CIARAN BARRY et al., Plaintiffs and Respondents,

v.

TWENTIETH CENTURY FOX FILM CORPORATION et al., Defendants and Appellants.

No. B221785.

Court of Appeals of California, Second District, Division Four.

Filed September 20, 2011.

Lewis Brisbois Bisgaard & Smith and Raul L. Martinez, for Defendants and Appellants.

Grassini & Wrinkle and Lars C. Johnson, for Plaintiffs and Respondents.

Twentieth Century Fox Film Corporation (Fox) and Flight Productions, Inc. (Flight), appeal from a judgment based on a jury verdict for respondent Ciaran Barry, a director of photography injured during a film production. We conclude substantial evidence supports the jury's finding that Barry was not a common law employee of Flight. We decline to consider the legal merits of appellants' belated theory that Barry was Flight's statutory employee. Therefore, the workers' compensation exclusivity rule does not preclude Barry's recovery against Flight. Counting on *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198 (*Hooker*), appellants contend that no evidence supports Fox's liability because Fox did not retain control over the safety conditions on the set and did not affirmatively contribute to Barry's injury, whether or not Barry was Flight's employee. But on the special verdict form, the jury was directed to skip the questions relevant to the analysis under *Hooker* if it found that Barry was not Flight's employee. In response to a separate question on the same form, the jury found that Fox was negligent, and this separate finding of negligence is supported by substantial evidence. Appellants also contend that damages were excessive and that Barry's trial counsel committed misconduct. We disagree with these contentions.

We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

In November 2003, Barry, an Irish national, signed a non-union crew deal memo to work as a camera operator on the film "Flight of the Phoenix." During the principal shoot, which occurred between October 2003 and February 2004, he also worked as second unit director of photography. In April 2004, Barry signed a separate non-union crew deal memo to work as a director of photography on a miniature shoot for the film. David Starke, Senior Vice President of Production at Fox, countersigned on behalf of Flight. On June 4, 2004, during

the miniature shoot of a simulated airplane crash in Namibia, a model airplane launched off a dolly flew farther than expected and went through the plywood structure from inside which Barry was filming.[1] Both of Barry's legs were broken. Nerve damage on his lower left leg caused his foot to claw, which means that his toes curl up and under.

In 2006, Barry and his wife sued Fox and Flight for negligence. In 2009, the case was tried to a jury, which found that Barry was not an employee of Flight. The jury awarded $1,317,000 in economic damages and $2,634,000 in noneconomic damages to Barry, as well as $75,000 for loss of consortium to Mrs. Barry, who also is a respondent in this appeal. The jury apportioned 75 percent of fault to Fox and 25 percent to Flight. Fox and Flight moved for judgment notwithstanding the verdict (JNOV) and for a new trial. The trial court denied the motions. This timely appeal followed.[2]

DISCUSSION

I

Appellants' first challenge is to the jury's finding that Barry was not a common law employee of Flight. The finding is significant because, were Barry an employee of Flight, the workers' compensation exclusivity rule would bar his civil action against the production company. (See §§ 3600, subd. (a), 3602, subd. (a); *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 812-813 [workers' compensation is employee's exclusive remedy against employer for compensable injury sustained in course of employment].)

Appellants ask us to review the jury's determination of Barry's employment status de novo because it raises an issue of law. In a related argument, they urge us to conclude that a jury should not be allowed to determine on an ad hoc basis and without regard for the purpose of the workers' compensation system whether an employment relationship exists. Assuming that this argument may be raised for the first time on appeal because it presents a legal issue (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 24), we see no reason to depart so drastically from established law.

The existence of an employment relationship is a question of fact when based on disputed evidence or inferences, and the trier of fact's decision is reviewed for substantial evidence to support it. (*S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 349 (*Borello*).) If the evidence is undisputed or if it supports only one reasonable conclusion, the question becomes one of law. (*Id.* at pp. 349, 369; *Angelotti v. The Walt Disney Co.* (2011) 192 Cal.App.4th 1394, 1404 (*Angelotti*).) The substantial evidence standard of review applies, whether the trier of fact is a jury in a civil case or an administrative agency in a workers' compensation case. (Cf. *Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 175 (*Kowalski*) with *Borello,* at p. 349.) When reviewing the sufficiency of the evidence, the court views the evidence in favor of the judgment, defers to the trier of fact's determination of credibility, and resolves factual conflicts in favor of the prevailing party. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925-926.) While the

Workers' Compensation Act must be liberally construed to extend benefits to injured employees (§ 3202), when it is raised as an affirmative defense in a civil action, the defendant bears the burden of pleading and proving its application. (*Doney v. Tambouratgis* (1979) 23 Cal.3d 91, 96-97 (*Doney*).)

In an effort to avoid the deferential substantial evidence standard of review, appellants argue that the evidence in this case was undisputed and compelled the conclusion that Barry was Flight's employee as a matter of law. It is this argument we address here.

An employee is a person "in the service of an employer under any . . . contract of hire." (§ 3351) Excluded from the presumption of employee status are independent contractors, who render services "for a specified recompense for a specified result, under the control of [their] principal as to the result of [their] work only and not as to the means by which such result is accomplished." (§§ 3353, 3357.) At common law, the existence of an employment relationship requires weighing several factors, the most important of which is the right to control the manner and means of accomplishing the work. (*Borello, supra,* 48 Cal.3d at p. 349.) The issue of control in the film and television industry has understandably come up more often in cases of injured stunt performers than directors of photography. The cases are nevertheless instructive on the issue of control in film production.

Most recently, in *Angelotti, supra,* 192 Cal.App.4th 1394, a stunt performer working under the direction of the stunt coordinator and the film's director did not dispute that the production company (whose employee the stunt coordinator was) had a right to control his work. (*Id.* at p. 1405.) It is unclear who employed the film's director in that case. In *Caso v. Nimrod Productions, Inc.* (2008) 163 Cal.App.4th 881 (*Caso*), an injured stuntman sued a television show's director and stunt coordinators and their respective loan-out companies. The defendants argued that they were employed by the same production company that employed the stuntman, limiting his recovery to workers' compensation benefits under section 3601, subdivision (a). The director testified that the stunt coordinators reported to him, and he reported to the production company, which "retained control over the entire production, including the ability to create, edit and even transform the production as it saw fit." (*Id.* at p. 890.) The *Caso* court resolved the issue of control in favor of the defendants. (*Id.* at p. 892) Even though the director and stunt coordinators "had a good deal of discretionary authority in their respective positions," the production company had "ultimate authority over the production, both substantive and aesthetic . . . ." (*Ibid.*) In an earlier case, *Von Beltz v. Stuntman, Inc.* (1989) 207 Cal.App.3d 1467, in which an injured stuntwoman sued the film's director and his loan-out company, the director similarly claimed to be the stuntwoman's co-employee. The evidence indicated the production company had control over the director, but because the director's employment contract was not with the production company, he was held not to be the company's employee. (*Id.* at pp. 1486-1487.) In all these cases, there was either evidence or a concession that the production company had a right to control the person whose employment status was at issue.

In this case, the extent of Flight's control over production was contested and its right to control the details of Barry's work was not conclusively established. Barry testified that, as director of photography, he would collaborate with the film's director on the overall concept but would then control the technical details of a particular shot. On cross-examination, he admitted that the film director could override his decisions. The director, John Moore, similarly testified that while the process of filming is collaborative, he has the final say. The evidence was thus undisputed that the director had the right to control the details of Barry's work. But the director gave conflicting testimony as to who employed him. Moore testified that he had a deal with Fox under which he showed his projects to Fox before any other studio, he had made four films for Fox, Fox paid him and he answered to Fox. On this basis, he initially concluded that he worked for Fox. On cross-examination, Moore was asked whether Flight was a signatory on the Director's Guild of America (DGA)'s agreement. He responded he believed it was and concluded he "could" have been working for Flight under his DGA contract. Appellants argue that Moore's initial conclusion was speculative but the second one was not. We disagree. Moore's second conclusion was based on his belief that Flight was a signatory on the DGA's union contract, but appellants presented no evidence that it was and did not clarify for the jury how Moore was hired for this film or who controlled him. Thus, it was never conclusively established that Moore worked for or was controlled by Flight.

Appellants presented expert testimony that, in general, the producer or production entity has the right to control the director of photography. But appellants point us to no evidence in the record, and we have found none, establishing that anyone at Flight had the right to control the details of Barry's work, and the evidence was in conflict as to whether Fox or Flight actually controlled the miniature shoot. Appellants' theory at trial was that Fox and Flight were corporate entities completely independent of each other and that their production finance distribution agreement left the film's production to Flight. The actual agreement was not produced. Appellants' expert named several individuals who signed it on behalf of Flight, but none of them testified at trial. Nor have we been pointed to testimony about the role of any identified Flight producer during the miniature shoot.

Instead, the testimony was that Starke, Fox's Senior Vice President of Production, was present during principal photography and at the miniature shoot. He was listed as first assistant director on the crew list for the day of the incident, but he claimed that that was an error. He testified that he was on set to see the film finished but had no ability to control physical details of production. Mark Koivu, the special effects technician on the miniature shoot, testified to the contrary that Starke was "running everything" on set and was "a supervisor of the other supervisors." Director Moore did not remember Starke doing anything other than observing and commenting on the shots. But he noted that Starke's role was to make sure the film was shot on schedule, everyone got their jobs done, and the director did not "go[] nuts and wait[] for the sunset for ten days and not film[] anything." The evidence was thus in conflict as to whether Flight, Fox, or both controlled the film's production.

To sum up, although the evidence was undisputed that the film director had the right to control Barry, there was no evidence conclusively establishing that Flight had the right to control the director or that the director worked for Flight. The evidence supported the inference that Fox, rather than Flight, controlled the director and the production. Because the evidence on this significant factor was in dispute, we decline to rule as a matter of law that Barry was Flight's employee. Drawing all inferences in favor of the judgment, there was substantial evidence from which the jury could conclude that Barry's work was not controlled by Flight, the entity that had hired him.

The determination of Barry's employment status requires weighing some "secondary" factors, including "(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee." (*Borello, supra,* 48 Cal.3d at p. 351.)

It is undisputed that Barry's work as a director of photography was part of Flight's regular business as a film production company. This factor favors Flight. It is also undisputed that Barry has a distinct occupation, that he is highly skilled and that he works on jobs for various production companies. These three factors favor Barry. There was expert testimony that a production entity has the right to control a director of photography, but as we have explained, the evidence of who had the right to control Barry's work was in dispute. Whether the parties believed that they were creating an employment relationship also was disputed. Although the form crew deal memo Barry signed referred to him as an employee, that label is not dispositive. (*Kowalski, supra,* 23 Cal.3d at p. 176.) There was testimony that Flight carried workers' compensation insurance but no evidence whether Barry received any worker's compensation benefits on account of his injury. Barry believed himself to be self-employed, and he testified that he received no benefits from Flight, nor did Flight withhold taxes from his paycheck. Contrary to appellants' argument on appeal that these matters are irrelevant, they inform Flight's position on its relationship with Barry. (See *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 305 (*Bowman*).) All the more so because no representative of Flight testified at trial as to the company's position. We see no evidence that Barry could be terminated at will or that he was hired for one week at a time with no obligation to rehire, as was the case in *Angelotti, supra,* 192 Cal.App.4th at page 1408.

The rest of the factors do not favor either party. The crew deal memo for the miniature shoot stated that Barry would be paid a set amount for a six-day week. This payment arrangement was different from the one for the principal photography, for which an hourly, daily, and weekly compensation was provided. As originally presented to him, the deal was to participate in a six-day shoot. The actual shoot lasted two and a half weeks, and during one of the interruptions Barry returned to Ireland to work on a another project. He testified that

he was paid only when he submitted an invoice, and he thought he invoiced only once, for the whole job. He provided some of the tools, such as light and spot meters, viewing filters, and the like, but the film camera equipment was rented because individuals do not own such equipment. This evidence does not establish an employment relationship as a matter of law, and the jury could have reasonably inferred that Barry was in fact hired as an independent contractor for the miniature shoot. We conclude that the jury's finding that Barry was not an employee of Flight was supported by substantial evidence.

Appellants argue that CACI No. 3704 incorrectly foreclosed the jury's consideration of the secondary factors by instructing that if Flight had the right to control how Barry performed his work, then Barry was Flight's employee. The jury was to consider the additional factors only if Flight did not have the right to control Barry. A year after this case was tried, we decided in *Bowman, supra,* 186 Cal.App.4th at page 303, that CACI No. 3704 was incorrect because the jury must weigh all factors. We found the instructional error to be prejudicial in that case because the jury found the plaintiff, a dump truck owner and driver, to be an employee of the City of Los Angeles even though there was substantial evidence supporting the conclusion that he was an independent contractor. (*Id.* at p. 304-305.)

Because the instruction in this case was requested by appellants, respondents argue that any error was invited. The invited error doctrine "bars an appellant from attacking a verdict that resulted from a jury instruction given at the appellant's request." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1653.) That is so even when, as in this case, a subsequent retroactive appellate decision has adopted the appellant's position. (*Id.* at p. 1655.) Even were this issue not barred by the invited error doctrine, appellants cannot show a reasonable probability that the erroneous instruction misled the jury. (See *Bowman, supra,* 186 Cal.App.4th at p. 304.) The jury found that Barry was not an employee of Flight. To make this finding as instructed, the jury must have concluded first that Flight did not control Barry, and then must have considered the additional factors. Under these circumstances, the error in CACI No. 3704 did not prevent the jury from considering all pertinent factors.

II

In their post-trial motions, appellants argued for the first time that Barry was a statutory employee under section 3351.5, subdivision (c).[3] That section defines the term "employee" to include "[a]ny person while engaged by contract for the creation of a specially ordered or commissioned work of authorship in which the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire, as defined in [s]ection 101 of [t]itle 17 of the United States Code, and the ordering or commissioning party obtains ownership of all the rights comprised in the copyright in the work." Section 101 of the Copyright Act defines a "work made for hire" as "(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work . . . if the parties expressly agree in a written instrument

signed by them that the work shall be considered a work made for hire." (17 U.S.C. § 101.) The trial court rejected appellants' argument because they cited no authority that section 3351.5, subdivision (c) supersedes the common law distinction between employee and independent contractor. The court also noted that the evidence on this issue was in dispute, and Barry was not questioned about it.

Respondents argue that deciding this issue on appeal when the facts supporting the existence of any work-for-hire agreement were not fleshed out at trial would be fundamentally unfair. We agree. Initially, we reject appellants' contention that because the workers' compensation exclusivity rule goes to the court's lack of subject matter jurisdiction over respondents' civil claims, so long as appellants pled the rule as an affirmative defense, they can raise new theories to support that defense at any time. In *Doney, supra,* 23 Cal.3d at page 98, the court held that its refusal to consider a workers' compensation defense on appeal did not improperly confer subject matter jurisdiction by waiver. When a plaintiff pursues a common law remedy, the trial court has subject matter jurisdiction until the application of the workers' compensation statute is demonstrated "by the defendant through setting up the affirmative defense of coverage in responsive pleadings and proceeding to prove the existence of the requisite conditions." (*Id.* at pp. 98-99.) Respondents here were pursuing a common law remedy, and the trial court had subject matter jurisdiction until appellants pled and proved that Barry was Flight's employee. Appellants' answer pled generally that plaintiffs' claims were barred by the workers' compensation exclusivity rule. But appellants also had to prove the factual basis for this defense in order to demonstrate that the trial court lacked subject matter jurisdiction. They did not do so.

At trial, appellants proceeded solely on the theory that Barry was Flight's common law employee. The jury rejected that theory. Although evidence about Barry's contracts to work in various capacities on various portions of the film was presented at trial, none of it was offered in relation to the statutory employee theory. The 2003 and 2004 crew deal memos Barry signed were admitted at trial. The same one-page preprinted form was used in both. It incorporates by reference a list of documents, including the producer's "Terms and Conditions," which "[e]mployee agrees to initial and adhere to." The "Terms and Conditions" form attached to the 2003 crew deal memo contains an ownership provision, which states in relevant part that all employee work products "are within the scope of Employee's employment and are being specially ordered . . . by Producer for use as part of a motion picture." The producer is their sole owner. Barry made changes to and initialed several terms, and his initials appear at the end of this two-page form, but not next to the ownership provision. At trial, he was asked no questions about this provision. He testified that there were no attachments to the 2004 crew deal memo he signed. Starke, Fox's Senior Vice President of Production, testified that the 2003 crew deal memo and its attachments accompanied the 2004 crew deal memo, when he countersigned it. The evidence was thus undisputed that Barry was not provided with a new copy of the "Terms and Conditions" form to initial when he signed the 2004 crew deal memo. The dispute at trial was only whether the attachments to the earlier crew deal memo accompanied the later crew deal memo, but the relevance of that dispute to appellants' statutory employee theory did not become apparent until appellants pursued the theory after trial. Even then, the factual and legal

basis for it was a moving target. Appellants initially cited only the first part of the work-for-hire definition in the Copyright Act, which pertains to work created by employees. In reply, for the first time, they cited the second part of the definition, which pertains to the specially commissioned work referenced in section 3351.5, subdivision (c). They initially relied on Barry's 2003 crew deal memo with Flight to establish the work-for-hire agreement. Only in reply did they suggest that the agreement was incorporated by reference in the 2004 crew deal memo.

It is an established principle of appellate review that "[t]he theory upon which a case was tried in the court below must be followed on appeal. An exception to this rule is `where a question of law only is presented on the facts appearing in the record.' [Citation.] "`But if the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial the opposing party should not be required to defend against it on appeal." [Citations.]' [Citation.]" (*Strasberg v. Odyssey Group, Inc.* (1996) 51 Cal.App.4th 906, 920 [raising a new issue in reply brief to JNOV motion was too late].) Raising a new theory for the first time on appeal is unfair because the other side did not have an opportunity to attack it factually or legally in the trial court. (*In re Marriage of Moschetta* (1994) 25 Cal.App.4th 1218, 1227.) If respondents had been given a fair warning that a work-for-hire agreement would be at issue in the case, they might have raised fact-based defenses to it at trial, the outcome of which we do not presume to know. (See *ibid.*) Because appellants' statutory employee theory evolved only gradually in the post-trial briefing, we cannot say that respondents were given a fair warning as to what facts or law they needed to attack.

Incorporation by reference requires that the reference to the other document be clear and unequivocal and called to the attention of the other party, who consented to it; and that the terms of the incorporated document be known or easily available to the contracting parties. (*Wolschlager v. Fidelity National Title Ins. Co.* (2003) 111 Cal.App.4th 784, 790.) Neither in the trial court, nor on appeal have appellants cited these requirements or provided any coherent analysis of incorporation by reference. Thus, we consider forfeited any argument that, as a matter of law, a work-for-hire provision was incorporated by reference in Barry's 2004 crew deal memo. (See Cal. Rules of Court, rule 8.204(a)(1)(B); *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2.)

And we are not persuaded by appellants' argument that Barry's 2003 crew deal memo is the operative "written instrument" for purposes of the Copyright Act and section 3351.5, subdivision (c). That argument is premised on the assumption that Barry understood and agreed that the film itself was a work made for hire and therefore all of Barry's work on the film, including work commissioned under another contract, was made for hire. Neither the language used in the ownership provision of the "Terms and Conditions," nor the Copyright Act supports this assumption. Under the Copyright Act, a work made for hire is work commissioned for use "as a part of a motion picture." (17 U.S.C. § 101.) A motion picture is "a work of authorship." (17 U.S.C. § 102(a)(6).) The ownership provision provides that an employee's "work products"—that is, "[a]ll the results and product of Employee's services"—are ordered "for use as part of a motion picture," and the work products (not the

motion picture) "are considered `a work made for hire.'" We therefore cannot conclude that, as a matter of law, in 2003 Barry agreed the entire film was a work made for hire.

Because we cannot conclude that the jurisdictional facts of appellants' statutory employee theory under section 3351.5, subdivision (c) have been fairly and conclusively established, we decline to consider its legal merits.

III

Appellants argue that Fox cannot be liable under *Hooker, supra,* 27 Cal.4th 198 because it neither retained control over safety on the set, nor affirmatively contributed to Barry's injury. Alternatively, they argue that Fox's involvement in the film was not a substantial factor in bringing about his injury under any theory of liability.

In California, a hirer of an independent contractor is not liable to an injured employee of that contractor on theories of vicarious liability under the peculiar risk doctrine set forth in the Restatement Second of Torts, where the contractor's negligence causes the injury. (See *Hooker, supra,* 27 Cal.4th 198, 201 [citing *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253; *Privette v. Superior Court* (1993) 5 Cal.4th 689; Rest.2d Torts §§ 413 & 416.]) Nor may a general contractor be held vicariously liable for injuries to an independent contractor hired by a subcontractor. (*Tverberg v. Fillner Construction, Inc.* (2010) 49 Cal.4th 518, 528-529.) Section 414 of the Restatement Second of Torts provides that a hirer of an independent contractor, "who retains the control of any part of the work, is subject to liability for physical harm . . . caused by his failure to exercise his control with reasonable care." The *Hooker* court concluded that, when a hirer retains control over safety conditions at a worksite and affirmatively contributes to the injury of a contractor's employee, the hirer's liability does not derive from the contractor's negligence and is therefore not vicarious or derivative but rather "*direct* in a much stronger sense of that term." (*Hooker,* at pp. 211-212.)[4]

The jury in this case was instructed with CACI No. 1009B "Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control." The standard jury instruction, as modified, tracks the holding of *Hooker,* directing the jury to make five findings: "1. That [Fox] controlled the set; ¶ 2. That [Fox] retained control over safety conditions at the set; ¶ 3. That [Fox] negligently exercised its retained control over safety conditions on the set; ¶ 4. That Ciaran Barry was harmed; and ¶ 5. That [Fox's] negligent exercise of its retained control over safety conditions on the set was a substantial factor in causing [Barry's] harm." The special verdict form directed the jurors to skip this analysis if they found that Barry was not Flight's employee. In that case, the jury was to decide separately whether Fox and Flight were negligent and whether the negligence of each was a substantial factor in causing Barry's injury. In their post-trial motions for JNOV and a new trial, appellants argued that CACI No. 1009B was incorrect because it allowed the jury to impose liability on Fox without finding that Fox affirmatively contributed to Barry's injuries

and the verdict form was incorrect because it allowed the jury to skip the analysis under *Hooker.*

In this court, appellants do not argue the special verdict form was incorrect. Rather, they challenge the sufficiency of the evidence, claiming that Fox's overall supervision of the film did not meet the *Hooker* test. But the jury did not make any findings under CACI No. 1009B or *Hooker* because the special verdict form instructed it not to do so. While we cannot imply findings in respondents' favor that the jury did not make under the *Hooker* line of questions, appellants do not argue that the special verdict was defective because the jury did not resolve every fact necessary to support a cause of action against Fox. (Compare e.g. *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 531 (*Behr*) [no finding to support fraud by misrepresentation where special verdict form asked jury to find fraudulent concealment but not affirmative misrepresentation]; *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 325-326 [no finding to support battery where special verdict form asked if medical procedure was performed without informed consent rather than without consent].) Nor do appellants contend that because the jury did not make findings under *Hooker,* the special verdict does not support a cause of action for negligence. To the extent that the special verdict may be ambiguous, appellants' failure to raise this issue before the jury was dismissed does not forfeit it, and any ambiguity in the verdict may be avoided by interpreting it in connection with the pleadings, evidence and instructions. (See *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 270 & fn. 30.)

Using the special verdict form and presumably following the court's instructions on negligence, the jury found that Fox was negligent, and that its negligence was a substantial factor in causing Barry's injuries. We review a jury's finding on a special verdict for substantial evidence, resolving conflicts and drawing inferences in favor of the prevailing party. (*Behr, supra,* 193 Cal.App.4th at p. 527.) ""`[W]e have 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 or in the reasonable inferences that may be drawn therefrom." [Citations.]' [Citation.]" (*Ibid.*)

The jury's finding was consistent with respondents' position at trial that Fox was directly involved in production and liable for its own negligence, rather than vicariously liable for Flight's negligence. This finding is supported by substantial evidence. While there was testimony Fox and Flight had agreed to leave the film's production to Flight, the agreement was not presented at trial. Neither side chose to call any representative of Flight. Our review of the record indicates that little if any evidence was presented on the affiliation of the various witnesses at trial with either appellant, and the identification of other individuals attending the shoot with a particular production company was rare even though necessary in light of the presence of other production companies on the set.[5] Thus, the jury was presented with little concrete evidence that anyone at Flight was in charge of production at the miniature shoot. Instead, it heard repeated, albeit conflicting, testimony about the involvement of Starke, Fox's Senior Vice President of Production, in areas of production that were left to Flight.

Starke testified it was the practice at the time that the studio would set up an entity like Flight to hire the non-union film crew. Yet, he countersigned Barry's non-union crew deal memo on behalf of Flight. Starke acknowledged that he, along with the assistant director hired by Flight, was responsible for keeping the film on schedule. He went to the set in Namibia several times to make sure the shoot finished on time and was there when Barry was injured on the second-to-last day of the miniature shoot. Starke acknowledged that the call sheet on that day listed him as first assistant director, and that the first assistant director was responsible for safety and for calling a safety meeting. But he denied that he worked in that position or that he could control production. While Starke's testimony was corroborated by others, it was contradicted by special effects technician Koivu, who testified that Starke was "running everything" on set, "communicating with everyone, getting everything going," and "[i]f there was a question about what would be going on, everyone—they would go to him and see about the grand oversight of the whole thing." On this record, the jury could choose to believe Koivu and the call sheet, and it could infer that Starke, on behalf of Fox, was involved in the actual production of the miniature shoot. We cannot reweigh the evidence.

There also was evidence of miscommunication on the set, as well as conflicting testimony whether a safety meeting was called before the launch of the model airplane. Starke and other witnesses testified that the details of the launch and the manning of cameras were discussed at a safety meeting within a half hour before the launch. According to these witnesses, Koivu and Barry attended the meeting. But Koivu and Barry testified that there was no such meeting. In fact, Koivu testified that he was on the opposite end of the set from Barry during the hour before the launch. He thought that the launch would be shot by a remote camera and did not know that the camera would be manned. Respondents' safety expert testified that a documented safety meeting is required for stunts and special effects.

Additionally, there was evidence of insufficient testing of the launch rig, which consisted of a dolly pulled along tracks by a counterweight mechanism. The model airplane was to be launched from the dolly into a dune where pyrotechnics and balloons were set up to simulate the effect of a crash. Tests had been done with filing cabinets, water tanks, and trash cans launched off the dolly. But because the model plane had not been tested, no one knew how far it would go when launched. Moore, the film's director, realized that he did not know how far the model plane would go, and after talking to others but without further testing he made the final decision where the camera would be set. At the last minute, he also switched places with Barry behind the camera. According to respondents' expert, the lack of sufficient testing was not up to industry standards. Given all of this, if the jury believed that Starke, who was listed as a first assistant director, was in charge of safety on the day of Barry's injury, and that a safety meeting was not held before the launch, it could hold Fox directly liable for Barry's injury.

Moore testified that he answered to Fox, and that there was an "ever-present pressure" to complete a shoot as scheduled, or otherwise he would get phone calls from studio heads. He did not believe the shoot was rushed because of such pressures or because of the need to get it done within the so-called "golden hour" at sunset. The jury could choose to partially

credit Moore's testimony, and it could infer that Starke's presence on set added to the generalized pressure Fox exerted on the director to finish the shoot on time. Thus, whether or not Moore was employed by Fox, the jury could still conclude that the pressure Fox exerted on production caused the shooting of the launch to be rushed. Alternatively, if the jury believed that Moore was employed by Fox, it could attribute any of his negligence to Fox under the general instruction on a corporation's vicarious liability for harm caused by its employees within the scope of their employment (CACI No. 3700). In reply, for the first time, appellants argue that the jury could not base Fox's liability on Moore's negligence because it was not instructed to do so under CACI No. 3701. We will not consider this tardily raised issue because failure to object to an instruction that is incomplete or too general forfeits the issue on appeal. (*Carrau v. Marvin Lumber & Cedar Co.* (2001) 93 Cal.App.4th 281, 297.)

IV

Appellants claim that respondents' trial counsel committed prejudicial misconduct by repeatedly stating that appellants forced Barry into the "Irish welfare system," which caused the jury to award excessive damages. "[A] deliberate attempt by counsel to appeal to social or economic prejudices of the jury, including the wealth or poverty of the litigants" may constitute misconduct. (See *Hoffman v. Brandt* (1966) 65 Cal.2d 549, 552-553 [argument that judgment against her would render defendant indigent was misconduct].) But "a timely and proper objection and a request that the jury be admonished" is required before we consider a claim of misconduct on appeal. (*Horn v. Atchison, T. & S. F. Ry. Co.* (1964) 61 Cal.2d 602, 610.) Appellants do not satisfy that requirement.

In opening statement, respondents' trial counsel stated: "You're going to learn that Mr. Barry was told that—after having a few of his bills paid, that he would then have to—that he was being cut off, in essence; that he could no longer get any more medical expenses or benefits paid; and that he, essentially, would have to go into the Irish welfare system and let the Irish system pay for his health care." There was no objection to this statement. In close succession in rebuttal, respondents' counsel made the following statements: "And I talked to [the Barrys] early on in our office, when they called to tell us about the accident and they called to tell us that the defendants told them to go on Irish welfare. ¶ . . . Where was [appellants' trial counsel] when Mr. Barry was being told to go on Irish welfare?" Both of these statements were objected to on the ground that counsel was not arguing the evidence. Both objections were sustained. There was no objection nor a request for an admonishment based on a claim that counsel was inflaming jury passion and prejudice by making a poverty-related argument, which is the sole basis for appellants' claim of attorney misconduct on appeal. The claim is forfeited. Moreover, we do not agree with the characterization of counsel's statements to the jury. No matter how objectionable on other grounds, the statements purported to recount only what Barry was told. They did not suggest that he actually was or would become indigent.

V

The jury awarded Barry $1,317,000 in economic damages and $2,634,000 in noneconomic damages. In their motion for a new trial, appellants unsuccessfully challenged the award of future economic damages as excessive and speculative and the award of noneconomic damages as excessive and not rationally based. On appeal, they add two new challenges—past economic damages are speculative and unsupported, and the jury verdict was not reduced to present cash value.

The excessiveness of a damage award must be challenged in a motion for a new trial because the trial court can weigh the evidence and judge the credibility of witnesses. (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 122.) Only legal errors, such as "erroneous rulings on admissibility of evidence, errors in jury instructions, or failure to apply the proper legal measure of damages" may be brought on appeal without a motion for a new trial. (*Ibid.*)

Barry claimed $130,000 in past economic damages based on his inability to work on four movies after the injury. For the first time on appeal, appellants argue these damages were not objectively verified because Barry did not show he received firm offers for the movies or what the actual terms of such offers were. To the extent this argument goes to the weight of the evidence presented at trial, it should have been presented to the trial court in the motion for a new trial. Appellants' attempt to analogize the measure of damages in this case to cases of tortuous interference with contract or prospective economic advantage does not raise a legal issue on appeal as there is no authority that the measure of damages for those torts should be used as a measure of past economic damages in a personal injury case.

Appellants' second new argument is that respondents' failure to present evidence of the present cash value of future economic loss constitutes reversible error. Since appellants' motion for a new trial challenged the damages award as excessive, the claim that no evidence on present cash value was presented at trial should have been made in that motion. To the extent that the burden of producing evidence of present cash value at trial is a legal question, no authority has been presented holding or suggesting that a plaintiff alone bears that burden or that the failure to produce such evidence requires a reversal. In *Schiernbeck v. Haight* (1992) 7 Cal.App.4th 869, a medical malpractice case, the court struck an award of interest on periodic payments of future damages because it was based on the trial court's erroneous interpretation of the verdict in present value terms when it had not been so reduced. (*Id.* at pp. 877-878, 882.) The court did not reverse the future damages award itself, or hold that a defendant has no burden to produce evidence on present cash value outside the periodic payment context. (*Id.* at p. 878.) Similarly, in *Wilson v. Gilbert* (1972) 25 Cal.App.3d 607, the court affirmed the award of the plaintiff's lost future earnings despite the lack of evidence of their present cash value. (*Id.* at pp. 613-614.) For comparison, we note that federal law holds that each party has a burden of producing evidence on the element that favors it—the defendant should produce evidence on the discount rate, the plaintiff on the inflation rate. (*Alma v. Manufacturers Hanover Trust Co.*

(9th Cir. 1982) 684 F.2d 622, 626.) When no evidence is produced, the award need not be adjusted. (*Ibid.*) Thus, even were this issue not forfeited, we would decline to reverse the award in the absence of authority requiring a reversal for lack of evidence of present cash value.

As in the trial court, appellants argue here that the damages awarded to Barry for future economic loss and impaired earning capacity were not supported by evidence and were based on speculation. The trial court concluded that the evidence sufficiently established that Barry's career in film and television was on the rise and he was working steadily before the injury. He established that he had lost work, would likely lose work, and would be forced into early retirement. The trial court is in a better position than the appellate court "to evaluate the amount of damages awarded in light of the evidence presented at trial." (*County of Los Angeles v. Southern Cal. Edison Co.* (2003) 112 Cal.App.4th 1108, 1121.) We review the record for substantial evidence and in favor of the prevailing party. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630-631.)

Although appellants purport to challenge the sufficiency of the evidence, their quarrel is primarily with counsel's method for computing the damage award. Respondents' counsel argued for an award of $1,446,000 in economic damages, of which $416,000 was for future lost earnings, $900,000 for lost earning capacity, and $130,000 for past economic damages. The jury awarded a total of $1,317,000 in economic damages. The jury's award is lower than that proposed by respondents' counsel, and because the award is not broken down into categories, the jury's calculation is not apparent from the total verdict. Nevertheless, appellants assume that the jury followed counsel's suggestion that Barry would lose four weeks a year until he is 60 years old and that he would lose $8,000 a week, for a total earning loss of $416,000. Counsel suggested further that Barry would be unable to work after the age of 60 and asked the jury to award $180,000 a year for five years, for a total of $900,000. Appellants maintain that these specific numbers are not supported by evidence. Even were that so, the jury was instructed on both lost earnings (CACI No. 3903C) and lost earning capacity (CACI No. 3903D). It was instructed that respondents did not have to prove the exact amount that would reasonably compensate them for the harm, but the jury should not speculate or guess, and counsel's arguments were not evidence. The jury is ordinarily presumed to follow the court's instructions. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 953, disapproved on another ground in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4.) Notably, appellants do not challenge the jury instructions on damages on any ground or argue that the jury did not follow the instructions.

Appellants argue that Barry was unlikely to experience any future economic loss, that his earning capacity was not impaired because he worked more as a director of photography in the years after his injury than he did before, and that he showed no limitations in his ability to work other than normal aging. These arguments are contrary to applicable law and are belied by the evidence. The evidence at trial was as follows: A neurologist testified that Barry suffered fractures to bones in his lower left leg, as well as nerve damage that causes his first and second toes to curl up and under. He testified that Barry had difficulty walking up and down, stooping, and squatting when he carried his camera. The injury was

permanent. Barry had developed a decompensated gait and would develop additional compensatory maneuvers, which would lead to back problems and would make camera work even more difficult with age. The neurologist opined that Barry would probably need surgery and monitoring by an orthopedist. Barry testified that he had difficulty standing still for a long time, walking on steep terrain, walking sideways, and crouching, all of which impacted his camera work. He had had to modify shots, especially low shots or shots with a hand-held camera, and had lost the opportunity to work on hand-held camera shots in one film because of his uneven gate. He was concerned that these limitations would affect his career.

Barry was extensively questioned about his work history as a camera operator and director of photography. His testimony indicated that his career was on a steady rise at the time of the injury, and his physical limitations affected his work after the injury. At the time of trial, he was 47 years old. As a director of photography, he made on average $9,000 to $9,500 a week. As a camera operator, he made $7,000 a week. He earned $180,000 in 2008. He worked on average eight to 12 weeks on a feature film, and his career goal was to work on three or four films a year. He also worked on shorter films, which took from three days to three weeks, as well as on commercials, which took three to four days. He wanted to work both as a camera operator and director of photography for as long as he could. He explained that, in Europe unlike the United States, both positions are filled by the same individual, and he personally preferred to be a director of photography who operated a camera.

"`Loss of earning power is an element of general damages which can be inferred from the nature of the injury, *without proof of actual earnings or income either before or after the injury,* and damages in this respect are awarded for the loss of ability thereafter to earn money.' [Citation.] ¶ `One's earning capacity is not a matter of actual earnings. The impairment of the power to work is an injury wholly apart from any pecuniary benefit the exercise of such power may bring and if the injury has lessened this power, the plaintiff is entitled to recover. . . .' [Citation.]" (*Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 656-657.) A plaintiff is not precluded from recovering damages because he has returned to work after the injury. This was the case in *Robison v. Atchison, Topeka & S. F. Ry. Co.* (1962) 211 Cal.App.2d 280. The plaintiff there, a switchman, had suffered various soft-tissue injuries in a fall from a moving boxcar. (*Id.* at pp. 282-284.) He had returned to work 75 days after the accident and "had worked steadily for almost four years since the accident in the same kind of employment as that in which he had been previously engaged and had received earnings equal to or greater than those which he had enjoyed before he suffered his injuries." (*Id.* at p. 287.) The court concluded that the increased difficulty in performing his job and the attendant pain and discomfort supported an inference that "he was reasonably certain to suffer a loss of future earnings because of inability to work for as long a period of time in the future as he could have done had he not sustained the accident. [Citations.]" (*Id.* at p. 288.) There was no expert testimony as to his life expectancy or projected loss. (*Id.* at p. 285, fn. 2 [plaintiff's testimony as to his pre-accident pay and life expectancy was submitted to jury as subject to judicial notice].) Thus, appellants are incorrect to insist that permanent disability or expert testimony about the loss

of future earnings is required in this case. (See also *Gargir v. B'nei Akiva* (1998) 66 Cal.App.4th 1269, 1280 [no expert testimony required to establish 16 year old with a knee injury and at risk for a knee replacement would be impaired in her chosen career as a preschool teacher].)

The evidence established that Barry suffered a permanent injury that affected his ability to perform his function as a camera operator and director of photography. His condition will deteriorate with age and may require surgery. The jury heard about his career before and after the injury, his aspirations, limitations and rate of pay. The jury's award is supported by substantial evidence.

Appellants attack the award of $2,634,000 in noneconomic damages on the ground that it was based on an improper formula because, in closing, respondents' trial counsel suggested that the noneconomic damages be double the economic damages, and the jury followed that suggestion. The cited authority does not support appellants' proposition. In *Beagle v. Vasold* (1966) 65 Cal.2d 166, the court allowed counsel to present a per diem argument to the jury, explaining that whatever "mathematical formula" or "manner of calculation is proposed by counsel or employed by the jury, the verdict must meet the test of reasonableness." (*Id.* at p. 179.) The formula rejected in *Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757 was a statistical formula not based upon evidence specific to the plaintiff. (*Id.* at p. 765.) (Cf. *Fagerquist v. Western Sun Aviation, Inc.* (1987) 191 Cal.App.3d 709, 728 [affirming noneconomic damages award 15 times greater than the economic damages award in a wrongful death case], *Shahinian v. Cedars-Sinai Medical Center* (2011) 194 Cal.App.4th 987, 1001 [rejecting contention arbitrator's doubling of economic damages to arrive at emotional distress damages was not reasoned judgment].)

Suggesting that noneconomic damages be proportional to economic damages does not obviate the need that the award still be based on evidence specific to the plaintiff. Here, respondents' counsel argued to the jury facts specific to Barry's past and future pain and suffering stemming from his injury—that he had gone from wheelchair to a walker to crutches over a year, that he had continued discomfort and limitations from his injury he needed to compensate for, and that he was anxious about the further deterioration of his physical condition and its impact on his life and work. Counsel also told the jury that it should consider the noneconomic damages on their own merit rather than simply doubling the economic damages. The jury was instructed that counsel's arguments were not evidence and that no fixed standard exists for deciding the amount of noneconomic damages, as *Beagle v. Vasold, supra,* 65 Cal.2d at page 181 directed. On appeal, we can reverse "only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury." (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 507.) Appellants have not satisfied that standard.

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal.

WILLHITE, J. and SUZUKAWA, J., concurs.

[1] Barry's nationality and the site of the accident do not affect the application of the California workers' compensation statutes because the trial court ruled that the contract of hire was formed in California. (See Labor Code, § 3600.5, subd. (a).) Unless otherwise specified, all subsequent citations are to the Labor Code.

[2] Appellants were jointly represented at trial and are jointly represented on appeal.

[3] The trial court did not remember appellants raising this issue, as they claimed, in chambers after the case had been presented to the jury and noted that they had submitted no jury instructions on it.

[4] The tentative draft of the Restatement Third of Torts (Tent. Draft, No. 7, April 22, 2011) is similar. It provides that direct liability of a hirer of an independent contractor for the hirer's own negligence is governed by sections 55 and 56, which replace sections 410 to 415 of the Restatement Second of Torts. (*Id.,* § 55, com. a, p. 5.) Section 56 in particular recasts section 414 as a duty limitation—a hirer "owes a duty of care only with respect to any part of the work over which [it] has retained control." (*Id.,* § 56, p. 29.)

[5] To give just a few examples, although on appeal respondents claim that special effects technician Koivu worked for Fox, and appellants retort that he worked for Flight, his trial testimony was that he did not remember signing a crew deal memo with either Flight or Fox. No evidence was proferred as to who employed first assistant director Veverka. Appellants now claim Veverka was a Flight employee, citing their trial attorney's stipulation to that effect for an evidentiary ruling and key grip Robert Fisher's deposition testimony that the first assistant director "is a link between production and crew." Fisher, incidentally, worked for Dragon Grips, an African company, and he did not expressly link Veverka and Flight. Barry testified that he received an offer to work on the miniature shoot from Guy Nockels, a unit production manager of the first part of the shoot. Nockels was not an employee of Flight but of a local production company, Namib Films.