind of the trier of fact. (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1667.) However, once that party produces evidence sufficient to make his or her prima facie case, the burden of producing evidence shifts to the other party to refute the prima facie case. (*Id*. at p. 1668.)

To establish the past medical expenses attributable to the accident, Maseba introduced testimony from Tracy Albee, a registered nurse and life care planning expert. Albee explained that she determines whether charges for medical treatment are reasonable and customary. In doing so, she analyzes the bills, examines the injured party's medical records and reviews the depositions given by the medical experts. Albee makes sure all of the bills are for services the injured party received and matches each bill

to the corresponding record documenting the service provided. In this case, Albee concluded that the amounts billed for the medical care given to Maseba were reasonable and customary and that those bills amounted to $214,261. A written summary of Maseba's medical bills was admitted into evidence.

Appellants assert that under *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541 (*Howell*), Maseba's submission of his medical bills alone was insufficient to support the award for past medical expenses. Rather, appellants argue, in order to meet his burden of proof, Maseba was required to offer evidence of what the medical services actually cost. Appellants are correct.

In *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, the court noted it has long been established that "a person injured by another's tortious conduct is entitled to recover the reasonable value of medical care and services reasonably required and attributable to the tort." (*Id*. at p. 640.) The court then analyzed what the "reasonable value" measure means and concluded that a plaintiff is entitled to recover "*up to, and no more than*, the actual amount expended or incurred for past medical services so long as that amount is reasonable." (*Id*. at p. 643.) An award for past medical expenses in excess of what the medical care and services actually cost constitutes overcompensation. (*Id*. at p. 641.) Accordingly, the *Hanif* court concluded that the trial court erred in awarding the plaintiff special damages in an amount exceeding the amount that Medi-Cal paid for the plaintiff's medical care and services. (*Id*. at p. 644.)

In *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, the court applied the rule set forth in *Hanif* to amounts paid by a private health insurer for medical care. The court noted that a "plaintiff in a personal injury action is entitled to recover from the defendant tortfeasor, the reasonable value of medical services rendered to the plaintiff, including the amount paid by a collateral source, such as an insurer." (*Id*. at p. 306.) However, the court held that when the plaintiff participates in a health plan where the health plan administrator has negotiated reduced rates with the medical

provider, the plaintiff is entitled to no more in special damages than the sum paid by the insurer for the medical services rendered, despite the fact that it might be less than the prevailing market rate. (*Id*. at p. 309.)

In *Howell*, the California Supreme Court addressed the substantive question of "whether recovery of medical damages is limited to the amounts providers actually are paid or extends to the amounts of their undiscounted bills." (*Howell, supra,* 52 Cal.4th at p. 552.) In answering this question, the *Howell* court agreed with *Hanif* that "a plaintiff may recover as economic damages *no more* than the reasonable value of the medical services received and is not entitled to recover the reasonable value if his or her actual loss was less." (*Id*. at p. 555.) Accordingly, the court held "that an injured plaintiff whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial." (*Id.* at p. 566.) The court further concluded that, if a provider by agreement with the plaintiff's private health insurer accepted as full payment an amount less than the provider's full bill, evidence of that amount is relevant to prove plaintiff's damages for past medical expenses, and, assuming it satisfies other rules of evidence, is admissible at trial. In this situation, evidence of the full billed amount is not itself relevant on the issue of past medical expenses. (*Id*. at p. 567.)

The complexity of the contemporary pricing and reimbursement patterns for medical providers compels placing these limits on an injured plaintiff's recovery for past medical expenses. Hospitals set a uniform schedule of inflated charges that represent the gross billed charge for a given service or item. However, only uninsured self-paying patients pay these inflated charges. For example, a hospital's bill of $30,000 might be reimbursed by Medicaid at $6,000 and commercial insurers at somewhere in between. Similarly, some physicians have reportedly shifted costs to the uninsured resulting in

significant disparities between charges paid by uninsured patients and those with private insurance or public medical benefits. (*Howell, supra,* 52 Cal.4th at pp. 560-561.)

Here, Maseba had the burden to prove his damages with reasonable certainty. To prove damages for past medical expenses, Maseba was required to establish that the amounts were both reasonable *and actually paid*. (*Howell, supra,* 52 Cal.4th at p. 566.) However, Maseba only provided evidence of the amounts that were billed by the medical providers. There was no evidence of what amounts were actually paid either by Maseba or an insurer. Therefore, Maseba did not meet his burden of proving past medical damages. Contrary to Maseba's position, the burden was not on appellants to establish what amounts were in fact paid. Rather, that was an element of Maseba's cause of action. Accordingly, the award of special damages for past medical expenses must be reversed and the matter remanded for a determination of the correct amount of past medical expenses.

b. General damages.

The jury awarded Maseba $1.5 million in past general damages and $2 million in future general damages. Appellants contend that these general damages were excessive. They argue that this award is so grossly disproportionate that it both raises a presumption of being the product of passion or prejudice and shocks the conscience. Appellants point out that Maseba's back and brain surgeries were successful and that these noneconomic damages are more than 13 times the amount of Maseba's medical bills. Appellants further argue that the erroneous admission into evidence of the amount billed for past medical expenses requires reversal of the general damages.

As noted above, there is no fixed standard for reviewing a claim that the damages are excessive. Rather, the appellate court usually defers to the jury's discretion unless the record shows inflammatory evidence, misleading instructions, or improper argument by counsel that would suggest the jury relied on improper considerations. (*Mendoza v. City of West Covina, supra,* 206 Cal.App.4th at pp. 720-721.) Moreover, the appellate court

gives great weight to the trial court's conclusion that the damages were not excessive. (*Rufo v. Simpson, supra,* 86 Cal.App.4th at p. 614.)

Relying on the recent case of *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308 (*Corenbaum*), appellants contend that, because the full amount of Maseba's medical bills was improperly admitted into evidence to prove the special damages for past medical expenses, the general damages awards must be reversed as well.

As noted above, the court in *Howell* held that evidence of the full billed amount is not itself relevant on the issue of past medical expenses. (*Howell, supra,* 52 Cal.4th at p. 567.) However, the *Howell* court expressed no opinion as to the relevance or admissibility of the plaintiff's full medical bills on other issues, such as noneconomic damages or future medical expenses. (*Ibid*.)

In *Corenbaum*, the court answered the questions left open by *Howell.* The court concluded that the full amounts billed for medical care was not relevant to future medical expenses or noneconomic damages and therefore the admission of such evidence was error. (*Corenbaum, supra,* 215 Cal.App.4th at p. 1333.) The court applied this rule retroactively and held that this "error was prejudicial because, as the record before us clearly demonstrates, the amounts awarded as damages were based on the full amounts billed rather than the lesser amounts accepted by medical providers as full payment." (*Ibid*.) The court therefore reversed the judgments in favor of the plaintiffs as to the awards of compensatory damages and remanded the matter for a new trial on compensatory damages. (*Id*. at pp. 1333-1334.)

Without expressing an opinion regarding the *Corenbaum* court's reasoning, we find this case is distinguishable on its facts. The jury awarded Corenbaum over $1 million for past medical expenses, the full amount Corenbaum requested. The jury also awarded Corenbaum $500,000 for past noneconomic loss and $250,000 for future

noneconomic loss.[1] From the fact that the past medical expenses substantially exceeded the noneconomic damages it can be inferred that the amount of the past medical expenses influenced the jury's decision on those noneconomic damages. Further, Corenbaum's counsel argued to the jury that it should award noneconomic damages based on the past medical expenses, suggesting an award totaling three or four times the amount billed for past medical care.[2] Based on this situation, the *Corenbaum* court concluded "that evidence of the full amount billed is not admissible for the purpose of providing plaintiff's counsel an argumentative construct to assist a jury in its difficult task of determining the amount of noneconomic damages …." (*Corenbaum, supra*, 215 Cal.App.4th at p. 1333.)

In contrast here, the total amount billed for past medical expenses, approximately $214,000, is a fraction of the $3.5 million awarded as general damages. In fact, appellants argue the general damages award, being more than 13 times the amount of the medical bills, is so grossly disproportionate to the past medical expenses that it raises a presumption of passion and prejudice. Moreover, Maseba's counsel did not argue that the jury should consider the amount billed for past medical care in determining the amount of general damages. Thus, assuming that *Corenbaum* was correct, i.e., it is error to admit the full amount billed for past medical care on the issue of general damages, in this case there is no prejudice. It is not reasonable to infer from this record that the jury was influenced by the amount billed for past medical expenses when it awarded Maseba $3.5 million in general damages.

---

[1] These facts are not in the *Corenbaum* opinion. They are in a January 15, 2013, letter brief filed by defendant and appellant Dwight Eric Lampkin in response to the court's request for supplemental briefing. On our own motion, we are taking judicial notice of the briefs filed in *Corenbaum*. (Evid. Code, § 452, subd. (d).)

[2] Again, these facts are not in the *Corenbaum* opinion. We have taken them from the appellant's opening brief in *Corenbaum*.

Appellants rely on *Don v. Cruz* (1982) 131 Cal.App.3d 695, to support their claim that the damages are excessive. In *Don*, the 49-year-old plaintiff experienced chronic low back pain and neck pain, that "'more probably than not'" would continue for the rest of her life, after being involved in an automobile accident. The trial court awarded the plaintiff the insurance policy limits of $100,000 noting that it was "'stretching it there.'" (*Id*. at pp. 706-707.) The *Don* court concluded that this award was excessive.

Appellants argue that the facts in *Don* are comparable to the situation here and thus *Don* supports their claim that the damages awarded to Maseba are excessive. However, the plaintiff in *Don* was vague and nonresponsive when asked whether the pain interfered with her employment. Further, there was no evidence that the plaintiff's condition was in any way disabling or that all methods of treatment had been exhausted. In sum, the evidence in *Don* showed only some degree of discomfort without substantial evidence of disability. (*Don v. Cruz, supra,* 131 Cal.App.3d at pp. 707-708.)

In contrast here, Maseba suffered traumatic injuries, including a permanent brain injury. Before the accident, Maseba was in good health and was actively involved in his farming operations. He now has diminished mental capacities that will never improve. Maseba has memory loss and residual deficits in attention and complex problem solving. He is depressed, short tempered, worried and anxious. Due to his injuries, Maseba can no longer actively farm, perform simple daily tasks, such as walking for long periods, or participate fully in his hobbies. Maseba's post-accident condition is simply not comparable to the condition of the plaintiff in *Don*.

Moreover, injuries from case to case can seldom be measured on the same scale. "The measure of damages suffered is a factual question and as such is a subject particularly within the province of the trier of fact. For a reviewing court to upset a jury's factual determination on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious

invasion into the realm of factfinding." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65, fn 12.)

Appellants' claim that the damages are excessive because they equal more than 13 times Maseba's medical bills is also unpersuasive. A plaintiff is not required to prove actual special damages, such as medical expenses and loss of earnings, to be entitled to general damages. (*Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 412.) Rather, the measure of tort damages is the amount that will compensate the plaintiff for all the detriment proximately caused. (*Ibid*.)

SLS additionally argues that the award of $2 million for future general damages is excessive because it exceeds the past general damages award of $1.5 million. According to SLS, Maseba was nearly recovered at the time of trial and there is a total absence of evidence of continuing injuries, ongoing pain and suffering, ongoing life plan needs, or ongoing medical treatment needs proportionate to such an award. However, contrary to SLS's position, the injuries will have significant detrimental effects on Maseba for the rest of his life. Maseba is permanently impaired, both physically and mentally. Accordingly, the future general damages award does not shock the conscience.

IHS and Mosqueda further argue that counsel's improper argument likely incited the jury's passion and prejudice. IHS and Mosqueda point to a brief passage in the closing argument where Maseba's counsel mentioned that IHS and Sears never apologized to Maseba. According to IHS, Maseba's counsel "tethered the amount of the verdict to IHS' 'failure' to apologize."

First, when read in context, counsel's argument about IHS's failure to apologize was part of a discussion of fault, not appropriate damages. Further, the comments were basically innocuous and thus not likely to incite passion and prejudice. Finally, IHS and Mosqueda did not object to this alleged misconduct at trial and thus may not raise the issue on appeal. (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 797.)

In sum, deferring to the jury's discretion and giving great weight to the trial court's conclusion, we find that the general damages awards are not excessive. The recovery is neither grossly disproportionate to the serious and permanent injuries sustained by Maseba nor so large that, at first blush, it shocks the conscience.

2. *The trial court did not err in refusing IHS and Mosqueda's special instruction.*

In response to Maseba's complaint, IHS and Mosqueda filed a cross-complaint against Martinez. IHS and Mosqueda claimed that Martinez negligently parked his tractor-trailer truck so that it completely concealed the stop sign and therefore Martinez was partially at fault. IHS and Mosqueda never asserted that the truck was illegally parked but, rather, conceded that it was parked legally.

Regarding this theory of liability, the jury was instructed:

> "Cross-complainant IHS, Incorporated, claims that Robert Mosqueda's conduct was caused in whole or in part by cross-defendant Joe Martinez's negligence. To establish this claim, cross-complainant must prove all of the following: One, that cross-defendant Joe Martinez was negligent; two, that cross-defendant's negligence contributed to plaintiff's harm, if any; and, three, that cross-defendant's negligence was a substantial factor in causing plaintiff's harm."

The jury was then instructed with CACI No. 401 on the basic standard of care as follows:

> "Negligence is the failure to use reasonable care to prevent harm to oneself or to others.
>
> "A person can be negligent by acting or by failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation.
>
> "You must decide how a reasonably careful person would have acted in Plaintiff Mamoru Maseba's and Defendants IHS, Inc.'s, by and through its employee Robert Mosqueda, and Joe Martinez's situation."

IHS and Mosqueda requested the trial court to give a special jury instruction pinpointing Martinez's duty of care as follows:

> "All persons have a duty to use ordinary care to prevent others from being injured as a result of their conduct. This duty extends to the drivers of commercial vehicles who park their commercial vehicles in an unsafe manner, such as blocking the view of an intersection, whether or not the commercial vehicle is legally parked."

The trial court refused to give this special instruction. IHS and Mosqueda contend that the trial court prejudicially erred. They argue that their proposed instruction tracks the law described in *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764 (*Cabral*) and *Lawson v. Safeway Inc.* (2010) 191 Cal.App.4th 400 (*Lawson*) and that it was warranted by the facts of the case.

"The trial court's 'duty to instruct the jury is discharged if its instructions embrace all points of law necessary to a decision.'" (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 82 (*Cristler*).) While, upon request, a party is entitled to correct and nonargumentative instructions on every theory advanced, that party is not entitled to have the jury instructed in any particular phraseology and may not complain if the court correctly gives the substance of the applicable law. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572; *Cristler, supra,* 171 Cal.App.4th at p. 82.)

In assessing the adequacy of the instructions given, the appellate court evaluates those instructions as a whole, not in isolation. (*Cristler, supra,* 171 Cal.App.4th at p. 82.) The court then applies the independent standard of review to decide whether the jury was fully and fairly instructed on the applicable law. (*Ibid*.)

Here, the first sentence of the proposed jury instruction is merely a rephrasing of the negligence instruction that was given. IHS and Mosqueda's proposed language "[a]ll persons have a duty to use ordinary care to prevent others from being injured as a result of their conduct" is duplicative of "[n]egligence is the failure to use reasonable care to prevent harm to oneself or to others." The proposed language merely phrases the concept in terms of "duty" rather than "negligence."

The second part of the proposed instruction, i.e., "[t]his duty extends to the drivers of commercial vehicles who park their commercial vehicles in an unsafe manner, such as

blocking the view of an intersection, whether or not the commercial vehicle is legally parked," is argumentative. An instruction should be general, not an argument to the jury in the guise of a statement of law. (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1217.) It is proper for the court to refuse to give an instruction that unduly overemphasizes issues, theories or defenses either by repetition or singling them out or making them unduly prominent even though the instruction may be a legal proposition. (*Ibid*.) Here, including IHS and Mosqueda's theory of the case as an example of a breach of the duty of care suggests that Martinez was parked in an unsafe manner and thereby breached his duty of care. Accordingly, the trial court properly refused to give this proposed instruction.

Further, the jury was adequately instructed on the subject of the proposed instruction, i.e., negligence. Negligence is conduct that falls below the legal standard established for the protection of others against unreasonable risk of harm. (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997.) As a general proposition, one "'is required to exercise the care that a person of ordinary prudence would exercise under the circumstances.'" (*Ibid.,* fn. omitted.) The application of this principle is inherently situational. Accordingly, "the amount of care deemed reasonable in any particular case will vary, while at the same time the standard of conduct itself remains constant, i.e., due care commensurate with the risk posed by the conduct taking into consideration all relevant circumstances." (*Ibid*.)

Here, when the court instructed the jury that a person is negligent if he or she does something that a reasonably careful person would not do in the same situation and that the jury must decide how a reasonably careful person would have acted in Martinez's situation, the court correctly informed the jury on negligence as it pertained to IHS and Mosqueda's claim against Martinez.

Moreover, contrary to IHS and Mosqueda's position, neither *Cabral* nor *Lawson* requires that an instruction such as the one IHS proposed be given. In *Lawson*, a large

Safeway tractor-trailer was parked legally on the side of U.S. Route 101 (101) close to an intersection. The Safeway truck blocked the view of oncoming traffic for a driver attempting to cross and turn left on 101. While attempting to make this turn, the defendant driver's vehicle struck the plaintiffs' motorcycle, injuring them. A jury awarded damages to plaintiffs and apportioned 35 percent of the fault to Safeway. (*Lawson, supra,* 191 Cal.App.4th at p. 404.)

On appeal, Safeway argued that its driver had no duty to avoid parking in a manner that blocked the views of other motorists at the intersection. (*Lawson, supra,* 191 Cal.App.4th at p. 408.) The court disagreed. Applying general negligence standards and balancing the factors set forth in *Rowland v. Christian* (1968) 69 Cal.2d 108, the court concluded that Safeway's driver had a duty to park safely, as well as legally. The court held that, unlike most legally parked vehicles, this case involved a situation where the risk of foreseeable harm was unreasonable. (*Lawson, supra,* 191 Cal.App.4th at p. 410.) However, the *Lawson* court did not consider the issue of jury instructions. Rather, the court applied general negligence principles. Here, the jury was instructed on general negligence in the context of IHS and Mosqueda's theory of their case against Martinez. *Lawson* does not compel the giving of a further instruction.

Similarly, in *Cabral*, the court considered whether a driver for Ralphs Grocery Company breached his duty of care when he parked his tractor-trailer along the side of a freeway for a nonemergency reason in an emergency only parking area. While a jury found Ralphs 10 percent at fault for an accident caused by the plaintiff's decedent driving into the back of the parked truck, Ralphs argued that its driver had no duty to other freeway drivers in this situation. However, the court disagreed and declined to create a categorical rule exempting those parking alongside freeways from the duty of drivers to exercise ordinary care for others in their use of streets and highways. (*Cabral, supra,* 51 Cal.4th at p. 768.) As did the court in *Lawson*, the *Cabral* court applied the general rules

applicable to negligence. Again, there is nothing in *Cabral* indicating that other than the general negligence instructions should have been given here.

In sum, the trial court did not err in refusing IHS and Mosqueda's proposed jury instruction. Accordingly, it is unnecessary to reach the issue of prejudice.

3. *The trial court did not err in excluding IHS's accident reconstruction videos.*

IHS and Mosqueda designated Robin Harrison as their retained expert on accident reconstruction. As part of his deposition, Harrison produced two CDs, one containing videos created by modifying the surveillance video from the convenience store and the other containing various computer simulations of the accident. These simulations were designed to reproduce Mosqueda's view as he approached the intersection and thereby demonstrate that Martinez's truck obscured the stop sign.

When questioned at his deposition regarding the making of these videos, Harrison testified that he hired Mark Johnson, an independent contractor, to produce them. Harrison stated that Johnson "is the guy that does the actual photo work. I provide the engineering basis. I give him the speeds, the distances, and he's the one who produces the videos." Johnson gathered "the actual photogrammetric data, both video and still."[3] It was Johnson who then used the computer programs and entered the photogrammetric data into those programs. According to Harrison, Johnson was "the specialist." However, IHS and Mosqueda did not designate Johnson as an expert witness. Rather, they relied on Harrison.

Maseba and Martinez each filed a motion in limine to exclude the simulation videos from evidence. Both motions argued that IHS and Mosqueda could not lay a foundation for these simulations because Harrison did not collect the data, including the photogrammetric measurements, used to create the videos. Maseba and Martinez argued

---

[3] Photogrammetry is the science of making reliable measurements by the use of photographs.

that Harrison "cannot adequately testify as to the nature of the computer simulations or the accuracy of the simulation portrayed in the Videos since Harrison admits in his deposition that he does not have the expertise to prepare such a video recreation, which is precisely why the expertise of Mark Johnson was retained." Thus, Harrison could not lay the foundation for the accuracy and nature of the photogrammetric data collected.

The trial court granted the motion to exclude the video recreations. The court stated that there is a "critical foundation missing to be able to show that video recreation. If that's somehow able to be remedied, then I'll revisit that."

During trial, IHS and Mosqueda called Harrison as their retained accident reconstruction expert. Counsel for IHS and Mosqueda asked Harrison about his visits to the site. Harrison explained that on his first visit he familiarized himself with the site, did some preliminary photography and measurements, and supervised some videography and other photography. Harrison stated that on the second visit he did "just more of the same. Did some more precise measurements just to confirm some of the things that we discovered from our videography and did more video work." Thereafter, the following exchange took place:

"[Counsel for Martinez]: Your Honor, may I be heard?

"THE COURT: Yes.

"[Counsel for Martinez]: I think some of this is subject to in limine motion.

"THE COURT: I think so too.

"[Counsel for IHS and Mosqueda]: Just talking about photographs.

"[Counsel for Martinez]: Talking about a little bit more than that."

IHS and Mosqueda argue that, despite the court's in limine ruling excluding the reconstruction videos "*without prejudice subject to the laying of a foundation,*" they were denied the opportunity to lay that foundation.

The reconstruction video at issue here is a computer simulation, as opposed to a computer animation. During his deposition, Harrison corrected counsel's use of the term "animation" to describe the video. Rather, Harrison labeled the video a reconstruction, i.e., a reproduction or simulation. According to Harrison, the videos "are various recreations of the accident, that show the true state of affairs."

An animation is demonstrative evidence used to illustrate an expert's testimony to help the jury understand that testimony. In contrast, a computer simulation is created by entering data into computer models that analyze the data and reach a conclusion. Thus, a simulation is itself substantive evidence. (*People v. Duenas* (2012) 55 Cal.4th 1, 20.) Accordingly, "[a] computer animation is admissible if '"it is a fair and accurate representation of the evidence to which it relates …."'" (*Ibid*.) However, a computer simulation "is admissible only after a preliminary showing that any 'new scientific technique' used to develop the simulation has gained 'general acceptance … in the relevant scientific community.'" (*Id*. at p. 21.)

Before experimental evidence, such as the reconstruction video, can be admitted into evidence, a foundation must be established. It must be shown that the experiment is relevant and was conducted under substantially similar conditions as those of the actual occurrence. (*Culpepper v. Volkswagen of America, Inc.* (1973) 33 Cal.App.3d 510, 521.) "Admissibility also depends on proof, 'with some particularity,' of the 'qualifications of [the] individual[] testifying concerning [the] experimentation ….' [Citation.]" (*People v. Bonin* (1989) 47 Cal.3d 808, 847.)

Here, Harrison testified at deposition that it was Johnson who gathered the photogrammetric data and then used the computer programs and input that data. Johnson was the specialist. Since Harrison did not produce the reconstruction video, he could not provide the foundation for admission of that video. Harrison simply was not qualified to testify regarding the video's creation. Accordingly, the trial court did not err in excluding the video.

Contrary to IHS and Mosqueda's position, the trial court did not deny them the opportunity to lay a foundation for the reconstruction video. Rather, as is evident from the exchange between counsel for Martinez and counsel for IHS and Mosqueda regarding Harrison's mention of "video work," IHS and Mosqueda abandoned their attempt to introduce the reconstruction video into evidence. In any event, without calling Johnson to testify at trial, IHS and Mosqueda could not lay the proper foundation. As the one who produced the reconstruction video, Johnson was the only one who was qualified to testify regarding its creation.

4. *The record supports the jury's agency finding.*

SLS challenges the jury's finding that IHS was SLS's agent at the time of the collision. According to SLS, the record conclusively establishes that Mosqueda was an employee of IHS alone and that IHS was a non-agent independent contractor of SLS. SLS relies on both the carrier agreement and the operation of the relationship between SLS and IHS to support its position.

Generally, the law presumes that a person is acting for him or herself and not as an agent for another. (*Armato v. Baden* (1999) 71 Cal.App.4th 885, 898-899.) If, as SLS asserts, IHS was acting for itself as an independent contractor, SLS is not liable to Maseba for Mosqueda's negligence. (*Millsap v. Federal Express Corp.* (1991) 227 Cal.App.3d 425, 430 (*Millsap*).) The burden of proving that IHS was SLS's agent rests on Maseba, the party asserting the agency's existence. (*Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal.App.3d 767, 780.)

The existence of an agency relationship is a factual question. (*Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 965.) Accordingly, the trier of fact's determination must be affirmed on appeal if supported by substantial evidence. (*Ibid*.) In conducting this review, the appellate court has no power to judge the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence.

(*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766.) Agency is a question of law only if the essential facts are undisputed. (*Arzate v. Bridge Terminal Transport, Inc.* (2011) 192 Cal.App.4th 419, 425 (*Arzate*).)

Here, SLS and IHS entered into a carrier agreement setting forth the details of their relationship and expressly stating the legal relationship they intended to create. Such an agreement is a significant factor for consideration. (*Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 952 (*Tieberg*).) Nevertheless, the label the parties place on their relationship is not conclusive, even in the absence of fraud or mistake. (*Ibid*; *Arzate, supra,* 192 Cal.App.4th at p. 425.)

"'An "independent contractor" is generally defined as a person who is employed by another to perform work; who pursues an "independent employment or occupation" in performing it; and who follows the employer's "desires only as to the results of the work, and not as to the means whereby it is to be accomplished." [Citations.]'" (*Millsap, supra,* 227 Cal.App.3d at p. 431.) The primary test to determine if the person performing the work is an agent is whether the one for whom the work is done has the legal right to control the manner and means of accomplishing the result desired. (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370; *Arzate, supra,* 192 Cal.App.4th at p. 426.) However, it is not essential to exercise control or actually supervise the agent. Rather, it is the existence of the right of control and supervision that establishes the agency relationship. (*Malloy v. Fong*, *supra*, 37 Cal.2d at p. 370.)

While the right to control work details is the most significant consideration, there are also secondary factors that indicate an agency relationship. These factors include: (1) the right to discharge at will, without cause; (2) whether the one performing the work is engaged in a distinct occupation or business; (3) the kind of occupation with reference to whether the work is usually done under the direction of the principal or by a specialist without supervision; (4) the skill required; (5) whether the principal or the worker supplies the instrumentalities, tools, and place of work; (6) the length of time for which

the services are to be performed; (7) the method of payment, whether by the time or by the job; (8) whether the work is a part of the regular business of the principal; and (9) whether the parties believe they are creating the relationship of employer-employee. (*Arzate, supra,* 192 Cal.App.4th at p. 426.) The various individual factors cannot be applied mechanically as separate tests. Rather, they are intertwined and their weight depends on particular combinations. The process is fact specific and is qualitative, not quantitative. (*Id*. at pp. 426-427.)

SLS focuses on certain language in the carrier agreement to support its position that IHS was an independent contractor. SLS notes the agreement states that IHS "is an independent contractor" and that "[n]either this Agreement nor the actions of the parties may be taken as creating a partnership, agency, or joint venture." The carrier agreement further provides that IHS "has exclusive control over its labor relations and its employees" and IHS's "employees and independent contractors are not agents, employees, or independent contractors of SLS." SLS also points out that IHS will "provide and direct, supervise and otherwise control all drivers and helpers … procure necessary licenses, provide maintenance, and furnish all tools, equipment and supplies necessary to perform the Services safely and efficiently." According to SLS, the carrier agreement conclusively disproves agency.

Although the agreement states that IHS is an independent contractor, that label is not conclusive. (*Tieberg, supra,* 2 Cal.3d at p. 952.) Moreover, while the carrier agreement contains some language that is consistent with an independent contractor relationship, it also gives SLS the right to control multiple aspects of the delivery service.

Under the carrier agreement, IHS is required to train the delivery teams to perform to SLS specifications and, if an IHS employee violates SLS policies, SLS may instruct IHS to terminate the employment of that individual. Regarding day-to-day operations, SLS requires that: the SLS manager attend IHS's daily operations review meeting; SLS associates be present during the loading of the delivery trucks and when the delivery

trucks arrive at the end of a route to confirm that the delivery manifests have been completed properly; merchandise be staged according to SLS routing software; and the delivery routes be run exactly as specified by SLS in the manifests unless otherwise directed by an SLS associate. SLS further has the right to control the apparel and appearance of IHS employees, including requiring IHS employees to wear a specific uniform with a "Sears-Authorized Delivery" emblem. SLS also supplies most of the delivery accessories. Thus, although the carrier agreement labels IHS as an independent contractor, the powers granted to SLS regarding the manner and means of accomplishing the deliveries supports the jury's finding that IHS was SLS's agent.

Evidence elicited at trial regarding the relationship between IHS and SLS further supports the jury's agency finding. For example, SLS provides IHS with a business office, rent free, inside the Sears warehouse. SLS tracks the IHS delivery trucks throughout the day and requires IHS drivers to call SLS to report after each delivery. Further, SLS pays all of IHS's overhead related to Sears deliveries, including making the lease or loan payments on the trucks and paying the fixed monthly truck expenses.

Contrary to SLS's position, neither *Millsap* nor *Bohanon v. James McClatchy Pub. Co.* (1936) 16 Cal.App.2d 188 (*Bohanon*), compels finding IHS was an independent contractor. Rather, these cases are distinguishable on their facts.

In *Millsap*, the driver was delivering packages for Federal Express when the accident occurred. The driver used his own car, furnished his own gas and liability insurance and paid for car repairs. The driver received no employee benefits and no taxes were withheld from his paychecks. Further, the driver was not instructed on how to make the deliveries or how to drive his car. (*Millsap, supra,* 227 Cal.App.3d at p. 431.) In contrast here, SLS exercised control over the manner in which the deliveries were performed and closely supervised the day-to-day operation. Further, SLS paid all of IHS's expenses that pertained to the delivery of Sears products.

When the accident occurred in *Bohanon*, the driver was delivering newspapers. The driver purchased the papers from the publisher and thereafter collected a fee from his customers. The court determined the relationship was "analogous to that of any retail dealer who buys goods from a manufacturer or jobber and purveys them to his customers, securing compensation for his services in whatever difference there may be between the price which he pays for the goods and the price which he receives on their sale." (*Bohanon, supra,* 16 Cal.App.2d at p. 197.) Here, however, IHS performed a service for SLS and was paid a fixed amount for each delivery of Sears products to Sears customers.

In sum, there is substantial evidence that SLS exercised significant control over the manner and means by which the deliveries were made and closely supervised the undertaking. Moreover, SLS paid all expenses associated with the delivery of Sears products, including the trucks, and provided delivery accessories and the place of work. Accordingly, the record supports the jury's agency finding.

5. *The trial court erred in imposing discovery sanctions against SLS.*

A few months before trial, Maseba served SLS, IHS and Mosqueda with seven requests for admission. Maseba asked these defendants to admit that: (1) Mosqueda negligently operated his vehicle; (2) Mosqueda was a substantial factor in causing the accident; (3) Mosqueda was the sole cause of the accident; (4) No other person was a substantial factor in causing the accident; (5) Maseba was not a substantial factor in causing the accident; (6) Maseba did not negligently operate his vehicle at the time of the accident; and (7) Maseba was injured as a result of the accident. SLS denied the first six of these requests and admitted that Maseba was injured. IHS and Mosqueda did not respond.

Following trial, Maseba moved the court for an order imposing sanctions against SLS under Code of Civil Procedure[4] section 2033.420. Under that section, if a party fails

---

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

to admit the truth of any matter when requested to do so and if the party requesting the admission thereafter proves the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. However, an award of costs of proof is improper if the "admission sought was of no substantial importance" (*id.*, subd. (b)(2)), or the "party failing to make the admission had reasonable ground to believe that that party would prevail on the matter" (*id.*, subd. (b)(3)).

The trial court awarded cost of proof sanctions against SLS in the amount of $51,531.25. SLS argues the trial court erred in making this award because the request to SLS to admit that Mosqueda was negligent and caused the accident was of no substantial importance to Maseba's case. SLS is correct. Any admission made by SLS regarding Mosqueda's negligence would not be binding on Mosqueda or IHS. SLS further contends that the denials were justified based upon the information available to SLS at that time.

We review the trial court's cost of proof sanctions award for abuse of discretion. (*Miller v. American Greetings Corp.* (2008) 161 Cal.App.4th 1055, 1066.) Accordingly, we are required to uphold the trial court's determination, even if we disagree with it, so long as it is reasonable. (*Stull v. Sparrow* (2001) 92 Cal.App.4th 860, 864.)

The primary purpose of requests for admission is to expedite trial by settling issues so that they will not have to be tried. (*Brooks v. American Broadcasting Co.* (1986) 179 Cal.App.3d 500, 509 (*Brooks*).) The basis for imposing sanctions is directly related to this purpose. Unlike other discovery sanctions, an award under section 2033.420 is not a penalty. Rather, "it is designed to reimburse reasonable expenses incurred by a party in proving the truth of a requested admission where the admission sought was 'of substantial importance' [citations] such that trial would have been expedited or shortened if the request had been admitted." (*Brooks, supra,* at p. 509.)

A request for admission is of substantial importance when the matter requested for admission is central to disposition of the case. "[A]s a general rule a request for admission should have at least some direct relationship to one of the central issues in the case." (*Brooks*, *supra*, 179 Cal.App.3d at p. 509.)

Here, there is no question that the issue of Mosqueda's negligence was central to the disposition of the case. However, SLS's liability was based on the jury finding that Mosqueda and IHS were SLS's agents. Thus, SLS could not be held liable unless the jury found that Mosqueda was negligent.

Any admission made by a party is binding only on that party. (§ 2033.410, subd. (b).) Accordingly, any admissions made by SLS regarding Mosqueda's negligence would not have been binding on Mosqueda. Thus, even if SLS had admitted the truth of the subject requests, those issues would still have had to be tried. Therefore, when directed to SLS, the admissions sought were not of substantial importance. Such admissions would have had no effect on the disposition of the case. Because the admissions requested from SLS would not have expedited the trial, the trial court erred in imposing sanctions.

DISPOSITION

The portion of the judgment awarding damages for past medical expenses is reversed and the matter is remanded for further proceedings. The balance of the judgment is affirmed. The order directing SLS to pay cost of proof damages to Maseba under Code of Civil Procedure section 2033.420 is reversed. Martinez is awarded his costs on appeal to be paid by appellants. The remaining parties shall bear their own costs on appeal.

_____

LEVY, Acting P.J.

WE CONCUR:

DETJEN, J.

PEÑA, J.