

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

ALASKA RENT-A-CAR, INC.

Plaintiff,

vs.

AVIS BUDGET GROUP, INC.; and
AVIS BUDGET CAR RENTAL, LLC,

Defendants.

No. 3:03-cv-00029-TMB

ORDER

[Re: Motions at Docket Nos.
504, 547 and 562]

I. MOTIONS PRESENTED

At Docket No. 504 Defendants Avis Budget Group, Inc. and Avis Budget Car Rental, LLC (collectively "Avis") have moved to amend/correct the judgment under Federal Rule of Civil Procedure 59(e). At Docket 531 Plaintiff Alaska Rent-A-Car, Inc. ("RAC") has opposed the motion and Avis have replied at Docket No. 539.

At Docket No. 547 Avis has moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(b) or, in the alternative, for a new trial under federal Rule of Civil Procedure 59(a). At Docket No. 552, RAC has opposed the motion and Avis has replied at Docket No. 560.

At Docket No. 562 Avis has requested oral argument on the motions. The court has determined that oral argument would not materially aid in the determination of these motions. The request for oral argument at Docket No. 562 is DENIED.^{1/}

^{1/} D.Ak. LR 7.2(a)(3)[B].

II. APPLICABLE LAW

A. Motion for Judgment as a Matter of Law.

Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

* * * *

(b) Renewing the Motion after Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 10 days after the entry of judgment — or if the motion addresses a jury issue not decided by a verdict, no later than 10 days after the jury was discharged — the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

- (1) allow judgment on the verdict, if the jury returned a verdict;
- (2) order a new trial; or
- (3) direct the entry of judgment as a matter of law.^{2/}

The court's discretion to grant a Rule 50(b) motion is severely restricted.

[I]n entertaining a motion for judgment as a matter of law, the court ... may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). Rather, "[w]e must view the evidence in the light most favorable to the nonmoving party ... and draw all reasonable inferences in that party's favor." *Josephs*, 443 F.3d at 1062. "The test applied is whether the evidence permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict." *Id.*

A Rule 50(b) motion for judgment as a matter of law is not a freestanding motion. Rather, it is a renewed Rule 50(a) motion. Under Rule 50, a party must make a Rule 50(a) motion for judgment as a matter of law before a case is submitted to the jury. If the judge denies or defers ruling on the motion, and if the jury then returns a verdict against the moving party, the party may renew its motion under Rule 50(b). Because it is a renewed motion, a proper post-verdict Rule 50(b) motion is limited to the grounds asserted in the pre-deliberation Rule 50(a) motion. Thus, a party cannot properly "raise arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its preverdict

^{2/} As in effect prior to its amendment effective December 1, 2009.

Rule 50(a) motion.” *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir.2003) (citing Fed.R.Civ.P. 50 advisory committee's notes to the 1991 amendments (“A post trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion.”)); *Murphy v. City of Long Beach*, 914 F.2d 183, 186 (9th Cir.1990) (“[Judgment notwithstanding the verdict] is improper if based upon grounds not alleged in a directed verdict [motion].” (brackets in original)); see also Fed.R.Civ.P. 50 advisory committee’s notes to the 2006 amendments (“Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion.”). However, Rule 50(b) “may be satisfied by an ambiguous or inartfully made motion” under Rule 50(a). *Reeves v. Teuscher*, 881 F.2d 1495, 1498 (9th Cir.1989). Absent such a liberal interpretation, “the rule is a harsh one.” *Nat’l Indus., Inc. v. Sharon Steel Corp.*, 781 F.2d 1545, 1549 (11th Cir.1986).^{3/}

B. Motion to Amend Judgment/New Trial.

Rule 59. New Trial; Altering or Amending a Judgment

(a) in General.

(1) *Grounds for New Trial.* The court may, on motion, grant a new trial on all or some of the issues — and to any party — as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

* * * *

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than 10 days after the entry of judgment.

* * * *

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment.^{4/}

The court may grant relief under Rule 59(e) under limited circumstances: an intervening change of controlling authority, new evidence has surfaced, or the previous disposition was clearly erroneous and, if uncorrected, would work a manifest injustice.^{5/}

^{3/} *Equal Employment Opportunity Comm’n v. Go Daddy Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009).

^{4/} As in effect prior to its amendment effective December 1, 2009.

^{5/} See *Circuit City Stores v. Mantor*, 417 F.3d 1060, 1064 (9th Cir. 2005); 389 *Orange* (continued...)

In general, a new trial may be granted under Rule 59(a) where an error occurs at trial that, if not corrected, will result in a miscarriage of justice: (1) the verdict is contrary to the clear weight of the evidence;^{5/} (2) the verdict is based upon false or perjurious evidence;^{7/} (3) misconduct by a party that permeates the proceeding sufficiently to provide conviction that jury was influenced by passion or prejudice;^{8/} or (4) a prejudicial error in instructing the jury.^{9/}

A motion for reconsideration under Rule 59(e) may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.^{10/} Reconsideration is also appropriate when there has been an intervening change in controlling law.^{11/}

III. DISCUSSION

A. Motion at Docket No. 504 (Amend Judgment).

Avis premises the motion to amend the judgment on the basis that the final judgment entered in this case addressed solely the verdict of the jury as against Avis Budget Group, Inc. and Avis Budget Car Rental, LLC. The judgment did not reflect the prior order of this court granting in part Defendants' motion for summary judgment dismissing certain causes of action and certain defendants.^{12/} The court agrees that the judgment as entered, although it perhaps incorporates the prior ruling dismissing this

^{5/}(...continued)

Street Partners v. Arnold, 179 F.3d 656, 665 (9th Cir.1999); see generally 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Fed. Prac. & Proc. Civ. § 2810.1 (2d ed.).

^{6/} *Graves v. City of Coeur d'Alene*, 339 F.3d 828, 839 n. 14 (9th Cir. 2003).

^{7/} *Ace v. Aetna Life Ins. Co.*, 139 F.3d 1241, 1248 (9th Cir. 1998).

^{8/} *Kehr v. Smith Barney*, 736 F.2d 1283, 1286 (9th Cir. 1984).

^{9/} *White v. Ford Motor Co.*, 312 F.3d 998, 1012 (9th Cir. 2002).

^{10/} *Exxon Shipping Co. v. Baker*, 554 U.S. ____, 128 S. Ct. 2605, 2617 n.5 (2008); see generally 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Fed. Prac. & Proc. Civ. § 2810.1 (2d ed.).

^{11/} *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1393 (9th Cir. 1995); see also *School Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

^{12/} Docket No. 335.

action in part by implication, is, on its face, incomplete. Because the omission is essentially clerical, not a substantive alteration of a judgment, the motion does not fit precisely within the parameters of Rule 59(e).^{13/} It does, however, fit squarely within the parameters of a clerical mistake under Federal Rule of Civil Procedure 60(a), which provides:

Rule 60. Relief from a Judgment or Order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

For the foregoing reasons, the motion to amend the judgment at Docket No. 504 will be granted to the extent necessary to render final judgment on the court's prior order granting summary judgment in part to defendants.

B. Motion at Docket No. 547 (Judgment as a Matter of Law/New Trial).

1. *Judgment as a Matter of Law (Rule 50(b)).*

Avis argues that the court erred in not excluding the testimony of Patrick Anderson, RAC's damages expert. Therefore, Avis argues, in the absence of Anderson's testimony, there was insufficient evidence to support the verdict.^{14/} As discussed further below in discussing the motion for a new trial under Rule 59, the court did not err in allowing the testimony of Anderson to be heard.

Alternatively, Avis argues that the Davis testimony was insufficient to support the verdict. The court, having heard the testimony and the evidence presented at trial, independently finds that there was sufficient evidence to support the verdict. As RAC points out in its opposition, the jury chose to accept the testimony of RAC's witnesses and rejected the testimony of Avis's witnesses. Consequently, under the standards this

^{13/} See 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Fed. Prac. & Proc. Civ.* § 2810.1 (2d ed.).

^{14/} The other points raised by Avis in their motion are properly the subject of the motion under Rule 59 and are discussed separately below.

court must apply in ruling on a renewed motion for a judgment as a matter of law under Rule 50(b), the Court will deny Avis's Rule 50(b) motion.

2. *New Trial – Rule 59(a)*.

In the motion for a new trial under Rule 59, Avis raises five points: (1) an erroneous ruling granting a *Batson* challenge^{15/} to a peremptory strike of a juror; (2) denial of Avis's motion *in limine* to limit proof regarding liability; (3) denying Avis's motion *in limine* to preclude testimony of RAC's damages expert, Patrick Anderson; (4) incorrectly instructing jury on the proper measure of damages; and (5) the jury returned a verdict unsupported by the evidence, but motivated by a desire to punish.

The first three grounds raised by Avis seek reconsideration of prior rulings of the court and are more properly characterized as a motion to alter or amend the judgment under Rule 59(e). As noted above, a motion for reconsideration under Rule 59(e) may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.^{16/} There has been no intervening change in controlling law. The arguments advanced by Avis, although couched somewhat differently, simply rehash earlier arguments, but do not establish that the court's earlier rulings were clearly erroneous. Therefore, the court has no basis upon which to revisit its earlier rulings.

Jury Instructions.

Avis contends that the court erred with respect to instructing the jury on two points. Specifically, Avis argues: (1) the court should have instructed the jury that they were not to punish by an award of damages; and (2) the instructions on damages omitted a key element—the damages occasioned by the breach were reasonably foreseeable and had to be proven with reasonable certainty.

Instruction Numbers 3, 4, 5 and 6 clearly instructed the jury as to the proper measure of damages. Under no reasonable interpretation of those instructions could the jury have construed them as authorizing an award of damages as "punishment."

^{15/} Named after *Batson v. Kentucky*, 476 U.S. 79 (1986).

^{16/} *Exxon Shipping Co*, 556 U.S. at ____, 128 S. Ct. at 2617 n.5.

Because a jury is presumed to have followed its instructions,^{17/} even if the failure to specifically instruct the jury that it could not award damages as punishment was error, it was not prejudicial.

Avis's argument on the instructions given on damages lacks merit. As Avis candidly acknowledges, the court found that, as a matter of law, the loss of profits was reasonably foreseeable. Consequently, there was no error in not submitting that issue to the jury. With respect to Avis's other objections, instructions 4 and 5 clearly stated "the loss must be directly traceable to the breach, not remote or the result of other intervening causes," and "be capable of measurement to a reasonable degree of certainty."

Verdict.

Avis argues that there is no evidence to support the jury award of \$16,000,000. While the court agrees that there is no direct evidence to support an award of exactly \$16,000,000, the court also notes that in closing argument, counsel for Avis argued to the jury that jury should either award \$16,000,000 or nothing. In short, in closing Avis "invited" the jury to award \$16,000,000. If the jury erred, Avis invited this error. "[O]ne may not complain on review of errors below for which he is responsible."^{18/}

Avis's motion for a new trial will be denied.

IV. ORDER

IT IS HEREBY ORDERED THAT

1. Defendants' Motion to Amend Judgment at Docket No. 504 is GRANTED.
2. Defendants' Motion for Judgment as a Matter of law or, in the Alternative, For a New Trial at Docket No. 547 is DENIED.
3. The Clerk of the Court is directed to enter a corrected judgment as follows:

^{17/} See *Weeks v. Angelone*, 528 U.S. 225, 234 (2000); *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (noting the "almost invariable assumption of the law that jurors follow their instructions"); *Francis v. Franklin*, 471 U.S. 307, 324 n. 9 (1985).

^{18/} *Sovak v. Chugai Pharmaceutical Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002) (internal quotation marks and citations omitted).

This action having been determined in part by the court without jury on a motion for summary judgment and the following decision was reached.

IT IS ORDERED THAT:

1. The First Amended Complaint is DISMISSED, with prejudice, in its entirety as to defendants Avis Group Holdings, Inc., Avis Rent A Car System, Inc., Avis Car Rental Group, Inc., and Budget Rent a Car System, Inc.;
2. The First, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and Twelfth Causes of Action of the First Amended Complaint are DISMISSED, with prejudice; and
3. Defendants Avis Group Holdings, Inc., Avis Rent A Car System, Inc., Avis Car Rental Group, Inc., and Budget Rent a Car System, Inc. recover from plaintiff Alaska Rent-A-Car-Inc, costs in the amount of \$ _____ and attorney's fees in the amount of \$ _____, for a total judgment in the amount of \$ _____.

This action was tried in part by a jury and the jury has rendered a verdict.

IT IS FURTHER ORDERED THAT:

Plaintiff Alaska Rent-A-Car recover from defendants Avis Budget Group, Inc. and Avis Budget Car Rental, LLC the principal sum of \$16,000,000, plus prejudgment interest in the amount of \$ _____, costs in the amount of \$ _____, attorney's fees in the amount of \$ _____, for a total judgment in the amount of \$ _____.

Dated: January 21, 2010

/s/ Timothy M. Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE