Not Reported in Cal.Rptr.3d, 2007 WL 3149164 (Cal.App. 2 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2007 WL 3149164 (Cal.App. 2 Dist.))

Court of Appeal, Second District, Division 7, California.
Isabel C. ROCHA, Plaintiff and Respondent,
v.
Martin RAYGOSA et al., Defendants and Appellants.

No. B191591.
(Los Angeles County Super. Ct. No. BC327512).
Oct. 30, 2007.

APPEAL from a judgment of the Superior Court of Los Angeles County, Irving Feffer, Judge. Affirmed.
Kinkle, Rodiger and Spriggs, Guillermo W. Schnaider, Robert P. Long and Allison Hilgers; Dunn **Koes** LLP, Pamela E. Dunn, Daniel J. **Koes** and Mayo L. Makarczyk for Martin Raygosa, Isabel Sanchez and Felix Sanchez Enterprises, Inc., Defendants and Appellants.

Law Offices of Gary A. Dordick, Gary A. Dordick and David Azizi for Isabel Rocha, Plaintiff and Respondent.

PERLUSS, P.J.

***1** Martin Raygosa, Isabel Sanchez and Felix Sanchez Enterprises, Inc ., also known as L.A. Marker (collectively, the L.A. Marker defendants), appeal from the judgment entered after a jury awarded Isabel C. Rocha nearly $3.7 million in damages in this personal injury lawsuit. On appeal the L.A. Marker defendants contend the trial court erred in denying their request either to continue the trial or to exclude expert testimony on the ground Rocha had not previously identified the subject of the testimony in discovery. They also contend the court erred in denying their new trial motion based upon newly discovered evidence and excessive damages. We affirm.

FACTUAL AND PROCEDURAL HISTORY

1. *The Accident*

Rocha suffered major fractures to her right tibula and fibula in September 2003 when her sedan was struck by a van driven by Martin Raygosa in the course and scope of his employment with L.A. Marker. Following surgery to repair her shattered leg, Rocha was fitted with a foot-to-thigh cast and, apart from attending physical therapy appointments, was ordered to remain on bed rest.

A few weeks after the automobile accident, Rocha fell on the sidewalk returning from a medical appointment. The fall caused "a change in the angulation" of her fractured leg, necessitating a second surgery. Hereafter, Rocha was again placed in a foot-to-thigh cast and ordered to remain on bed rest for 10 months.

2. *The Lawsuit and Pretrial Motions To Continue the Trial or Exclude Testimony*

On January 20, 2005 Rocha sued the L.A. Marker defendants for personal injuries she sustained in the accident. The L.A. Marker defendants admitted liability and conceded there was no comparative or contributory negligence on Rocha's part. The case was scheduled to go to trial on February 14, 2006 solely on the amount of Rocha's damages resulting from the accident.

On February 6, 2006 the L.A. Marker defendants filed an ex parte application for an order continuing the February 14, 2006 trial date, asserting they had learned for the first time on February 1, 2006, while taking the deposition of Rocha's designated expert, Dr. Lawrence Miller, that Miller intended to testify part of Rocha's chronic pain might be attributable to a condition in her right foot called Reflexive Sympathetic Dystrophy (RSD), a painful

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and chronic nerve condition. The L.A. Marker defendants requested a 60-day continuance of the trial to allow Dr. Martin D. Levine, a neurologist, to examine Rocha and respond to Miller's RSD testimony. Alternatively, the L.A. Marker defendants argued Rocha had not previously identified a foot injury in her discovery responses, some of which were submitted after Miller's diagnosis, and requested the court exclude Miller's testimony concerning RSD. The trial court denied the application. The ex parte hearing was not transcribed, and the court's reasons for its ruling do not appear in the record.

On the first day of trial the L.A Marker defendants reasserted orally their request to exclude Miller's testimony concerning RSD on the ground Rocha had not complained of pain in her right foot. Rocha opposed the request, arguing it should have been made by written motion and, in any event, both her discovery responses and her medical records were replete with notations that she continuously complained of pain in her right ankle. The court denied the request to exclude Miller's testimony. No explanation for the court's ruling was requested by the L.A. Marker defendants, and none was provided in the record.

3. *The Trial on the Amount of Damages*

***2** Rocha presented testimony concerning her physical injuries, medical treatments past and future, pain and suffering and other damages resulting from the accident: Dr. Kyle Landauer, an orthopedic surgeon who had examined Rocha eight or nine times beginning in September 2004, testified Rocha frequently complained of ankle, back and knee pain and walked with a limp that favored her right leg. Landauer believed her leg fracture had healed by September 2004 and it was safe for Rocha to put weight on her right leg. Nonetheless, he noticed in September 2004 that Rocha's ankle was swollen and suspected the swelling was caused by the bone creating callus when it heals. He concluded the ankle condition was chronic and Rocha would likely have some permanent right ankle restriction of motion. He also believed her back pain was caused, at least in part, by her limp and recommended medication and physical therapy. He diagnosed Rocha with lumbar strain with facet syndrome and recommended pain management treatment and facet blocks. He referred Rocha to a pain specialist, who also recommended facet block injections.

Dr. Miller, a board certified specialist in physical medicine and rehabilitation and a clinical professor at the University of California at Los Angeles, examined Rocha in November 2005. He found Rocha suffered from foot and back pain. She had difficulty putting weight on her right foot and leg and had a chronic limp. Miller testified it was likely Rocha suffered from RSD in her foot. He explained the physical manifestations of RSD, such as swelling, had ameliorated, but the pain component of the condition had become chronic. Miller opined Rocha would always walk with a limp, the limp would aggravate pain in other areas and it would be difficult for her to be physically active.

Rocha, who was 30 years old at the time of the accident, testified she has had pain every single day since the accident and the pain intensifies whenever she places weight on her right foot. Physically active prior to the accident, Rocha explained she has not been able to play sports or go on outings with her young children since the accident. She is unable to run, jump, hop and finds it difficult to carry anything. She has difficulty getting out of bed and walking to the bathroom. Rocha has not been able to return to her position as accounts receivable clerk at the United Auto Group, where she had been earning $2,300 per month at the time of the accident. Sandra Schneider, Rocha's vocational rehabilitation counselor, testified, at best, because of her chronic pain, Rocha will only be able to work 50 percent of the time.

Jan Roughan, a registered nurse who works with Dr. Miller and specializes in helping to create "life care plans" (a cost estimate of a patient's medical needs over time), estimated the present value cost of Rocha's future medical care resulting from injuries sustained in the accident to be $1.5 to $1.6

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million, a calculation predicated on a life expectancy of approximately 76 years.

*3 Dr. Tamorah Hunt, an economist, estimated Rocha's economic losses at $1,827,622, allowing $76,078 for past lost wages, $549,082 for future wages, $1,110,045 for future medical care costs, $16,022 for contingent items and $76,435.32 for medical specials. Hunt explained her calculations were based on Rocha's current age, her annual income at the time of the accident, her ability to work 50 percent of the time in the future and a projected retirement age of 61.7 years.

The defense presented a single witness, Dr. Arthur Kreitenberg, an orthopedic surgeon, who examined Rocha in August 2005. Kreitenberg testified that, at the time he examined her, Rocha's leg fractures had healed. He acknowledged Rocha had suffered a "big injury" and would likely continue to have some "residual pain and residual limp" as a result, but expected both her pain and her limp to be stable throughout her life. Kreitenberg explained it was common for people with a chronic limp to also suffer from back pain, but believed, based on the imaging of her leg and back and his physical examination of her, Rocha was embellishing her limp. Although Rocha complained of pain in her ankle, she had normal range of motion in her ankle. Although he acknowledged that, theoretically, the pain component of RSD could persist without pathology, he explained he did not "entertain that diagnosis" because Rocha did not complain of pain in her foot. Moreover, he questioned Dr. Miller's RSD diagnosis because it was premised on an initial foot trauma that had not, in fact, occurred in this case. Kreitenberg also disputed all of Rocha's evidence concerning future medical treatment, stating he did not believe future medical treatment (apart from some home exercises) was warranted.

4. *The Verdict*

In its special verdict the jury awarded Rocha $3,685,008.32 in damages, calculated as $152,513.32 in past economic loss, including lost earnings and medical expenses, $1,532,495 in future economic loss, including lost earnings and medical expenses, $500,000 in past noneconomic loss and $1.5 million in future noneconomic loss, including pain and suffering.[FN1]

FN1. Pursuant to a stipulation of the parties, the judgment against Isabel Sanchez, the registered owner of the vehicle, was limited to $15,000.

5. *The New Trial Motion*

The L.A. Marker defendants filed a timely motion for a new trial based on newly discovered evidence-a surveillance videotape taken after the trial had concluded, purportedly showing Rocha walking without a cane and without a limp. In addition, they argued Rocha's failure to disclose a foot injury in her own interrogatory responses and the nature of Dr. Miller's testimony in the narrative description of his testimony (Code Civ. Proc., § 2034.260, subd. (c)(2)) had resulted in unfair surprise at trial. Included with the motion was the declaration of Dr. Levine, whose unavailability to examine Rocha in February 2006 had prompted the L.A. Marker defendants' eve-of-trial request for a continuance. In his declaration Levine opined Miller's RSD diagnosis was improper absent consultation with RSD specialists and additional testing to rule out other conditions. In addition, based on his review of Rocha's medical records, Levine observed Rocha did not have other indicia of RSD, including allodynia and hyperpathia. Finally, the L.A. Marker defendants asserted the more than $3.6 million verdict was excessive in light of the evidence.

*4 The trial court denied the new trial motion without viewing the surveillance video, concluding it should have been obtained prior to trial. The court also refused to vacate or reduce the verdict. Although the court stated its initial reaction to the damage award had been that it was "too much money," upon "reflection and hearing the arguments and taking a dispassionate look at the matter," it concluded the award was not excessive or without evidentiary support.

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DISCUSSION

1. *The Trial Court Did Not Err in Denying the Request To Continue the Trial or in the Alternative To Exclude Expert Testimony on RSD*

The L.A. Marker defendants contend the trial court erred in denying their request, made in an ex parte application several days before trial, to continue the trial to allow Rocha to be examined and evaluated by Dr. Levine for RSD or to exclude Dr. Miller's RSD testimony under Code of Civil Procedure section 2023.030 [FN2] for misuse of the discovery process. They insist either a continuance for the purpose of examination or exclusion of the RSD evidence was necessary because they did not learn Miller would testify Rocha suffered from RSD until they took Miller's deposition two weeks before tri- al.

> FN2. Code of Civil Procedure section 2023.030, subdivision (c), provides, "The court may impose an evidence sanction by an order prohibiting any party engaging in the misuse of the discovery process from introducing designated matters into evidence."

a. *The trial court did not err in denying the L.A. Marker defendants' request to exclude RSD-related testimony*

Citing Rocha's expert witness designation provided in accordance with Code of Civil Procedure section 2034.260, subdivision (c), which stated Dr. Miller would testify "to all of plaintiff's rehabilitation issues including but not limited to the cost and necessity of all life care needs," the L.A. Marker defendants contend Miller's testimony on RSD was diagnostic in nature and therefore outside the scope of his expert witness designation. Although they are correct a trial court may exclude expert witness testimony when "the narrative statement fails to disclose the general substance of the testimony the party later wishes to elicit from the expert at trial" (*Bonds v. Roy* (1999) 20 Cal.4th 140, 148-149), the L.A. Marker defendants did not assert either in their ex parte application or in connection with their oral motion in limine at trial that Miller's testimony was outside the scope of the expert designation and for that reason warranted exclusion of the testimony. Accordingly, to the extent they claim the evidence should have been excluded on that basis, they have forfeited the argument on appeal. (See, e.g., *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 412 [failure to raise issue or argument in trial court results in forfeiture of the point on appeal]; *Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 988-989 [party may not raise issue on appeal not presented in trial court]; see also *Ernst v. Searle* (1933) 218 Cal. 233, 240-241.

The L.A. Marker defendants also insist exclusion of Dr. Miller's RSD-related testimony was warranted because Rocha did not identify either a foot injury or RSD in her responses to interrogatories asking her to describe her injuries, which she served after she had been examined by Dr. Miller. [FN3] To the extent Rocha was experiencing pain in her foot or was aware of Miller's diagnosis of RSD, her failure to include the information in the supplementary interrogatory responses was improper and may well have justified the imposition of evidentiary sanctions. (See Code Civ. Proc., §§ 2030.220, subd (a) ["[e]ach answer in a response to interrogatories shall be as complete and straightforward as the information reasonably available to the responding party permits"]; 2023.030, subd. (c) [trial court has discretion to impose evidence sanction against party engaged in misuse of the discovery process]; cf. *Thoren v. Johnston & Washer* (1972) 29 Cal.App.3d 270, 274 [court has power to bar testimony of witness whose identity was willfully excluded from an answer to an interrogatory seeking names of witnesses].) Moreover, even if Rocha was unaware of Miller's diagnosis because she did not speak to him after the examination, Rocha's counsel had a duty to attempt to obtain information from Rocha's own designated expert that would have been responsive to the supplemental interrogatory. (See, e.g., *Gordon v. Superior Court* (1984) 161 Cal.App.3d 157, 167 [party responding to in-

terrogatories " 'cannot plead ignorance to information which can be obtained from sources under his control' "].)

> FN3. Interrogatory number 6.2 asked Rocha to "[i]dentify each injury you attribute to the [accident] and the area of your body affected." In her initial response Rocha stated, "Right leg, multiple fractures in my tibia and fibula; fractured tail bone, lower back, left hip, mental anguish, depression, stress, fear." On October 25, 2005 the L.A. Marker defendants served Rocha with supplemental interrogatories asking her to supplement any prior interrogatory response that was inaccurate or incomplete. On January 25, 2006, after the L.A. Marker defendants filed a motion to compel, Rocha served her supplemental interrogatory responses but did not alter her answer to interrogatory number 6.2, even though she had been examined by Dr. Miller on November 18, 2005.

***5** Had the trial court excluded RSD evidence on the ground the interrogatory was intentionally evasive or willfully false, we likely would have upheld the decision as being within the court's broad discretion in these matters. (See, e.g., *Thoren v. Johnston & Washer, supra,* 29 Cal.App.3d at p. 274 [substantial evidence supported trial court's conclusion interrogatory response was "willfully false" and thus imposition of evidentiary sanction was within court's discretion].) However, in denying the request to exclude the evidence, the trial court impliedly found Rocha's supplemental interrogatory response was neither willfully false nor intended to obfuscate her injuries so as to gain unfair advantage at trial. Indulging all inferences in favor of the court's implied findings, as we must (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571), we cannot say the court's determination that her conduct did not warrant the evidentiary sanction was outside the parameters of its broad discretion. (*Bonds v. Roy, supra,* 20 Cal.4th at pp. 145-146 [appellate court reviews under "abuse of discretion" standard trial court's decision to exclude evidence for misuse of discovery process]; *Britts v. Superior Court* (2006) 145 Cal.App.4th 1112, 1123; see also *Milton v. Montgomery Ward & Co., Inc.* (1973) 33 Cal.App.3d 133, 140 [party's "inadvertent failure to respond [to interrogatory] with technical perfection is very different from willful failure to respond to an unambiguous interrogatory"].)

b. *The trial court did not err in denying the L.A. Marker defendants' request for a continuance of the trial*

The trial court also acted well within its discretion in denying the motion for a continuance on the ground an additional medical examination would not have aided the defense. (See *People v. Sakarias* (2000) 22 Cal.4th 596, 646-647 [appellate court reviews order denying motion to continue for abuse of discretion]; *Forthmann v. Boyer* (2002) 97 Cal.App.4th 977, 984.) As evidenced by the testimony of Dr. Kreitenberg, the defense medical expert, RSD that has "burned out" but remains as a chronic pain syndrome is not apparent on examination.[FN4] In any event, to the extent the L .A. Marker defendants were surprised by Dr. Miller's deposition testimony concerning RSD, there were means other than a continuance of the trial to address it. In particular, the L.A. Marker defendants could have sought to augment their own expert witness designation to include Dr. Levine (or another neurologist) to offer an opinion as to Miller's RSD diagnosis. (See Code Civ. Proc., § 2034.610, subd. (a)(1) & (2) [party who has engaged in a timely exchange of expert witness information may seek leave to augment party's expert witness with an additional witness or amend his or her expert witness declaration with respect to the general substance of testimony the previously designated expert is expected to give]; see also *Dickison v. Howen* (1990) 220 Cal.App.3d 1471, 1477-1478 [leave to augment defendant's expert witness list properly granted where designated defense medical expert indicated in preinterview with defense counsel that he believed de-

fendant's treatment met proper standard of care, but then changed his mind and testified differently at deposition].) Alternatively, instead of waiting until the new trial motion to offer his impeaching testimony, the L.A. Marker defendants could have called Levine to testify at trial as an undesignated expert to impeach Miller's testimony. (Code Civ. Proc., § 2034.310, subd. (b) [party may call undesignated expert witness to impeach testimony of an expert witness]; *Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 922-923["[a] party may impeach an expert witness by contradiction, i.e., by showing the falsity of any matter upon which the expert based his opinion. This can be done either by cross-examination of the expert or by calling other witnesses to offer evidence showing the nonexistence or error in the data upon which the first expert based his opinion"], italics omitted.) On this record, indulging all intendments in favor of the ruling, as we must (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133), we cannot say the trial court's denial of the request to continue the trial was "arbitrary, capricious or patently absurd and result[ed] in a miscarriage of justice." (*In re Karla C.* (2003) 113 Cal.App.4th 166, 180 [discretion is abused only when trial court's ruling is arbitrary, capricious or patently absurd and results in a manifest miscarriage of justice].)

> FN4. Dr. Kreitenberg testified, "There is nothing that I would see on a current examination that would suggest there was RSD in the past." In response to the question, "So from a mere examination you couldn't tell" whether RSD had existed, Kreitenberg responded, "Correct."

2. *The Trial Court Did Not Err in Denying the New Trial Motion*

***6** The L.A. Marker defendants contend the court erred in denying their new trial motion based on newly discovered evidence and excessive damages, both of which are grounds for new trial. (Code of Civ. Proc., § 657, subds. 4 & 5.) The "trial judge is accorded a wide discretion in ruling on a motion for new trial and ... the exercise of this discretion is given great deference on appeal." (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872; see also *Enyart v. City of Los Angeles* (1999) 76 Cal.App.4th 499, 508.) Still, in reviewing an order denying a new trial, as opposed to an order granting a new trial, "we must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error[, if any,] was prejudicial." (*Decker,* at p. 872; *Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1160.)

a. *The trial court did not err in concluding the videotape did not constitute newly-discovered evidence warranting a new trial*

To obtain a new trial based on newly discovered evidence, the moving party must establish the evidence is both material and newly discovered and could not, with reasonable diligence, have been discovered and produced at trial. (Code Civ. Proc., § 657, subd. 4 [new trial authorized based on "[n]ewly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial"].) The L.A. Marker defendants claim the court abused its discretion in refusing to even consider the surveillance videotape purportedly showing Rocha walking without a cane and without a limp. They assert their application satisfied each of the three statutory requirements because the evidence was "newly discovered"; it was material to the trial in which Rocha had claimed a permanent limp; and the evidence could not have been discovered sooner with reasonable diligence. As to the reasonable diligence requirement, they refer to the declaration of Manuel Palacio included with the new trial motion. Palacio explained he had made three separate attempts before the February 14, 2006 trial (on January 26, 27 and 28, 2006) to obtain videotape evidence, but had been unable to capture any videotape of Rocha that "would have shown the extent to which she was able to walk or climb stairs."

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The trial court concluded the L.A. Marker defendants had not shown the evidence could not, with reasonable diligence, have been obtained sooner. Although the L.A. Marker defendants insist three, 6-hour attempts to obtain such evidence in the days leading up to the trial are sufficient, we cannot say the trial court abused its discretion in concluding otherwise. Having determined reasonable diligence had not been exercised, the trial court was under no obligation to view the tape to determine its materiality. (See, e.g, *Enyart v. City of Los Angeles, supra,* 76 Cal.App.4th at p. 508 [all three statutory requirements of materiality, newly discovered evidence, and reasonable diligence must be present in order for court to grant new trial based on newly discovered evidence].)

b. *The trial court did not err in denying the new trial motion on the ground the damages were not excessive*

***7** Code of Civil Procedure section 657, subdivision 5, authorizes the trial court to vacate the jury's verdict and grant a new trial if it finds the damages awarded are excessive. "[T]o state that the damages awarded by the jury are excessive is simply one way of saying that the evidence does not justify the amount of the award." (*Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 61; see also *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 64.) A damage award is not justified by the evidence " ' "if it is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice." ' " (*Bertero,* at p. 64.) The trial court is "in a far better position than the appellate court to determine whether a damage award was influenced by 'passion or prejudice.' " (*Shroeder v. Auto Driveaway Co.* (1974) 11 Cal .3d 908, 919.) Thus, in reviewing the trial court's ruling denying a new trial, we do not reweigh the evidence or resolve issues of credibility; we may reverse only when the award is not supported by substantial evidence. (*Ibid.; Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1078 [in reviewing new trial motion based on excessive damages, "[a]ll presumptions favor the trial court's ruling, which is entitled to great deference because the trial judge, having been present at trial, necessarily is more familiar with the evidence and is bound by the more demanding test of weighing conflicting evidence rather than our standard of review under the substantial evidence rule"].)

The L.A. Marker defendants assert the jury's award of $1,532,495 for future economic losses was not supported by the evidence and bears no relationship to any actual or possible future costs that plaintiff will incur as a result of the accident. They urge that the testimony of Rocha's experts, estimating the need and costs of such items as lifetime massage therapy ($225,459) and orthopedic shoes ($59,000), for example, was "outrageous." Apart from characterizing the testimony in disparaging terms, however, the L.A. Marker defendants do not explain, or even attempt to explain, in what way the testimony supporting these items is insubstantial as a matter of law.

The L.A. Marker defendants' argument the $2 million award for noneconomic losses was excessive ($1.5 million for future noneconomic loss, $500,000 for past noneconomic loss) fares no better. Noneconomic loss, such as pain and suffering, may be awarded as part of compensatory damages when it is "a natural concomitant of the physical injury, inferable from the fact of the injury and the common experience of humanity." (*Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1664; cf. *Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 894-896 [jury may quantify pain and suffering based on human experience without necessity of experts].) The jury is entrusted with vast discretion in determining the amount of noneconomic damages, and its verdict will not be vacated if supported by substantial evidence. (*Bertero v. National General Corp., supra,* 13 Cal.3d at p. 65.)

***8** The noneconomic losses portion of the verdict was amply supported by the evidence. According to the evidence at trial, Rocha's future medical care and expenses as a result of her injuries suffered in the accident will total more $1.1 mil-

lion, with past medical expenses totaling more than $75,000. As a result of the accident, Rocha has a permanent limp and debilitating chronic pain. She must use a cane to walk long distances. Her ability to work and engage in an active life has been severely curtailed. She uses a bedpan at night because of her mobility limitations. On this record the jury's pain and suffering award, approximating that for economic losses, cannot be said to be excessive as a matter of law.[FN5]

> FN5. Much of the L.A. Marker defendants' argument as to the excessiveness of the damage award is predicated on assertions the videotape surveillance shows Rocha can walk without a cane and, purportedly, without much of a limp. However, that evidence was not before the jury. Having determined the evidence did not warrant a new trial, we do not consider it in evaluating the court's determination the award was not excessive.
>
> The L.A. Marker defendants also observe Rocha's opposition to the new trial motion was not timely filed. In denying the new trial motion, the trial court determined the L.A. Marker defendants had not met their burden to demonstrate entitlement to a new trial. The opposition, tardy or not, was not relevant and did not impact the court's determination.

5. *The Trial Court Did Not Err in Ordering the Complaint To Be Amended To Name Felix Sanchez Enterprises, Incorporated as a Defendant*

In her initial complaint Rocha named Raygosa (the driver of the van), Isabel Sanchez and Felix Sanchez as defendants, as well as Doe defendants she could not identify. After learning at Raygosa's deposition the name of his employer was L.A. Marker, Rocha timely substituted L.A. Marker as a defendant. L.A. Marker thereafter filed an answer generally denying the allegations in the complaint. At trial L.A. Marker requested to be dismissed, stating for the first time Raygosa's actual employer was Felix Sanchez Enterprises, Inc. (FSE), doing business as L.A. Marker, and L.A. Marker itself was a fictitious business entity. The court refused to dismiss L.A. Marker. Instead, citing FSE's actual participation in the lawsuit from the inception, the court ordered the complaint amended to name FSE as a defendant with L.A. Marker's status as a fictitious business entity correctly identified.

On appeal FSE contends that, because Rocha did not actually name FSE or serve it with the complaint, the court erred in adding it to the lawsuit. We find no error in allowing the amendment to correct the misnomer in the complaint. (See Code Civ. Proc., § 473, subd. (a)(1) ["[t]he court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect"]; see also Code Civ. Proc., § 474 [authorizing substitution of Doe defendant]; *Streicher v. Tommy's Electric Co.* (1985) 164 Cal.App.3d 876, 884 [absent prejudice, court has no discretion to refuse substitution of Doe defendant when amendment is timely and plaintiff was ignorant of true identity at time complaint filed].)

DISPOSITION

The judgment is affirmed. Rocha is to recover her costs on appeal.

We concur: WOODS and ZELON, JJ.

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