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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RAGAA EBRAHIM, an Incompetent
Person, etc., et al.,

Plaintiffs and Appellants,

v.

GRANITE CYPRESS VILLAGE, L.P. et
al.,

Defendants and Respondents.

G045070

(Super. Ct. No. 30-2008-00102275)

O P I N I O N

Appeal from a judgment and an order of the Superior Court of Orange
County, Linda S. Marks, Judge. Affirmed.

Law Offices of Steven R. Young and Jim P. Mahacek for Plaintiffs and
Appellants.

Willis DePasquale, Larry N. Willis and Scott S. Blackstone for Defendants
and Respondents.

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Plaintiffs filed a tort lawsuit arising out of a near-drowning incident that took place at an apartment complex swimming pool. The victim was a woman who got into the pool even though she could not swim and was afraid of the water. Following a jury trial, judgment was entered in favor of the owners and operators of the apartment complex. Plaintiffs appeal.

Plaintiffs concede that they probably would not prevail if they based their appeal on the insufficiency of the evidence. So, they appeal on a litany of other grounds, pertaining to voir dire rulings, a plethora of evidentiary rulings, and purportedly erroneous jury instructions. In addition, they challenge the order denying their new trial motion. Their arguments are unpersuasive. We affirm.

I

FACTS

A. Incident:

Although Ragaa Ebrahim (Ebrahim) did not testify at trial, portions of her deposition transcript were read to the jury. She testified that she lived at an apartment complex that had a swimming pool. She was afraid of the water, because she did not know how to swim. Nonetheless, she got into the pool without a flotation device. She was holding onto the edge of the pool so that she would not drown. Ebrahim further testified that she did not slip either on the pool deck or inside the pool. However, at some point, she let go of the edge of the pool in order to get out.

On the date in question, July 20, 2006, Rafael Figueroa (Figueroa) was working at the complex as a temporary maintenance worker. He was alerted that there was a problem at the swimming pool. When he arrived on the scene, he saw Ebrahim under water, on the bottom of the pool. Figueroa, who was unable to swim himself, grabbed a pole with a hook on the end of it. He was able to reach the crook past Ebrahim and pull it across her. However, she was heavy, and he could not get her out of the water

with the pole, even though he tried to use the hook in different ways. Another man jumped in and pulled Ebrahim out of the water, with the help of a third person.

B. Litigation:

Ebrahim, her husband Maher Alnajjar (Alnajjar), and their son George, filed a first amended complaint for negligence, negligence per se, loss of consortium and negligent infliction of emotional distress against Granite Cypress Village, L.P., Granite Asset Management Group, L.P., and Bryant of Cypress, L.L.C. (defendants). They alleged that defendants owned and operated the apartment complex where the incident occurred.

As further alleged, Ebrahim was a tenant at the apartment complex. “On or about July 20, 2006, [she] lost her footing on the slippery steps at the shallow end of the subject pool In this, she was unable [to] reach safety; she began to drown and was rendered unconscious.” Purportedly, another tenant attempted to rescue Ebrahim, but was unable to do so because the pool did not have the poolside safety equipment required by law. According to plaintiffs, by the time Ebrahim was dragged from the pool, she had suffered permanent brain damage.

In its special verdict, the jury found that defendants were not “negligent in the use, management, or maintenance of their property.” The court thereafter entered judgment in favor of defendants.

Ebrahim and Alnajjar (plaintiffs) then filed a new trial motion. The court denied the motion and plaintiffs filed a notice of appeal from the judgment and the order denying the new trial.

II DISCUSSION

A. Voir Dire:

(1) Questioning—

Shortly before the commencement of voir dire, the court permitted each party to present a mini opening statement. Plaintiffs' counsel began by stating: "I represent Maher Alnajjar and his wife, Ragaa Ebrahim. And they are Syrians. They immigrated to this country ten years ago legally, with green cards, to avoid religious persecution as Christians."

During voir dire, plaintiffs' counsel addressed the panel: "As I told you in the mini opening, Maher and his wife are Syrian. We hear a lot of bad news from—news that's bad about Syria and the Syrians. How are you going to approach the task of hearing a case with somebody that we read in the newspaper all sorts of bad things about that country?" The court sustained an objection to the question and asked plaintiffs' counsel to rephrase.

Plaintiffs' counsel then asked: "How do you approach sitting on a jury with a Syrian as a plaintiff?" Defendants' counsel again objected on the basis of an improper question and the court again sustained the objection with a suggestion that plaintiffs' counsel rephrase.

Thereafter, plaintiffs' counsel informed the panel: "The Syrians are part of the Arab League. It's an Arab country. In fact, Maher's primary language is Arabic." Defendants' counsel interjected that he "thought [they] were going to use last names." The court then requested plaintiffs' counsel to use surnames.

Plaintiffs' counsel then asked: "What are your feelings about Arabs and Syrians?" Defendants' counsel again objected that the question was improper.

The court then stated: "Once again, ladies and gentlemen, you will be receiving an instruction. . . . [T]he fact that a party . . . may come from a particular

national, racial, religious group, . . . that may be different from your own would have no effect on your ability to judge or weigh the credibility of the testimony that you would hear in this case. [¶] Does anyone here sitting—and it is important. It is an important question that [plaintiffs’ counsel] is posing—would have any difficulty in this case because the party . . . comes from an Arab descent? Is that a difficulty for anybody sitting in this panel at the present time to be able to be fair, impartial, and weigh the credibility of the witness without bringing to the table any bias? Anybody have difficulty with that concept?”

No panel member voiced any difficulty. The court then asked for the next question, and plaintiffs’ counsel asked to take a break.

After the break, plaintiffs’ counsel moved for a mistrial on the basis that the court precluded him from asking about bias as permitted by Code of Civil Procedure section 222.5. The court denied the motion. It explained that how the jurors felt about Syrians was irrelevant unless counsel could connect their feelings about Syrians with “their inability to be fair and impartial”

After the court denied the mistrial motion, voir dire resumed. Plaintiffs’ counsel began posing a number of questions to the panel, as a group, pertaining to bias or prejudice against persons who do not speak English. He first asked: “Do any of you have a reason for thinking that . . . testimony [given through an interpreter] is entitled to any less credibility than that delivered in English in the court?” There being no response, he then asked: “Is there anyone who feels . . . that if someone can’t testify in English, should they really be coming to court to testify?” One juror responded: “Absolutely not.”

Plaintiffs’ counsel then said: “There was a move afoot, English only in courts and government. In fact, we had . . . an initiative on that. How did you feel about that statute . . . that would impose that requirement? Do you feel like that was a good thing?” One juror replied, “It’s prejudice” and “there’s something wrong there.” He

explained: “[E]verybody, regardless of race, color or creed, they are American. They have a right to a fair trial, to be understood in their language. And it would be ludicrous if I was tried over there in Syria and I didn’t know how to speak Syrian.” Plaintiffs’ counsel then asked: “You all agree with that?” The reporter’s transcript shows that no juror, except the one who had originally provided the comments, verbalized a response. Plaintiffs’ counsel then moved on to another topic.

(2) *Argument*—

On appeal, plaintiffs contend the court erred in prohibiting them from asking questions related to their Syrian ethnicity, in violation of Code of Civil Procedure sections 222.5, 225, and 229, subdivision (f). As we shall show, any error in limiting voir dire was not prejudicial and thus not reversible error.

Code of Civil Procedure section 225 permits a party to challenge a prospective juror for actual or implied bias. Code of Civil Procedure section 229, subdivision (f), provides that a challenge for implied bias may be taken for “[t]he existence of a state of mind in the juror evincing enmity against, or bias towards, either party.”

In furtherance of the determination of whether a juror may harbor actual or implied malice, Code of Civil Procedure section 222.5 provides in pertinent part: “During any examination conducted by counsel for the parties, the trial judge should permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case.”

Plaintiffs here contend the court failed to permit such liberal and probing examination. True, the court did sustain objections pertaining to the form of the questions plaintiffs’ counsel asked. However, as Code of Civil Procedure section 222.5 also provides: “The scope of the examination conducted by counsel shall be within reasonable limits prescribed by the trial judge in the judge’s sound discretion. In exercising his or her sound discretion as to the form and subject matter of voir dire

questions, the trial judge should consider, among other criteria, any unique or complex elements, legal or factual, in the case and the individual responses or conduct of jurors which may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case.”

Here, the court gave plaintiffs’ counsel several opportunities to rephrase his question about ill-feelings towards Syrians or Arabs. When the lawyer did not come up with satisfactory wording, the court asked the question itself. No juror admitted to any bias or prejudice towards persons of Arab descent that would impair his or her ability to be impartial.

However, as has previously been observed, “bias often deceives its host by distorting his view not only of the world around him, but also of himself. Hence, although we must presume that a potential juror is responding in good faith when he asserts broadly that he can judge the case impartially [citation], further interrogation may reveal bias of which he is unaware or which, because of his impaired objectivity, he unreasonably believes he can overcome.” (*People v. Williams* (1981) 29 Cal.3d 392, 402, fns. omitted, superseded by statute on another point as observed in *People v. Leung* (1992) 5 Cal.App.4th 482, 493-494.) Moreover, “a biased juror may be unwilling to confess that bias openly, and . . . questions to which there is a “right” and a “wrong” answer may be less likely to reveal such bias than more open-ended questions.” (*People v. Williams, supra*, 29 Cal.3d at p. 403, fn. omitted.) Bearing this in mind, we agree with plaintiffs that more open-ended questions might have stood a better chance of unearthing bias than the pointed question the court phrased. At the same time, “the court need allow only *reasonable* questions” and it may require that questions “be phrased in neutral, nonargumentative form.” (*Id.* at p. 408.) The court has “considerable discretion . . . to contain voir dire within reasonable limits. [Citations.] Under this standard, trial courts need not and should not permit . . . inordinately extensive and unfocused questioning” (*Ibid.*)

On the one hand, the court here cut off unfocused questions like, “How are you going to approach the task of hearing a case with somebody that we read in the newspaper all sorts of bad things about that country?” On the other hand, the court ultimately posed the question in a more focused manner. Moreover, it permitted plaintiffs’ counsel to ask the jury probing questions about their bias against litigants who do not speak English. Ultimately, plaintiffs’ counsel had the opportunity to piggy-back on pointed comments a prospective juror made about Syrians having a right to a fair trial in an American court. No juror responded negatively and plaintiffs’ counsel chose to move on. Had he seen any reason to continue the line of questioning given the attitude of the prospective jurors, he could have done so. In short, any error in limiting voir dire was not prejudicial, and therefore not ground for reversal. (Cal. Const., art. VI, § 13.)

B. Bart Photographs:

(1) Authentication of photographs, in general—

“A photograph is a ‘writing’ and ‘[a]uthentication of a writing is required before it may be received in evidence.’ (Evid. Code, §§ 250, 1401, subd. (a).) [¶] A photograph or other writing may be authenticated by ‘the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is’ (Evid. Code, § 1400)” (*People v. Beckley* (2010) 185 Cal.App.4th 509, 514.)

“The general rule is that photographs are admissible when it is shown that they are correct reproductions of what they purport to show. This is usually shown by the testimony of the one who took the picture. . . . [¶] The essential element is that . . . the picture . . . be verified or authenticated as a genuine picture of what it purports to depict.” (*People v. Doggett* (1948) 83 Cal.App.2d 405, 409.) As our Supreme Court has stated, “It is well settled that the testimony of a person who was present at the time a film was made that it accurately depicts what it purports to show is a legally sufficient foundation

for its admission into evidence. [Citations.]” (*People v. Bowley* (1963) 59 Cal.2d 855, 859; *accord, People v. Beckley, supra*, 185 Cal.App.4th at pp. 514-515.) Furthermore, “a photograph may, in a proper case, be admitted into evidence . . . as probative evidence in itself of what it shows.” (*People v. Bowley, supra*, 59 Cal.2d at p. 861; *accord, People v. Beckley, supra*, 185 Cal.App.4th at p. 515.)

(2) *Authentication by insurance adjuster Bart—*

Richard Steven Bart (Bart) was a senior general adjuster for Farmers Insurance, having been employed by that company for 25 years. The day after the incident, Bart went to the apartment complex pool area and took 14 or 15 photographs.

At an Evidence Code section 402 hearing, held before the jury was impaneled, Bart testified that he took the photographs on July 21, 2006 with a disposable camera, he took the camera to Walgreens and left it for development, he went back to Walgreens and picked up the developed paper photographs together with a disk of the photographs, and the photographs accurately depicted the conditions that were present when he was at the apartment complex poolside on July 21, 2006. The court admitted the photographs into evidence.

(3) *Evidence Code section 402 hearing—*

On appeal, plaintiffs contend the court erred in admitting the photographs into evidence at an Evidence Code section 402 hearing before the jury was impaneled. But this is precisely what section 402 allows.

Evidence Code section 402, subdivision (b) provides in pertinent part:

“The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury” The court in the matter before us determined the admissibility of the photographs at a section 402 hearing because plaintiffs’ counsel had made plain that he wanted to ask a litany of questions regarding Bart’s affiliation with Farmers. However, the court determined that it would be unduly prejudicial to permit the jury to learn of the existence of insurance coverage pertaining to the incident. Plaintiffs

cite no authority to show that the use of a section 402 hearing was improper in this context.

Plaintiffs complain that, at the hearing, the court refused to permit them to question Bart about his recollection, independent of the photographs, as to the precise color of the water when he visited the apartment complex. The court emphasized that the purpose of the examination of Bart was to lay the foundation for the photographs, not to probe Bart's independent recollection. The court stated Bart "[was] not a witness to the incident." Plaintiffs cite no authority to show that the court erred in limiting testimony in this way.

(4) Admissibility of evidence of insurance to show bias—

Plaintiffs argue that as long as they don't "make use of the 'I' word to argue liability, its use is proper." That is an oversimplification of the law.

"Evidence of a defendant's insurance coverage ordinarily is not admissible to prove the defendant's negligence or other wrongdoing. (Evidence Code, § 1155.) "The evidence is regarded as both irrelevant and prejudicial to the defendant. Hence, not only is it subject to objection and exclusion, but any attempt to inject it by question, suggestion or argument is considered misconduct of counsel, and is often held reversible error. [Citations.]" [Citations.]" (*Blake v. E. Thompson Petroleum Repair Co.* (1985) 170 Cal.App.3d 823, 830, italics omitted.) However, evidence of insurance may be admissible to prove a different point. For example, where a party disclaims ownership of a truck, the fact that the party insured the truck may be relevant to show ownership. (*Perry v. A. Paladini, Inc.* (1928) 89 Cal.App. 275, 285.) Similarly, the maintenance of workers' compensation insurance may be relevant to the determination of a disputed employer-employee relationship in the context of respondeat superior. (*Mullanix v. Basich* (1945) 67 Cal.App.2d 675, 682.)

Where evidence of insurance is relevant to an issue other than the defendant's negligence, "[t]he trial court must . . . determine, pursuant to Evidence Code

section 352, whether the probative value of the other evidence outweighs the prejudicial effect of the mention of insurance. [Citations.]” (*Blake v. E. Thompson Petroleum Repair Co., supra*, 170 Cal.App.3d at p. 831.)

Here, plaintiffs argue the fact that Bart was an insurance adjuster was relevant to the issue of whether he was biased such that he might have staged the photographs or misrepresented that the photographs depicted what he saw on July 21, 2006. Nonetheless, we conclude that the court did not abuse its discretion in determining that the probative value of the fact that Bart was an insurance adjuster did not outweigh the prejudicial effect of mentioning that defendants had insurance. The court allowed ample questioning of Bart outside the presence of the jury and there was no hint that Bart either staged the photographs or misrepresented that the photographs depicted the poolside as he found it on July 21, 2006.

(5) *Authentication of photographs or projections?*—

Plaintiffs contend the court erred in admitting the paper photographs into evidence despite the fact that Bart did not authenticate the photographs, but only authenticated projections of the photographs. They also contend that the court erred in allowing Bart to authenticate projections.

At the Evidence Code section 402 hearing, counsel for defendants was about to show Bart the photographs. The court interrupted and asked counsel for plaintiffs whether he had seen the photographs. Counsel for plaintiffs replied: “Your Honor, I have no objection to him putting them on the screen because this is a bench matter rather than a jury matter. So it’s fine if he simply displays them. He has given us a packet of photographs that are identified as the 402 photographs. I assume if they are the same, I’ve got no problem with that.” In this manner, plaintiffs’ counsel invited the use of the projector as part of the authentication process.

As defendants’ counsel continued to show photographs to Bart, to lay the foundation for the admission of each photograph, plaintiffs’ counsel interrupted and

stated that plaintiffs only had an issue with three photographs—photographs of the shepherd’s hook (an item of safety equipment). He indicated that plaintiffs had no issue with the photographs of the pool. The court responded that it intended to permit defendants’ counsel to lay the foundation for the admission of all the photographs to avoid having to call Bart at trial. Plaintiffs’ counsel responded that he objected to the examination of Bart outside of the presence of the jury. However, he made no objection to the use of the projector, something he had suggested himself.

As noted, plaintiffs now assert that Bart authenticated the projections rather than the paper photographs themselves. They argue that the court erred in permitting this because the jury considered the paper photographs. They contend that, pursuant to *People v. Bowley, supra*, 59 Cal.2d at page 859, in order to authenticate the paper photographs, Bart would have had to testify that they were accurate reproductions of what they purported to be. However, because Bart was looking at the projections during the authentication process, he failed to authenticate the paper photographs.

We disagree. To the extent that Bart may have looked at the projections when authenticating the photographs, this was at the invitation of plaintiffs. If there was any error in the use of this procedure for the authentication of the photographs, it was invited error. (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1685-1686.) Besides, the reporter’s transcript makes clear that Bart was authenticating the photographs he had taken with a disposable camera and had gotten developed at Walgreens, even though he may have been looking at projections during the authentication process. Furthermore, when asked whether the coloration of a particular photograph looked any different on the projection versus the actual photograph, Bart replied that the projection and the actual photograph looked the same to him.

Plaintiffs further contend that the court violated the dictates of *Harmon v. San Joaquin L. & P. Corp.* (1940) 37 Cal.App.2d 169, when it permitted this method of authentication. We disagree. In a case with conflicting evidence on the extent of a

plaintiff's injuries, including extensive medical testimony on the one hand and a film of the plaintiff on the other hand, the *Harmon* court made comments with respect to the weighing of film as evidence. (*Id.* at pp. 173-174.) It stated: "Moving pictures should be received as evidence with caution, because the modern art of photography and the devices of an ingenious director frequently produce results which may be quite deceiving. [Citation.] . . . Telescopic lenses, ingenious settings of the stage, the elimination of unfavorable portions of a film, an angle from which a picture is taken, the ability to speed up the reproduction of the picture and the genius of a director may tend to create misleading impressions." (*Id.* at p. 174.)

Harmon v. San Joaquin L. & P. Corp., *supra*, 37 Cal.App.2d 169 is inapposite. The case did not have to do with the authentication of still photographs. It had to do with the relative weight of a film as an item of conflicting evidence. Plaintiffs in the matter before us have not shown that the court erred in permitting Bart to look at projections when authenticating the photographs he took.

(6) *Court commentary on date of photographs*—

Plaintiffs acknowledge that the paper photographs "show 'clear and clean' water." However, they contend the water color was different when shown on the projector. They say that one of their theories at trial was that the pool contained algae and that Ebrahim slipped on the algae before sliding into the deep end of the pool. Plaintiffs argue that the court committed prejudicial error when it permitted the jury to see the unauthenticated paper photographs depicting a swimming pool with clear blue water when Bart authenticated projections showing a pool with cloudy green water. It was prejudicial error, they say, because there was conflicting testimony as to whether there may have been algae in the pool, and the jury was more likely to conclude that there was no algae in the pool when it saw the paper photographs.

William Rowley (Rowley), defendants' expert, testified that given the chlorine readings in the pool the day before the incident, there would not have been

green, brown or yellow algae in the pool, although black algae could have been present. On the other hand, Gerald Demers (Demers), plaintiffs' expert, opined that the slippery condition of the pool would have been caused by algae. He also testified that a pool can be slippery with algae even though the water is fairly clear and without cloudiness. Given that, the question of whether the color of the water appeared to be exactly the same in the projections and in the paper photographs is of little significance. Plaintiffs' own expert testified that the water could have had algae in it even if the water were clear.

Plaintiffs point out that the court, in response to their objections, stated outside the presence of the jury: "My inclination would be to give the following limiting instruction, which would just be that the photos . . . were not taken on July 20th, 2006, but depict the pool and surrounding area at Cypress Granite Apartments." Plaintiffs' counsel replied: "Perfect."

On appeal, plaintiffs contend the court nonetheless refused to give the agreed upon jury instruction. The record dispels that assertion, however. Shortly after the court proposed to instruct the jury as agreed, the jury was brought back into the courtroom and the court said: "Prior to [defendants' attorney] proceeding, the court is going to just inform the jurors that you had an opportunity to take a look at a series of photographs. Those photographs were not taken on July 20th, 2006. They were taken on July 21st, 2006, and they depict the pool, the surrounding area at Cypress Granite Apartments." The court did indeed tell the jury what it said it would.

If plaintiffs intend to argue that the court failed to provide a written jury instruction on the point, they cite no portion of the record to show that they proffered a written jury instruction. On appeal, we presume that the order of the trial court is correct. (*Virtanen v. O'Connell* (2006) 140 Cal.App.4th 688, 709.) It is the burden of the appealing party to show error. (*Id.* at p. 710.) "[I]t is not our responsibility to scour the appellate record for [information] to support a party's position" (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1270.) Plaintiffs, as appellants,

have failed to meet their burden to show that the court erred in failing to give a written jury instruction along the lines discussed above.

(7) Court commentary on coloration issues—

At trial, defendants' counsel claimed his clients were the victims of photographic technology that projected the photographs onto the screen with a greenish tinge that was not present in the actual paper photographs. He argued that "it would be misrepresentative to allow this to go unaddressed to this jury." The court acknowledged that the paper photographs showed the pool to be blue, but that they came up on the screen "in a greenish hue." However, the court was unconcerned for several reasons. For one, it stated the "photographs most likely [would] end up in the jury room" and the jury would give the photographs whatever weight they chose.

Plaintiffs' counsel interjected that "any difference between the photographic color and the screen color doesn't matter because [the jury is] relying upon what's on the screen" The court disagreed, stating, "All that matters is the hard copy of the photograph I'm holding in my hand." In response, plaintiffs' counsel continued to assert that what Bart had authenticated was the projection on the screen, not the paper photographs.

The court rejected the argument of plaintiffs' counsel. It stated: "The photograph is what speaks for itself, not the publication or the projection of the photograph onto the screen. It's the photograph itself that Mr. Bart was authenticating; that he took these photos; that he held them in his custody, care and control; that he had them developed; that he picked them up from . . . Walgreen's; that they represent on the date that he went out to the site what is depicted in this photograph."

The court further stated: "The problem is there's this color of water that really doesn't change anything either because the expert's testified that regardless of the color of the water, there still could be algae existing in the pool. . . . So the expert's already testified regardless of the color of the water, it doesn't change the fact that he

believes that there was algae located in the pool.” In conclusion, the court stated, “And so I will allow to the extent that [defendants’] counsel wants to just clarify, if that is even required at this point, with regards to what is seen in these photographs.”

When a photograph of certain rescue equipment was circulated to the jury, the court made several remarks. First, it stated, “Ladies and gentlemen, . . . as great as we are with our technology, it’s sometimes difficult with photographs to have them translate fully on the screen for you.” It also remarked, “There’s a bit of discoloration and it’s just not projecting.” The court further said, “This just allows you, ladies and gentlemen, . . . to have a look at the photo because . . . it’s not, in this court’s opinion, projecting exactly the same as it looks.”

Later, defendants’ counsel showed 10 photographs of the pool to witness Marlon Young. After the witness stated that he recognized the photographs as being photographs of the pool, the photographs were circulated to the jury. The court explained that the reason for circulating the photographs was “that the projection does not accurately depict these photographs. And so they seem to be displayed better by the means of publication to each of you in this manner.” The court noted: “There have been several jurors that have indicated to the court and nodded their head that it has been difficult for them to observe these photographs on the overhead projection that we have. So I don’t know if our projection is not state-of-the-art, but it’s not projecting accurately.”

Plaintiffs requested that the court give CACI No. 5016 as follows: “In this case, I have exercised my right to comment on the evidence. However, you the jury are the exclusive judges of all questions of fact and of the credibility of the witnesses. You are free to completely ignore my comments on the evidence and to reach whatever verdict you believe to be correct, even if it is contrary to any or all of those comments.”

The court rejected the request, for two reasons. First, it said that it had not commented on the evidence. Second, it said that the instruction is only “given if after

deliberations have begun, the jury asks for additional guidance and then the judge comments on the evidence.”

On appeal, plaintiffs maintain that the court did comment on the evidence, so the instruction was required to be given. However, a review of the reporter’s transcript makes clear that what the court did was explain to the jury why the paper photographs were being circulated. The court noted that the projection of the photographs on the screen was not a perfect match for the paper photographs themselves, there being an apparent difference in coloration, and, furthermore, some of the jurors had indicated that they had a hard time viewing the projections. The clear point of the court’s comments was that the jury should view the paper photographs themselves, because the paper photographs were the evidence, not the projections, and the projections were inaccurately reproducing the images shown on the paper photographs.

The court did not comment that the water as shown in the paper photographs was a beautiful clear blue or that the jury should make note to weigh the color of the water as shown in the paper photographs against any testimony to the effect that there may have been algae in the pool.

Here, the court commented only that there appeared to be a discrepancy between the paper photograph and the projection of the photograph on the screen. Given that, the court felt it best to put the paper photographs in the hands of the jury for the jury to examine the actual photograph and not be limited to a viewing of the projection of the photograph. By doing so the court carefully gave the jury the best opportunity to size up the evidence. We disagree with plaintiffs’ assertion that the court committed prejudicial error in making its comments.

“Article VI, section 10 of the California Constitution provides, in pertinent part: ‘The court may make any comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause.’ We have interpreted this provision to require that such comment “‘be accurate,

temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power.” [Citations.] Thus, a trial court has ‘broad latitude in fair commentary, so long as it does not effectively control the verdict.’ [Citation.] ‘We determine the propriety of judicial comment on a case-by-case basis.’ [Citation.]” (*People v. Monterroso* (2004) 34 Cal.4th 743, 780.) In this case, we see no error in the court's comments regarding the reason for circulating the paper photographs.

C. Exclusion of Plaintiffs' Evidence:

In addition, plaintiffs argue the court wrongly excluded numerous items of their evidence, effectively precluding them from putting on their case. We look at each item in turn.

(1) Demers' expert testimony—

Plaintiffs contend the court erred in excluding certain testimony of their expert witness Demers. We have reviewed plaintiffs' record references and determined that, once again, they do not support plaintiffs' characterization of the proceedings. Even were that not the case, we would conclude that any error in excluding the cited portions of Demers' testimony was not prejudicial.

(a) chlorine levels

Plaintiffs claim the court improperly precluded Demers from testifying about proper chlorine levels. However, the record reflects that Demers testified at length regarding the pool chemistry records, including the chlorine readings, pertaining to the swimming pool at the time of the incident. Indeed, he testified that based on those records and readings, “there was algae in the pool on the date of the incident” and there was “basically a perfect storm, perfect conditions for algae growth.” It is hard to imagine

what more favorable testimony plaintiffs' counsel could have hoped to elicit from this witness.

(b) filtration system

Plaintiffs contend the court erred by disallowing, on the basis of relevancy, "Demers' testimony that the pool's broken filtration system would remove algae from the pool" However, the record does not support plaintiffs' representation that the filtration system was broken. Rather, Demers testified: "I don't believe they had any problems with filtration. I know that they made some repairs to the filter, but I don't know if there was a problem with it."

Plaintiffs' counsel asked Demers: "Isn't the pool filter one of the primary means of removing algae from water?" Defendants' counsel objected: "Your Honor, this is irrelevant, beyond the scope of cross." On appeal, plaintiffs do not address whether the question was beyond the scope of cross examination. They only claim the court erred in ruling on relevancy. In any event, any error was not prejudicial. Demers was permitted to testify that recirculation equipment affects water quality because if the water doesn't circulate through the filter, no chemicals are being circulated, and there is no filtration. He explained that "[t]he filter kind of cleans the dirt off the bacteria, and it allows the chlorine to get at it and kill the bacteria." So, if any portion of the record supported plaintiffs' assertion that the filtration system was broken, Demers had an opportunity to explain the significance of that fact.

(c) safety equipment

On another topic, plaintiffs asked Demers: "Is there a standard in the swimming pool industry, maintenance and operation, concerning the way that a float line should be rigged and positioned in a pool?" The court sustained an objection based on lack of foundation. However, after Demers identified six organizations with standards on the topic, the court permitted him to read aloud some of those standards. It thereafter permitted him to opine as to whether the safety line in question was sufficient to support

a person in need, based upon the quoted standards. Demers opined the safety line was deficient and stated why. This testimony did not prejudice plaintiffs.

(d) body weight in water

Next, plaintiffs complain that the court erred in sustaining, on the basis of lack of foundation, the question: “Does a body weigh the same under water as it does on land?” They omit to mention, however, that after Demers testified as to his background in biomechanics and the hydrodynamics involved with body weights, the court permitted him to respond to the rephrased question, “Tell us what happens when you submerge a body in water as it relates to the mass or weight of the body.” He testified in part: “So there are people who are negatively buoyant. That’s about 5 percent of the population. And those are primarily athletes or people who do a lot of weight training. And the rest of the population is either neutrally buoyant or positively buoyant. They float or they will suspend between the surface and the bottom of the pool.” In other words, Demers was ultimately permitted to respond, and did respond, to the questioning of plaintiffs’ counsel.

(e) Ebrahim’s mass in water

While being questioned, Demers also indicated that “the perceived mass of someone submerged in water” could be determined based on the individual’s height and weight. When plaintiffs’ counsel asked Demers if he had “an opinion as to what the maximum mass [was] that Ragaa Ebrahim would have been perceived to have when submerged in the water on July 20th, 2006,” the court sustained another objection based on lack of foundation. On appeal, plaintiffs again claim error. However, they cite no portion of the record to show that they had provided Demers with any information on Ebrahim’s height or weight.

Plaintiffs contend they asked for an opportunity to lay additional foundation, but the court ruled that the entire line of questioning was ““not appropriate.”” This very simply is not an accurate representation of the record. The court was setting

some ground rules for the attorneys because emotions were running high. It stated: “I do not want either of you to ask this court to admonish the other . . . unless it is something . . . egregious in front of the jury. If you think that things have become so difficult you can’t handle the question that’s being asked, ask for a sidebar. Okay?” It reiterated: “So now, please, *if you feel that . . . this line of questioning is just not appropriate*, I cannot tolerate it any longer, ask the court to have a sidebar” (Italics added.) The court did not rule that the line of questioning was inappropriate; it only told the attorneys how to proceed if they themselves felt a given line of questioning was inappropriate.

(2) *Photograph of Ebrahim*—

On a related note, plaintiffs contend the court erred in precluding them from presenting a photograph of Ebrahim taken before the incident. They claim the photograph would have had bearing upon the issue of her weight under water and would have cast doubt upon the testimony of Figueroa, who said he could not pull Ebrahim out of the water with the pole because she was too heavy. However, plaintiffs do not provide a record reference either for the assertion that they sought to admit the photograph or that the court excluded the photograph. The issue is therefore waived, due to failure to provide record references. (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768.)

In any event, Demers testified that “the perceived mass of someone submerged in the water” could be determined based on the individual’s height and weight. However, a photograph of Ebrahim would not have provided data on her height and weight, from which mass could be calculated.

Even so, Demers acknowledged having seen photographs of Ebrahim taken before the incident. Plaintiffs’ counsel asked Demers what Ebrahim’s perceived mass would have been assuming that in those photographs she was five feet one inch tall and weighed 130 pounds and that at the time of the incident she was lying near the bottom of the pool at the six-foot level. Demers replied that she probably would have weighed

quite a bit less than 10 pounds.

Plaintiffs complain that the excluded photograph (which they do not identify) would have provided the foundation for Demers' testimony. However, as defendants point out, after the court excluded from evidence a photograph of Ebrahim and her son, taken more than a year before the accident¹, Ebrahim's husband did testify as to her height and weight. He testified that immediately before the incident, she was approximately 155 centimeters tall and weighed approximately 120 pounds. So, plaintiffs ultimately managed to get all the puzzle pieces before the jury.

(3) Rowley's expert testimony—

(a) chlorine levels

Defendants' expert Rowley testified that the records showed the chlorine levels were zero on July 17, 2006, and about three parts per million on both July 19 and July 21, 2006. He further testified that in order for the chlorine level to have increased by three parts per million from July 17 to July 19, "a copious quantity of chlorine" would have to have been added to the water.

In their opening brief on appeal, plaintiffs assert that they asked "Rowley, if the pool maintenance company fell below the standard of care by failing to properly check the chlorine level in the pool." They further state: "Amazingly, the Court rejected the questions [as being] 'without foundation and speculative.'"

Plaintiffs again mischaracterize the record. Plaintiffs' record references are to testimony that shows the chlorine levels were checked and recorded every other day during the time period in question. Plaintiffs cite no portion of the record to show that Rowley was asked whether this frequency of testing fell below the standard of care.

Furthermore, the court did not sustain objections to questions about properly checking chlorine levels in the pool. Rather, plaintiffs' counsel repeatedly asked

¹ We do not know whether this was the particular photograph plaintiffs say was erroneously excluded.

Rowley what he would have done had he been on site on July 17 and gotten a chlorine reading of zero. The court sustained objections to *those* questions based on speculation.

Plaintiffs argue “[t]here is nothing ‘speculative’ about asking a person the Court deemed a qualified expert how Cypress Village could have timely rectified the algae problem.” But testimony on that point was not precluded, even though some questions were barred. Rowley testified that it was the job of a pool service technician to immediately correct a low chlorine reading. When it came to what in fact happened in the case, Rowley testified that the pool technician at Cypress Village “on the 17th of July, when he got a zero reading, had to put chlorine in because you’ve got three parts per million on . . . a Monday, and you’ve got three parts per million of chlorine on Wednesday, so he loaded it with chlorine.”

In other words, three days before the incident took place, the chlorine level in the pool was low. It was the technician’s responsibility to correct the low chlorine level. In order to do so, he loaded the pool with chlorine, so that, by the day before the incident, the chlorine reading was three parts per million. The day after the incident, the chlorine reading remained three parts per million. Plaintiffs cite no evidence to show that there was any problem with the chlorine level on the day of the incident. Any error in precluding the particular questions plaintiffs’ counsel asked about how Rowley himself would have proceeded had he seen the low chlorine level on July 17th was harmless error.

(b) retainer agreement

On recross-examination of Rowley, plaintiffs sought to enter into evidence a copy of Rowley’s retainer agreement. Defendants’ counsel objected to the admission of the evidence as being beyond the scope of direct examination. The court sustained the objection, but offered plaintiffs’ counsel an opportunity to question Rowley regarding his retainer agreement. As plaintiffs’ counsel proceeded, defendants’ counsel objected that plaintiffs’ counsel was misstating the content of the retainer agreement. The court then

said to plaintiffs' counsel, "I just don't know where you are going with this." Plaintiffs' counsel replied: "That doesn't matter whether you do or not, your Honor." The court responded: "Counsel, it does," and "You are in my courtroom and I am controlling this trial. Excuse me."

Plaintiffs' counsel then stated: "But the jury decides what's important. You just call the balls and strikes." The court responded: "That is not correct and you know that." Plaintiffs' counsel retorted: "Do you decide the winner here?"

The way plaintiffs characterize this exchange, they received a "sharp rebuke" for having attempted to question Rowley about the retainer agreement. We disagree. When defendants' counsel asserted that plaintiffs' counsel was misstating the retainer agreement, the court paused to make inquiry. What followed was a display of arrogance and disrespect for the court by plaintiffs' counsel.

Plaintiffs say they were severely prejudiced because they were denied the opportunity to show the extent of Rowley's bias. But this is not the case. In response to questioning by plaintiffs' counsel, Rowley stated he received an initial retainer of \$4,000, that he charges \$1,000 per day for each day he appears in deposition for more than three hours, and that he has a fee of \$3,000 per day for each day he testifies in court at trial. Rowley further testified that with additional time spent for visiting the pool, taking measurements, and making drawings, he billed at least \$10,000 on the case. This testimony was sufficient to show possible bias.

(4) Sandra Ochoa's deposition transcript—

Sandra Ochoa (Ochoa) was the apartment complex manager. She testified that about a week before the incident, she observed that the pool water looked cloudy or dirty, so she closed the pool and called Walton's Pool Inc. (Walton's). A man from Walton's came out to service the pool.

Plaintiffs' counsel asked Ochoa if anyone told her why the pool was cloudy and dirty at that time. The court sustained a hearsay objection, but permitted the witness

to answer “yes” or “no.” She answered “yes.”

Ochoa testified that when the man from Walton’s came out, he shocked the pool with chlorine. However, she did not remember if any filter repairs were performed at that time. Ochoa observed that, after the man from Walton’s came out, the pool water was clear, no longer cloudy.

She was familiar with the appearance of algae, and testified that she did not see any algae in the pool on the day of the incident. Defendants’ counsel handed Ochoa a paper photograph—exhibit 204-009. She testified that there was no “difference between the clarity of the pool water that [she] saw on the day of the accident versus [the] photograph taken a day later.”

Plaintiffs’ counsel sought, under Evidence Code section 771, to use Ochoa’s deposition transcript record to refresh her recollection that Walton’s had told her there was a problem with the filter a week before the incident. Defendants’ counsel objected on the basis of hearsay. Plaintiffs’ counsel acknowledged that it would be hearsay to use the statement for its truth, but argued that he should be allowed to use the statement only to show that the property management had notice that there was a problem with the filter. The court declined the request of plaintiffs’ counsel, stating: “[T]he witness has never testified that she doesn’t recall the reason why the water was cloudy and dirty. She has testified, no, she doesn’t know the reason why the water was cloudy and dirty. Therefore, the use of a transcript to refresh recollection is inappropriate.” We agree. (*People v. Lee* (1990) 219 Cal.App.3d 829, 840.)

In any event, the court permitted plaintiffs’ counsel to read into the record, outside of the presence of the jury, the portion of the deposition transcript at issue. It read: “Question: You had mentioned that there was an occasion about two weeks before the incident where the pool was cloudy. Were you ever told the pool was cloudy because of an excessive amount of suntan lotion or oil in the pool? Answer: No. It was cloudy because, according to Walton’s, . . . the filter was dirty because people get into the water

with shoes and diapers and things like that.”

Even if the court had erred in its ruling, we observe that plaintiffs’ counsel later had the opportunity to get the desired information before the jury. On recross-examination, plaintiffs’ counsel asked Ochoa: “After Mr. Walton made the repair or came to the property and put the shock in, do you recall him telling you anything about what caused the problem?” She responded that Mr. Walton said the filter could have gotten clogged due to the residents getting “into the pool with shoes and clothes and whatever” She reiterated that Mr. Walton “added the shock” but that she did not know whether he inspected the filter. Inasmuch as plaintiffs were eventually able to get Ochoa to testify just as they desired, they have no grounds for complaint.

(5) *Broken safety pole*—

First, plaintiffs attack the court’s ruling on a photograph of a broken safety pole found at the apartment complex two years after the incident. Although plaintiffs unabashedly admit that the photograph was taken two years after the incident, they claim the court erred in excluding the photograph as irrelevant and unduly prejudicial when weighed against probative value. In a disingenuous argument, plaintiffs erroneously assert that defendants, in their motion in limine, did not argue lack of relevancy. Plaintiffs appear to contend that since defendants did not argue relevance, the court erred in ruling at least in part on this ground.

However, the record reflects that defendants, in their motion in limine, cited both Evidence Code section 350 and Evidence Code section 352 and argued both relevancy and prejudicial effect. They said that “one of the most fundamental rules of evidence is that evidence that is not relevant is not admissible. (Cal. Evid. Code § 350.)” In their reply to plaintiffs’ opposition, defendants stated: “Here, a photograph of pool safety equipment taken two years after the underlying incident is not relevant to prove any of the facts surrounding the events that took place July 20, 2006. Moreover, such evidence would also confuse or mislead the jury and would be substantially prejudicial to

defendant.” The trial court agreed and so do we. No more need be said, except perhaps that appellate counsel is cautioned not to misrepresent the record.

(6) John Kouri’s testimony—

(a) initial trial testimony

John Kouri (John), Ebrahim’s nephew, was 12 years old at the time of trial in November 2010. He was at the pool on the day of the incident in July 2006. When he was unable to save Ebrahim himself, he ran into the apartment to get his uncle.

At trial, John was questioned at length as to whether he observed a safety pole at the pool on the day of the incident and, if so, whether the pole was broken. Initially, he said the “end” of the pole was “broken.” Then he clarified that he meant “the hook.” Later, John said the “loop” on the end of the pole “was loose, like it was coming out of the pole.”

Defendants’ counsel asked John to refresh his recollection by looking at a portion of his deposition transcript. Counsel then asked John whether the transcript refreshed his recollection as to whether the pole was actually broken on the day of the incident. John responded affirmatively. Counsel then asked, “And what’s the truth?” John replied: “It was broken.” Counsel continued, “As you’ve described it?” John responded: “Yeah.”

(b) deposition transcript

Plaintiffs’ counsel then asked that the reading of the deposition transcript begin on the preceding page, because John had been looking at a photograph at the pertinent point in his deposition and plaintiffs’ counsel wanted to establish context. However, defendants’ counsel pointed out that the photograph in question, a photograph of a broken pole taken two years after the incident, had been excluded from evidence. Consequently, the court did not permit as much of the transcript to be read aloud as plaintiffs’ counsel desired. On appeal, plaintiffs claim this was error because, under Code of Civil Procedure section 2025.620, subdivision (a), they had a right to use the

deposition transcript for impeachment purposes. However, as we shall show, the portion of the deposition transcript that was excluded was largely irrelevant and, indeed, confusing.

The entire segment of the transcript that plaintiffs sought to have read aloud states: “Question: ‘I’d like to show you another picture and ask you if you’ve ever seen—’ Mr. Blackstone: ‘Let me take a look. What’s all this?’ Mr. Carras: ‘You know, I don’t know. It printed out this way . . . with some writing. I assume it’s not Arabic.’ Mr. Blackstone: ‘It looks like it.’ Mr. Carras, Question: ‘Do you see looking at the picture here there’s a metal pole? Do you see that?’ Answer: ‘Yes.’ Question: ‘Have you ever seen that pole—this pole broken in that fashion?’ Mr. Blackstone: ‘*I assume you’re talking about other than on the day of the accident, right?*’ Mr. Carras: ‘I’m talking at any time.’ *Witness: ‘No. I don’t remember.’ Question: ‘You don’t remember ever seeing it broken?’ Answer: ‘No.’*” (Italics added.)

Only the italicized portions of the transcript were read before the jury. Plaintiffs say they suffered obvious prejudice due to the exclusion of the portion of the transcript appearing before the first italicized words. Actually, it isn’t obvious how it was harmful to plaintiffs to exclude references to a broken pole and some possibly Arabic writing, unless plaintiffs hoped the jury would assume the pole was broken at the time of the incident and not two years afterwards. In any event, the attorneys for each party had an opportunity to ask further questions of John, whose testimony continued to be confused.

(c) further trial testimony

After defendants’ counsel read the portion of the transcript in question to John, he asked: “Do you recall saying that you didn’t recall ever saying it broke?” John replied: “Yes.” Defendants’ counsel then asked: “Which is true?” John responded: “Yes.” Trying again, defendants’ counsel asked: “Which is true, that you don’t recall saying it broken at any time, including the day of the accident, or that do you recall

having seen it broken?” (Grammatical errors in the original.) John then said: “I don’t recall.” Defendants’ counsel then asked: “You don’t recall either way?” John replied: “That it was broken on the day of the accident.”

After that, plaintiffs’ counsel gave it a try. Seeking clarification, he reminded John: “Now, when you were asked about whether the pole was broken or not, you were asked to read from the deposition that day.” He asked: “And you said, well, maybe it wasn’t broken. Tell us why you did that. Why did you change your mind?” John responded: “To be honest with you, I couldn’t remember.”

Plaintiffs’ counsel then tried a different approach. He asked John: “Did you see the pole that the hook was . . . in, hanging on the fence, broken in two?” John responded: “No.” Plaintiffs’ counsel tried again: “Two pieces of pole?” John reiterated: “No.”

Whether or not the jury became aware that there was a photograph of a broken pole (taken two years after the incident), they were made aware that John testified at deposition that on the one hand, he did not remember, and on the other hand, he did not remember seeing a broken pole. John continued to be vague and/or inconsistent at trial. It was up to the jury to weigh the testimony of a witness who was 12 at the time of trial and about eight at the time of the incident. Plaintiffs have not shown that it was prejudicial to exclude that one confused snippet of deposition transcript from the pile of evidence.

D. Improper Admission of Defendants’ Evidence:

Plaintiffs also contend the court erred in admitting much of defendants’ evidence. We look at the various assertions of error in turn.

(1) Exhibit 334—

Several extremely similar exhibits were offered at trial—exhibits 329a, 329, 334a, and 334. Exhibits 329a and 334a were eight and one-half- by 11-inch

diagrams of the swimming pool and immediately surrounding area. The swimming pool was presented with a slightly different angle of orientation in each of exhibits 329a and 334a, but the two exhibits were otherwise largely the same. Exhibits 329 and 334 were the blowups of exhibits 329a and 334a, respectively.

When defendants' counsel was questioning apartment resident Lilia Young (Young), he sought to mark for identification a blowup of a smaller exhibit. He said he had marked it exhibit 139B. However, *plaintiffs' counsel pointed out an error, and stated the exhibit was correctly identified as No. 329, a blowup of exhibit 329a, which was already in evidence.* The clerk then checked with plaintiffs' counsel, "So this is the original 329 that 329a is the reduction of?" Plaintiffs' counsel agreed. The exhibit was then marked for identification.

Defendants' counsel asked Young whether exhibit 329 appeared to her "to be a representation of the area of the pool at the [apartment complex]?" She replied, "Yes." He then made reference to the wording "left gate," in the upper left-hand corner of the diagram. He asked her whether she had entered the pool area from that gate on the day of the incident, and she replied that she had.

Defendants' counsel asked Young if, at the time she arrived at the pool area, Ebrahim was already in the pool. Defendants' counsel asked Young to draw a circle on the diagram in the area where she observed Ebrahim. The witness complied, and wrote "EB1" next to the circle, to show where she first observed Ebrahim. Then, she marked the diagram with "Y1" to show where she and her family were situated at a certain point in time. Later, she marked the diagram "EB2" to show where Ebrahim was located inside the pool when Young saw her splashing. Young answered many other questions about the locations of various persons at the poolside at specified points in time, by reference to the same diagram, which defendants' counsel continued to refer to as exhibit 329.

After the court excused the jury for a recess, plaintiffs' counsel stated: "When counsel placed exhibit 329 on the board, he made a representation that it was simply a blowup of the document that had already been admitted. I have looked at 329a, which was admitted, and there has been a gross manipulation of what we have up here on 329 that is incredibly different from what is here, including the relocation of the pool in relationship to the gates and its location within the deck" He further stated: "But I've got a problem with counsel making a representation and it is nowhere near accurate."

After a lengthy exchange on the record, defendants' counsel realized that the exhibit about which Young had testified was exhibit 334, not 329 as plaintiffs' counsel had originally suggested. Plaintiffs' counsel objected that exhibit 334 was not in evidence and that it never should have been used or shown.

The court had exhibit 334 marked for identification and reminded plaintiffs' counsel that he would have an opportunity to question Young with respect to the exhibit on redirect examination. In face of further objections by plaintiffs' counsel, the court also observed that in the hour of testimony regarding the exhibit, no one had represented that the blowup was to scale.

When defendants' counsel moved for the admission of exhibit 334, plaintiffs' counsel objected on the basis of lack of authentication, and lack of any testimony stating the exhibit fairly and accurately depicted the conditions or was to scale. The court admitted the exhibit into evidence.

On appeal, plaintiffs contend the court erred in admitting exhibit 334 into evidence during a sidebar without any semblance of authentication. We reject the contention wholeheartedly.

We cannot help but make note of the fact that plaintiffs' counsel was the one that offered the incorrect exhibit number—329 rather than 334. Moreover, when the exhibit was first presented, Young specifically stated that it appeared to her "to be a representation of the area of the pool at the Cypress Village Apartments." Young was an

apartment complex resident who was present at the time of the incident, and who testified at great length by specific reference to the exhibit. It cannot reasonably be asserted that her testimony was insufficient to authenticate the exhibit. It would have been a waste of judicial resources to have called her back to the stand to repeat all of her testimony after the correct exhibit numbers were sorted out and exhibit 334, properly identified as such, was admitted into evidence.

As a side note, we observe that there is no question which exhibit Young addressed. Her markings were made on exhibit 334, not exhibit 329.

(2) *Exhibit 119*—

During redirect examination of expert witness Demers, plaintiffs' counsel was asking questions about whether Walton's had given the pool a shock chlorine treatment. In connection with that line of questioning, plaintiffs' counsel asked Demers to look at exhibit 119—a June 2, 2006 invoice from Walton's. At the request of plaintiffs' counsel, exhibit 119 was marked for identification. Plaintiffs' counsel then proceeded to ask Demers about exhibit 119 and the fact that it made reference to a chlorine shock treatment.

On recross-examination, defendants' counsel asked Demers about exhibit 119. Plaintiffs' counsel objected that the exhibit had not been admitted into evidence. When defendants' counsel moved to have the exhibit admitted, plaintiffs' counsel objected on the basis of lack of foundation. The court admitted the exhibit and defendants' counsel proceeded to ask Demers about exhibit 119—the June 2, 2006 invoice for chlorine shock treatment.

On appeal, plaintiffs contend the court erred in admitting exhibit 119 over their objection as to lack of foundation. They claim “[i]t is difficult to underestimate the prejudicial effect on our jury. Exhibit 119 claimed that the pool was ‘shocked’ with chlorine on June 2, 2006” As defendants observe, our Supreme Court has stated: “It is axiomatic that a party who himself offers inadmissible evidence is estopped to

assert error in regard thereto. [Citation.]” (*People v. Williams* (1988) 44 Cal.3d 883, 912.) Here, plaintiffs’ counsel is the one that initially questioned Demers about the June 2, 2006 invoice. For that matter, we note that plaintiffs’ counsel also asked Demers, on redirect examination, about exhibits 109, 113, 120, and 122—Walton’s invoices dated February 15, April 15, June 15, and July 15, 2006, respectively. Plaintiffs are estopped from asserting error with respect to defendants’ use of those exhibits on recross-examination.

(3) *Exhibit 125*—

Turning to a related exhibit, on recross-examination, defendants’ counsel also asked Demers about exhibit 125—a July 25, 2006 Walton’s invoice for a chlorine shock treatment. When defendants’ counsel moved for the exhibit to be admitted into evidence, plaintiffs’ counsel objected on the basis of lack of foundation and authentication. The court overruled the objection and admitted the exhibit into evidence.

On appeal, plaintiffs claim the court erred in admitting exhibit 125 without authentication. They omit to mention that, before voir dire, the parties stipulated as to foundation and authenticity with respect to the exhibits identified on the exhibit list. They preserved their right to object on the basis of other grounds, such as hearsay and relevance. Having stipulated as to foundation and authenticity, plaintiffs cannot now claim error on those grounds.

As an aside, we note, as defendants point out, that plaintiffs called Demers as their first witness. When they later called William Walton, he identified exhibits 119 and 125 as copies of his invoices. Plaintiffs have not shown that the court erred in admitting exhibits 119 and 125. (See Evid. Code, § 403, subd. (b).)

(4) *Exhibits 155, 157 and 159*—

Exhibits 155, 157 and 159 were invoices from K. Kovacovsky Pools, dated May 27, July 1, August 28, and October 29, 2008, respectively. They pertained to purchases of pool equipment, including safety equipment. Plaintiffs complain that the

court erred in admitting these exhibits into evidence, over their objections as to foundation, authenticity, relevancy and overbreadth. In their opening brief on appeal, they cite no legal authorities in support of their assertion of error. However, they say the court compounded its error when it later decided to strike the exhibits, but failed to inform the jury of that fact.

As the record reflects, at one point in time, the court had decided to grant plaintiffs' motion to strike the exhibits. Considerable argument ensued. Defendants' counsel argued, *inter alia*: "We entered this trial with everybody stipulating to authentication as long as the documents have been exchanged during discovery. Suddenly, that's morphed. That's all changed." Eventually the court, upon further reflection, decided to admit the exhibits over plaintiffs' objection.

In their appellants' reply brief, plaintiffs recollect that the court ultimately denied their motion to strike. However, they state that the exhibits should have been inadmissible because defendants failed to pose questions that would make the business records exception of Evidence Code section 1271 applicable. Even were we to conclude that this argument trumped the parties' stipulation as to foundation and authentication, we would conclude that any error was harmless.

It would benefit plaintiffs to show that the pool safety equipment at the apartment complex was broken or otherwise deficient at the time of the incident on July 20, 2006. The invoices in question indicated that the apartment complex purchased new pool safety equipment in 2008. However, evidence of that nature was unlikely to convince a jury that the pool equipment must necessarily have been in proper condition in 2006. Put another way, plaintiffs have not shown it is reasonably probable that, in the absence of the invoices, the jury would have concluded that the pool equipment was broken in 2006. (*Easterby v. Clark* (2009) 171 Cal.App.4th 772, 783.)

(5) *Rowley's testimony*—

(a) *Kennemur objection*

Defendants' expert witness Rowley had a Ph.D. in engineering. He had an expertise in the design and engineering of commercial swimming pools and related components, including diving boards, filters, pumps, heaters, deck equipment, drains and the like.

A declaration in support of defendants' expert witness designation described the general substance of the testimony Rowley was expected to give (Code Civ. Proc., § 2034.260, subd. (c)) as follows: "Dr. Rowley is expected to testify, from an engineering perspective, regarding issues concerning aquatic safety, the design, construction, and conditions of the pool where the incident occurred, regulations and codes applicable to the pool including compliance of the pool and pool area with applicable codes and regulations, equipment present at the pool and usage of pool equipment, and operation of the pool. Dr. Rowley is expected also to testify regarding accident reconstruction issues, including the facts of the incident. Dr. Rowley may also offer testimony regarding swimming behavior. Dr. Rowley may also offer rebuttal testimony depending on the opinions of plaintiff's experts."

On direct examination, Rowley responded to a hypothetical regarding whether using a shepherd's crook would be an effective means of bringing a 130-pound woman located near the bottom of the pool, at the eight-foot level, to the surface. He also testified as to the effect of the drag coefficient on trying to pull a person through water. Plaintiffs made a *Kennemur* objection² with respect to the line of questioning and testimony. They claimed the topic of what Ebrahim was doing in the water was beyond the scope of Rowley's deposition.

² *Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 918-919.

In support of their position plaintiffs quoted only one question and one answer from the deposition at issue. The question was: “As part of your reconstruction, . . . did you perform an anatomical or physiological evaluation . . . in terms [of] what was happening to Miss Ebrahim as she was in the pool struggling?” The answer was: “This is the area of Dr. Engstrom, who [has] a Ph.D. in kinesiology, which he would be able to talk to the physiological and psychological aspects of the accident much, much more detailed and much more professional than I would as an engineer.” Plaintiffs also offered some generalizations about Rowley’s deposition testimony.

In ruling on plaintiffs’ objection, the court stated: “With regard to the . . . issue that you’re posing with regard to *Kennemur*, the physiological and psychological aspects of the plaintiff have not been testified to at all by this expert.” Based on the portion of the record plaintiffs cite, we agree.

(b) accident reconstruction

On direct examination, Rowley was asked whether he had formed “any opinions regarding reconstructing how this accident occurred.” He stated that he had. He opined that there was no algae present in the pool that was “a causative factor” for the accident. He also opined that, based on where Ebrahim was situated in the pool before she went under the water, her feet would not have been touching the bottom of the pool, so they could not have slipped.

On redirect examination, defendants’ counsel asked Rowley what factors he had taken into consideration in forming his opinion that Ebrahim had not slipped. Plaintiffs’ counsel objected “it exceeds the scope of his expertise.” The court overruled the objection.

On appeal, plaintiffs claim this was error, because “there was no testimony that Mr. Rowley had special training and education in accident reconstruction.” We see no error. Rowley had designed nearly 700 major commercial pools, including two swimming pools for the 1984 Olympics and three swimming pools at West Point, and

had designed the circulation system for the White House swimming pool. He was licensed as a mechanical engineer and all of his engineering work was related to swimming pools. He had received various awards for his work.

Rowley had appeared as an expert witness for the analysis and reconstruction of aquatic accidents including those arising out of drowning incidents, diving incidents, suction entrapments, swimming pool failures, filter pneumatic separations, and slips and falls on decks. He had been retained as an expert witness approximately 800 times and had been involved in accident or event reconstruction each time.

With respect to the matter before us, Rowley testified that he had performed a “very careful measurement of the swimming pool and the depths of the swimming pool, and the location of the deck around the swimming pool” In determining whether Ebrahim’s feet would have been touching the bottom of the pool when she lost contact with the pool deck, Rowley indicated that he had considered the deposition testimony of witnesses as to the last spot they saw her when she was still above water.

Plaintiffs’ citation to *Williams v. Volkswagenwerk Aktiengesellschaft* (1986) 180 Cal.App.3d 1244, at pages 1263-1264, does not persuade us that Rowley’s testimony, as to why he believed Ebrahim did not slip, was outside the scope of his expertise.

(c) scope of expertise

On direct examination, defendants’ counsel asked Rowley whether he was an expert in pool chemistry. Rowley responded: “I am.” When plaintiffs’ counsel then objected based on lack of foundation, the court overruled the objection.

On appeal, plaintiffs baldly assert that “the Court found that one self serving statement qualified him as an expert on pool chemistry and then allowed him to opine over objection.” As the record reflects, there is more to it than that.

Rowley had previously stated that he had designed over 700 commercial swimming pools and, in fact, had designed the circulation system for the White House swimming pool. It would be shocking indeed if someone who had designed the circulation system for the White House swimming pool did not have an expertise in pool chemistry.

In any event, any error in ruling upon plaintiffs' objection to what they characterize as the one "self-serving" statement "I am," was harmless error. Immediately after the court overruled the objection, defendants' counsel asked Rowley: "Would you tell us about your education and training and experience in pool chemistry matters?" Rowley then explained that he had to go through an extensive training course before he obtained his swimming pool technician license from the County of Los Angeles. He also stated that for 27 years he had been on the board of directors "of the National Swimming Pool Foundation that wrote the pool operators' manual" and that he was "completely conversant with regard to water chemistry in the various aspects of sanitation on a swimming pool." He added that he did his doctoral dissertation on filtration systems and that he was familiar with California's laws and standards applicable to pool chemistry. This makes a sufficient showing of expertise under Evidence Code section 720.

Only after Rowley provided this information did defendants' counsel begin asking him questions about the chemical readings for the apartment complex pool in July 2006. And when Rowley responded to questions about the significance of the chlorine level in the pool the day before the incident, he gave some testimony that was favorable to plaintiffs. He opined that black algae could have been present in the pool.

(d) scope of designation

In addition to asserting that the court erred in permitting Rowley to testify outside of his area of expertise, plaintiffs contend the court erred in permitting Rowley to testify in an undesignated area. They say Rowley was designated only as an engineer,

not as a chemist. Plaintiffs also complain that Rowley testified at length regarding the effect of chlorine in the pool water and the effect that the addition of chlorine to the pool water, as shown by a review of maintenance records, would have had on algae growth. They insist they were prejudiced because they could not call a rebuttal pool chemist to demonstrate the flaws in his methodology.

We can only call this another disingenuous argument. Code of Civil Procedure section 2034.260, subdivision (a) requires an exchange of expert witness information. Subdivision (c) of that statute also requires, in certain contexts, that the list be accompanied by a declaration containing a statement of qualifications of the expert and “[a] brief narrative statement of the general substance of the testimony that the expert is expected to give.” (Code Civ. Proc., § 2034.260, subd. (c)(2).) “Only by such a disclosure will the opposing party have reasonable notice of the specific areas of investigation by the expert, the opinions he has reached and the reasons supporting the opinions, to the end the opposing party can prepare for cross-examination and rebuttal of the expert’s testimony.” (*Kennemur v. State of California, supra*, 133 Cal.App.3d at p. 919.)

Here, as we recall, Rowley was designated as an expert “to testify, from an engineering perspective, regarding issues concerning aquatic safety, . . . conditions of the pool where the incident occurred, regulations and codes applicable to the pool . . . , and operation of the pool.” He was also designated “to testify regarding accident reconstruction issues, including the facts of the incident.” Here, chlorine levels, algae growth, and factors that bear upon a slippery pool surface, are matters that pertain to aquatic safety issues, the condition and operation of the pool, and accident reconstruction.

Even if that were not the case, “a party’s expert may not offer testimony at trial that exceeds the scope of his deposition testimony *if* the opposing party has no notice or expectation that the expert will offer the new testimony” (*Easterby v. Clark, supra*, 171 Cal.App.4th at p. 780.) In this case, plaintiffs had plenty of notice of the

scope of Rowley’s testimony on chlorine levels, algae growth, and the possible causes of any slipperiness. This is so because Rowley’s testimony at trial was well within the scope of this deposition testimony, as plaintiffs should well know.

Pages 82 through 131 of Rowley’s deposition transcript show extensive questioning and response on the chlorine levels reflected in Walton’s records, the effect of chlorine on algae growth, the addition of chlorine to the pool, the likelihood that there was algae in the pool, what other factors could cause a pool surface to seem slippery, Rowley’s opinion that Ebrahim did not slip on the pool surface, and the information he reviewed before forming that opinion. Considering that the bulk of the questions on these topics were asked by plaintiffs’ counsel, the assertion that plaintiffs could not be prepared to meet these issues at trial is nothing short of shocking. Furthermore, plaintiffs had their own expert, Demers, testify at trial regarding his opinion that the slippery condition of the pool would have been caused by algae.

(e) Rowley’s view of Marlon Young’s testimony—

(i) Marlon’s testimony

Witness Marlon Young (Marlon) was about 10 years old at the time of the incident and 14 years old at the time he testified in October 2010. He lived at the apartment complex and was present at the pool at the time of the incident. He testified at trial that after Ebrahim went under the water, he “saw her feet pushing up against the edge of the pool to pull herself back up.” He said he thought that she could not pull herself back up because there was green algae in the pool on the side of the wall and the pool was slippery. Marlon further testified at trial that he saw Ebrahim slip at about the five-foot marker. He said that the algae on the side of the pool between the three and one-half-foot marker and the five-foot marker was “about two inches thick and . . . green.”

In addition, at trial Marlon testified that the algae was about an inch and a half thick on the third step. However, at deposition he had testified that the algae on the

steps looked like green mold building up, almost like mud, and was about four inches high. At trial, when asked to describe the color of the algae, he said that it was dark and light green, but that he was partially color-blind.

(ii) Rowley's analysis

In the context of the review of the chlorine levels in the pool surrounding the date of the incident, defendants' counsel asked Rowley if he had been able to corroborate Marlon's testimony that there were four-inch-thick patches of green and yellow algae in the pool on the date of the incident. Plaintiffs' counsel objected that the question mischaracterized the testimony, but the court overruled the objection.

Defendants' counsel also asked Rowley whether his review of 32 depositions had assisted him in determining whether algae was a factor in the happening of the incident. Rowley responded that the review did assist him, because only two people, Marlon and his brother Ivan (about seven years old at the time of the incident), had testified that there was algae in the pool whereas all the others had said either that the water was clear or they did not notice. Plaintiffs' counsel argued that there was a mischaracterization of the testimony and improper examination—that plaintiffs were arguing the case through an expert. His objections were overruled. After further objections, the court said: "Let's just make it a standing objection that the plaintiff is rendering regarding this line of questioning so we won't break the testimony in the manner in which we have"

In his deposition, Marlon had indicated that Ebrahim was located between the three and a half and the five foot markers of the pool immediately before she got in trouble. Plaintiffs' counsel asked Rowley why he would reject that testimony as to location in favor of the testimony of another person on the point. Rowley then described at length, by reference to exhibit 329, why he chose the more precise testimony of John, who stated that he "could see the '5' in front of her stomach."

(iii) argument on appeal

On appeal, plaintiffs argue that the court turned Rowley “into a ‘Human Lie Detector’” as to Marlon’s credibility. They say they were prejudiced because Rowley was permitted to evaluate the credibility of conflicting witness testimony and to choose one over the other with respect to the location of Ebrahim in the pool. Plaintiffs say this was enough to sway the opinion of a juror and to enable a juror to abdicate his or her responsibility to judge the credibility of the witnesses.

Plaintiffs’ only citation to legal authority is to Evidence Code section 312, subdivision (b). Section 312 provides as follows: “Except as otherwise provided by law, where the trial is by jury: [¶] . . . [¶] (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.”

Plaintiffs would have us believe that by permitting Rowley to identify the deposition testimony he relied upon and to explain why he relied upon one person’s testimony over another person’s conflicting testimony as to a particular point, the court stripped the jury of its role as the judge of credibility. We disagree. When Rowley explained why he found John’s testimony to be more credible than Marlon’s less detailed testimony with respect to where Ebrahim was located in the pool, this did not mean that the jury was constrained to view the conflicting testimony the same way Rowley did. It also does not mean that they were prohibited from rejecting Rowley’s testimony as based on faulty assumptions.

The point of the matter is that there was conflicting testimony. Rowley’s own testimony, as to whether Ebrahim could touch the bottom of the pool with her feet or not, was worthless without an explanation of why Rowley believed she was located at a particular spot in the pool when she started to have trouble. In order to substantiate his opinion, he had to identify the “facts,” or testimony, he relied upon to formulate that

opinion. If the jury determined that he had made improper assumptions about the facts, then the entire house of cards would tumble.

As defendants point out, Evidence Code section 801, subdivision (b) permits an expert witness to base his opinion “on matter . . . made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates” Plaintiffs, on the other hand, cite no authority to show that it was improper for Rowley to rely upon the deposition testimony.

They also cite no authority to show that the court erred in its various evidentiary rulings. This includes its ruling on the “sua sponte” standing objection about which plaintiffs grumble. Any point that is not supported by legal authority is waived. (*Roden v. AmerisourceBergen Corporation* (2010) 186 Cal.App.4th 620, 648-649.)

(6) Property manager’s hearsay testimony—

(a) background: Lilia Young

Plaintiffs called Young, the mother of Marlon and Ivan, to testify as a witness. Young testified that she had grabbed a pole to try to reach Ebrahim, but that the pole was not long enough. She later said that the pole “was broken in half.” Later still, she said that a part of the pole was “separated.” Finally, she said the part was “loose.” Young also testified that a man in a maintenance uniform arrived on the scene, but that he never picked up the pole to attempt to rescue Ebrahim.

Under direct examination, Young stated that she had previously worked for Trinity Property Consultants. She acknowledged that witness Jack Rice³ had been the chief financial officer of Trinity and that he and she had been involved in litigation

³ Jack Rice was the chief financial officer of Granite Investment Group, which owned the apartment complex, and president of Branson Property Management, which managed the apartment complex.

previously. However, she maintained that the result of that lawsuit would not affect what she would say involving the parties.

On cross-examination, Young revealed more particularly that she had filed a wrongful termination action against Trinity. She acknowledged that Nicole Ralston (Ralston), Trinity's human resources manager, was the one who had informed Young that she was being fired, and that Ralston was present at the Trinity trial. Young eventually admitted that she lost the lawsuit, that Trinity obtained a \$220,000 judgment against her, and that she and her husband thereafter filed for bankruptcy.

(b) Sandra Ochoa's testimony about Lilia Young

Ochoa, as we recall, was the apartment complex property manager. She was called as defendants' witness. She was asked whether she had ever spoken to Young about knowing some of the apartment complex management people from her prior employment. Ochoa replied, "Yes." Ochoa was also asked whether Young had mentioned the name of anyone she had worked with previously at a prior place of employment who now worked for the apartment complex management. The court overruled another hearsay objection, and then Ochoa replied: "She mentioned Nicole Ralston." When defendants' counsel started questioning Ochoa about what Young had mentioned about Ralston, plaintiffs' counsel made more hearsay objections. The court then gave plaintiffs' counsel a standing objection to the line of questioning.

Ochoa thereafter testified that Young was upset because Ralston had run two credit checks on her. Ochoa was asked if Young mentioned that she and Ralston had "had some kind of an encounter at the prior employer?" The court overruled the objection of plaintiffs' counsel that the question was leading. Ochoa then answered: "Yes."

On appeal, plaintiffs contend that the court erred in permitting the admission of Ochoa's statements about Young to prove the truth thereof. (Evid. Code, § 1200.) Defendants, on the other hand, argue the statements were admissible to show

bias. (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1150.) In other words, they say the statements showed Young harbored ill-will against a member of defendants' management—Ralston— because Ralston had run Young's credit report twice and because of dealings at a former workplace. On account of this ill-will, the argument goes, Young had a reason to testify falsely against the apartment complex.

Defendants have a reasoned argument. Plaintiffs, on the other hand, do not. If the proffered statements were meant to show their truth—that Ralston had run two credit checks on Young and had some prior encounter with her—they would have been irrelevant. But this is not what plaintiffs argued.

Plaintiffs also argue that the court erred in permitting Ochoa to respond to leading questions (Evid. Code, § 767, subd. (a)(1)), in refusing to allow plaintiffs' counsel to have a standing "leading" objection to the line of questioning, and in stating for the record after Ochoa's testimony was complete that it had allowed testimony over "leading" objections because Ochoa was not a native English speaker and it thought "it would be easier to understand her if those questions were framed in the manner that they were."

Plaintiffs do not reference any one purportedly leading question or answer thereto that caused them grief. Rather, they cite page 2606 of the reporter's transcript, line "20 *seriatum*." However, it is not our burden to scour the record for information to substantiate a party's point. (*ASP Properties Group, L.P. v. Fard, Inc.*, *supra*, 133 Cal.App.4th at p. 1270; *Del Real v. City of Riverside*, *supra*, 95 Cal.App.4th at p. 768.) We will not review the succeeding 76 pages of Ochoa's testimony line-by-line to find the purportedly leading questions and responses thereto and ponder all the ways any erroneous ruling could have been prejudicial.

We will, however, address the two "leading" objections appearing on page 2606 of the reporter's transcript. Ochoa was asked: "Do you recall during this discussion whether any other people who had been at this prior employer were mentioned

that were now at Branson?” Over objection, she replied: “I don’t remember.” No prejudice there.

Ochoa was also asked about the location of a particular discussion with Young and she said it took place in her office. She was then asked: “Had she come into your office?” Over a “leading” objection, Ochoa responded: “Yes.” Even assuming the question was leading, we hardly see what prejudice plaintiffs could have suffered when the jury learned that Young went into Ochoa’s office before the conversation took place.

E. Jury Instructions Based on California Code of Regulations:

Plaintiffs requested that the court give a negligence per se jury instruction based on the purported violation of California Code of Regulations, title 22, section 65527. They contend the court erred in refusing to give the instruction.

With regard to public swimming pools, California Code of Regulations, title 22, section 65527 provides: “The recirculation and purification system shall be operated and maintained so as to keep the pool water clean and clear. Under no circumstances shall the pool be used *if the main drain is not clearly visible from the deck. Such a pool shall be closed* and shall not be reopened until the water is clean and clear, and upon specific written approval of the enforcing agent. If the pool drain is still not visible 48 hours following inspection and closure by the enforcing agent, the enforcing agent may order the pool drained as a safety procedure.” (Italics added.)

As previously noted, Ochoa testified that the pool water was cloudy or dirty about a week before the incident, so she closed the pool. She said the pool was clean, but the water was not clear—not what it should have been. Ochoa contacted Walton’s about the situation.

When a man from Walton’s came out, he shocked the pool with chlorine. After that, Ochoa observed that the water quality improved. After Walton’s told her that

it was okay, and the water was then clear, she reopened the pool. This all happened before the incident.

On appeal, plaintiffs contend that once Ochoa closed the pool, California Code of Regulations, title 22, section 65527 required that it remain closed until the appropriate health authority authorized reopening. They argue that if only the pool had been closed on July 20, 2006, as required by law, the near-drowning event never would have occurred.

The court rejected the requested jury instruction as being unsupported by the evidence. We agree. The regulation states, as noted above, that a pool shall not be used “if the main drain is not clearly visible from the deck.” In that event, the pool shall be closed and not reopened without proper authorization. Here, the pool was not closed because the main drain was not visible. The pool was closed simply because Ochoa thought that closing it temporarily was the prudent thing to do.

Plaintiffs’ counsel asked Ochoa on cross-examination: “You couldn’t see the bottom?” Ochoa replied: “I could, but it was not the way it should be.” On appeal, plaintiffs say Ochoa represented that “[i]t took an effort to see the bottom of the pool” That is, in fact, the opposite of what Ochoa said. Ochoa testified that “you could see the bottom without—without putting an effort to see it.” The court did not err in declining to give the proffered instruction.

F. Cumulative Error Doctrine:

Finally, plaintiffs contend that even if no single error standing alone were sufficient for a reversal, the cumulative effect of the errors would require reversal. The cumulative error doctrine applies when “the cumulative effect of the errors . . . make[s] it ‘reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error[s].’ [Citation.]” (*Johnson v. Tosco Corp.* (1991) 1 Cal.App.4th 123, 141.)

To the extent the court made any errors, those errors were not prejudicial, as we have discussed. Contrary to plaintiffs' assertion, it is not reasonably probable that a more favorable result would have ensued but for the cumulative effect of any errors. Ebrahim admitted that she did not know how to swim, that she was afraid of the water because she could not swim, that she held onto the edge of the pool so that she would not drown, that she did not slip in the pool or on the pool deck, and that she let go of the edge simply so she could get out. In short, Ebrahim chose to go swimming despite the fact that she did not know how to swim. Plaintiffs do not contend otherwise.

G. New Trial Motion:

Plaintiffs filed a new trial motion on numerous grounds. The court denied the motion.

“A trial court’s broad discretion in ruling on a motion for new trial is accorded great deference on appeal. [Citation.] However, particularly when reviewing an order denying a new trial, the appellate court is required to review the entire record to determine independently whether the error on which the new trial motion is based is prejudicial. [Citation.]” (*Plancarte v. Guardsmark* (2004) 118 Cal.App.4th 640, 645.)

Plaintiffs assert in conclusory fashion that they “brought to the Trial Court’s attention judicial error that dramatically affected their substantial rights and caused them specific and articulable prejudice.” In support of this assertion, they do not discuss any particular portion of their motion and say how the court erred in addressing it. However, they provide a list of bullet points and cross-reference sections I, II, III.B, III.D, III.F and V of their opening brief on appeal, so that we may further review their arguments presented in those sections and determine on our own how they apply to the new trial motion. We have already addressed their arguments as raised in sections I, II, III.B, III.D, III.F and V of their opening brief and will not reiterate that discussion here. We see no prejudicial error.

III
DISPOSITION

The judgment is affirmed. The order on the new trial motion is affirmed.
Defendants shall recover their costs on appeal.

MOORE, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.