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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RAMON ORTIZ,

Plaintiff and Appellant,

v.

WMC-A, INC., et al.,

Defendants and Respondents.

G052592

(Super. Ct. No. 30-2012-00608184)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thierry Patrick Colaw, Judge. Affirmed.

Garcia, Artigliere, Medby, & Faulkner, Stephen M. Garcia and David M. Medby for Plaintiff and Appellant.

Horvitz & Levy, David S. Ettinger, Mark A. Kressel; Dummit, Buchholz & Trapp, Craig S. Dummit and Harmon B. Levine for Defendants and Respondents.

\* \* \*

Plaintiff Ramon Ortiz sued defendants WMC-A, Inc., and Integrated Healthcare Holdings, Inc., a hospital and its owner (collectively the Hospital), for professional negligence and violation of the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15600 et seq.; the Elder Abuse Act). A jury returned a special verdict finding the Hospital was *not* “negligent in [its] care and treatment of [Ortiz],” but also that the Hospital’s employees “failed to use that degree of care that a reasonable person in the same situation would have used in the provision of *medical and/or custodial care* for physical and mental health” needs. (Italics added.) The court reconciled these findings by suggesting the jury could have intended the latter finding to apply only to “custodial care,” which is not the same as “care and treatment” described in the first finding. On appeal, Ortiz contends this amounted to improper implied findings in favor of a special verdict. We conclude the verdict form’s question requesting a “yes” or “no” answer to a compound question rendered the jury’s answer ambiguous. The court properly resolved the ambiguity in light of the evidence at trial, and with the ambiguity properly resolved, the verdict was not inconsistent.

Ortiz also contends jury misconduct requires a new trial. He waived that argument on appeal, however, by failing to mention any of the adverse evidence the court credited in rejecting his argument.

## FACTS

We begin by noting that the record in this case is anemic. We have no record of the pleadings or the evidence presented at trial. Our record is limited to minute orders during trial, the judgment, the motion for a new trial and corresponding papers, trial transcripts of closing arguments, a discussion about jury instructions, and discussions about the verdict form.

What we can glean from the record is that two causes of action were tried to a jury: professional negligence and neglect under the Elder Abuse Act. The trial took place over the course of approximately six weeks. The parties agreed on the basic factual context of the case: Ortiz has lifelong mental illness and was admitted to the hospital for treatment. He apparently suffered a neck injury while staying at the hospital, though the circumstances of how he was injured were disputed.

The jury was presented with a special verdict form. Under a bold-faced heading labeled "**NEGLIGENCE**," question No. 1 asked: "Do you find by a preponderance of the evidence that [the Hospital was] negligent in [its] care and treatment of [Ortiz]?" Answer: No. Under a bold-faced heading labeled "**DEPENDENT ADULT ABUSE**," question No. 5 asked: "Do you find by clear and convincing evidence that [the Hospital]'s employees failed to use that degree of care that a reasonable person in the same situation would have used in the provision of medical and/or custodial care for physical and mental health needs?" Answer: Yes. The jury then found the Hospital did not act with recklessness, fraud, malice, or oppression. At this point, the verdict form instructed the jury not to make any further findings regarding causation or damages.

Upon receiving the verdict form, and prior to calling the jury into court to read the verdict, the court called counsel for both sides into chambers. The court's principal concern was that the jury did not make any findings on causation and damages (which was what the verdict form instructed, given their prior answers). The court offered to ask the jury to make findings on causation and damages, but counsel for Ortiz declined, conceding the verdict was correct. Ortiz's counsel brought up the fact that the verdict was inconsistent, calling it a "nightmare," but agreed "there's nothing we can do about it now." The court entered judgment for the Hospital.

Ortiz filed a motion for new trial on two grounds: inconsistent verdict and jury misconduct. On the jury misconduct front, Ortiz filed declarations from two jurors

and argued the jury failed to follow the law, considered matters outside the record, refused to deliberate, and concealed bias during voir dire. In its opposition, the Hospital presented declarations from two jurors that contradicted Ortiz's jury declarations.

The court denied the motion for a new trial. It found the professional negligence and elder abuse claims were legally distinct and factually distinct in light of the evidence at trial: "The jury verdict makes sense. The jury here concluded that defendants were not negligent in their care and treatment of plaintiff, i.e. professionally negligent (Question Number 1), but factually decided that hospital employees did commit 'neglect' in their 'medical and/or custodial care' of plaintiff for physical and mental health (Question Number 5), just not recklessly so (Question Number 6), so as to support award of the enhanced remedies of the Elder Abuse Act. [¶] Therefore, this court cannot conclude as a matter of law that there is no possibility of reconciling the Jury Special Verdict findings under any possibility of the evidence and instructions pursuant to *Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1183. For example, the failure to report a bloody nose on 4/19/12 did not involve any nursing or medical care or treatment, it was neglect, not professional negligence." The court also found there was no juror misconduct, finding much of Ortiz's jury declarations inadmissible, and crediting the Hospital's juror declarations where they contradicted the others. Ortiz timely appealed.

## DISCUSSION

Ortiz first contends the verdict was inconsistent and the court erred by implying findings in favor of the verdict, a challenge we review de novo. (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 358.) Specifically, question No. 5 of the verdict form asked about neglect in "medical *and/or* custodial care," and the court implied a finding that the jury intended custodial care, rather than medical care, to

harmonize the jury's responses. Ortiz supports this argument by pointing out the court cited *Lambert v. General Motors* (1998) 67 Cal.App.4th 1179 (*Lambert*), a case that is not only inapplicable to the circumstances of this case but articulates a legal standard at odds with the appropriate legal standard here.

We recognize initially that Ortiz is correct insofar as the court applied the wrong standard for inconsistencies in a special verdict form. In *Lambert*, the court was tasked with reconciling an apparently conflicting special verdict with a *general* verdict. “The first principle of inconsistent *general and special* verdicts is that they must be harmonized if there is any ‘possibility of reconciliation under any possible application of the evidence and instructions. If any conclusions could be drawn thereunder which would explain the apparent conflict, the jury will be deemed to have drawn them.’” (*Lambert, supra*, 67 Cal.App.4th at p. 1183, italics added.) By contrast, “A court reviewing a special verdict does not infer findings in favor of the prevailing party [citation], and there is no presumption in favor of upholding a special verdict when the inconsistency is between two questions in a special verdict.” (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1092.)

However, where, as here, the verdict form is ambiguous, a complementary set of standards apply. “Prior to the jury’s discharge, the trial court is obliged upon request to ask the jury to correct or clarify a potentially ambiguous or inconsistent verdict. [Citation.] If the verdict is ‘merely ambiguous,’ a party’s failure to seek clarification of the verdict before the jury is discharged may work a forfeiture of the purported defect on appeal, ‘particularly if the party’s failure to object was to reap a “technical advantage”’ or to engage in a “litigious strategy.”’ [Citations.] However, absent a forfeiture, courts may properly interpret a ‘merely ambiguous’ verdict in light of the pleadings, evidence, and instructions. [Citation.] In contrast, if the special verdicts are ““hopelessly ambiguous”” or inconsistent, failure to seek clarification from the jury does not create a forfeiture, and the proper remedy is ordinarily a retrial on the issues

underlying the defective verdict.” (*Little v. Amber Hotel Co.* (2011) 202 Cal.App.4th 280, 299-300; *Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456.)

Applying these standards here, Question No. 5 was ambiguous. The jury was required to give a yes-or-no answer to a compound question about “medical *and/or* custodial care.” The easiest way to resolve this ambiguity would have been to request that the jury clarify its finding. Despite having ample opportunity, Ortiz did not request a clarification. That put the court to the task of resolving the ambiguity in light of the evidence at trial, which it did, finding the jury’s responses “make sense” in light of the evidence. Since Ortiz did not provide us a record of the evidence at trial, we cannot address whether the court abused its discretion in determining that the ambiguity was capable of resolution by reference to the evidence (and, in any event, Ortiz does not address that issue — he presents a purely legal issue). But the court did not err *per se* by interpreting the jury’s ambiguous response to question No. 5 in light of the evidence. That interpretation is bolstered by our observation that the answer to the negligence question was under a large heading labeled “**NEGLIGENCE**,” whereas the answer to the ambiguous question was under a section of the verdict form labeled “**DEPENDENT ADULT ABUSE**.”

Of course, the verdict would still be inconsistent if the jury’s answer to question No. 1, finding no professional negligence, was inconsistent with a finding of custodial neglect. But it is not. A claim for custodial neglect under the Elder Abuse Act is distinct from a professional negligence claim, as our high court explained in *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 786, “[E]lder abuse as defined in the [Elder Abuse] Act, even when committed by a health care provider, is not an injury that is ‘directly related’ to the provider’s professional services. That statutory elder abuse may include the egregious withholding of medical care for physical and mental health needs is not determinative. As a failure to fulfill custodial duties owed by a custodian

happens also to be a health care provider, such abuse is at most incidentally related to the provider's professional health care services. [¶] That is, claims under the Elder Abuse Act are not brought against health care providers in their capacity as providers but, rather, against custodians and caregivers that abuse elders and that may or may not, incidentally, also be health care providers. Statutorily, as well as in common parlance, the function of a health care provider is distinct from that of an elder custodian, and 'the fact that some health care institutions, such as nursing homes, perform custodial functions *and* provide professional medical care' [citation] does not mean that the two functions are the same."

Consistent with this distinction, the CACI verdict form for neglect under the Elder Abuse Act asks whether the defendant failed to use reasonable care "in assisting in personal hygiene or in the provision of food, clothing, or shelter." (CACI VF-3102.) It is unclear to us why this language, or similar language, was not used here, but it would have properly delineated professional negligence from custodial neglect and eliminated the ambiguity and any potential inconsistency.

Regardless, the important point is this: The jury verdict was not inconsistent given the court's interpretation of the jury's answer to question No. 5. The jury could consistently find no professional negligence, yet find custodial neglect. Thus, no new trial was required.

Ortiz's final contention is that jury misconduct required a new trial, but he forfeited that contention on appeal. In his opening brief, Ortiz presented *only* the declarations from his jurors. He did not mention the existence of the Hospital's rebuttal declarations, much less that the court credited the Hospital's juror declarations over Ortiz's. The Hospital, naturally, pointed out this omission in its respondent's brief. Ortiz, in his reply brief, ignored juror misconduct altogether.

"A party who challenges the sufficiency of the evidence to support a finding must set forth, discuss, and analyze *all* the evidence on that point, *both favorable and unfavorable*." (*Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177

Cal.App.4th 209, 218, italics added.) “Accordingly, if, as [plaintiff] here contend[s], ‘some particular issue of fact is not sustained, [he is] required to set forth in [his] brief *all* the material evidence on the point and *not merely* [his] own evidence. Unless this is done the error is deemed to be waived.’” (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) Quite clearly, that was not done here, and thus the juror misconduct argument has been forfeited.

#### DISPOSITION

The judgment is affirmed. Respondents shall recover their costs incurred on appeal.

IKOLA, J.

WE CONCUR:

FYBEL, ACTING P. J.

THOMPSON, J.