

SHARON RAHMANIAN, Plaintiffs and Appellants, v. BRENT NELSON, Defendant and Respondent.

B191612

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR

2007 Cal. App. Unpub. LEXIS 3060

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PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Los Angeles County, No. LC069370. Michael Harwin, Judge.

DISPOSITION: Affirmed.

COUNSEL: Law Offices of Eugene Fisher and Eugene Fisher for Plaintiff and Appellant.

Calendo, Puckett, Sheedy and DiCorrado and Christopher M. Sheedy for Defendant and Respondent.

JUDGES: MANELLA, J.; WILLHITE, Acting P.J., SUZUKAWA, J. concurred.

OPINION BY: MANELLA

OPINION

Appellant Sharon Rahmanian brought suit against respondent Brent Nelson for negligence and trespass. Her complaint arose from an incident in which water leaking from Nelson's property caused a mudslide on Rahmanian's property. After trial, she was awarded \$110,000 by the jury. She contends the trial court erred in permitting the jury to hear evidence and argument about funds she received from a collateral source. She further contends the jury awarded inadequate damages [*2] as a consequence of this evidence and of having been given an erroneous instruction on mitigation of damages. We conclude any error that occurred was harmless or invited, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Certain essential facts are not in dispute. Nelson's house is located above the house owned by Rahmanian, where Rahmanian lived with her parents and siblings. On or about June 27, 2003, a water leak on Nelson's property caused the slope located at the back of Rahmanian's property to collapse. This led to a mudslide that covered Rahmanian's pool and patio area. Rahmanian brought suit against Nelson for negligence and trespass. Nelson did not dispute liability. The primary issue at trial was the amount of damages.¹

1 The parties also disputed whether a second, smaller mudslide occurred two weeks later, whether a tarp laid to protect the hillside caused excessive runoff onto Rahmanian's property when it rained, and whether Nelson cut or trimmed trees located on Rahmanian's property without permission. Any damage arising from these acts were included in Rahmanian's overall damage claim.

[*3] *Evidence at Trial*

Rahmanian's witnesses, including three experts and her parents, testified that the mudslide caused damage to the pool and patio, and to the French doors at the back of the house. In addition, mud or muddy water entered the house, causing damage to everything located near the doors, including carpets and drapes. Subsequently, holes had to be drilled in the stucco to dry out the walls and prevent mold. Rahmanian's physical damage expert testified that to repair the slope would cost approximately \$75,000, plus \$24,440 to re-landscape the slope. According to the expert, to repair the damage to the pool and patio area and the interior and exterior of the house would cost approximately \$134,000, for a total of \$233,486 for physical damages.

Rahmanian and her parents further testified that following the incident the backyard and pool became unus-

able. Rahmanian's real estate expert testified that the value of the unusable facilities was \$1,153 per month, and that loss of use damages would total more than \$40,000 by the time the area could be repaired. Rahmanian also sought compensation in an unspecified amount for the physical symptoms and mental suffering she had [*4] experienced since the mudslide.

Witnesses testifying on behalf of Nelson testified that the mudslide could not have caused appreciable damage to the patio or pool. They also questioned the need to drill holes in the stucco and whether water or mud caused any damage to the interior of the house. The defense damage expert estimated it would cost \$89,371 for repairs and re-landscaping. Of that amount \$9,701 was for repairs to the pool and the remaining \$79,670 was for repairing and re-landscaping the slope.

References to Funds from Collateral Source

During the trial, there were three references to money Rahmanian had received from a collateral source.² In opening statement, apparently anticipating a defense of failure to mitigate, Rahmanian's counsel argued that she did not have the money for repairs in part because she "put out \$20,000 for the cleanup out of her pocket." Defense counsel responded by stating during his opening statement: "You'll hear testimony that Ms. Rahmanian's been paid over \$20,000 and hasn't used any of that to try to take care of this property." Rahmanian's counsel immediately objected. The court overruled the objection and told defense counsel to "move [*5] on." Defense counsel finished his opening statement without further mention of the funds.

2 The funds were apparently from Rahmanian's insurance carrier.

The next reference occurred during Rahmanian's cross-examination by defense counsel. The following exchange occurred: "[Q:] You did get money though toward the repair of your property, correct? [A:] I kind of got reimbursed for that \$20,000 that I spent out of my own pocket. [Q:] Kind of, huh? What's 'kind of'? I mean did you get the cash?" At that point, Rahmanian's counsel interposed an objection based on "collateral source." Defense counsel withdrew the latter question, and Rahmanian's counsel did not obtain a ruling on the objection. Nor did he move to strike the answer to the first question.

Finally, during cross-examination of Rahmanian's physical damage expert, defense counsel asked whether "at one point[,] [Rahmanian] received . . . \$20,000." Rahmanian's counsel objected on relevance grounds. The objection was sustained. Defense counsel [*6] then asked: "Ms. Rahmanian has testified that she received

\$20,000 with respect to issues related to this claim. Are you aware of that?" Rahmanian's counsel interposed an objection based on the collateral source rule. The court stated: "The testimony has already been received; consequently, the objection is overruled." The witness answered that he was aware. Defense counsel went on to ask whether Rahmanian used any of the funds for repairs on the property or the house, but the witness did not know.

Jury Question

During deliberations, the jury asked: "Does Ms. Rahmanian still have the \$20,000 given to her, and is that money she gets in addition to what we award?" Rahmanian's counsel initially suggested that the court simply answer "yes." The court rejected that suggestion and Rahmanian's counsel proposed the following language: "That issue is not before you." When defense counsel proposed alternative wording -- "You should continue your deliberations, and do not concern yourself with that issue" -- Rahmanian's counsel did not object. Instead, he described the proposed language as "okay" and "as good . . . as we're going to get between us." The court ultimately responded to the [*7] jury's question by saying: "You should not consider this issue in your deliberations. Please continue your deliberations."

Verdict and Post-Trial Motions

The jury awarded Rahmanian the following damages: \$80,000 for slope repair; \$21,000 for other property damage; \$5,000 for loss of use; and \$4,000 for emotional distress.

Rahmanian moved for a new trial on grounds of inadequate damages. The moving papers contended that the information concerning funds Rahmanian received from a collateral source should not have been allowed into evidence and that it confused the jury. Rahmanian also moved for disclosure of the names and addresses of jurors in order to determine whether the jury committed misconduct by improperly considering Rahmanian's receipt of collateral funds in its calculation of damages. The court denied both motions. A timely appeal followed. The primary issue raised on appeal is whether the introduction of evidence concerning funds received by Rahmanian from a collateral source infected the jury's verdict, requiring reversal and retrial.

DISCUSSION

I

Collateral Source Rule

There is no dispute that, under the collateral source rule, "if an injured [*8] party receives some compensa-

tion for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor." (*Smock v. State of California* (2006) 138 Cal.App.4th 883, 886, quoting *Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 6, 84 Cal. Rptr. 173.) The parties also agree that the \$20,000 received by Rahmanian represented funds from a collateral source and fell within this rule.

Evidence of funds received from a collateral source is generally excluded from trial because "[t]o permit the defendant to tell the jury that the plaintiff has been recompensed by a collateral source for his . . . costs might irretrievably upset the complex, delicate, and somewhat indefinable calculations which result in the normal jury verdict." (*Helfend v. Southern Cal. Rapid Transit Dist.*, *supra*, 2 Cal.3d at pp. 11-12.) As Nelson points out, there are exceptions to the exclusionary rule where defendant makes a "'persuasive showing' that such evidence is of 'substantial probative value'" for purposes other than directly reducing [*9] damages on a dollar for dollar basis. (*Arambula v. Wells* (1999) 72 Cal.App.4th 1006, 1015.) For example, a trial court might permit evidence that the plaintiff received payment of wages or medical benefits during a period of alleged disability in order to establish a motive for malingering. (*Ibid.*; *Hrnjak v. Graymar, Inc.* (1971) 4 Cal.3d 725, 730-731, 94 Cal. Rptr. 623.) However, in order to permit such evidence to be introduced, the trial court must "weigh the relevance and probative value of evidence of plaintiff's receipt of collateral benefits against the inevitable prejudicial impact such evidence is likely to have on the jury's deliberations." (*Hrnjak v. Graymar, Inc.*, *supra*, at p. 732.) If a party wishes to inform the jury about a collateral source of compensation such as insurance coverage, well established authority and *Evidence Code section 352* "require the trial court to assess the prejudicial effect of telling the jury about insurance coverage, even with appropriate cautionary instructions, against the probability that the party who seeks to present evidence of insurance coverage can show [*10] a proper relationship between the coverage and an issue in the case." (*Helfend v. Southern Cal. Rapid Transit Dist.*, *supra*, 2 Cal.3d at p. 16.) Nothing in the record here indicates that the trial court engaged in this balancing process or that the decision to allow the jury to hear about the \$20,000 received by Rahmanian from a collateral source was the result of a reasoned exercise of the court's discretion. Therefore, the evidence was not properly introduced.

II

Trial Court's Rulings

Based on the above analysis, we agree that the trial court erred in overruling the objection to defense counsel's reference to collateral source funds received by Rahmanian in the opening statement. Rahmanian's counsel may have created a potential basis for relevance by describing his client as struggling to afford the cleanup and unable to pay for repair and refurbishment. However, defense counsel was not entitled to bring up receipt of funds from a collateral source without complying with the procedures outlined in *Helfend* and *Hrnjak* and obtaining a favorable ruling from the court. (See *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 127, 116 Cal. Rptr. 713 [*11] [lawyer should not "state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence . . ."].)

The second time the topic of collateral funds came up -- when defense counsel asked Rahmanian whether she received money for the repair of her property, no objection was raised. Her answer -- "I kind of got reimbursed for that \$20,000 that I spent out of my own pocket" -- became part of the evidentiary record. Rahmanian's counsel objected to the followup question, causing defense counsel to withdraw it, but did not move to strike the prior answer. Where an objection is not made "at the earliest opportunity, i.e., before the improper question is answered, or, if this is not feasible, by motion to strike immediately thereafter," the objection is forfeited for purposes of appeal. (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 372, p. 461.)

The topic was raised for the third time during the cross-examination of Rahmanian's physical damage expert. At this point, Rahmanian's counsel interposed an appropriate objection. The trial court overruled the [*12] objection because "[t]he testimony has already been received." The trial court was correct that evidence of collateral source funds was part of the record before the jury because Rahmanian's counsel had failed to object or move to strike when a similar question was directed to Rahmanian. It was incorrect in its apparent assumption that Rahmanian's counsel was precluded from objecting to an improper question because he failed to object to an earlier question on the same topic. (See 3 Witkin, Evidence, *supra*, § 374, p. 463 ["If a party offers some inadmissible evidence of a certain type without objection by the opposing party, this should not make similar evidence admissible for the rest of the trial."].)

III

Prejudice

Although we agree the trial court twice erred in overruling Rahmanian's timely objections, we find no prejudice resulted. "A verdict or finding shall not be set

aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless . . . [t]he [appellate court] is of the opinion . . . that the error or errors complained of resulted in a miscarriage of justice." (*Evid. Code* β 353 [*13] .) "In civil cases, a miscarriage of justice should be declared only when the reviewing court, after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Huffman v. Interstate Brands Corp.* (2004) 121 Cal.App.4th 679, 692.)

The jury question sent to the court during deliberations indicates that the introduction of evidence concerning Rahmanian's receipt of funds from a collateral source did lead to some confusion. But by posing the question, the jury allowed the parties and the court to prevent the evidence from tainting the verdict. The court told the jury "not [to] consider [the] issue." As Rahmanian did not object to the language of the court's instruction -- indeed, her counsel supplied the key wording used by the court -- she cannot now raise an objection concerning its clarity. Because the court, with the assistance of counsel, was able to intervene during deliberations to prevent the jury from acting on the misleading information it received concerning the \$20,000, the jury's verdict could not have [*14] represented an improperly discounted award. No miscarriage of justice occurred.³

³ For the same reason, we reject appellant's argument that defense counsel's conduct in referring to, and in inquiring about, the \$20,000 warrants reversal. Any impact counsel's comments and questions may have had was nullified by the court's admonition to the jury not to consider the amount received by Rahmanian. (See *Dominguez v. Pantalone* (1989) 212 Cal.App.3d 201, 211-212, 260 Cal. Rptr. 431 ["[T]he effect of misconduct can ordinarily be removed by an instruction to the jury to disregard it.]

IV

Mitigation Instruction

Rahmanian argues that the trial court erred by giving an instruction concerning mitigation of damages. She maintains that the only evidence to support the instruction was the improperly admitted evidence of receipt of funds from a collateral source. Preliminarily, we note that Rahmanian failed to include any of the jury instructions in the record on appeal. It is up to the [*15] party challenging a judgment to provide an adequate record to enable the appellate court to assess error. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295, 240 Cal. Rptr. 872.)

In determining whether a jury has been correctly instructed, an appellate court must consider the instructions as a whole. The existence of error ""is not to be determined from a consideration of parts of an instruction or from particular instructions, but from the entire charge of the court."" (*People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1074, quoting *People v. Monteverde* (1952) 111 Cal.App.2d 156, 168, italics omitted.) "Failure of a separate instruction or part of an instruction to contain all of the conditions and limitations that may be gathered from the entire text is not ground for holding the instruction erroneous." (*Id.* at p. 1075.) The failure to include the jury instructions in the record precludes meaningful consideration of this issue.

Moreover, even were we to assume the mitigation instruction was erroneously given, we would find the error harmless for the reasons discussed above. The parties and the court may well have confused the jury [*16] about whether or how to use the information presented at trial concerning funds received from a collateral source. But because the jury expressed its confusion during deliberations, the matter was cleared up. We presume the jury followed the court's final directive to "not consider" the \$20,000 in calculating damages.

DISPOSITION

The judgment is affirmed.

MANELLA, J.

We concur:

WILLHITE, Acting P.J.

SUZUKAWA, J.