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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

PANYIOTES CHARALAMBOPOULOS,
an Incompetent Person, etc.,

Plaintiff and Appellant,

v.

UHS OF RANCHO SPRINGS, INC.,

Defendant and Respondent.

E049808

(Super.Ct.No. RIC409911)

OPINION

APPEAL from the Superior Court of Riverside County. Gloria Connor Trask, Judge. Affirmed.

Law Offices of John R. Contos and John R. Contos for Plaintiff and Appellant.

Dummit, Buchholz & Trapp, Scott D. Buchholz, Jeffrey H. Bogart, Amanda N. McCarty and William R. Moore for Defendant and Respondent.

Plaintiff and appellant Panyiotes Charalambopoulos, through his conservators, sued defendant and respondent UHS of Rancho Springs, Inc. (UHS; UHS does business as Inland Valley Medical Center), and various medical doctors for (1) professional

negligence; (2) negligent infliction of emotional distress; (3) tortious deprivation of access to medical records (Health & Saf. Code, § 123110); (4) tortious maintenance of medical records; (5) emergency medical services discrimination (Health & Saf. Code, § 1317); (6) violation of the Unruh Civil Rights Act (Civ. Code, § 51); (7) violation of emergency medical requirements (42 U.S.C. § 1395dd); and (8) interference with his constitutional rights (Civ. Code, § 51).¹

A jury found UHS negligent in the medical care of Plaintiff; however, the jury also found Plaintiff acted negligently. The jury found UHS to be 25 percent responsible for Plaintiff's injuries, and found Plaintiff to be 75 percent responsible for his injuries. Plaintiff was awarded \$1,801,300.76, which was reduced to \$37,500, due to the jury's apportionment and a settlement offset. Plaintiff moved the trial court for (1) a judgment notwithstanding the verdict, and (2) a new trial. The trial court denied both motions.

As to both motions, Plaintiff contends the trial court erred by denying the motions because: (1) there is not substantial evidence supporting the finding that Plaintiff was negligent; (2) the jury's finding of no future wage loss is not supported by substantial evidence; and (3) the jury's finding on past medical expenses is not supported by substantial evidence.

Plaintiff also raises contentions that relate solely to the motion for new trial: (1) the trial court incorrectly instructed the jury on the law of contributory negligence;

¹ On April 29, 2011, UHS requested that this court take judicial notice of UHS's answer filed on July 26, 2006. We grant the request. (Evid. Code, § 452, subd. (d).)

and (2) UHS's trial counsel made arguments to the jury that were not supported by the evidence. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. CHARALAMBOPOLOUS'S BACKGROUND

Plaintiff was 41 years old in 2002—the time of the incident at issue in this case. Plaintiff came to the United States in 1979 from Greece, to attend Whittier College; he received a bachelor's degree. Plaintiff worked in human resources and as a finance manager, but was not working at the time of the incident at issue in this case. In 2002, Plaintiff was married to Helena; he was married for eight or nine years. Plaintiff had two children. At the time of trial, in 2009, the children were 14 years old and 11 years old.

B. EMERGENCY ROOM

On December 20, 2002, Plaintiff went to the emergency room at Inland Valley Regional Medical Center in Wildomar, because he had been suffering a nosebleed for approximately three hours. At approximately 11:58 p.m., Dr. Michael Forrester (Forrester) began taking care of Plaintiff in the emergency room. Forrester specializes in otorhinolaryngology, which refers to the ear, nose, and throat. Plaintiff was suffering from a posterior nosebleed. Anterior nosebleeds are the common type of nosebleeds, which involve bleeding inside the nose. A posterior nosebleed refers to bleeding at the base of the skull—behind the nose or in the upper throat area. A posterior nosebleed is serious. Because of the bleeding, Plaintiff lost approximately half his volume of blood, suffered respiratory arrest, and required intubation. If the bleeding were not controlled,

Plaintiff would likely have died from the posterior nosebleed. Plaintiff was unconscious when Forrester cared for him in the emergency room.

It is not clear what caused Plaintiff's posterior nosebleed to start; however, he may have continued to bleed due to (1) high blood pressure, and (2) low platelets, which are critical to forming clots. Plaintiff likely had low platelets due to taking aspirin-type products.

An emergency room physician called Forrester, because the emergency room physician was having difficulty controlling the posterior nosebleed. The emergency room physician had tried balloon packing,² referred to as Nasostat, which is the common solution to posterior nosebleeds, but Plaintiff continued to bleed. Additionally, Plaintiff sneezed out some of the packing and may have aspirated some blood, which led to him being intubated. Since the Nasostat was not stopping the bleeding, Forrester made his own packing, which is how posterior nosebleeds were controlled prior to the use of Nasostat. Forrester used ointment gauze and umbilical tape to create packing that resembled a tampon. Ointment gauze is gauze that has been infused with ointment, such as Vaseline or Neosporin. The ointment gauze was approximately five inches wide by three yards long. The umbilical tape was one-eighth of an inch wide and very strong, such that it could be pulled on without breaking. When rolled up, the packing was about the size of a cigar. Forrester used square knots, or surgeon's knots, when

² Balloon packing involves blowing up a balloon in the upper throat area (nasopharynx area) and placing packing in the front of the nose.

tying the umbilical tape around the rolled-up gauze. There were two tape “strings” tied around the gauze roll—one for each nostril.

The packing was inserted through Plaintiff’s mouth, and the tape strings were threaded through the front of Plaintiff’s nose; then the packing was pulled up to the back of his nose. The umbilical tape was pulled on through Plaintiff’s nostrils. The posterior packing was pulled up so that it was higher than the roof of Plaintiff’s mouth. The posterior packing could not be seen by looking into Plaintiff’s mouth. The two strings were tightly tied together under the columella—the column dividing the two nostrils. The tape strings were tied very firmly for the sake of stopping the bleeding. Forrester placed gauze between the columella and the knot to provide cushioning and prevent the skin from dying. The packing is very uncomfortable.

Forrester then used bayonet forceps to pack the anterior portion of Plaintiff’s nose with ointment gauze.³ Forrester used approximately five yards of ointment gauze in each nostril. Forrester also placed gauze under Plaintiff’s nose, which is referred to as a “mustache dressing,” for the purpose of catching any blood and/or mucus. The mustache dressing was affixed to Plaintiff’s face with tape on both sides, and it was taped to his nose, but did not go into the nostrils. With the mustache dressing in place, a person could not see into Plaintiff’s nose. Forrester worked on Plaintiff until approximately 1:20 a.m. on December 21, 2002.

³ Anterior packing was inserted because blood will sometimes flow to the front of the nose, after the posterior packing closes off the back of the nose. The primary purpose of the anterior packing is “to catch some of the drainage.”

C. INTENSIVE CARE

After finishing in the emergency room, Plaintiff was moved to the intensive care unit (ICU). Plaintiff was placed in the ICU because (1) he was on a mechanical ventilator, which required a nurse to be near him at all times; (2) it was possible he was suffering from an underlying illness or organ problem that caused the posterior nosebleed to start; and (3) the posterior nose pack can cause patients to stop breathing.

After being moved to the ICU, Plaintiff remained intubated and was not breathing on his own. He suffered from a high temperature and was very ill, possibly suffering from sepsis. Forrester followed-up with Plaintiff on December 22, 2002. Forrester noted that Plaintiff understood questions asked of him and responded to them by shaking his head or squeezing Forrester's hand. Forrester spoke to Plaintiff about why he was in the ICU and what procedures had taken place. Forrester prescribed Plaintiff intravenous Ativan, which is a type of sedative used to control restlessness. Sedatives are usually prescribed to prevent people who were unconscious from waking up, not knowing where they were, and then ripping out their breathing tubes and trying to get out of bed.

Forrester ordered that the packing be removed on Friday, December 27, at the earliest, which would be seven days after it was initially inserted; if Plaintiff started bleeding again, then the seven-day clock would start over. The packing had to stay in place for at least seven days, in order for a strong clot to form.

Plaintiff's father (Father) travelled from Greece upon hearing of his son's hospitalization. Father arrived at the hospital on December 23, 2002. Father stayed in

the ICU room for five to ten minutes at a time, but had to leave whenever a nurse came in the room. On December 23, at approximately 6:00 p.m., a nurse described Plaintiff as “periodically very anxious [and] mildly agitated.” However, by 8:00 p.m., Plaintiff was “alert and cooperative.”

Dr. Jorge Martinez (Martinez) was assigned as Plaintiff’s primary care physician, or attending physician. Martinez noted that, while in the ICU, Plaintiff suffered periods of anxiety and agitation. Martinez was not sure if the anxiety and agitation were caused by (1) the ICU environment; (2) Plaintiff being sick, in that he was recovering from nearly dying of shock and was possibly septic; (3) his desire to go home; (4) the uncomfortable packing in his nose; or (5) his alcoholism.⁴ Martinez did not believe Plaintiff’s anxiety was caused by confusion, because Plaintiff was not disoriented as to time, space, and his name. During the periods of agitation, Plaintiff attempted to remove medical equipment from his body, such as IVs and monitoring equipment.

On December 24, 2002, at 4:00 a.m., Plaintiff was “getting more anxious and wanting to take the [endotracheal] tube out.” At 6:37 a.m., the nurse made the following note: “Patient has been very restless and anxious towards this morning. [Patient] wanted to take the [endotracheal] tube out and wanted to eat food. [Patient] has been explained the steps of extubation. [Patient] seems calmer than earlier when he was found naked.” At 2:34 p.m., a nurse noted that Plaintiff had to repeatedly be

⁴ Upon further questioning, Martinez testified there was nothing in the medical chart referring to Plaintiff being an alcoholic. However, there is a report from Forrester reflecting Plaintiff used alcohol regularly, and a report from Martinez that Plaintiff suffered from chronic alcoholism.

instructed not to remove his oxygen mask; Plaintiff was complaining that the mask was “too uncomfortable.” At 5:29 p.m., Plaintiff was described as “anxious [and] restless.” At 6:28 p.m., Plaintiff was “non compliant.”

On December 24, at 8:00 p.m., a nurse found Plaintiff to be “restless and disoriented.” Plaintiff was “constantly tossing and turning, examining the nasal packing and foley cath[eter]. The nurse believed Plaintiff was having a difficult time remembering the instructions given to him. At 9:00 p.m., a nurse found Plaintiff trying to get to the bathroom so that he could examine the packing. The nurse found Plaintiff to be unaware of “all the information provided earlier.” At approximately 9:30 p.m., Helena telephoned, and a nurse informed her that they were considering using restraints on Plaintiff, because he had tried to remove the foley catheter and nasal packing. Helena came to the hospital and stayed with Plaintiff, which seemed to calm him, but she left at 3:30 a.m., after Plaintiff fell asleep. When Plaintiff awoke he was anxious and wanted to speak to Helena. A nurse explained she had left. Plaintiff became restless and tossed from side to side in bed, such that his blood pressure could not be taken due to the restlessness.

On December 25, 2002, a nurse noted that she had to stay with Plaintiff “all the time” because he was “constantly picking on electrodes [and] IV’s.” The nurse further noted Plaintiff “repeatedly expressed [a] wish to go home” and that he was “unable to seemingly find a comfortable position.” The nurse described Plaintiff as “extremely noncompliant.” Plaintiff removed some of the medical equipment from his body, as well as some of the anterior packing from one of his nostrils. Via telephone, Forrester

ordered that a nurse repack the nostril with a four-inch by four-inch piece of gauze. The nurse repacked the nostril, and noted, “family being at the . . . bedside helps to calm [Plaintiff] down.” Forrester did not believe that Plaintiff removed the packing due to being confused.

On December 26 at 8:00 a.m., Plaintiff complained that the packing was bothering him, because his nostrils felt ““plugged.”” A nurse explained the need for the packing and reminded him not to pull at the packing. At 1:00 p.m., Plaintiff pulled an IV from his hand, “stating, ‘I want the tape off of there.’” A nurse noted Plaintiff was awake and alert, but did “not always retain instructions given to him.”

D. DIRECT OBSERVATION UNIT

Later in the day on December 26, 2002, Martinez ordered that Plaintiff be transferred from the ICU to the direct observation unit. The ICU typically has a nurse to patient ratio of one to one, while the direct observation unit has a ratio of one to two or three. Forrester believed the transfer was reasonable since Plaintiff was not having breathing problems, his temperature was normal, and he had been extubated. As part of the move, Martinez ordered that Plaintiff be regularly monitored.

On December 26 at 8:00 p.m., a nurse noted in Plaintiff’s record that he was oriented as to himself, but forgetful. At 12:15 a.m. on December 27, Plaintiff was given Ativan to help him relax, but approximately one hour later, he removed his telemetry equipment (heart monitor). The nurse was able to reapply the telemetry equipment, but described Plaintiff as “confused.” At 4:00 a.m., Plaintiff was “refusing” the telemetry equipment.

Nancy Bergeron (Bergeron) was the nurse assigned to Plaintiff on the morning of December 27, 2002. Bergeron's shift started at 7:30 a.m. The nurse from the night shift (Harris) informed Bergeron that Plaintiff "had packing and that it was taped and intact." Harris mentioned to Bergeron that Plaintiff and his family were anxious to talk to Forrester about Plaintiff going home from the hospital.

Plaintiff had an appointment to have the packing removed at 8:00 a.m. Forrester planned to place Plaintiff under general anesthesia in order to remove the packing. Forrester wanted Plaintiff to be under general anesthesia in case he needed to repack the posterior nose, because it is an uncomfortable procedure. Martinez went to Plaintiff's room and spoke to Plaintiff and Father. Martinez explained that the 8:00 appointment had been canceled because Forrester was busy; the appointment was moved to 4:00 p.m. Martinez briefly examined Plaintiff. Plaintiff was conversational. Martinez left the hospital and returned to his office after speaking with Plaintiff.

At 8:00 a.m., Bergeron checked Plaintiff's lung sounds with a stethoscope. Plaintiff had a blood oxygen level of 96 percent. During the 8:00 check, Plaintiff did not appear anxious to Bergeron; however, Helena questioned Bergeron about when Forrester would arrive and when Plaintiff would be allowed to go home. Bergeron did not know Forrester's schedule, so she was unable to answer the questions, but Helena "kept asking."

At approximately 9:00 a.m., Bergeron visited Plaintiff a second time. Plaintiff appeared fine; however, he was "pulling at [the] packing in [his] nose," and there was dried blood on the dressing and packing. At approximately 9:30 a.m., Bergeron

checked on Plaintiff a third time. During the third visit, Bergeron saw Plaintiff touching the mustache dressing on the outside of his nose. Bergeron told Plaintiff not to touch the dressing. Helena was also in the hospital room when Bergeron instructed him not to touch the dressing. Plaintiff's respiration rate was good during the third visit; he did not appear to be suffering any respiratory distress.

E. CODE BLUE

Dawn Carr (Carr) was a certified nurse assistant in the direct observation unit. Carr was working in the direct observation unit on the morning of December 27. At approximately 10:00 a.m., Carr saw Father in the hallway waving his arms; she assumed he needed something. Carr went into Plaintiff's room with Father. Father was unable to communicate with Carr in English, so he pointed at his throat. Carr saw Plaintiff sitting on the edge of the bed with his elbows on his knees and his head in his hands, but his face was up, not pointed towards the floor. The mustache dressing, with the tape, was on the floor next to Plaintiff. Carr had seen Bergeron in the hallway or in another patient's room, so she called out for Bergeron, "Nancy, come here." Carr called for Bergeron because "[b]andages aren't in [Carr's] scope of practice." Bergeron quickly came into the room. Carr left the room when Bergeron arrived.

When Bergeron entered the room, Plaintiff was standing near the bathroom door. Bergeron saw the dressing on the floor and dried blood on Plaintiff's fingers. Plaintiff appeared anxious and short of breath. Bergeron called out for help, due to the dressing being on the floor, and Plaintiff suffering shortness of breath and anxiety. The charge nurse, Lourdes David (David) came to Plaintiff's room within seconds. Two respiratory

therapists were in the direct observation unit at the time, so they also went to Plaintiff's room. Bergeron listened to Plaintiff's lungs with a stethoscope, and he "sounded good." Bergeron also checked Plaintiff's blood oxygen level, and found it to be "in the normal limits."

Someone said that Plaintiff's anxiety might be causing the shortness of breath. Bergeron and David walked Plaintiff back to his bed, and he sat on the side of the bed. Plaintiff's breaths were louder than typical breathing sounds, such that his breathing could be heard in the room. A respiratory therapist gave Plaintiff a nebulizer breathing treatment. Bergeron and David asked Plaintiff to take slow and deep breaths. Plaintiff did not speak in response to Bergeron and David. Father was frantically saying, in Greek, that there was problem with Plaintiff's throat. When the nurses could not understand what Father was saying, he began yelling, and then was escorted from the room by a security guard.

Bergeron yelled for a secretary to call Martinez. Someone at the nurses' station informed Bergeron that Martinez was on the telephone. According to Martinez, Bergeron told him Plaintiff was agitated, that it was difficult to control him, and they had called a security guard to control him. Bergeron told Martinez that Plaintiff's vital signs were stable. Martinez testified that Bergeron did not tell him that Plaintiff was short of breath, that he was receiving treatment from a respiratory therapist, or that the mustache dressing had been removed. Bergeron testified she *did* tell Martinez that Plaintiff was short of breath, that he was receiving treatment from a respiratory therapist, and that the mustache dressing had been removed. Martinez ordered Ativan

for Plaintiff. Martinez stated he would not have ordered the Ativan if he had known the details of the situation; Ativan can have a suppressive effect on a person's breathing.

Within one minute of ending the telephone call, Bergeron administered intravenous Ativan to Plaintiff. Plaintiff began shaking. Ativan typically takes about five to fifteen minutes to affect a person. Bergeron, the respiratory therapists, and Floarn Lott (Lott), who was a nursing supervisor, had Plaintiff lay down on the bed; he had been sitting on the side of the bed and there was a fear that he would lose consciousness. After Plaintiff lay down, "he just quit breathing."

Lott called a "code blue," and the code blue was announced over the intercom system. Dr. Gregory Murphy (Murphy) was working in the emergency room on the morning of December 27. Murphy responded to the code blue. Murphy ran to Plaintiff's room; he was there within two minutes. When Murphy arrived at the room, a respiratory therapist was ventilating Plaintiff via a "bag valve mask." When Murphy arrived, Plaintiff had a pulse, but shortly thereafter the pulse was lost. Someone began doing CPR compressions on Plaintiff's chest, in addition to the bag valve mask ventilation.

Murphy decided to insert a breathing tube, because it would "secure the airway" and provide the most oxygen. When Murphy looked into Plaintiff's mouth he saw something blocking the vocal chords, which is the path that the breathing tube takes to the trachea. Murphy found "a big clump of gauze that was packed together into sort of a solid wad" in the back of Plaintiff's throat. Murphy used forceps to move the gauze aside, and then he inserted a breathing tube. Murphy stated that Ativan could suppress a

person's ability to cough up an obstruction. Murphy ordered various medications to restart Plaintiff's heart. After the medications were administered and the breathing tube was inserted, Plaintiff's breath and heart rate were reestablished. Murphy left the room soon after ensuring the breathing tube was secure.

A nurse from the ICU, Maureen Mogavero (Mogavero), also responded to the code blue. While at Plaintiff's hospital room, Mogavero asked Bergeron "what had happened that caused this event." Bergeron told Mogavero "[t]hat she had found [Plaintiff] and his wife, [Helena], in the bathroom, and [Plaintiff] was manipulating, trying to remove the nasal packing." Bergeron said that Helena "was upset with him that he was manipulating the gauze," and Bergeron told him to stop touching the gauze. Mogavero was also told that Plaintiff "was angry from the night before that the doctor had said he would be in around a particular time to remove the gauze. The doctor did not make it in, so by the following morning, [Plaintiff] was more angry because he wanted the gauze out. And . . . that's when he went into the bathroom."

Margaret Godoy (Godoy), a respiratory therapist who responded to the code blue, saw Helena and Father in the hospital room. Godoy saw Father crying in the room. During the code blue, Helena told Godoy that "[s]he was upset with her husband for playing with the packing. She had stated that she had told him to stop playing with it, to wait for the doctor."

F. AFTER THE CODE BLUE

After Murphy left the room, he spoke to Helena. Murphy explained what had happened during the code blue. Helena was very upset and asked why Plaintiff had

been moved out of the ICU when he still had the nasal packing. Murphy was unable to offer her an explanation. Plaintiff was moved back to the ICU.

Through a translator, Father explained that, prior to the code blue, Plaintiff went into the restroom and manipulated the packing; when Plaintiff came out of the restroom he “became much more distressed and then was unable to breathe.”

Forrester arrived at the hospital at approximately 4:00 p.m. on December 27. Forrester removed the posterior packing. The right side of the packing was still in Plaintiff’s upper throat (nasopharynx), but the left side of the packing had “swung into the lower throat.” Forrester had to maneuver the right side of the packing in order to gently loosen it, because the packing “remained firmly embedded or wedged in the nasopharynx.” The packing was removed through Plaintiff’s mouth.

While performing the procedure, Forrester saw that the umbilical tape string was broken in two places. The umbilical tape string coming out of the left nostril was missing, and there was just a piece of the string coming out of the right nostril. The knot that had been tied under the columella was still intact. The tape was broken approximately one-half to three-quarters of an inch from the knot. It appeared to Forrester the string had been cut. Forrester explained that the umbilical tape is made of a woven material, and if it had been rubbed or worn out, then it would have frayed; however, the strings were not frayed, there “was a very straight cut across it.” Forrester believed that Plaintiff cut the strings; he did not believe a healthcare provider would have cut the strings. Forrester did not believe the breathing tube caused the umbilical tape to break, because the packing and tape were at the back of the nose, above the roof

of the mouth, and the breathing tube goes down the throat, so “the umbilical tape would have been nowhere near” the breathing tube.

Forrester conceded that following the procedure, in his medical record notes, he described the umbilical tape as “broken,” and did not use the word “cut.” Forrester explained that he used the word “broken” as opposed to “cut,” because he was not sure what had happened to the tape. Forrester believed that a person might pull “at whatever is on his nose” and “stick his hands in his mouth” if he felt that he were choking on an object.

Father testified that Plaintiff did not have any shaving equipment, knives, scissors, or sharp implements in his hospital room. Father did not assist Plaintiff with manipulating the packing.

While Plaintiff was in the ICU, the nursing staff noticed neurological changes, in that his pupils appeared dilated and abnormal. Plaintiff did not respond to treatment for hypoxic encephalopathy (lack of oxygen to the brain). The prognosis was that Plaintiff “would remain as a vegetable.” While in the ICU, Plaintiff’s mental condition did not improve, and he “remained unresponsive.” Plaintiff’s was transferred to a long-term care center, after being discharged from the hospital on February 14, 2003.

Helena and the children she shares with Plaintiff went to Greece in May or June 2003, and have not returned to visit Plaintiff.

Father never returned to Greece; he stayed in America to care for Plaintiff. Plaintiff’s mother (Mother) also moved to America from Greece, to take care of

Plaintiff. Since 2003, Mother and Father have provided 24-hour care for Plaintiff in his home.

G. PROGNOSIS

Dr. Thomas Hedge (Hedge) was a medical doctor who specialized in physical medicine and rehabilitation; he testified on behalf of Plaintiff. Physical medicine and rehabilitation are for people who have suffered strokes, spinal cord injuries, brain injuries, multiple amputations, and major trauma or illness. Hedge evaluated Plaintiff in January 2007 and reviewed Plaintiff's medical records. During the examination in 2007, Plaintiff was fed through a tube going into his stomach; he was wearing a diaper. Plaintiff was not able to speak in words, although he did attempt to speak, and made unintelligible sounds. Plaintiff's condition had not substantially changed since 2007. Hedge did not expect Plaintiff to ever be able to feed himself, walk, or have meaningful use of his arms. Hedge estimated that Plaintiff could expect to live for 13 more years.

H. DEFENSE EXPERT

Margaret Morley (Morley) was a clinical nurse specialist for critical care and a nurse practitioner in a cardiology department. Morley testified as an expert on behalf of UHS. Morley concluded that the case was "tragic" but that "all the workers" on the morning of December 27 "were within the standard of care." Morley believed it was proper to administer the breathing treatment to Plaintiff because he was short of breath, and the treatment allows people to "breathe more effectively." Morley felt that the UHS staff "made heroic measures to reinstate [Plaintiff's] respiratory effectiveness." In

regard to the Ativan, Morley testified, “[T]he patient had been given Ativan 23 previous times and had had no side effects of Ativan.”

Morley did not believe it was necessary for the staff to look into Plaintiff’s airway for a possible obstruction, because Plaintiff “revealed no signs of any type of obstruction in his airway[, so t]here was no reason for them to think [that there was an obstruction].” Morley explained that when a person’s airway is partially obstructed, “You would hear something abnormal. And also that the patient would be showing signs and symptoms of choking.” Morley felt the UHS staff was within the standard of care by not asking Plaintiff what was wrong with him, because he was short of breath, and speaking while short of breath is difficult.

I. PLAINTIFF’S MEDICAL EXPERT

One of Plaintiff’s experts was Dr. Dennis Crockett (Crockett), an ear, nose, and throat surgeon. Crockett testified that “[n]asal packing is miserable[, e]specially when it’s been in for five to seven days. It’s rather barbaric actually. That’s why we don’t do it anymore.” Crockett explained that nasal packing is usually not left in longer than five days because (1) it can cause a fatal infection due to collecting secretions; and (2) the packing gauze and umbilical tape can deteriorate, and then can become slippery and dislodge, due to the gauze already being infused with ointment and then collecting mucous and secretions. Crockett stated that the gauze would expand as it absorbed secretions, and “[i]f not for the umbilical tape, the pack would expand and eventually just squeeze out [of the compact nasal space] and fall down into the airway.”

Crockett stated the best way to secure posterior packing is to tape the umbilical tape to the patient's cheeks, as opposed to tying a knot with the umbilical tape under a person's columella. Crockett stated that was the preferred method because if the tape was tied tight enough to secure the packing, then the columella became deformed, but if it were tied so as to not deform the columella, then the packing could fall back into the airway. Crockett noted there was no columella deformity recorded in Plaintiff's medical records. Crockett further noted the gauze pad, which was located between the knot and Plaintiff's columella, was on Plaintiff at the time of his code blue, but was missing when Forrester came into the intensive care unit on December 27, and was not on the floor.

Crockett explained that a patient might pull at the packing if he were suffering a partial airway obstruction. Crockett explained loud breathing is an indication of a partial airway obstruction, and not speaking is an indication of a total airway obstruction. Crockett stated the standard of care required that a nurse or respiratory therapist ask a patient about his symptoms when diagnosing respiratory distress.

Crockett did not believe that administering a breathing treatment to Plaintiff met the standard of care, because breathing treatments "are designed for the lungs specifically" and the problem in this case was an obstruction of the upper airway, so the breathing treatment was "a waste of time." Crockett opined that Plaintiff went "in and out of total obstruction" on the morning of December 27. Crockett explained there is a "ball valve phenomenon where the pack sits in the back of the throat; and when you breathe in, it sucks it down, occludes the airway briefly, and then as you exhale, you

pop it back up again.” Crockett stated, “this [phenomenon] could have been going on for hours or even days, for all we know.”

Crockett opined the ball valve phenomenon was consistent with a patient who was panicking, because a person panics when he feels he cannot breathe. Crockett also believed the ball valve phenomenon was consistent with the posterior packing being attached on the right side, but pivoting into the hypopharynx on the left side, because the pack would have been sucked down on inhale, but “bounce[d] up on exhale.”

Crockett believed that Plaintiff’s acts of removing the telemetry equipment and refusing the telemetry equipment reflected Plaintiff was not receiving enough oxygen to his brain (hypoxia), because he was not behaving in a coherent manner. Crockett explained that even properly placed nasal packing can lead to hypoxia depending a person’s other health factors, such as age and body weight.

Crockett opined that when the nurse in the ICU replaced the anterior packing in Plaintiff’s left nostril, he or she “very likely could have begun the process of dislodgement.” Crockett further opined that when Plaintiff pulled on the packing around 9:30 a.m. on December 27, he had the potential to dislodge the packing, due to the deterioration of the packing.

As to the Ativan, Crockett explained that the drug could lessen a person’s ability to “cough up” an airway obstruction, and it could “decrease the ability to hold the pack in place by the natural muscle action which occurs in the area of the nasopharynx.”

Crockett opined that Ativan was contraindicated for Plaintiff, and believed that the drug “could have been part of the problem.”

J. ECONOMIC DAMAGES

1. *MEDICAL EXPENSES*

Athanasia Charalambopoulos (Athanasia), Plaintiff's younger sister, lived in Greece. Athanasia handled Plaintiff's bills, via automatic bill pay at the bank, because Father and Mother could not write in English. When Plaintiff was initially injured, he was still covered by his prior employer's private health insurance, and that insurer paid for part of the initial hospitalization and rehabilitation hospitalization. Eventually, the private insurance "ran out." In the summer of 2003, Medi-Cal began covering Plaintiff's medical expenses. Approximately one year later, Medicare began covering some of the expenses.

As of December 31, 2008, Medi-Cal had paid \$240,620.26 for Plaintiff's care, and Medicare had paid approximately \$95,000. Athanasia estimated the family had spent \$10,000 in medical copays. The family had also paid \$75 three times per week for Plaintiff's physical therapy.

2. *WAGES*

Dr. Joyce Pickersgill (Pickersgill) holds a Ph.D. in economics and testified on behalf of Plaintiff. Pickersgill was hired to determine (1) Plaintiff's lost earnings as a result of his injuries; and (2) the value of his medical care. In regard to medical expenses, Pickersgill calculated the value of Plaintiff's past medical care provided by family members to be \$715,010. Pickersgill explained the \$715,010 was the estimated value of the family's care for Plaintiff from "July 2004, through the present, less the time that was provided by Medi-Cal." Pickersgill valued the parents care at \$14.50 per

hour, which is the rate for attendant care, but did not double the rate for two people—presuming the parents took turns caring for Plaintiff. Pickersgill stated that the Medi-Cal deduction was due to Medi-Cal “provid[ing] 145 hours per month between January 2006 and the present except for a six-month period.”

In calculating the lost earnings, Pickersgill took into account the fact that Plaintiff had lost his job the month prior to the nosebleed (November 2002), and was unemployed at the time of the nosebleed. Pickersgill assumed Plaintiff would have found a new job by March 2003, and the job would have paid \$49,400 per year, which was the amount of his last salary.

For past lost earnings, calculated through July 31, 2009, Pickersgill assessed a total loss of \$375,599. For future lost earnings, Pickersgill assumed Plaintiff would have worked another 15 years, to the age of 63.7, and calculated that loss to be \$883,135 (present value) or \$1,310,657 (future value).

K. VERDICT

The jury found (1) UHS was negligent in its care and treatment of Plaintiff; (2) the negligence of a non-physician staff member of UHS was a substantial factor in causing Plaintiff’s injuries; (3) Plaintiff suffered damages; (4) Plaintiff was negligent; (5) Plaintiff’s negligence was a substantial factor in causing his injuries; (6) UHS was 25 percent responsible for Plaintiff’s injuries; and (7) Plaintiff was 75 percent responsible for his injuries.

The jury awarded: (1) \$287,528 for loss of past earnings;⁵ (2) \$715,010 for past medical expenses; (3) nothing for loss of future earnings; (4) \$7,870,105 for the expected value of future medical and care costs (\$5,635,086 in present value); (5) \$150,000 for past non-economic damages, including pain and suffering; and (6) nothing for future non-economic damages, including pain and suffering. Due to the jury's verdict and a settlement offset, the trial court found Plaintiff was entitled to a judgment against UHS in the amount of \$37,500.

L. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Plaintiff moved for a judgment notwithstanding the verdict (JNOV). First, Plaintiff argued expert medical testimony was required to establish comparative negligence in medical malpractice cases. Plaintiff argued, "Defendant offered absolutely no medical testimony that the plaintiff's actions were negligent. Indeed, there is no testimony that [Plaintiff], in fact, removed any part of the dressing or packing. There is only testimony that the mustache dressing was found on the floor of plaintiff's room. Defendant offered only speculation as to whether [Plaintiff] did or did not remove portions of the dressing." Plaintiff argued there was no evidence reflecting that failure to follow instructions was unreasonable behavior.

Second, Plaintiff asserted there was no evidence to support the finding that he was substantially a factor in causing his injuries. Plaintiff explained there was no

⁵ The reporter's transcript reflects the jury found Plaintiff sustained a loss of past earnings in the amount of \$28,752,800. We infer this number is a typographical error, and rely on the written judgment in the appellant's appendix.

evidence “that any act of the plaintiff caused displacement of the *posterior* nasal packing.” Plaintiff asserted the defense would have needed to provide expert medical testimony that his actions dislodged the posterior packing, in order for the jury’s verdict to stand.

Third, Plaintiff asserted he was entitled to a JNOV on the issue of future wage loss because there was no dispute he suffered such damages; the only issue was how much damage he suffered. Plaintiff argued his expert believed the amount should be \$883,135, while the defense expert concluded the amount should be \$610,273. Plaintiff argued there was no evidence supporting an award of zero dollars for future lost earnings.

Fourth, Plaintiff asserted he was entitled to a JNOV on the issue of past medical expenses. Plaintiff argued there was uncontradicted evidence he incurred \$335,000 in medical expenses that were covered by Medi-Cal and Medicare, and such payments were subject to reimbursement. Plaintiff asserted the past medical expense award should be increased from \$715,010 to \$1,050,000.

M. MOTION FOR NEW TRIAL

Plaintiff also moved for a new trial. First, Plaintiff argued the trial court improperly instructed the jury on contributory negligence, because there was no expert testimony establishing his negligence, or evidence that any act of his was the ultimate cause of his injuries.

Second, Plaintiff asserted the future loss of earnings finding was not supported by any evidence, because “[t]here was absolutely no dispute that such damages exist.

The only dispute, based on the evidence, was the amount of the damages.” Plaintiff also asserted the past medical expenses award was not supported by substantial evidence, because there was uncontradicted evidence he incurred \$335,000 in bills that were covered by Medi-Cal and Medicare, and subject to reimbursement. Third, Plaintiff argued there was no evidence related to his comparative negligence, and thus he was entitled to a new trial.

N. OPPOSITION TO MOTION FOR JNOV

UHS opposed Plaintiff’s motion for a JNOV. As to evidence of contributory negligence, UHS argued that (1) there was expert testimony of Plaintiff’s contributory negligence; (2) expert testimony is not required if the subject is within the jurors’ common knowledge; (3) there was substantial evidence supporting the finding that Plaintiff’s was negligent; and (4) there was substantial evidence that Plaintiff’s negligence caused his injuries.

In regard to damages, UHS asserted a motion for JNOV was an inappropriate vehicle for adding damages. Additionally, UHS asserted the jury’s decision not to award future lost earnings was within its discretion, because the jury did not have to adopt the experts’ opinions, and there was evidence Plaintiff was unemployed at the time of the nosebleed. As to the Medi-Cal and Medicare expenses, UHS asserted Athanasia’s testimony regarding the amounts paid by Medi-Cal and Medicare was speculative and not supported by documentation. Further, UHS argued Plaintiff was awarded \$715,010 for past medical expenses, so it was not as if the jury completely failed to award past medical expenses.

O. OPPOSITION TO MOTION FOR NEW TRIAL

UHS opposed Plaintiff's motion for new trial. As in the prior opposition, UHS argued it presented sufficient evidence of contributory negligence and contributory causation. UHS also repeated its arguments that it was within the jury's discretion to not award future lost earnings, and the jury was justified in not awarding Medi-Cal and Medicare expenses. As to the jury instruction on contributory negligence, UHS argued Plaintiff did not object to the instruction at the time of trial and therefore forfeited the issue.

P. RULINGS

At a hearing on Plaintiff's motions, the trial court found there "is evidence by which the jury could find contributory negligence. There certainly is evidence that they could find that; that they could find that he cut the packing." The trial court explained, "It doesn't have to be eyewitness evidence. Circumstantial evidence, we know, is sufficient." In response, Plaintiff argued, "[W]hat is missing from the presentation by the defense is a . . . competent statement with foundation that to a medical probability an action taken by the plaintiff resulted in the dislodgement of this packing." The trial court said it disagreed an expert was required to prove comparative negligence. There was little discussion at the hearing regarding the economic damages issues. The trial court denied both of Plaintiff's motions.

DISCUSSION

We begin our discussion with Plaintiff's contentions related to the motion for a JNOV, and then address the contentions related to the motion for new trial.

A. JNOV

1. *PROCEDURE AND STANDARD OF REVIEW*

In determining whether to grant a motion for a JNOV, a trial court must (1) accept the evidence supporting the verdict as true; (2) disregard all conflicting evidence; and (3) indulge in every legitimate inference that may be drawn in support of the judgment. The court may grant the motion only if there is no substantial evidence to support the verdict and the evidence compels a judgment for the moving party as a matter of law. On appeal from the denial of such a motion, we determine de novo whether there is any substantial evidence, contradicted or uncontradicted, supporting the verdict and whether the moving party is entitled to judgment as a matter of law. (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68; *Paykar Construction, Inc. v. Spilat Construction Corp.* (2001) 92 Cal.App.4th 488, 493-494; see also Code Civ. Proc., § 629.)

Plaintiff asserts that we should review the record de novo, because the issue involves undisputed facts. UHS asserts “*de novo* appellate review is inappropriate here,” because we should apply the same substantial evidence standard as the trial court. Each party has a portion of the standard of review correct. As set forth *ante*, we review the record de novo to determine if there is substantial evidence supporting the verdict.

2. *SUBSTANTIAL EVIDENCE: CONTRIBUTORY NEGLIGENCE*

a) Contention

Plaintiff contends the trial court erred by denying his JNOV motion because there was not substantial evidence supporting the finding that he was contributorily

negligent. Specifically, Plaintiff asserts that the contributory negligence finding fails because UHS did not present expert medical testimony establishing that Plaintiff's conduct could have caused his injury. Thus, we are presented with a threshold issue that we must address before analyzing whether there was substantial evidence to support the contributory negligence finding: Was expert medical testimony required to prove contributory negligence? We conclude expert testimony was not required, and the trial court did not err.

b) Expert Testimony was Not Required

In *Barton v. Owen* (1977) 71 Cal.App.3d 484, 506, the appellate court wrote:

“[W]here contributory negligence arises in a medical malpractice context there is need for the defendant to have offered expert testimony on the issue. Only experts can testify regarding the proximate effect of the plaintiff's actions upon the aggravation of his condition. In much the same way that laymen are not qualified to judge whether a doctor has been negligent because of their lack of common knowledge on the subject, they also are not qualified from a medical standpoint to determine the effects of the ‘negligent’ acts of the plaintiff. We note in passing that this might not always be the case. For when a doctor's negligence is ‘obvious’ to anyone as a matter of common sense, i.e., the leaving in of a sponge, so might there arise similar situations on the part of the plaintiff where his negligence is similarly ‘obvious.’”

We do not find the foregoing rule applicable to the instant case because there was adequate evidence regarding proximate cause. As Plaintiff writes in his opening brief, “There is no dispute that displaced posterior nasal packing occluded plaintiff's airway,

resulting in hypoxia That dislodged nasal packing was the culprit is not the issue.

[¶] The issue is: what caused the nasal packing to dislodge?” The fact that the packing caused Plaintiff’s injuries is undisputed, thus UHS did not need to present expert testimony about the cause of the injuries. The primary question is whether Plaintiff loosened the packing, or whether the packing came loose for another reason, such as from collecting too many secretions.

To the extent Plaintiff is contending that an expert was required to prove he loosened the packing, we disagree with such an assertion. At the trial court, this case involved accepting or rejecting inferences based on circumstantial evidence. Was the string cut or broken? If the string was cut did it reflect that Plaintiff was impatient and cut it, or did the cut happen after the code blue? If the jury accepted that Plaintiff cut the string, then it can be inferred by the common knowledge of lay people that Plaintiff was responsible, at least in part, for his injuries, because he severed the string that was holding the posterior packing in place. In other words, if the jury accepted that Plaintiff cut the string, it is unclear what a medical expert’s testimony would have added to the case. Forrester and Crockett both explained that the strings were holding the posterior packing in place. Thus, a layperson could determine that the packing would likely come loose if the strings were cut.

Plaintiff does not explain why expert testimony was needed in this case; rather, he asserts, “In medical malpractice, comparative negligence may only be established by expert medical testimony.” This assertion is not correct. As set forth *ante*, expert medical testimony is not necessary where negligence is obvious to anyone as a matter of

common sense. (*Barton v. Owen, supra*, 71 Cal.App.3d at p. 506.) Common sense dictates that severing the strings that are holding packing in place would result in the packing falling down. Thus, we are not persuaded by Plaintiff's assertion that expert medical testimony was required simply because this is a medical malpractice case.

c) Sufficiency of the Evidence: Cutting the Strings

We now turn to whether there was substantial evidence that Plaintiff cut the strings prior to the code blue. We conclude that there is substantial evidence.

“Relevant circumstantial evidence is admissible in California. [Citations.]

Circumstantial evidence can be substantial evidence for an inference based on it.

[Citation.] For that reason, circumstantial evidence can provide the sole basis for a verdict and, in such a case, can meet the substantial evidence test on appeal.

[Citation.]” (*Ensworth v. Mullvain* (1990) 224 Cal.App.3d 1105, 1110.)

““Contributory negligence is negligence on the part of a person injured which, cooperating in some degree with the negligence of another, helps in proximately causing the injury of which the former thereafter complains.”” (*Saeter v. Harley Davidson Motor Co.* (1960) 186 Cal.App.2d 248, 256.)

The record includes testimony that Plaintiff had been removing medical equipment from his body throughout his stay at the hospital; he removed electrodes, an IV, and the anterior packing from one of his nostrils. On the morning of the code blue Plaintiff's family was anxious to have Forrester arrive to remove the posterior packing. At one point in the morning, Helena was in the bathroom instructing Plaintiff not to touch the packing. At another point in the morning, Plaintiff had dried blood on his

finger. Forrester testified that when he arrived at the hospital after the code blue, the umbilical tape appeared to have been cut in two places. The string from the left nostril was missing, and it was the left side of the posterior packing that fell into Plaintiff's airway. Crockett testified that if Plaintiff cut the umbilical tape, then the packing would fall into his airway and cause the occlusion.

The foregoing is circumstantial evidence from which the jury could reasonably infer that Plaintiff cut the umbilical tape while in the bathroom, because he did not want to wait for the packing to be removed by Forrester. Since there is evidence supporting the jury's finding, the trial court did not err by denying the JNOV motion—Plaintiff was not entitled to a judgment as a matter of law.⁶

Plaintiff asserts there is not substantial evidence supporting the finding that he cut the umbilical tape because there is not eyewitness testimony that he cut the tape. As set forth *ante*, circumstantial evidence is sufficient to support a verdict. (*Ensworth v. Mullvain, supra*, 224 Cal.App.3d at p. 1110.) Thus, we are not persuaded by Plaintiff's argument regarding a lack of eyewitness testimony.

Next, Plaintiff contends that if there is substantial evidence he cut the tape, then there needed to be evidence that cutting the tape was unreasonable, such as expert medical testimony. Plaintiff appears to be confusing ordinary negligence with professional negligence. Expert testimony is needed to prove that a professional, such as a doctor, acted negligently, because whether a professional acted unreasonably is “a

⁶ Our discussion focuses only on the evidence related to how the packing came dislodged because Plaintiff concedes that is the only issue in dispute.

matter peculiarly within the knowledge of experts.” (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001; see also *Scott v. Rayhrer* (2010) 185 Cal.App.4th 1535, 1542.) Ordinary negligence “consists of a failure to exercise the degree of care in a given situation that a *reasonable person* under similar circumstances would employ” (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 754, italics added.) This standard requires only that Plaintiff’s conduct conform “to that of ‘a reasonably prudent person under like circumstances.’ [Citation.]” (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1024.)

Since Plaintiff is not a doctor it does not seem necessary to have expert testimony regarding whether his actions were unreasonable—he was not alleged to have committed professional negligence. Rather, the issue was whether a reasonably prudent person in Plaintiff’s circumstances would have conducted himself in a similar manner—expert testimony is not needed on this point. (See *Ewing v. Northridge Hospital Medical Center* (2004) 120 Cal.App.4th 1289, 1303, fn. 7 [expert testimony not required for ordinary negligence].)

Nevertheless, to the extent it could be argued medical testimony was required, because this case involves medical malpractice, we note Forrester testified that it would be “unreasonable” for Plaintiff to “cut his umbilical tape.” Forrester was the treating physician, not an expert witness, but his testimony does provide evidence that Plaintiff acted unreasonably by medical standards. Thus, we are not persuaded by Plaintiff’s argument because (1) it is not clear that expert medical testimony was needed on the subject of reasonableness, and (2) medical testimony was provided on the issue.

Plaintiff contends if there is evidence he cut the umbilical tape, then there is uncontradicted evidence that he did so because he was unable to control his actions due to agitation and confusion. Contrary to Plaintiff's position, the evidence is contradicted. Martinez testified as follows, "I'm using lay terms here, confusion and agitation. Again, that terminology, we might need to revise. [¶] Basically[,] patient was agitated means he was nervous, restless, pulling out things off his body, IV lines or any other object. At times patient will follow commands. So that makes me believe that he was—in my mind, when you say 'confusion,' the patient is—will not respond to your commands based on patient is a—you know, a state of mind that basically is totally disoriented to space, name, and time essentially. So that's where I'm trying to make a difference. So I do believe that the patient's agitation led him to pull out all things off his body."

Forrester also testified that he did not believe Plaintiff pulled out the anterior packing due to confusion. Martinez's and Forrester's testimonies reflect that Plaintiff was in control of his actions, but he was upset or anxious, which caused him to act out by removing the medical equipment from his body. In other words, Plaintiff did not remove the medical equipment because he was not in control of his actions; rather, he removed the equipment because he *was* in control of his actions, and he was upset. Therefore, we find Plaintiff's argument to be unpersuasive.

d) Sufficiency of the Evidence: Causation

Plaintiff contends that if there is substantial evidence he acted negligently, then there is not substantial evidence that his actions caused the respiratory arrest and

resulting brain damage. Plaintiff asserts, “The uncontradicted expert testimony established that the packing was, to a medical probability, deteriorated and fell apart.” We disagree.

Causation is proven by showing that the plaintiff’s “act or omission was a ‘substantial factor’ in bringing about [his own] injury. [Citations.]” (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 778.) The substantial factor test requires “‘the contribution of the individual cause be more than negligible or theoretical.’ [Citation.]” (*Bockrath v. Aldrich Chemical Co., Inc.* (1999) 21 Cal.4th 71, 79.)

Forrester testified the umbilical tape had to be firmly tied because it was holding the posterior packing in place, and firm pressure was needed to control the bleeding. Forrester described knotting the strings with square knots in order to ensure the packing would not be “going anywhere.” Forrester stated that if the tape were severed, then there would no longer be tension holding the posterior packing. Forrester testified that if he had cut the tape to properly remove the packing, then he would have placed a clamp on the posterior packing, prior to cutting the tape, in order to prevent the packing from falling. Forrester also explained that posterior packing had the potential to stop a person from breathing; Forrester stated posterior packing can result in a partial blockage of the airway. Crockett testified that cutting the umbilical tape would result in the packing falling down into the airway. Father said that after Plaintiff manipulated the packing in the bathroom, Plaintiff became distressed and was unable to breathe. Forrester described the left string as being “absent” after the code blue. It was the left side of the packing that “swung into the lower throat.”

From the foregoing evidence, the jury could reasonably infer that Plaintiff cut the left side of the umbilical tape, which loosened the left side of the packing, and caused it to fall into his airway, which led to the respiratory arrest. Loosening the packing was a substantial factor in causing the respiratory arrest, because the packing obstructed the airway. Thus, we conclude there is substantial evidence that Plaintiff's actions were a contributory cause of his respiratory arrest and his injuries.

Plaintiff asserts UHS was required to present expert medical testimony that, to a medical probability, his actions were a substantial factor in causing his injuries. We infer that Plaintiff is relying on the following rule: "In cases . . . presenting complicated and possibly esoteric medical causation issues, the standard of proof ordinarily required is "a reasonable medical probability based upon competent expert testimony that the defendant's conduct contributed to [the] plaintiff's injury.'" [Citations.]" (*Bockrath v. Aldrich Chemical Co., Inc.*, *supra*, 21 Cal.4th at p. 79.) This rule is employed when there is not a clear connection between cause and effect. (*Id.* at p. 78.) For example, the standard might be used when a plaintiff alleges that a chemical product caused the plaintiff to develop cancer. (*Id.* at pp. 79-80.)

The instant case does not involve esoteric or complicated medical causation issues, such as a chemical's link to cancer. Rather, the instant case involves a basic medical issue of choking on an object. A jury of laypeople could reasonably be expected to understand how an object blocking an airway will cause problems with breathing. Thus, there does not appear to be a need in this case for expert testimony concerning the "reasonable medical probability" standard.

3. *FUTURE WAGE LOSS*

Plaintiff contends the trial court erred by denying his JNOV motion because there was no dispute that he suffered the loss of future wages; the only dispute related to how much damage he suffered. We disagree.

The applicable test for determining lost wages is “not what the plaintiff would have earned, but what he could have earned.” [Citation.]” (*Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 656.) “The fact that the injured person was not employed at the time of the accident does not necessarily deprive him of the right to compensation for the loss of his earning capacity. [Citation.]” (*Germ v. City and County of San Francisco* (1950) 99 Cal.App.2d 404, 423.) It is a question of fact “to determine to what extent the impairment of plaintiff’s earning ability is traced to defendant’s negligence. [Citation.]” (*Harris v. Los Angeles Transit Lines* (1952) 111 Cal.App.2d 593, 598.)

The record includes evidence that Plaintiff used alcohol regularly, and that he suffered from chronic alcoholism. The record also reflects Plaintiff lost his job, or quit his job, during the month prior to the nosebleed (November 2002), and was unemployed at the time of the nosebleed.

From the foregoing evidence the jury could have found that Plaintiff was an unemployed alcoholic with few job prospects, and that he would be unlikely to secure future employment through no fault of UHS. Thus, the jury’s finding of no future wage loss is supported by the record, and the trial court did not err by denying the JNOV motion on this issue.

Plaintiff argues that there was no evidence of zero future lost wages because, at trial, he asserted his lost wages were \$883,135, while UHS estimated lost wages in the amount of \$610,273. “Even where there is undisputed evidence regarding a specific component of damages, a lesser award is not necessarily inadequate as a matter of law where it may be justified on an alternative basis. [Citation.]” (*Abbott v. Taz Express* (1998) 67 Cal.App.4th 853, 857 (*Abbott*)). In the instant case, the finding of zero future wage loss is justified by the evidence that Plaintiff was unemployed at the time of the nosebleed and possibly suffering from chronic alcoholism. Accordingly, we find Plaintiff’s argument to be unpersuasive.

During oral argument at this court, Plaintiff seemed to assert an award of lost wages was required due to a stipulation between the parties. Plaintiff cited to a portion of UHS’s closing argument to support his assertion concerning the stipulation. The closing argument reflects: “And briefly, when we tried to move this through, we even agreed to stipulate to the damages we had. Instead of calling those witnesses, we were allowed to submit a stipulation. So it’s in there. And that’s if you get to damages.” It appears from the record UHS stipulated Plaintiff’s future wage loss would be \$610,273, while Plaintiff’s expert testified Plaintiff’s future wage loss would be \$883,135.

It does not appear UHS stipulated Plaintiff would receive an award for future wage loss; rather, it was a stipulation that allowed UHS to skip having an expert testify about future wage loss. Further, as set forth *ante*, “Even where there is undisputed evidence regarding a specific component of damages, a lesser award is not necessarily inadequate as a matter of law where it may be justified on an alternative basis.

[Citation.]” (*Abbott, supra*, 67 Cal.App.4th at p. 857.) The alternative basis in this case is the evidence that Plaintiff was unemployed at the time of the nosebleed and possibly suffering from chronic alcoholism, and thus did not have good job prospects.

4. *PAST MEDICAL EXPENSES*

Plaintiff contends the trial court erred by denying his JNOV motion because the jury omitted \$335,000 in past medical expenses that were paid by Medi-Cal and Medicare. We disagree.

“California participates in the Medicaid program through Medi-Cal [citation]. In implementing Medi-Cal, our Legislature has authorized the [Department of Health Care Services] to assert and collect on a lien for reimbursement of medical costs from the recovery in an action by the beneficiary against a third party tortfeasor. [Citations.] The amount of a Medi-Cal lien is reduced by 25 percent of the beneficiary’s attorney fees, and by ‘that portion of the cost of litigation expenses determined by multiplying by the ratio of the full amount of the reasonable value of benefits so provided to the full amount of the judgment, award, or settlement.’ [Citation.]” (*Branson v. Sharp Healthcare, Inc.* (2011) 193 Cal.App.4th 1467, 1474.)

Pickersgill calculated the value of Plaintiff’s past medical care provided by family members to be \$715,010. Pickersgill explained the \$715,010 was the estimated value of the family’s care for Plaintiff from “July 2004, through the present, less the time that was provided by Medi-Cal.” Athanasia testified Medi-Cal had paid \$240,620.26 for Plaintiff’s care, and there was a lien for that amount. Athanasia

estimated Medicare paid \$95,000 for Plaintiff's care. The jury awarded \$715,010 for past medical expenses.

It is possible the jury chose to disregard Athanasia's testimony regarding the Medi-Cal and Medicare costs. For example, the jury could have believed Medi-Cal and Medicare did not pay so much for Plaintiff's care. When Pickersgill explained her math, she stated that \$715,010 was meant to cover one person caring for Plaintiff for 24-hours per day from July 2004 through the trial in 2009. Pickersgill said she valued the parents care at \$14.50 per hour, which is the rate for attendant care, but did not double the rate for two people—presuming the parents took turns caring for Plaintiff. Pickersgill stated Medi-Cal provided 145 hours of care per month from January 2006 through the trial in 2009, but missed a six-month period. 145 hours equates with approximately six 24-hour days. Athanasia estimated the Medi-Cal and Medicare expenses at approximately \$335,000—nearly half of the amount that Pickersgill calculated for Plaintiff's parents.

The jury may not have believed that Medi-Cal and Medicare paid so much when they provided care for a much shorter amount of time than Plaintiff's parents. In other words, Medi-Cal and Medicare provided care for the equivalent of six days per month beginning in January 2006, while Plaintiff's parents provided care every day of every month beginning in 2004; since Medi-Cal and Medicare did not take care of Plaintiff for close to 50 percent of the time, the jury may have disregarded Athanasia's testimony that they were entitled to close to 50 percent of the amount that Plaintiff's parents were also owed. In sum, the jury could have reasonably rejected Athanasia's testimony

because the math did not match Pickersgill’s math. (See generally *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525 [discussing how a jury could “reasonably disbelieve” testimony].) Since there is substantial evidence supporting the jury’s lack of an award, we conclude the trial court did not err by denying the JNOV motion—Plaintiff was not entitled to a judgment as a matter of law on this point.

B. MOTION FOR NEW TRIAL

We now turn to Plaintiff’s contentions related to the denial of his motion for new trial. We address the contentions that relate to insufficient evidence, and then the contentions concerning irregularities in the trial proceedings.

1. *BACKGROUND LAW*

“The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: [¶] 1. Irregularity in the proceedings of the court . . . by which either party was prevented from having a fair trial. . . . [¶] 5. Excessive or inadequate damages. [¶] 6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law.” (Code Civ. Proc., § 657.)

2. *STANDARD OF REVIEW FOR INSUFFICIENCY OF THE EVIDENCE*

“When a trial court rules upon a motion for a new trial made upon the ground of insufficiency of the evidence, the judge is required to weigh the evidence and judge the credibility of witnesses. [Citation.] ‘While it is the exclusive province of the jury to

find the facts, it is the duty of the trial court to see that this function is intelligently and justly performed, and in the exercise of its supervisory power over the verdict, the court, on motion for a new trial, should consider the probative force of the evidence and satisfy itself that the evidence as a whole is sufficient to sustain the verdict.’

[Citation.]” (*Kelly-Zurian v. Whol Shoe Co.* (1994) 22 Cal.App.4th 397, 413.)

“In ruling on the motion, the trial judge does not disregard the verdict, or decide what result it would have reached if the case had been tried without a jury, but instead ‘. . . it should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict.’ [Citations.]” (*Kelly-Zurian v. Whol Shoe Co.*, *supra*, 22 Cal.App.4th at p. 413.) “The determination of a motion for a new trial rests so completely within the [trial] court’s discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.” (*Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 387; see also *Dodson v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931, 938 [denial of new trial motion was an abuse of discretion].)

3. *COMPARATIVE NEGLIGENCE*

Plaintiff contends the trial court erred by denying his motion for a new trial because there was a lack of evidence related to his comparative negligence. Specifically, Plaintiff asserts, “There was no expert testimony to guide the jury to a determination that plaintiff committed *any* negligent act or that his conduct was a proximate cause of [the] injury.” We have concluded *ante*, that the foregoing expert

testimony was not required in this case. Since the expert testimony was not required, we are not persuaded the trial court acted unreasonably in denying the new trial motion.

4. *LOSS OF FUTURE EARNINGS*

Plaintiff contends the trial court erred by denying the new trial motion because the jury's award of zero for future lost wages was not supported by substantial evidence. We have concluded *ante*, that substantial evidence supports the jury's award of zero. Plaintiff does not explain why the trial court should have weighed the evidence differently than the jury. For example, Plaintiff does not explain why it would be unreasonable to believe the evidence that he was an alcoholic. Thus, we are not persuaded the trial court acted unreasonably in denying the motion for new trial.

5. *PAST MEDICAL EXPENSES*

Plaintiff contends the trial court erred by denying his new trial motion because the jury's award of \$715,010 in past medical expenses was not supported by substantial evidence. We have already concluded that substantial evidence supported the jury's award of past medical expenses. Plaintiff does not explain why that evidence lacks credibility, such that it was unreasonable for the trial court to deny the motion for new trial. Thus, we are not persuaded the trial court erred.

6. *JURY INSTRUCTION*

We now turn to Plaintiff's contentions that concern the trial court erring by denying his motion for new trial because there were irregularities in the trial proceedings. Plaintiff contends the trial court erred by denying his motion for new trial

because the trial court should not have instructed the jury on contributory negligence “when there is no expert testimony the plaintiff was negligent.” We disagree.

“The grant of a new trial is a proper remedy for the giving of an erroneous jury instruction when the improper instruction materially affected the substantial rights of the aggrieved party. [Citation.]” (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 205.) Jury instructions should be relevant to the parties’ theories of the case, consistent with the pleadings, and supported by the evidence. (*Ayala v. Arroyo Vista Family Health Center* (2008) 160 Cal.App.4th 1350, 1358.) We review the trial court’s ruling for an abuse of discretion. (*Jiminez v. Sears, Roebuck & Co.*, *supra*, 4 Cal.3d at p. 387.)

As set forth *ante*, UHS was not required to provide expert testimony regarding whether Plaintiff was negligent. Also set forth *ante*, is our reasoning as to why the record includes substantial evidence supporting the finding that Plaintiff was negligent. Thus, since expert testimony was not required and the record includes substantial evidence of Plaintiff’s contributory negligence, we conclude the trial court did not err by instructing the jury on the law of contributory negligence.

7. *IMPROPER ARGUMENT*

Plaintiff contends the trial court erred by denying his new trial motion because UHS’s trial counsel made improper arguments to the jury.⁷ We disagree.

⁷ UHS asserts Plaintiff forfeited this issue by failing to object during UHS’s opening statement and closing argument. Regardless of the possible forfeiture, we address the merits of the contention because the issue is easily resolved.

“[A] new trial may be granted for an ‘[i]rregularity in the proceedings of the court, jury or adverse party . . . by which either party was prevented from having a fair trial.’ It is well settled that misconduct of counsel is such an irregularity and a ground for new trial. [Citation.] It is also well settled that misconduct has often taken the form of improper argument to the jury, such as by urging facts not justified by the record or suggesting that the jury may resort to speculation” (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 870.) We review the trial court’s ruling for an abuse of discretion. (See *Id.* at pp. 871-872 [trial court is afforded wide discretion].)

First, Plaintiff asserts it was misconduct for UHS’s attorney, John Fitzpatrick (Fitzpatrick), to assert during opening statements that the evidence would show (1) Plaintiff cut the umbilical tape, which caused the packing to fall into his airway; (2) Father admitted Plaintiff caused the packing to fall; and (3) Helena admitted that Plaintiff caused the packing to fall. Plaintiff contends the arguments have “no basis in fact or support in the record.”

Forrester testified that when he examined the umbilical tape after the code blue, the tape appeared to have been cut, because there “was a very straight cut across it,” and the tape did not appear frayed. Forrester further testified, “I believe the patient Mr. Charalambopoulos cut, cut the tape.” Forrester testified that through a translator, Father explained that, prior to the code blue, Plaintiff went into the restroom and manipulated the packing; when Plaintiff came out of the restroom he “became much more distressed and then was unable to breathe.”

Mogavero testified that she asked Bergeron “what had happened that caused this event.” Bergeron told Mogavero “[t]hat she had found [Plaintiff] and his wife, [Helena], in the bathroom, and [Plaintiff] was manipulating, trying to remove the nasal packing.” Bergeron said that Helena “was upset with him that he was manipulating the gauze,” and Bergeron told him to stop touching the gauze. Godoy testified that, during the code blue, Helena told Godoy that “[s]he was upset with her husband for playing with the packing. She had stated that she had told him to stop playing with it, to wait for the doctor.”

Fitzpatrick’s opening statements to the jury were consistent with the foregoing evidence, because the evidence reflects (1) Plaintiff cut the umbilical tape; (2) Father admitted Plaintiff caused the packing to fall; and (3) Helena admitted Plaintiff manipulated the packing prior to the code blue. Since the statements conform to the evidence presented, the trial court did not act unreasonably in denying the motion for new trial in regard to misconduct during the opening statements.

Second, Plaintiff contends it was misconduct for Fitzpatrick to assert during closing arguments that the evidence reflected: (1) Plaintiff was angry on the morning of the code blue when he manipulated the packing, because Forrester had not arrived to remove the packing; (2) Father said Plaintiff went into the bathroom to remove the packing; (3) Bergeron saw Plaintiff and Helena in the bathroom when Plaintiff was trying to remove the packing; and (4) Crockett testified that Plaintiff tried to remove the packing on the day of the code blue, and Crockett believed Plaintiff was contributorily negligent.

“In conducting closing argument, attorneys for both sides have wide latitude to discuss the case. ““““The right of counsel to discuss the merits of a case, both as to the law and facts, is very wide, and he has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom. The adverse party cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the consideration of the jury.”” [Citations.]” (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 795.)

Martinez testified that Plaintiff’s “agitation led him to pull out all things off his body.” Mogavero testified, “[Plaintiff] was angry from the night before that the doctor had said he would be in around a particular time to remove the gauze. The doctor did not make it in, so by the following morning, [Plaintiff] was more angry because he wanted the gauze out. And my understanding is, that’s when he went into the bathroom.”⁸ Bergeron testified that on the morning of the code blue Helena “kept asking” about when Forrester would be coming in to remove the packing. Godoy testified Helena told her “[s]he was upset with her husband for playing with the packing. She had stated that she had told him to stop playing with it, to wait for the doctor.”

⁸ Mogavero’s testimony on this point is primarily based on hearsay. (Evid. Code, § 1200.) However, there was no objection raised during the reading of her deposition at trial. Thus, there is nothing indicating that the hearsay was not admitted for the truth of the matter asserted. Therefore, the “hearsay evidence may be considered in support of the judgment.” (*Burke v. Bloom* (1960) 187 Cal.App.2d 155, 165; see also *Smith v. Smith* (1955) 135 Cal.App.2d 100, 105 [“That testimony went in without objection . . . [i]t thereby became competent evidence.”].)

It can reasonably be inferred from this testimony that Plaintiff was angry on the morning of the code blue. It can also be inferred that Helena was asking about Forrester, because she knew Plaintiff was angry, and wanted the doctor to remove the packing as opposed to Plaintiff doing it himself. Thus, the evidence supports the argument that Plaintiff was angry when he manipulated the packing.

Next, Forrester testified that, through a translator, Father explained Plaintiff went into the restroom and manipulated the packing; when Plaintiff came out of the restroom he “became much more distressed and then was unable to breathe.” This evidence supports the argument that Father admitted Plaintiff went into the bathroom to remove the packing. Thus, Fitzpatrick’s statement could reasonably be found to not be misconduct.

As to the argument about Bergeron, Mogavero testified that Bergeron said “she had found [Plaintiff] and his wife, [Helena], in the bathroom, and [Plaintiff] was manipulating, trying to remove the nasal packing.” This evidence supports the argument that Bergeron saw Plaintiff and Helena in the bathroom when Plaintiff was trying to remove the packing. Thus, it was reasonable for the trial court to conclude that the argument did not amount to misconduct.

Finally, during closing argument, Fitzpatrick asserted that Crockett gave the following testimony: “I agree he pulled out the anterior packing on the 25th. I agree he tried to do it on the 27th. And he clearly removed the mustache. I thought there was contributory negligence. I thought that there was a plausible theory until he tells me if you do that we lose the case.”

On redirect examination of Crockett, the following exchange occurred:

“[Plaintiff’s Counsel]: Mr. Fitzpatrick got you to concede that the nurses calling the doctors on December 25 was good practice. And you would have no issue with that, correct?”

“[Crockett]: Correct.

“[Plaintiff’s Counsel]: This is after *the patient removed a portion of the packing.*

“[Crockett]: Correct.”

From this evidence, it could reasonably be inferred that Crockett agreed Plaintiff had pulled out the anterior packing on December 25, because Crockett agreed with the statement that Plaintiff had removed a portion of the packing.

As to Plaintiff pulling at the packing on December 27, the following exchange occurred during the direct examination of Crockett:

“[Plaintiff’s Counsel]: You’re aware that—from your review of the records that this patient is said to have been pulling at the nasal packing on the morning of December 27th, correct?”

“[Crockett]: Yes.

“[Plaintiff’s Counsel]: Would such an action by a patient who has nasal packing be consistent with an effort to demonstrate or deal with a partial or even total occlusion?”

“[Crockett]: Oh, sure. Yes.

“[Plaintiff’s Counsel]: Trying to get to it.

“[Crockett]: Yes, absolutely.”

“[Plaintiff’s Counsel]: Do you have an opinion to a reasonable degree of medical probability that a patient *pulling on seven-day-old packing*, timed at 9:30 a.m., had any potential for dislodgement of the packing at this hour?

“[Crockett]: Yes.

“[Plaintiff’s Counsel]: And what’s your opinion?

“[Crockett]: It did.”

“[Plaintiff’s Counsel]: When Nurse [Bergeron] found the patient pulling at the packing in his nose, a patient who had just a day and a half before [removal of] the packing, did the standard of care require that she do something to notify one of the patient’s physicians about the patient’s conduct?

“[Crockett]: Yes. [¶] . . . [¶]

“[Plaintiff’s Counsel]: Short of physical restraint, what other alternatives were available to the nursing staff, Nurse [Bergeron], to make certain that this patient would not *further disrupt the nasal packing*?

“[Crockett]: Oh, talk to him, counsel him, call the doctor.” (Italics added.)

“[Plaintiff’s Counsel]: You mentioned calling the physician when the patient on the morning of the 27th *was pulling at the packing*. What would the report to the physician require to meet the standard of care, concentrating just at this point and this observation by the nurse, pulling at the packing?

“[Crockett]: I’m not sure I understand your question. But I—obviously if you call the doctor, you should mention that the patient is trying to remove his packing or pulling at it.”

On cross-examination, Crockett was asked, “So the records indicate, and certainly the depositions and everything you have read indicate, that at about 10:00 o’clock he pulled out a portion of the packing and that the nurses paged both physicians. Fair?” Crockett responded, “My answer is yes; but there’s obviously a lot of discussion of sort about the timing of the notes and whether it’s accurate or not.”

The foregoing evidence supports an argument that Crockett agreed Plaintiff tried to remove the packing on December 27. Crockett seemed to be asserting that Plaintiff pulled at the packing, and therefore the nursing staff had a duty to inform a physician that Plaintiff was pulling at the packing; it was this failure to fully inform a physician about the packing that led to the nursing staff falling below the standard of care. Accordingly, it was reasonable for Fitzpatrick to assert that Crockett agreed that Plaintiff had pulled at the packing.

On cross-examination, Crockett was asked, “Now, even in some of your notes you—you had a question about was the plaintiff contributorily negligent by cutting it, fair? Crockett responded, “Yes. The reason I wrote that is I was searching for that in the record.” It could be extrapolated from this evidence that Crockett believed Plaintiff had been contributorily negligent in pulling at the packing, because Crockett stated that pulling on seven-day-old packing had the potential to dislodge the packing. If Crockett believed Plaintiff may have caused the packing to dislodge, then he could have believed Plaintiff was negligent in not letting a doctor remove the packing. Thus, the deductions are logically related to the record, and it cannot be said that Fitzpatrick was urging facts not justified by the record.

On cross-examination, Crockett stated a theory that he was advancing was the packing essentially fell apart on the morning of December 27. Fitzpatrick asked Crockett if he had a theory that the nurse who replaced the anterior packing on December 25 “may have somehow cut the tape”? Crockett responded, “Oh sure, I mean, once I—Remember I’ve already said that I had assumed that Dr. Forrester had come in on the 25th. But then once I learned that he had not and that a nurse had placed that packing, sure.^[9] In evaluating the records and trying to figure out what’s going on and what’s happening and knowing I’m going to get grilled up here, that’s a theory—I’m being—I’m being lighthearted—that is a reasonable theory that I came up with, yes.”

Crockett’s testimony could be interpreted as advancing at least three different theories: (1) Plaintiff manipulated the packing, which caused it to dislodge; (2) the nurse cut the umbilical tape on December 25, which caused the packing to dislodge; and (3) the packing fell apart and dislodged because it should not have been in place for more than five days. Each of Crockett’s theories placed blame on a different person: Plaintiff, the nurse, and Forrester. Given the various ideas set forth by Crockett, it was reasonable for Fitzpatrick to argue that Crockett was choosing a theory that would help win the case.

In sum, it was reasonable for the trial court to conclude that UHS’s trial counsel did not make improper arguments to the jury, because Fitzpatrick’s arguments were

⁹ At the time of his deposition, Crockett believed Forrester, not a nurse, had replaced the anterior packing on December 25.

based on the evidence presented. Thus, we conclude the trial court did not abuse its discretion by denying Plaintiff's new trial motion.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.