Filed 6/14/17 Rempell v. Hofmann CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

STEVEN REMPELL et al., Plaintiffs and Appellants, v. ROBERT THEODORE HOFMANN et al., Defendants and Respondents.	A146257 (Marin County Super. Ct. No. CIV1302527)

I.

INTRODUCTION

Appellants Steven and Marcia Rempell[1] appeal from a judgment and cost award following a five-week trial of their personal injury action brought against Robert Hofmann, who was employed by O.C. Jones and Sons, Inc. (respondents). Appellants argue the trial court erred in failing to grant a new trial based upon juror misconduct and attorney misconduct, and in failing to admit expert evidence at trial. Appellants further argue they should be granted a new trial because the jury failed to award damages for loss of consortium and for past and future lost earnings. Finally, appellants argue the trial court improperly awarded costs to respondents.

We conclude appellants have forfeited the jury misconduct claim for failing to object before the jury was discharged and for failing to file a timely motion for a new

[1] We will refer to each of the Rempells by their first name to avoid confusion. No disrespect is intended.

trial. Appellants have waived their attorney misconduct claim on appeal by neglecting to comply with fundamental rules of appellate procedure. We further conclude the trial court properly excluded expert testimony, and that substantial evidence supported the jury's damage awards. Finally, the court properly awarded costs under Code of Civil Procedure[2] section 998 to respondents. Accordingly, we affirm.

II.

FACTUAL AND PROCEDURAL BACKGROUND

This personal injury lawsuit arises from a vehicular accident, and the facts surrounding the accident are simple and undisputed.

On November 29, 2011, Hofmann, driving a Ford F250 pickup truck, rear-ended Steven's Chevrolet Tahoe. Steven's vehicle was pushed into the vehicle ahead of him. Appellants sued Hofmann as the driver of the truck, and O.C. Jones & Sons, Inc. as the owner of the truck and Hofmann's employer.

While the accident itself is straightforward, the evidence relating to the extent of damages consumed most of the five-week trial period. After the police and EMTs arrived, Steven drove home in his vehicle. He did not go to the emergency room until the following day, but the wait was too long so he left. He went again two days after the accident and again left before being seen. On his third visit, a CT scan of his head showed no brain injuries. Approximately one week later, Steven went to his family doctor and had a second CT scan that was also normal. Later, another doctor diagnosed him with a traumatic brain injury.

He claimed extensive lost income damages due to his inability to work at his company, Express Mobile. Express Mobile, founded by Steven in 2006, developed mobile applications (commonly known as "apps") for TV and "app platforms" for smartphones. Express Mobile had not generated any net profits and had failed to secure any venture capital funding. Steven testified he received no salary or income from

[2] All subsequent statutory references are to the Code of Civil Procedure unless otherwise identified.

Express Mobile in 2008 through 2011. During its entire period of existence, Express Mobile generated only $231,950 in revenue.

Appellants alleged that the accident prevented Steven from completing a mobile app platform for televangelist Joel Osteen and Lakewood Church. They claimed Express Mobile had entered into a contract with a company called Cross MediaWorks to create a platform for mobile apps for Cross MediaWorks' client, Osteen.

Cross MediaWorks had an agreement to provide services to Lakewood Church. Cross MediaWorks paid approximately $60,000 to Express Mobile for television station apps, which were unrelated to the Osteen app, but did not pay anything for development of the Osteen app. Express Mobile was developing the app using its own funds.

Appellants requested the jury award $65,000 in past medical expenses, $12.9 million in past economic loss, $3.9 million in future economic loss, $16.8 million in past and future pain and suffering, and "at least $1 million" in damages for loss of consortium to Marcia.

The jury returned a verdict finding defendants' negligence was a substantial factor in Steven's injuries. The jury awarded him $10,710 for past economic loss and medical expenses, and $16,065 for past pain and suffering. However, the jury awarded Steven nothing for lost earnings, future economic loss, future medical expenses, and future pain and suffering, and nothing was awarded to Marcia for loss of consortium. For each of the special verdict questions, with the exception of "future pain and suffering," 11 jurors voted in favor of the special verdict issues; for future pain and suffering, 10 jurors voted to deny the claim.

III.

DISCUSSION

A. Juror Misconduct Claim

1. Factual and Procedural Background

After the jury rendered its verdict, the court polled each juror on the eight special verdict questions. For each question, Juror 10 stated "abstain." The court then read the final instruction to the jury and discharged them. Counsel raised no objection.

One of appellant's trial attorneys, Stephen Gorski, signed a sworn declaration that after the jury was discharged, Juror 10 told both plaintiff and defense counsel that he "abstained from deliberating." Gorski stated he did not suspect misconduct when Juror 10 abstained from the jury polling until Juror 10 made this statement after the jury was discharged.

Appellants' private investigator, Joseph Parisi, interviewed Juror 10 a few days after the conclusion of the trial. Juror 10 was a "mostly retired" civil attorney. He acted as the foreperson for the jury. Juror 10 "said that he did not participate in the jury deliberations and abstained from voting on the verdict." As the foreperson he "simply presided over the deliberations." He said he acted like the Vice President presiding over the United States Senate and would only vote if there was a tie.

On June 17, 2015, the court entered judgment and served notice on the parties the following day, June 18, 2015. On July 1, 2015, appellants filed a notice of intention to move for a new trial and noticed the hearing for August 25, 2015. Appellants filed a motion for a new trial on July 10, 2015. Among other arguments, appellants contended that Juror 10's abstention required a new trial and the court neglected its duty to inquire further after Juror 10 abstained. On July 27, 2015, appellants filed a "Motion for Order to Subpoena Juror to Motion for New Trial and Hearing on Juror Misconduct." It listed the date for hearing on the motion for new trial as September 8, 2015.

The court issued a tentative decision and held a hearing on appellants' request to subpoena Juror 10 on August 25, 2015.[3] Appellants' counsel argued that when Juror 10 abstained during polling, neither the court nor counsel raised any issue with the abstention. But five minutes later, when counsel met with the discharged jurors, Juror 10 revealed that he had failed to deliberate. Juror 10, however, refused to sign a declaration.

[3] Appellants filed a motion to augment the record with the transcript of the August 25, 2015 hearing. Respondents opposed the motion. We issued an order that we would consider the motion and opposition along with the merits of the appeal. We now grant the motion. (See Cal. Rules of Court, rule 8.155(a)(1)(A).)

Counsel argued that he had not waived his right to contest the issue because he was not aware of the misconduct before the jury was discharged. Counsel then argued that the court had a duty to conduct a hearing pursuant to *Juror Number One v. Superior Court* (2012) 206 Cal.App.4th 854 (*Juror One*). The trial court responded that the Supreme Court's decision in *Linhart v. Nelson* (1976) 18 Cal.3d 641 (*Linhart*) prohibited it from permitting jury testimony "after the fact." The court quoted *Linhart*: " '[P]ermitting counsel for the losing party to interrogate unwilling trial jurors touches the integrity of our venerable jury process.' " (*Id.* at p. 644.) The court stated *Juror One* was a criminal case and counsel had failed to cite any civil cases where a juror could be subpoenaed for testimony after a trial is concluded. Under *People v. Hedgecock* (1990) 51 Cal.3d 395 (*Hedgecock*), there is a different rule for jurors in criminal cases.

Respondents' counsel argued appellants waived their right to raise this issue by failing to object at the time the verdict was rendered. Even if Juror 10 engaged in misconduct, the court was not under an obligation to question him weeks after the end of trial, especially where counsel has not presented an affidavit from Juror 10.

The court adopted its tentative order finding that under section 657 it was improper for the court to issue a subpoena. Evidence in support of a motion for new trial must be presented " 'solely by affidavit,' " citing *Linhart*, *supra*, 18 Cal.3d at page 645 and section 658.[4] The case relied on by appellants, *Juror One*, was a criminal case and "the rule regarding juror testimony about alleged juror misconduct is different in criminal cases than in civil cases." The court denied the motion for a subpoena and allowed appellants to submit additional briefing as it related to their new trial motion.

[4] Section 658 provides that a new trial motion based upon an irregularity in the proceeding or jury misconduct "must be made upon affidavits." (§ 658.)

Section 660 provides that a motion for new trial is deemed denied as a matter of law if it is not ruled upon within 60 days after the clerk's notice was mailed.[5] The new trial motion was noticed for August 25, 2015, which was eight days after the 60-day period had run. The court mailed notice of entry of judgment on June 18, 2015. Appellants filed their new trial motion July 10, 2015, and set a hearing date of August 25, 2015. The parties did not raise this issue with the court until September 2, 2015. The 60-day period had run so the court lacked jurisdiction to hear the new trial motion. (*Dakota Payphone, LLC v. Alcaraz* (2011) 192 Cal.App.4th 493, 500 (*Dakota*).) The court ordered the hearing off calendar.

2. Appellants Have Forfeited Any Juror Misconduct Claim

The parties have raised several procedural issues that impact our review of appellants' jury misconduct claim, including whether: (1) the claim has been forfeited by the failure to object to the "abstention" of Juror 10; (2) the trial court had an independent duty to address Juror 10's conduct even absent any objection by counsel; (3) appellants' new trial motion raising the juror misconduct issue was untimely under section 660, thus depriving the trial court of jurisdiction to hear it.

We first address whether appellants forfeited the claim by failing to raise it before the jury was discharged. At the time that Juror 10 abstained to each of the eight special verdict questions, appellants' counsel never objected or requested the court to inquire into Juror 10's responses. The court then discharged the jury. Appellants did not raise the issue until their notice of intent file a new trial motion on July 1, 2015. Respondents

[5] "[T]he power of the court to rule on a motion for a new trial shall expire 60 days from and after the mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5 or 60 days from and after service on the moving party by any party of written notice of the entry of the judgment, whichever is earlier, or if such notice has not theretofore been given, then 60 days after filing of the first notice of intention to move for a new trial. If such motion is not determined within said period of 60 days, or within said period as thus extended, the effect shall be a denial of the motion without further order of the court." (§ 660.)

argue that appellants' failure to timely object to Juror 10's abstention forfeits the claim on appeal.

Our Supreme Court addressed a similar issue in *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 252 (*Keener*). In *Keener*, after the jury rendered its verdict, the court failed to poll Juror 4 about eight of the special verdict form questions and failed to poll Juror 7 (Brown) about negligence or apportionment. (*Id.* at p. 252.) Counsel did not object and the court discharged the jury. (*Ibid*.) The defendants moved for a new trial based upon the fact the jury polling was incomplete. (*Id*. at p. 253.) The defendants argued the polling had revealed a three-quarters majority for eight of the special verdict questions, but only eight jurors voted on the apportionment issue. (*Id*. at p. 252.) Both the defendants and plaintiffs submitted declarations from various members of the jury including two declarations that Juror Brown had abstained from voting on the issue of apportionment. (*Id*. at pp. 253-254.)

"California Constitution, article I, section 16 provides: 'Trial by jury is an inviolate right . . . , but in a civil cause three-fourths of the jury may render a verdict.' When a jury is composed of 12 persons, it is sufficient if *any* nine jurors arrive at each special verdict, regardless of the jurors' votes on other special verdict questions." (*Keener, supra*, 46 Cal.4th at p. 255, original italics.) "[U]pon polling, a civil verdict *must be upheld unless* '*more than one-fourth of the jurors disagree thereto*'; it states that absent such '*disagreement . . . expressed, the verdict is complete.*' (Italics added.) . . . [S]ection 618 effectively creates a 'rebuttable presumption: If a verdict *appears* complete, it *is* complete *unless* there is an affirmative showing [during polling] to the contrary.' " (*Id.* at p. 257, original italics.) Importantly, the court noted that by remaining silent when the court failed to poll them, the jurors were not expressing a disagreement with the verdict. (*Id.* at p. 258.) Section 618 "requires *affirmative* disagreement—an utterance, statement, or some similar active conduct—of 'more than one-fourth' of the jurors in order to prevent a trial court from finding the verdict to be complete and from then discharging the jury. [Citations.]" (*Id.* at p. 259.)

The *Keener* court referenced *Silverhart v. Mt. Zion Hospital* (1971) 20 Cal.App.3d 1022 (*Silverhart*), where during polling one juror ambiguously responded, "Yes, I voted." (*Keener, supra*, 46 Cal.4th at p. 263.) "On appeal, the reviewing court held the defendant forfeited his right to challenge the polling, because 'any impropriety could have been cured if raised on time' and hence 'the failure to object amounted to a waiver of the alleged impropriety or error.' [Citation.] The court in *Silverhart* further observed that 'all reasonable inferences must be indulged on appeal to support, rather than to defeat, the jury's verdict and the judgment thereon . . . ' [citation] and noted that, so viewed, no impropriety occurred in the polling or the verdict." (*Keener*, at p. 263, quoting *Silverhart*, at p. 1029.)

The defendants in *Keener* raised the same argument relied upon by appellants here that the claim was not forfeited because their failure to object was not " 'the result of a desire to reap a "technical advantage" or engage in a "litigious strategy," ' " citing *Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456, fn. 2 (*Woodcock*). (*Keener, supra*, 46 Cal.4th at p. 269.) In *Woodcock*, the jury returned a verdict of $13,000 for the plaintiff. (*Woodcock, supra*, 69 Cal.2d at p. 457.) On appeal the parties claimed there was an ambiguity in the verdict: defendants alleged the amount should be reduced by the amount of workers' compensation benefits the plaintiff received, and the plaintiff alleged the $13,000 reflected an offset by the jury for the workers' compensation payments. (*Id.* at pp. 458-459.) The Supreme Court held the verdict was not ambiguous and represented the full amount. In dictum, the court stated: "Frequently, failure to object to the form of a verdict before the jury is discharged has been held to be a waiver of any defect. [Citations.] However, waiver is not automatic, and there are many exceptions. [Citations.] [¶] *Waiver is not found where the record indicates that the failure to object was not the result of a desire to reap a 'technical advantage' or engage in a 'litigious strategy.*' [Citations.] . . . In . . . many . . . cases, waiver is not an issue where a defect is latent and there is no hint of 'litigious strategy.' [¶] There was no waiver here because, in light of the instructions, the verdict was not ambiguous. [Citation.] Accordingly, there was nothing to clarify. But even if the verdict

were ambiguous, there is no hint of a purpose to achieve a 'technical advantage' or fulfill a 'litigious strategy,' and defendant should not be estopped to make his objections." (*Id.* at pp. 456-457, fn. 2.)

The *Keener* court held that the rule articulated in *Woodcock* for an ambiguous verdict does not extend to a case involving incomplete polling of the jury. (*Keener, supra*, 46 Cal.4th at p. 270.) "[W]ithout a timely objection to *incomplete polling*, a court cannot avoid or cure the defect: after the jury's discharge, the court can neither complete the polling nor return the jury to its deliberations." (*Ibid*., original italics.)

In sum, the Supreme Court held: "We conclude that a juror's *silence* at polling, brought about by the trial court's failure to poll that particular juror on one of several special verdict questions, does not constitute an *expressed disagreement* with the verdict under section 618, and hence does not prevent the trial court from accepting the verdict as complete and discharging the jury. We further conclude that a party's failure to object to incomplete polling before the jury is discharged forfeits any claim of irregularity in polling procedure." (*Keener, supra*, 46 Cal.4th at p. 250.)

Under *Keener*, appellants have forfeited their claim the jury was improperly polled. Juror 10's stated abstention does not constitute express disagreement with the verdict; and furthermore counsel failed to object before the jury was discharged. Appellants contend counsel did not have sufficient time to raise an objection. The record belies this assertion. Juror 10 stated "abstain" eight times in response the polling questions over a period of several minutes. After the jury was polled, the trial judge thanked the jury, entered the verdict, and then gave a final instruction to the jury. Respondents point out that appellants' trial counsel had been practicing law for 46 years and had conducted more than 50 jury trials so he should be expected to make a contemporaneous objection. A similar point also was made by our Supreme Court in *Keener*. (*Keener, supra*, 46 Cal.4th at p. 266 [defense counsel should have been able to make a contemporaneous objection].)

"Failure to object to a verdict before the discharge of a jury and to request clarification or further deliberation precludes a party from later questioning the validity of

that verdict if the alleged defect was apparent at the time the verdict was rendered and could have been corrected." (*Henrioulle v. Marin Ventures, Inc.* (1978) 20 Cal.3d 512, 521, fn. omitted (*Henrioulle*).) If Juror 10's "abstention" comment constituted a polling defect, it was apparent at the time the jury was polled, and could have been cured by further deliberation. Therefore, counsel's failure to object forfeits the claim. (*Id.* at p. 522.)

As noted earlier, even with Juror 10's stated "abstention" each of the other 11 jurors voted on each of the special verdict questions. For each of special verdict questions, except "future pain and suffering," 11 jurors voted "yes" and for future pain and suffering, the vote was 10 to 1. Therefore, despite any infirmity created by Juror 10's stated abstention, the verdict is constitutional as there were more than 9 jurors in agreement. (*Keener*, *supra*, 46 Cal.4th at p. 257.) Juror 10's reasons for stating "abstain" may not have been apparent, but the verdict itself was not ambiguous. Additionally, no juror, including Juror 10, expressed an affirmative disagreement with the verdict. (§ 618; *Keener*, at pp. 257-258.)

Appellants next argue they were denied their constitutional right to a 12-person jury because Juror 10's "abstention" means he did not deliberate. The fact Juror 10 said "abstain" when polled could mean any number of things: it could mean he did not want to state his verdict in open court, or, as respondents argue, it could mean he disagreed with the verdict, or it could mean, as appellants argue, he abstained from deliberating. We have no declaration from Juror 10, and no admissible evidence before this court as to why Juror 10 said "abstain."[6] The situation presented here further supports the Supreme Court's rationale for applying the forfeiture rule when counsel fails to object before the

[6] Appellants submitted declarations from trial counsel and their investigator regarding Juror 10's state of mind. These declarations were not admitted or considered by the trial court because the new trial motion was untimely. Further, as respondents argue, these declarations were inadmissible evidence because they were based upon hearsay. See section A.3. *post*.

jury is discharged. The time to clarify any issue concerning the jury polling is while the jury is present. (*Keener*, *supra*, 46 Cal.4th at p. 250.)

3. The Court Was Not Required to Investigate Juror 10's Abstention

Appellants argue that the court had a sua sponte duty to investigate Juror 10's abstention from the jury polling even absent an objection by counsel. Appellants cite to *People v. Russell* (2010) 50 Cal.4th 1228, which involved the court's duty to investigate juror misconduct *during deliberations* after it was brought to the court's attention and discussed with counsel; it is simply not analogous to the situation presented here. (*Id.* at pp. 1248-1249.)

The relevant inquiry is whether the court was required to conduct a posttrial hearing on juror misconduct when appellants filed their request to subpoena Juror 10 for a hearing on their new trial motion. Setting aside for the moment the procedural problems with appellants' new trial motion discussed below, the court was not obligated to question Juror 10 based upon the declarations submitted by appellants in conjunction with the new trial motion.

Appellants contend that *Juror One* requires the court to conduct a posttrial hearing on Juror 10's alleged misconduct. In *Juror One*, the Third District examined whether a trial court could compel production of a juror's Facebook posts that were brought to the court's attention after trial. (*Juror One*, *supra*, 206 Cal.App.4th at pp. 858-859.) " 'When a trial court is aware of *possible* juror misconduct, the court "must 'make whatever inquiry is reasonably necessary' to resolve the matter.' " (*Id.* at p. 866, quoting *People v. Hayes* (1999) 21 Cal.4th 1211, 1255, original italics (*Hayes*).)

As respondents point out, *Juror One* is a criminal case that involved allegations of juror misconduct. They assert this case is more properly compared to *Linhart*, a civil case. (*Linhart*, *supra*, 18 Cal.3d 641.) In *Linhart*, our Supreme Court considered whether a party has the right to subpoena jurors to testify in support of a motion for new trial based on juror misconduct. The defendants submitted a declaration from their investigator based on his conversations with jurors about the deliberations. (*Id.* at

p. 643.) The court applied section 657[7] and concluded that under section 658, a motion for new trial must be presented solely by affidavit. (*Id.* at p. 645.) "Moreover, permitting counsel for the losing party to interrogate unwilling trial jurors touches the integrity of our venerable jury process." (*Id*. at p. 644.)

The Supreme Court addressed the same issue in a criminal case in *Hedgecock*. (*Hedgecock, supra*, 51 Cal.3d 395.) The court held that a trial judge has the discretion to call jurors to testify at a new trial hearing. (*Id.* at p. 399.) The court expressly distinguished *Linhart* because it was a civil case governed by the Code of Civil Procedure, where "a motion for a new trial based on allegations of jury misconduct must be presented solely by affidavit, without the testimony of witnesses." (*Id*. at p. 414.) "[W]hen a new trial motion in a criminal case is based on allegations of juror misconduct, the trial court may conduct an evidentiary hearing to determine the truth of the allegations." (*Id*. at p. 415.)

The holding in *Hedgecock* makes clear that the court's duty to conduct a new trial hearing with testimony is different in the context of a criminal case. Moreover, even in the criminal context, a court has the discretion to conduct an evidentiary hearing but it is not required to do so. (*Hedgecock, supra*, 51 Cal.3d at p. 415.) A criminal defendant is "not entitled to such a hearing as a matter of right." (*Ibid*.)

In a civil case, as set forth in *Linhart*, the court proceeds by affidavit. Here, appellants submitted two affidavits to the trial court from their investigator and trial counsel. The affidavits recounted statements made by Juror 10 about his role in the jury deliberations. Juror 10 did not provide an affidavit.

Where a party offers only hearsay declarations in support of a motion for new trial premised on jury misconduct, the court is not required to inquire further into the allegations. (*Hayes, supra*, 21 Cal.4th at p. 1252.) In *Hayes*, the defendant submitted written statements from defense counsel and his investigator about a juror's misconduct.

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[7] Section 657 outlines the grounds for a new trial motion including irregularity in the proceedings and jury misconduct. (§ 657, subds. 1, 2).)

(*Id.* at p. 1253.) Where the only evidence offered in support of the juror misconduct claim were the statements of the investigator and defense counsel regarding a juror's out-of-court statements and there was no statement, sworn or unsworn, from the juror (and the court had evidence that misconduct did not occur), "the court did not abuse its discretion in denying the new trial motion without further inquiry into the claim of jury misconduct." (*Id*. at p. 1256, fn. omitted.) The juror's statements to the investigator and attorney could not be admitted under any exception to the hearsay rule. (*Id*. at p. 1258.)

Our Supreme Court has held that when the sole evidence of the alleged misconduct is the declaration of a defense investigator that purports to relate a conversation with the juror, this does not warrant a new trial. (*People v. Williams* (1988) 45 Cal.3d 1268, 1318, abrogated on other grounds in *People v. Diaz* (2015) 60 Cal.4th 1176.) "It is settled, however, that 'a jury verdict may not be impeached by hearsay affidavits.' [Citations.]" (*Williams, supra*, 45 Cal.3d at pp. 1318-1319.) This same rule applies in civil cases. (See *Burns v. 20th Century Ins. Co*. (1992) 9 Cal.App.4th 1666, 1670 [declarations from an investigator regarding jurors' statements are inadmissible hearsay].)

Furthermore, as discussed in the next section, even if the declarations were admissible evidence, appellant's new trial motion was not timely filed under section 660, and the court lacked jurisdiction to rule upon it after the 60-day statutory time period.

4. The Motion for New Trial Was Untimely Under Section 660

The court served notice of judgment on both parties on June 18, 2015. Appellants filed a motion for a new trial on July 10, 2015, with a noticed hearing date of August 25, 2015. In conjunction with their new trial motion, appellants sought to subpoena Juror 10 to testify on August 25. The court held a hearing on appellants' request for an evidentiary hearing on August 25, and appellants scheduled the new trial hearing for September 8, 2016.

However, prior to that date, on September 2, the parties notified the court of the jurisdictional issue that the 60-day period to rule on the motion ended August 17, 2015. The court issued an order on September 8, 2015, finding appellants' new trial motion was

deemed denied as a matter of law because it was not ruled upon within 60 days of the clerk's notice of judgment.

Appellants place the blame on the trial court for failing to conduct a hearing within the 60-day period, but it is " 'the duty of the [moving] party to be present and see that his motion for a new trial is set for hearing within the statutory [time] period.'. . . [Citation.]" (*Dakota, supra,* 192 Cal.App.4th at p. 500.) "Based on the jurisdictional nature of section 660's time frame for ruling on a new trial motion, courts have rejected requests to create equitable exceptions or provide equitable relief from the harsh consequences of the trial court's failure to rule timely. [Citation.]" (*Garibotti v. Hinkle* (2015) 243 Cal.App.4th 470, 482.)

Appellants argue the trial judge "newly appointed in January 2015, did not understand how to handle juror misconduct," or that their declarations were submitted for a dual purpose—both to support a new trial motion and a motion to investigate juror misconduct. Throughout their briefing and in the transcripts, appellants repeatedly attempt to shift to the trial court their own legal responsibility to object to the jury polling, to submit a timely new trial motion, or to submit admissible evidence of juror misconduct. The trial court held a hearing on appellants' request to subpoena Juror 10 and would have held a hearing on the merits of appellants' new trial motion if it had been timely noticed.

In conclusion, as detailed above, even if appellants had not forfeited the issue, they would not have been entitled to an evidentiary hearing based upon the hearsay affidavits they provided in conjunction with their new trial motion—even if it had been timely heard.

B. Alleged Attorney Misconduct

Although appellants allege that defense counsel committed prejudicial misconduct during the trial, they have failed to set forth a proper argument to support the contention. Instead, appellants state that due to "space limitation, it is necessary to simply list the categories of misconduct," and attach portions of the trial transcript. Appellants then list six categories of misconduct: (A) referring to Dr. Newkirk as appellants' "partner";

(B) misstatement of evidence; (C) reference to appellants' insurance; (D) asking deceptive questions; (E) showing deceptive exhibits; and (F) false claims about witnesses, accompanied by a long string of record citations to support these general categories. This is followed by a single concluding sentence: "In general, these types of deceptive practices were disapproved in *Smith v. Covell*, 100 Cal.App.3d 947 (1980)."

Appellants have failed to comply with several fundamental rules of appellant procedure, including the failure to: (1) present legal analysis and relevant supporting authority for each point asserted, with appropriate citations to the record on appeal (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856); (2) support references to the record with a citation to the volume and page number in the record where the matter appears; and (3) state the nature of the action, the relief sought in the trial court, the judgment or order appealed from, and summarize the significant facts. (Cal. Rules of Court, rule 8.204(a)(1)(C), (2)(A), (C).)

"The appellate court is not required to search the record on its own seeking error." (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768.) To do so here would require this court to examine more than 3,500 pages (24 volumes) of the reporter's transcript, 1,670 pages of the clerk's transcript, and a motion to augment the record. (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1406.) "If a party fails to support a claim of error with argument, or support an argument with the necessary citations to the record, we may deem the argument waived. [Citations.]" (*Utility Consumers' Action Network v. Public Utilities Com.* (2010) 187 Cal.App.4th 688, 697 (*Utility*).) We deem it so waived under these circumstances of this case.

C. Exclusion of Expert Testimony

1. Factual and Procedural Background

Prior to trial, appellants filed an expert witness disclosure listing Christine Davis, a certified public accountant, as an expert witness. It proffered that Davis would testify about the viability of Express Mobile's contracts with Cross MediaWorks and the value of the contracts. Appellants claimed that Joel Osteen Ministries agreed to share revenue

for an Osteen app with Cross MediaWorks who would in turn share revenue with Express Mobile.

The court held three hearings on respondents' motions in limine to exclude Davis's testimony about contracts with Express Mobile or its alleged "intermediary" Cross MediaWorks. Davis's testimony was dependent upon the testimony of another witness, Jay O'Sullivan, about a purported revenue sharing agreement for an Osteen app between Express Mobile and Cross MediaWorks.[8] While O'Sullivan had testified at his deposition that there was a written contract, he later retracted this statement.[9] Counsel then proffered that O'Sullivan would testify to an oral contract between Cross MediaWorks and Osteen.

The court held a second hearing on Davis's testimony during trial where it stated that it now appeared there would be no evidence of a contract between Cross MediaWorks and Osteen. The court asked how Davis could provide revenue projections for the Osteen app without any contract in existence and with no evidence of what the revenues or profits would have been.

Counsel argued that additional evidence, such as Steven's testimony, would support Davis's testimony. The court then suggested that Davis could be called at the end of the case if the evidence made her testimony relevant. The court tentatively excluded her testimony about the Osteen app, but if appellants could introduce additional evidence of a contract, the court stated: "I'm more than happy to consider that, and we can reconvene this discussion after that evidence is in."

During a break in Steven's trial testimony, the parties again addressed the issue of the foundation for Davis's testimony. The court stated that based upon Steven's testimony, Davis could not testify about the Cross MediaWorks agreement regarding the Osteen app because there was no foundation for it. Steven had testified that there was no

[8] O'Sullivan worked for Cross MediaWorks and was the "administrator" of the contacts with Express Mobile. Cross MediaWorks was the advertising agent for Osteen.

[9] At his deposition, O'Sullivan stated that there was a written agreement between Cross MediaWorks and Joel Osteen. He stated he negotiated the written agreement.

contract between Express Mobile and Osteen, and O'Sullivan had not verified a contract between Osteen and Cross MediaWorks. Steven admitted that Jason Madding, director of marketing for Joel Osteen Ministries, signed an affidavit that there was no revenue sharing agreement between Osteen and Express Mobile. There was also no contract between Cross MediaWorks and Osteen that involved the development of an app.

Thus, the court excluded Davis from testifying about the Osteen app but stated it was not precluding any other aspect of her testimony. Davis then testified about the television apps and other matters.

2. The Court Properly Excluded the Expert Testimony

We review the trial court's ruling excluding or admitting expert testimony for abuse of discretion. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773 (*Sargon*).) " '[T]he expert's opinion may not be based "on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors . . . . [¶] Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide?" [Citation.]' [Citations]." (*Id.* at p. 770.)

The case law distinguishes between lost profits for established and unestablished businesses. " '[W]here the operation of an established business is prevented or interrupted, . . . damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales.' [Citation.]" (*Sargon*, *supra*, 55 Cal.4th at p. 774.) " 'On the other hand, where the operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative. [Citations.] . . . But although generally objectionable for the reason that their estimation is conjectural and speculative, anticipated profits dependent upon future events are allowed where their nature and

occurrence can be shown by evidence of reasonable reliability.' " (*Id.* at p. 774, citing *Grupe v. Glick* (1945) 26 Cal.2d 680, 692-693.)

Appellants argue it was improper for the court to limit Davis's testimony to "contracts actually procured and signed." They contend the court "rejected" their offer of proof and blocked Davis's from testifying about the Cross MediaWorks contract. As noted, the record reveals that the trial court tentatively excluded Davis's testimony, but expressed a willingness to consider introduction of the testimony if appellants could offer additional evidence of the alleged contract. It would not, however, allow Davis to testify about a contract without any antecedent evidence that such a contract existed. Appellants never provided this foundational evidence.

Once O'Sullivan retracted his deposition testimony that he had negotiated a written revenue sharing agreement between Cross MediaWorks and Osteen, counsel then proffered that O'Sullivan would testify there was an oral agreement. However, O'Sullivan stated that he had no personal knowledge of any revenue sharing agreement.

Appellants rely on *Food Safety Net Services v. Eco Safe Systems USA, Inc*. (2012) 209 Cal.App.4th 1118 (*Food Safety*) to support their argument that no actual contract must be proven in order to pursue lost income damages here. In *Food Safety*, Eco Safe Systems USA, Inc. (Eco Safe), the creator of ozone-based food disinfection equipment, hired Food Safety Net Services (Food Safety) to test the performance of their disinfection system. (*Id.* at p. 1122.) Eco Safe was engaged in preliminary discussions with Carl's Jr. restaurants about use of their equipment. (*Id.* at p. 1122.) A few months later, Carl's Jr. informed Eco Safe that it was not interested in the ozone disinfection equipment. (*Ibid.*) Eco Safe did not pay Food Safety for the study and Food Safety sued them.

Food Safety argued Eco Safe could not demonstrate lost profits from any alleged errors in the study. (*Food Safety*, *supra*, 209 Cal.App.4th at p. 1132.) Eco Safe had no agreement with Carl's Jr. to buy their equipment and the Carl's Jr. representative testified at his deposition that he never discussed entering into a contract to buy Eco Safe's equipment. (*Id.* at p. 1133.) There was "no evidence the parties negotiated any agreement, however tentative, regarding the purchase or lease of the equipment. . . . It is

thus speculation that Eco Safe lost profits as the result of purported defects in the study." (*Id.* at p. 1134.)[10] Because there was no evidence of an agreement between Cross MediaWorks and Osteen or between Osteen and Express Mobile related to the Osteen app, *Food Safety* is directly on point adverse to appellants' position, and instead it supports the trial court's decision.

Here the court could "hardly have exercised its discretion more carefully." (*Sargon*, *supra*, 55 Cal.4th at p. 776.) It held three hearings on Davis's testimony, both before and during trial, and allowed appellants several opportunities to demonstrate a foundation for Davis's expert opinion through Steven's testimony, exhibits, and the testimony of other witnesses before deciding to exclude the portion of Davis's testimony regarding the Osteen app.[11] Davis's analysis was based on a purported revenue sharing agreement appellants failed to show existed. Therefore, the testimony was based on speculation and conjecture. (*Sargon*, at p. 774.)

D. Jury's Award of Damages

Appellants argue that the jury's decision not to award loss of consortium damages to Marcia and not to award past and future earnings to Steven entitles them to a new trial because the damages were inadequate as a matter of law. Appellants cast their claims in this way because the trial court never ruled on their untimely new trial motion. "The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial." (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 506 (*Seffert*).) Because the jurors see and hear the witnesses and evaluate their credibility, "all presumptions are in favor of the decision of

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[10] Appellants argue their case is akin to *Asahi Kasei Pharma Corp. v. Actelion Ltd.* (2013) 222 Cal.App.4th 945 (*Asahi*), a decision by Division Five of this court that was certified for publication on only one issue, and the portions they cite are unpublished. An opinion "that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action." (Cal. Rules of Court, rule 8.1115(a).)

[11] Appellants' arguments regarding the Express Mobile television applications are misplaced because the court did not preclude Davis from testifying about that portion of the business.

the trial court. [Citation.]" (*Id.* at pp. 506-507.) " '[W]hen a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury." (*Crawford v. Southern Pacific Co*. (1935) 3 Cal.2d 427, 429 . . . .)" (*Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 816.)

1. Loss of Consortium

Appellants provide a two-page summary of Marcia's testimony, and argue there was uncontradicted evidence of loss of consortium. They contend under *Smith v. Covell* (1980) 100 Cal.App.3d 947 (*Smith*), the jury's zero verdict was inadequate as a matter of law because the testimony was uncontroverted and the court had a duty to set aside the verdict. Steven's own testimony contradicted Marcia's claim. Steven testified that his relationship with his wife had "gotten better" since the accident. "I used to be running, you know, a million miles an hour . . . I didn't spend that much time with the relationships that I cherish before the accident. Now I have more time and so the relationships are great." Steven testified that they had "grown closer" since the accident.

Marcia testified that before the accident, Steven always worked long hours—seven days per week, sometimes 14 hours per day. When Steven was not working, they watched sports on television and attended sporting events. Marcia's testimony was often contradictory. She testified since the accident, they could not go on full day outings because Steven got tired. However, Steven was still active and lifted weights, as much as 65 pounds in each hand, on a regular basis. Marcia further testified that since the accident, their sex life had "evaporated," but she also testified about potential problems with their sex life prior to the accident. She stated Steven had been prescribed erectile dysfunction medication prior to the accident. Like Steven, Marcia testified that she loved Steven more than before the accident, providing evidence for the jury to conclude that she had not suffered a loss of enjoyment in her marriage.

Respondents rely upon *Da Silva v. Pacific King, Inc*. (1987) 195 Cal.App.3d 1, 12 (*Da Silva*) to argue that the facts here did not demonstrate loss of consortium. Da Silva was a commercial fisherman injured on the job. (*Id.* at p. 5.) Mrs. Da Silva testified that

her husband was "flat on his back" for five weeks and his hearing loss made it difficult to communicate. (*Id.* at p. 12.) Da Silva was normally at sea for two to three months at time with two to three week intervals at home between trips. "Given the unique circumstances created by Mr. Da Silva's occupation, the jury could reasonably conclude that Mrs. Da Silva did not lose any of the society, comfort and companionship she would have otherwise expected from her husband. Thus we cannot set aside the jury's determination that she did not suffer any net loss of consortium. [Citation.]" (*Ibid*.)

Consortium refers to " 'the noneconomic aspects of the marriage relation, including conjugal society, comfort, affection, and companionship.' [Citation.]" (*Boeken v. Philip Morris USA, Inc*. (2010) 48 Cal.4th 788, 793, fn. 1.) "The relevant injury in a loss of consortium claim is injury to the spouse's enjoyment of the marital relationship. [Citations.]" (*Leonard v. John Crane, Inc*. (2012) 206 Cal.App.4th 1274, 1290.)

Here, the jury was not only presented with contradictory evidence about Marcia's enjoyment of the marital relationship, but it was also presented with evidence that Steven's injuries were not as serious or life-altering as he contended. Indeed, the jury only awarded damages for past economic loss and pain and suffering, and zero damages for future medical expenses and future pain and suffering. This evidence likewise necessarily led the jury to conclude that the accident did not adversely impact the couple's marriage relationship. Therefore, we conclude the jury's decision not to award loss of consortium damages is supported by the evidence.

2. Jury Award of No Damages for Past and Future Earnings

Appellants argue they are entitled to a new trial because the jury's award of zero damages for past and future lost earnings was inconsistent with the award of damages for Steven's medical expenses and pain and suffering. Appellants again rely on *Smith* to assert the jury's zero verdict was inadequate as a matter of law because the testimony was uncontroverted. (*Smith, supra*, 100 Cal.App.3d 947.)

Smith is inapposite here because weeks of this trial were devoted to the issue of Steven's past and future earning so the evidence was far from uncontroverted. There was

no evidence presented at trial that Steven had earned any income in the five years preceding the accident. To the contrary, there was evidence that Express Mobile had not generated any net profits or paid any dividends in the preceding five years. Also, respondents presented evidence that Steven was not earning any money from Express Mobile at the time of the accident. Steven testified he received no salary or income from Express Mobile in 2008 through 2011.

Moreover, respondents also presented evidence of Steven working during the days and weeks following the accident. For example, respondents introduced emails Steven sent regarding the app just three days after the accident. In addition, Steven's claims of lost future earnings were based upon the Osteen app, but the evidence at trial contradicted this claim. There was no contract with Joel Osteen Ministries regarding the app and no revenue sharing agreement with Express Mobile. Even if the jury believed Steven's testimony that the accident interfered with his ability to work on the Osteen app, the evidence at trial showed that Joel Osteen Ministries never provided Express Mobile with the "feeds" (the content for the app) that would have been necessary to complete the app. Osteen's failure to provide the feeds had nothing to do with the accident.

Furthermore, the jury awards are not inconsistent. The jury could have concluded, based upon respondents' admission of liability and the evidence presented, that Steven was entitled to recover all his medical expenses as well as damages for pain and suffering while still concluding the accident did not cause him past or future lost earnings.

Applying "all presumptions" in favor of the jury's verdict (*Seffert*, *supra*, 56 Cal.2d at p. 507), we conclude there was substantial evidence to support its verdict that Steven suffered no past or future lost earnings.

E. Settlement Offer under Section 998 and Allocation of Costs

1. Factual and Procedural Background

On July 9, 2014, respondents served an offer of compromise on appellants offering $175,001. Appellants rejected the offer. On May 2, 2015, respondents served a second section 998 offer to compromise offering $250,001. This offer was personally served on appellants on May 2, 2015. The same offer was served on appellants' counsel on May 6,

2015. Appellants rejected the offer. The first day of trial was scheduled for May 14, 2016.

As noted, at trial Steven obtained judgment for a total of $26,775 for past economic loss and medical expenses. Marcia received nothing for loss of consortium.

Respondent filed an amended motion for fees under section 998. Both parties filed motions to tax costs. On October 9, 2015, the court issued an "Order re: . . . Motion to Tax Costs." The court granted appellants' motion to tax the total amount of costs by $57,388.03. With this reduction, the court awarded respondents a total of $514,009.66 in post-offer costs, and awarded appellants $3,025.20 in pre-offer costs.

2. Section 998 Offer

We review a trial court's determination of the reasonableness of a section 998 award for an abuse of discretion. (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332.) We review the trial court's rulings de novo to the extent that the appeal raises claims the court misapplied section 998 and applicable case law. (*Litt v. Eisenhower Medical Center* (2015) 237 Cal.App.4th 1217, 1221 (*Litt*).)

"As a general rule, a prevailing party in a civil action is entitled to recover its costs from its opponent. (§ 1032.) However, section 998 establishes a procedure for shifting costs if the prevailing party obtains a judgment less favorable than a pretrial settlement offer made by the other party. [Citation.]" (*Elite Show Services, Inc. v. Staffpro, Inc*. (2004) 119 Cal.App.4th 263, 268 (*Elite*).) The purpose of the cost-shifting statute is to encourage the settlement of litigation without trial, by punishing the party who fails to accept a reasonable settlement offer from its opponent. (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 152.) "Section 998 aims to avoid the time delays and economic waste associated with trials and to reduce the number of meritless lawsuits. [Citations.]" (*Martinez v. Brownco Construction Co.* (2013) 56 Cal.4th 1014, 1019 (*Martinez*).) "In interpreting a section 998 offer, general contract principles apply when they neither conflict with nor defeat the statute's purpose of encouraging the settlement of lawsuits prior to trial. [Citation.]" (*Elite*, at p. 268.)

There is no question that either offer made under this section by respondents was greater than the amount appellants recovered at trial. However, appellants argue that several defects in respondents' two section 998 offers preclude their enforcement, including: (1) the misspelling of respondent Hofmann's last name; (2) defective service of the second offer; (3) an assertion that legally the second offer effectively acted to revoke the first offer; (4) failure of the offers to provide for the payment of any liens; and (5) the failure to make separate offers to Marcia and Steven.

a. Misspelling of Hofmann's Name

Appellants argue that the misspelling of Hofmann's name in the first section 998 offer invalidated it. The offer listed "Robert Theodore Hoffman," rather than "Robert Theodore Hofmann." The offer contained the correct caption for the case and was signed by respondents' counsel of record.

Appellants cite to inapposite authority and argue these cases require invalidating the section 998 offer. (See *Engelken v. Justice Court* (1920) 50 Cal.App. 157 [notice of entry of default judgment addressed to wrong person required court to vacate default judgment]; *Peckham v. Stewart* (1893) 97 Cal. 147 [execution of a deed for property contained the wrong name].)

Both parties discuss *Orr v. Byers* (1988) 198 Cal.App.3d 666 (*Orr*). *Orr* involved the misspelling of a party's name on the abstract of judgment. The *Orr* court set forth the following rule: " 'The doctrine of idem sonans is that though a person's name has been inaccurately written, the identity of such person will be presumed from the similarity of sounds between the correct pronunciation and the pronunciation as written. Therefore, absolute accuracy in spelling names is not required in legal proceedings, and if the pronunciations are practically alike, the rule of idem sonans is applicable.' (46 Cal.Jur.3d, Names, § 4, p. 110, fns. omitted; see also *Napa State Hospital v. Dasso* (1908) 153 Cal. 698, 701 . . . .) The rule is inapplicable, however, under circumstances 'where the written name is material.' (*Emeric v. Alvarado* (1891) 90 Cal. 444, 466 . . . .) '[T]o be material, [a variance] must be such as has misled the opposite party to his prejudice.' (Black's Law Dict. (5th ed. 1979) p. 671.)." (*Orr*, at p. 669.)

In *Orr*, the court found the misspelling material because the debtor's name was spelled incorrectly on the abstract of judgment. (*Orr*, *supra*, 198 Cal.App.3d at pp. 669-671.) Here, the trial court found the misspelling was not material defect in the offer because appellants knew the offer came from respondent Hofmann. It included the correct case number, caption for the case, and listed defendant O.C. Jones and Sons, Inc. It only misspelled Hofmann's last name by adding an extra "f" and leaving off the ending "n." This minor misspelling did not invalidate the offer.

b. Service of the Offer

After issuing a tentative ruling on September 16, 2015, the court ordered the parties to submit supplemental briefing on the amount and validity of costs. In addition to these issues, appellants' supplemental letter brief raised new arguments including that respondents improperly served the second section 998 offer on appellants directly rather than on their counsel.

The court heard argument on October 6, 2015, about its tentative ruling. Appellants argued that their counsel only received eight-days' notice of the second section 998 offer prior to trial, and therefore the offer was invalid. While the offer was personally served on appellants on May 2, 2015, the same offer was served on appellants' counsel on May 6, 2015. The first day of trial was scheduled for May 14, 2015. Therefore, appellants argued because the offer was not effective unless and until it was served on counsel and not upon the parties directly, it was untimely.

In response to the court's observation that appellants had failed to provide any authority to support their argument,[12] counsel responded that sometimes there is no case law "on an absolutely dumb move" by opposing counsel.

The court adopted its tentative ruling, finding that appellants had raised new evidence and arguments in their supplemental briefing: appellants "argue now, for the first time, that Defendants' second Section 998 offer was invalid because it was

[12] The court also stated that even if it accepted appellants' contentions about the second offer, their arguments regarding untimeliness did not apply to the first offer.

'unethically' served directly on Plaintiffs." The court rejected the argument because appellants offered no reason they could not have raised the argument or offered evidence as part of their initial moving papers before the court's tentative ruling. The court denied it as an improper motion for reconsideration. The court also noted their argument failed on the merits because they offered "no authority as to why direct service of a Section 998 offer would render it invalid, and the Court has found none."

On appeal, appellants once again argue that the second section 998 offer was untimely because it was personally served on appellants and not served on appellants' counsel in a timely fashion. Appellants contend the court "ignored the clear fact" that the offer was not served on counsel until eight days before trial. Appellants mischaracterize the record because the trial court denied appellants' argument as an improper motion for reconsideration and found it failed on the merits. Appellants fail to address whether they can appeal a motion that was denied as untimely and an improper motion for reconsideration.

We conclude that appellants have waived this argument on appeal. (*Litt*, *supra*, 237 Cal.App.4th at p. 1224.) It was not properly raised before the trial court and the court found it was an improper motion for reconsideration. Additionally, appellants fail to set forth a proper argument in their brief, or cite any authority to support their argument that a section 998 offer is not effective unless and until served on counsel, even if timely served on the parties themselves. Moreover, the trial court did not abuse its discretion in concluding the second offer was valid. (See *Berg v. Darden* (2004) 120 Cal.App.4th 721, 732 [§ 998 offer is not "fatally defective" because it was not formally served].) As discussed in detail in the next section, even if the service of the second offer was defective, the first offer remained operative, and the court could properly award costs from the time of the first offer as it did here.

c. Second Offer to Compromise Does Not Revoke the First Offer

Appellants argue that respondents second section 998 offer extinguished the first offer, so they are not responsible for any expert costs that accrued from the date of the first offer.

Our Supreme Court addressed this issue in *Martinez, supra,* 56 Cal.4th 1014 where it considered whether a later offer extinguishes a prior offer for purpose of section 998's cost-shifting provisions. The court held: "We conclude that where, as here, a plaintiff makes two successive statutory offers, and the defendant fails to obtain a judgment more favorable than either offer, allowing recovery of expert fees incurred from the date of the first offer is consistent with section 998's language and best promotes the statutory purpose to encourage settlements." (*Id.* at p. 1017.)

The *Martinez* court distinguished *Wilson v. Wal-Mart Stores, Inc.* (1999) 72 Cal.App.4th 382 (*Wilson*), relied on by appellants. *Wilson* held the last offer superseded and "extinguished" the first offer. (*Id.* at pp. 389-390.) Under "the so-called 'last offer rule' applied in *Wilson* and *Distefano* [*v. Hall* (1968) 263 Cal.App.2d 380], when a party makes successive unrevoked and unaccepted section 998 offers, the last such offer is the only operative offer with respect to the statutory benefits and burdens." (*Martinez, supra*, 56 Cal.4th at p. 1023, italics omitted.) The *Martinez* court concluded: "[I]f the statutory benefits and burdens were to run only from the date of the last offer in circumstances such as these, plaintiffs may be deterred from making early offers or from later adjusting their demands. This would inhibit settlement opportunities and be at direct odds with our prior recognition that '[t]he more offers that are made, the more likely the chance for settlement.' " (*Id*. at p. 1025, quoting *T.M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 281.)

Where a defendant makes two statutory offers and the plaintiff fails to obtain a verdict more favorable than either, "section 998's policy of encouraging settlements is better served by not applying the general contract principle that a subsequent offer entirely extinguishes a prior offer. [Citation.]" (*Martinez, supra*, 56 Cal.4th at p. 1026.) This is different than *Wilson* where the offeree obtains an award less favorable than a first section 998 offer but more favorable than the second offer. (*Id.* at p. 1026.) "[W]e hold that where, as here, a plaintiff serves two unaccepted and unrevoked statutory offers, and the defendant fails to obtain a judgment more favorable than either offer, the trial court

retains discretion to order payment of expert witness costs incurred from the date of the first offer." (*Ibid*.)

Here, the trial court found that respondents made two offers, never revoked either offer, and appellants refused both offers. Appellants ultimately recovered less than *either* offer. The court distinguished *Wilson*, where the judgment was an amount between the two offers, whereas here the judgment fell below both offers. Under *Martinez*, the court could order the payment of expert witness fees for the period between the two offers.

d. Offer Failed to Provide for Liens

Without citing any authority, appellants argue the section 998 offer was defective because it failed to address any outstanding liens.[13] To the contrary, a defendant does not have to take into consideration any liens pending against a possible settlement when evaluating his case for purposes of making a settlement offer. (*Culbertson v. R. D. Werner Co., Inc*. (1987) 190 Cal.App.3d 704, 708 (*Culbertson*).)

In *Culbertson*, the plaintiff rejected a settlement offer because it would have resulted in zero recovery due to a workers' compensation lien. (*Culbertson*, *supra*, 190 Cal.App.3d at p. 708.) "Reduced to its simplest terms, the essence of plaintiff's argument is that the filing of a complaint for damages, no matter how unmeritorious the claim might be, imposes upon a defendant, no matter how meritorious its defense may be, an obligation to reward the plaintiff by making an offer of settlement which would liquidate any outstanding liens, pay plaintiff's attorney's fees and costs and yield some significant sum to the plaintiff, or lose the benefits of section 998. That, of course, is diametrically opposed to the clear language and intent of section 998. Such a strained interpretation of the statute and the cases would result in an increase of spurious lawsuits and a reduction in the number of settlements." (*Id*. at pp. 709-710.)

Here the trial court held appellants had failed to show the exclusion of liens invalidated either offer. The court noted appellants cited no relevant authority to support

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[13] The only case cited involves whether a section 998 included attorney fees, which in no way supports appellants' position. (*Ritzenthaler v. Fireside Thrift Co.* (2001) 93 Cal.App.4th 986.)

their argument. We agree. Under *Culbertson*, respondents did not need to consider any potential liens in making their section 998 offer. Furthermore, unlike *Culbertson*, the various liens cited by appellants amounted to $46,487, which would still have provided them with a substantial recovery under either offer.

e. Separate Offers to Each Appellant

Appellants argue that respondents were required to make separate offers to Marcia and Steven citing *Menees v. Andrews* (2004) 122 Cal.App.4th 1540 (*Menees*). In *Menees*, a wife brought a medical malpractice action against her doctor and her husband brought an action for negligent infliction of emotional distress. (*Id.* at p. 1542.) The doctor made a section 998 offer jointly to the husband and wife which they rejected. (*Menees*, at pp. 1543-1544.) The Fifth District held the section 998 offer should have been separately served on the individual plaintiffs, allowing each to accept or reject it. (*Menees*, at p. 1546.) The court noted, however, that the husband and wife were legally separated and had filed for divorce at the time the offer was made, and the court expressly declined to address the "complex issues" regarding community property. (*Id.* at p. 1545, fn. 3.)

Respondents contend this case is more akin to *Farag v. ArvinMeritor, Inc*. (2012) 205 Cal.App.4th 372 (*Farag*), which directly addressed the community property issue. The Farags argued a section 998 offer made jointly to a husband and wife was void. (*Farag*, at p. 374.) The Second District court held "a section 998 offer may be made jointly to spouses because, under California's community property law, a cause of action for personal injury damages is community property (Fam. Code, § 780) and under Family Code section 1100, subdivision (a), either spouse has the power to accept the offer on behalf of the community." (*Farag*, at p. 374.) ArvinMeritor received a defense verdict in the Farags' personal injury action against them. ArvinMeritor submitted a memorandum of costs requesting expert witness fees and expert travel costs. (*Id.* at p. 375.) The Farags' causes of actions—the husband's cause of action for personal injury and the wife's cause of action for loss of consortium—arose during the marriage and

constituted community property and the section 998 offer, made to the Farags jointly was valid. (*Farag*, at p. 382.)

"Indeed, requiring married couples with a common interest in the chose in action be allowed to accept or reject joint offers individually could result in the plaintiffs gaming the system by having one spouse accept the offer and the other reject it. 'That way they could both benefit if the judgment is greater than the offer, and could both avoid incurring costs . . . if it is less.' " (*Vick v. DaCorsi* (2003) 110 Cal.App.4th 206, 213, fn. omitted [§ 998 offer made jointly to a husband and wife whose recovery would be community property was valid]; see also *Barnett v. First National Ins. Co. of America* (2010) 184 Cal.App.4th 1454 [same].)

The trial court applied *Farag* and concluded that respondents were not required to make separate offers to Marcia and Steven. Appellants offered "no compelling reason and no authority" why the court should apply *Menees* instead of *Farag.* We agree the section 998 offer made jointly to Marcia and Steven was valid.

F. The Trial Court's Award of Costs Was Reasonable

On appeal, appellants argue the award of expert witness fees was unreasonable, citing to counsel's declaration filed in the trial court. In their opening appellate brief, appellants list the names of 12 experts, with a notation whether the costs associated with their testimony were either "reasonable" or "unreasonable," along with brief comments.[14] No legal argument supporting their position is included, and no citation to authority.

In their brief, respondents essentially make appellants' arguments for them and disprove them with citation to relevant authority as well as reference to the trial court's findings on each issue. In their reply brief, appellants fail to respond to the legal authority cited by respondents or to offer any argument of their own.

[14] For example, the brief lists Dr. John Hesselink as "unreasonable" because he did not appear at trial; he only testified for one hour at a deposition."

We, once again, decline to search the record for evidence to support appellants' claims, especially where they provide not a single citation to authority to support their assertions. (Cal. Rules of Court, rule 8.204(a)(1)(C), (2)(A), (C).)

Because appellants have failed to support their claims of error with argument, and to support their arguments with the necessary citations to the record, we deem the argument waived. (*Utility*, *supra*, 187 Cal.App.4th at p. 697.)

IV.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents.

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RUVOLO, P. J.

We concur:

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RIVERA, J.

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STREETER, J.