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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

MARIA FRANCISCO et al., Plaintiffs and Respondents, v. ALAMEDA-CONTRA COSTA TRANSIT DISTRICT et al., Defendants and Appellants.	A142884 (Alameda County Super. Ct. No. RG12617444)

Defendants Alameda-Contra Costa Transit District (AC Transit) and Dollie Gilmore appeal from a judgment entered after a jury awarded a total of $15.3 million in economic and noneconomic damages to Maria Francisco (Francisco) and her daughter Mia Cisneros (Mia) in their personal injury action against defendants. AC Transit contends the judgment must be reversed because: (1) plaintiffs' trial counsel engaged in misconduct; (2) the trial court committed judicial misconduct; (3) the court erroneously excluded expert testimony regarding Francisco's need for future surgery; (4) the court erroneously admitted into evidence undiscounted medical bills and excluded from evidence any self-pay discounts that had been applied to the bills; and (5) "the noneconomic damages are grossly disproportionate to plaintiffs' harm, indicating that they were tainted by passion and prejudice induced by the pervasive misconduct and other errors at trial." For the reasons set forth below, we reject the defendants' contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On Saturday, August 27, 2011, then-21-year-old Francisco was riding as a passenger in an AC Transit bus with her mother, cousin, and daughter, Mia. They were on their way to the mall to buy some clothes and a gift for Mia, who was starting preschool. Francisco and Mia were sitting in the last bench in the back of the bus when the driver, defendant Gilmore, went over a speed bump at 30 miles per hour, twice the speed limit.

The impact catapulted Francisco approximately two feet in the air while the bus was still moving. As her body was descending toward the metal seat, the seat was still accelerating upwards, increasing the impact's force as Francisco slammed back down onto the metal seat. Her body then went up and fell back onto the seat a second time. The force exerted by the first impact on Francisco's spine was approximately 1,000 pounds, equivalent to a baseball player swinging a sledgehammer into her spine. Immediately after the incident, Francisco could not feel her legs. She felt a "sharp" "awful" pain in her lower back that she compared to giving birth. She was scared and worried she "wasn't going to make it" and "would never see [her] daughter again."

Gilmore stopped the bus but did not immediately summon medical help. Instead, she berated Francisco in front of her family and other passengers, accusing her of being a "faker" and telling her that "if she need[ed] a[n] ambulance, [she's] got to pay for it." Francisco, who was in extreme pain, crying, and unable to move, pleaded with her, but Gilmore continued to yell at her. She told Francisco that she was "lying" and said "they're going to get her for fraud." Gilmore testified at her deposition—which was played at trial—that when she was yelling, she was not yelling *at* Francisco, but was merely expressing her frustration about "fakers" in general. When Gilmore was asked whether, looking back, and knowing how severely Francisco was injured, she would have done anything different at the time of the incident, she responded, "No."

After Gilmore finally called for help, an ambulance transported Francisco to a medical center, where she was diagnosed with a severe burst spine fracture. Francisco was then taken to John Muir Hospital's trauma center.

Francisco was in extreme pain in the emergency room—a "10 out of 10" on the pain scale. She was given an intravenous injection of pain killers. Hospital personnel determined that Francisco had suffered a "three-column fracture" that included the front, middle, and back of the spine ripping the ligaments and bone apart. Her burst fracture was so severe that the L1 vertebra exploded apart and pushed into the spinal canal. Francisco's treating neurosurgeon, Dr. Geoffrey Adey, opined that Francisco's fracture was "unstable," meaning that she was "at risk for having neurologic deterioration as a result of having fragments move around and compress neural elements." He believed there was "no question" that surgery was necessary.

Four days after the incident, Francisco underwent an emergency five-level fusion surgery. Dr. Adey placed eight screws, two large thoracic hooks, and two large connecting rods into her spine. Francisco remained at John Muir Hospital until about September 6, 2011. After the surgery, Francisco was largely bedridden, confined in a back brace, had to take large amounts of strong painkillers, and was receiving antibiotics intravenously. The pain killers caused Francisco to develop gastritis, requiring additional medications. She was unable to care for herself, could not walk without a walker, and required a nurse's assistance.

In early October 2011, Francisco developed a high fever and noticed "a white thing coming out of [her] back." She had developed an infection at the surgical site. She was diagnosed as suffering from necrotic skeletal muscle with extensive acute inflammation at all surgical biopsy sites. Her condition could have proven fatal if not treated through a second surgery.

Dr. Adey performed the second surgery, which required cutting out the infected and necrotic tissue. Francisco was hospitalized until October 25, 2011. During her recovery from the second surgery and physical therapy, Francisco worked hard to regain strength but continued to suffer lumbar pain as the screws in her spine loosened and began to protrude into her skin due to her petite stature (she is 4'8" tall). Her physicians eventually determined that the hardware in her back was contributing to her severe pain and that it had to be surgically removed. Thus, on April 15, 2013, after consulting with

Dr. Adey, Francisco's treating orthopedic surgeon Dr. Douglas Abeles performed surgery to remove the loosened hardware and perform a secondary bone graft fusion.

Unfortunately, Francisco's spine has never healed from the initial trauma, as the second fusion surgery did not completely bridge the fracture in her spine. This "non-union" is a source of mechanical instability and severe pain. All the physicians for both sides testified that Francisco has chronic pain syndrome. Her neurosurgeon testified that when someone suffers a fracture of this type, "their spine is never going to be normal again. They may have periods of time when they feel pretty good, but they're going to be limited in terms of what they can lift, what they can do physically. They will probably need to be on some type of chronic medication, if not every day, fairly frequently for the rest of their lives."

Francisco loves children and wishes to have more, and Mia has asked for siblings, but doctors believe she will not be able to bear any more children because of her injuries. Her interactions with her daughter have become severely limited. She is no longer able to do the things she used to do with her, such as getting on the floor and playing with her, taking her to the park or on field trips, attending school events, bathing her, and camping with her. She can no longer cook meals for her; she can only put something in the microwave or make a sandwich. She spent Mia's most recent birthday party in bed, and was only able to get out of bed twice to join the party.

Francisco spends a lot of time lying down because it alleviates the pain. Her typical day consists of sitting up in bed and reading or scrapbooking for about 10 minutes at a time before laying down to rest. She gets out of bed to heat something up in the microwave for lunch, then goes back to bed. When Mia returns from school, Francisco and Mia play and read and do homework together on Francisco's bed.

Francisco requires assistance from her family members with most daily activities, including showering, putting on her shoes, shaving her legs, and cooking. She is constantly fatigued and depressed. She is in pain and cannot move freely. She used to weigh 110 pounds and had an active life. Since the incident, she has gained over 25 pounds, can no longer run, and tires easily so that she has to periodically lean on sidewalk

poles when she walks. She can no longer go out with her friends and cannot walk her dogs. She can wear only flip flops because she can put them on herself; otherwise, she would need her fiancé (Mia's father) or his family members, or Mia's help in putting her shoes on.

Francisco feels she is a burden on her family, and when her fiancé's family helps her, she feels bad because "it's not their responsibility." Francisco's medical problems, pain and dependence on others makes her mad and frustrated, and has contributed to her depression. She misses being free.

Francisco is at increased risk for paralysis should she suffer a fall or some other relatively minor impact to her spine. Her fracture site is now at a 25 degree kyphotic-deformity (curvature of the spine), a problem that is getting worse and will worsen further with age.[1] Her physician told her she will likely need another surgery, which frightens her.

Because Francisco's spine is essentially still fractured, she will require one hardware instrumentation fusion in the immediate future, followed by two more lumbar fusion extension surgeries over her lifetime. Dr. Abeles has recommended a "global" surgery—a complicated, "360" procedure, or "a front-and-back spinal fusion" where the surgeon takes "the disc out from each level of that spine and put[s] some form of hardware in there to get that to fuse." All experts agree that Francisco will likely have chronic pain and seriously limited mobility for the rest of her life, which will require attendant care on average of six hours a day. To combat the chronic pain disorder, she also will require pain medications multiple times a day for the rest of her life. Due to the chronic pain, limited physical mobility, and additional spine surgeries, it will be difficult, if not impossible, for Francisco to work. She will require attendant care for the rest of her life and more care as she ages.

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[1]Kyphosis occurs when a person's spinal balance has moved too far forward to allow the spine to effectively carry the body weight without progressive deformity, pain or neurologic loss of function. Patients typically walk in a forward flexed posture being unable to stand up straight.

In February 2012, Francisco and Mia filed a complaint against AC Transit and Gilmore alleging causes of action for negligence, negligent hiring, retention, training and supervision, and negligent infliction of emotional distress.[2] After defendants stipulated to liability, damages were tried in a five-week jury trial. Plaintiffs presented a number of treating physicians, expert witnesses and lay witnesses, including an accident reconstructionist as well as a biomechanical scientist who opined on the physical forces that caused Francisco's injury. The physicians and experts who testified about Francisco's medical problems and past and future treatments included Francisco's neurosurgeon, Dr. Adey, who performed Francisco's first and second surgeries, and her orthopedic surgeon, Dr. Abeles, who performed Francisco's third surgery to remove the hardware.

Dr. Sanjog Pangarkar, a pain management expert, opined on his diagnosis of Francisco's chronic pain syndrome. Dr. Alex Barchuk, a physical medicine and rehabilitation expert, testified about Francisco's future care needs. Dr. Maria Nucci, a clinical psychologist treating Mia, testified about the post-traumatic stress disorder Mia had developed as a result of witnessing her mother's injury.

In addition to medical experts, plaintiffs also presented expert testimony regarding damages. Dr. Randall Epperson, Ph.D., a clinical psychologist specializing in the neurological and physical evaluation of persons to determine their employment capabilities, testified about Francisco's future job prospects. He stated that because of Francisco's educational and intellectual level, she was limited to performing work of a physical nature, such as housekeeping. Dr. Ricky Sarkissian, a vocational rehabilitation consultant, testified that, although before her injury Francisco could obtain that type of employment, she is no longer employable on a permanent basis due to her injuries. Economist Peter Formuzis, Ph.D., provided opinions regarding Francisco's earning capacity and anticipated future care and medical expenses and reduced his figures to

[2]Francisco's mother and cousin were also were plaintiffs but their claims were resolved before trial.

present value. Carol Hyland, a certified life care planner, opined about the cost of Francisco's disability and injury-related care.

Plaintiffs also presented numerous other witnesses, including Francisco, her fiancé, and several family members, who testified regarding the impact of her injuries on Francisco's quality of life and her relationship with her daughter. Various medical providers also testified about the outstanding medical bills Francisco incurred as well as the amounts of the bills.

Defendants' experts included Gregory Sells, a vocational rehabilitation counselor who opined that Francisco could probably work as a cashier or ticket taker at a movie theater. Sells agreed that most of the jobs Francisco could have done were physical in nature. Dr. Clement Jones, an orthopedic surgeon, opined that Francisco suffered a two-column burst fracture and that the injury was painful. He agreed her first surgery was reasonable and that the second surgery was necessary because she had an infection. He disagreed that the third surgery to remove the hardware was reasonable and necessary, and criticized the opinions and recommendations of Francisco's orthopedic surgeon, Dr. Abeles, regarding future surgery. On cross-examination and in response to a jury question, Dr. Jones acknowledged that Francisco's treating physicians were in the best position to determine whether she needed her past surgeries and whether she will need the future ones.

Defendants' pain management expert, Dr. David Bradshaw, agreed that Francisco had suffered a very serious orthopedic injury that would cause severe pain. Based on his examination of Francisco, Dr. Bradshaw testified that his diagnosis was that Francisco has chronic pain, depression, and spinal deformity, among other maladies. Dr. Bradshaw admitted that he was withdrawing his testified-to deposition observation that Francisco was lying about her pain but maintained that he still believed she was exaggerating. On redirect, Dr. Bradshaw stated that even though his previous characterization that Francisco was lying was not "accurate," what she told him about her pain levels was "inaccurate." Dr. Bradshaw agreed that Francisco will have pain for the remainder of her

life and that a physical job is impossible for her. Dr. Bradshaw also agreed that Francisco will require attendant care on a daily basis for the rest of her life.

Defendants also presented an expert economist, Margo Rich Ogus, who provided opinions regarding Francisco's possible loss of earnings and the present value of future medical costs. Linda Olzack, life care planner, provided opinions regarding Francisco's future life care costs, disagreeing with the cost projections of plaintiffs' expert, Carol Hyland. In closing, plaintiffs' counsel requested a total award for Francisco in the amount of approximately $29 million, including $5 million for past pain and suffering and $17.8 million for future pain and suffering.

After deliberating for several days, the jury returned a special verdict awarding approximately $14.3 million to Francisco. The award consisted of $127,472.52 for past family services, $975,677 for past medical expenses, $2,410,288 for future medical expenses, $0 for past lost earnings, $800,266 for future lost earning capacity, $3 million for past noneconomic damages, and $7 million for future noneconomic damages. The jury awarded $1 million to Mia for past and future emotional distress.

Defendants moved for a new trial for the most part on the same grounds they raise on appeal, including attorney misconduct and judicial misconduct. Defendants also argued the jury was influenced by passion and prejudice because the verdict as to future noneconomic damages was "close," i.e., nine jurors agreeing on the amount of future noneconomic damages, and three jurors dissenting.

In opposition, plaintiffs argued that defendants had forfeited any claim of attorney misconduct by failing to timely and properly object. Plaintiffs also argued that no misconduct took place, defendants failed to demonstrate prejudice, and substantial evidence supported the damages award. Plaintiffs submitted declarations from two of the three dissenting jurors stating they dissented because they believed a higher award was warranted.

At the hearing on defendants' new trial motion, the trial court disagreed that plaintiffs' counsel's conduct during closing argument required a new trial. Pointing to one particular example, the court noted that "[a]ll counsel were very zealous. All counsel

were very assertive and aggressive in representing their clients including [defense counsel], [s]o what [plaintiffs' counsel] did . . . was fair game. . . ." The court noted "the jury was a smart jury" and disagreed it was influenced by passion and prejudice: "I disagree with that. [¶] . . . [¶] . . . I think from the totality of the evidence that I recollect, and I sat through the trial as well, there was ample evidence to support medical treatment, other services. There were numerous witnesses who came in and testified about these things, including the plaintiff herself. . . . I think the jury listened to all of the evidence in a dispassionate way. I think they analyzed the evidence. They received the evidence, and they asked questions. They asked informed intelligent questions that counsel . . . didn't even ask because there were things they wanted to know and then they made a decision."[3]

The trial court denied defendants' motion for a new trial. The court refused to consider the juror declarations. Defendants appealed.

DISCUSSION

1. Attorney Misconduct

AC Transit and Gilmore contend a new trial is required because Francisco and Mia's trial counsel engaged in "rampant and deliberate misconduct." We reject the contention.

In conducting closing argument, attorneys for both sides have wide latitude to discuss the case. " ' "The right of counsel to discuss the merits of a case, both as to the law and facts, is very wide, and he has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom. The adverse party cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the consideration of the jury." ' [Citations.] Counsel may vigorously argue his case and is not limited to 'Chesterfieldian politeness.' 'An attorney

[3]After each witness testified, the court had allowed the jurors to ask questions of the witness. The jurors often submitted multiple questions, asking Francisco detailed questions about her condition, and asking experts to clarify their opinions or address points of conflict among the various experts.

is permitted to argue all reasonable inferences from the evidence.' . . . 'Only the most persuasive reasons justify handcuffing attorneys in the exercise of their advocacy within the bounds of propriety.' " (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 798–799.)

An attorney who exceeds this wide latitude commits misconduct. For example, "[w]hile a counsel in summing up may indulge in all fair arguments in favor of his client's case, he may not assume facts not in evidence or invite the jury to speculate as to unsupported inferences." (*Malkasian v. Irwin* (1964) 61 Cal.2d 738, 747.) Nor may counsel properly make personally insulting or derogatory remarks directed at opposing counsel or impugn counsel's motives or character. (*Garden Grove School Dist. v. Hendler* (1965) 63 Cal.2d 141, 143.)

To prevail on a claim of attorney misconduct on appeal, the appellant must generally have objected to the challenged statements as misconduct at the time the statements were made and asked the court to admonish the jury. (*Horn v. Atchinson, Topeka, & Santa Fe Roadway* (1964) 61 Cal.2d 602, 610 (*Horn*); *Whitfield v. Roth* (1974) 10 Cal.3d 874, 891–892 [misconduct claim forfeited]; *Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 317–319 [attorney misconduct claim waived because defendant failed to object and ask for admonition].) The purpose of this rule is remedial in nature, and seeks to give the court the opportunity to admonish the jury, instruct counsel, and forestall the accumulation of prejudice by repeating improprieties, thus avoiding the necessity of a retrial. (*Horn, supra*, 61 Cal.2d at p. 610.)

" 'It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove any effect his conduct or remarks would otherwise have. [Citation.] In the absence of a timely objection the offended party is deemed to have waived the claim of error through his participation in the atmosphere which produced the claim of prejudice.' " (*Ibid.*; *Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1411–1412 [objection to opening statement one day after party had presented statement and failure to timely request admonition

"preclude[d] . . . consideration of the point on appeal"].) We review the trial court's determination as to whether attorney misconduct took place for an abuse of discretion. (*Garcia v. Rehrig Internat., Inc.* (2002) 99 Cal.App.4th 869, 874.)

Defendants assert that plaintiffs' counsel's conduct, especially during closing argument, was so egregious that it deprived them of a fair trial.[4] The record shows, however, that even though plaintiffs' counsel's closing lasted approximately 90 minutes, defense counsel raised only a few objections based on the conduct of plaintiffs' counsel, and never requested that the jury be admonished. We will address the statements to which defendants objected, and deem the other challenges waived.[5] (*Horn*, *supra*, 61 Cal.2d at p. 610; *Rosenfeld v. Abraham Joshua Heschel Day School, Inc.* (2014) 226 Cal.App.4th 886, 902–903 [failure to object to improper references to defendant's wealth waived attorney misconduct claim on appeal]).)

Defense counsel first raised an objection when plaintiffs' counsel urged the jury to write "$975,677.09 . . . right there on the verdict form." The trial court agreed this was not appropriate and said, "Yes. You [the jury] are going to have to decide that yourself. So you can hear what counsel is saying. You don't have to follow those instructions." During a break, defense counsel said, "Your Honor, counsel has made several statements in his closing remarks that are improper because they are, in essence, punitive damage arguments and improper. I'll give the Court some examples." The court stated that was not necessary and that it had "heard everything that he said." Plaintiffs' counsel said, "He should object if there's a problem," and defense counsel said, "I'll object."

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[4]Defendants also complain of one incident that occurred outside of closing arguments, when defense counsel objected that plaintiffs' counsel had inappropriately mentioned Francisco's lack of health insurance. The trial court, however, sustained the objection and admonished the jury to disregard it. Moreover, that objection was on the ground of relevance, not misconduct.

[5]We note, however, that after having reviewed the entire record, we agree with the trial court's observation that all of the comments plaintiffs' counsel made in closing—including ones to which defense counsel did not timely object and we deem waived—taken as a whole, did not constitute prejudicial attorney misconduct.

Thereafter, defense counsel objected when plaintiffs' counsel was trying to perform a calculation in his head and said, "I don't know about my math but 60 years goes [to] 1943. Is that right?" A juror said, "It should be—" and plaintiffs' counsel said, "1973. What is it? Well, it's 2014 so 61 years, what is that? Anyway." Defense counsel objected that "counsel is interacting with the jury," and the trial court sustained the objection.

During rebuttal argument, plaintiffs' counsel stated that defendants "label her as an exaggerator and even a liar. And people that try to escape responsibility, they're a danger to all of us because you do . . ." Defense counsel objected that it was "improper argument," and the trial court overruled the objection. Later, plaintiffs' counsel, in referring to the defendants' attempt to reduce their liability, said, "He wants to knock this off, knock that off, and leave it at her doorstep and get a discount. The rule-breakers are not entitled to a discount. They're hoping that you're going to split the baby, they'll be clicking champagne glasses over at AC Transit." Defense counsel objected that it was improper argument. Defense counsel raised one last objection when plaintiffs' counsel said, "They know they caused serious injury and they're trying to get off cheap." Defense counsel objected, and the court said, "You're right. What the lawyers say is not evidence. . . ."

After the jury was excused, defense counsel said, "Your Honor, during Mr. Panish's closing argument, Mr. Panish made inappropriate comments, improper comments. I want to address those with the Court. [¶] I did raise this timely after these comments were made. The Court said the Court would take this up later on." Counsel said that after plaintiffs' counsel finished his rebuttal argument, he asked for a sidebar and said he was going to move for a mistrial based on plaintiffs' counsel's comments. He then listed all of the statements plaintiffs' counsel made during closing that defense counsel believed were inappropriate, including, "If you do the crime, you pay the time," "You need to make that right," "You are enforcing the rules," and "You are the only ones who can fix that." Counsel explained that he did not raise an objection at the time the statements were made because he did not want to emphasize them in front of the jury.

Plaintiffs' counsel responded, "First of all, counsel made one objection. He didn't object to any of the other things . . . ." Counsel went on to explain the reasoning behind his statements, and argued they were not improper. The court denied the request for a mistrial. The court said, "I think that the sipping champagne was a gratuitous argument," but noted it had already instructed the jury that the attorneys' statements are not evidence. The court addressed several of the other comments and said, "I think that the totality of the arguments that have been made and the comments, the specific comments that were made don't, in my mind, total up to a mistrial. I'm not going to give a curative instruction beyond those that I've already given."

We conclude that the statements plaintiffs' counsel made—and to which defense counsel raised a timely objection—did not constitute prejudicial attorney misconduct. Plaintiff's counsel's comment urging the jury to write a certain dollar figure on the verdict form was not an ideal way of presenting argument on the issue of damages, but the trial court immediately instructed the jury that it has no obligation to follow counsel's instructions. When plaintiffs' counsel appeared to be interacting with a juror, the court sustained defense counsel's objection to that effect and plaintiffs' counsel immediately moved on.

As to plaintiffs' counsel's comment that "people who try to escape responsibility, they're a danger to all of us," we note that it is improper to appeal to the self-interest of jurors or to urge them to view the case from a personal point of view. (*Cassim v. Allstate Ins. Co*. (2004) 33 Cal.4th 780, 797.) In *People ex rel. Dept. of Public Works v. Graziadio* (1964) 231 Cal.App.2d 525, for example, a case involving eminent domain, an attorney suggested in closing argument that the jury should view the question of just compensation from the "personal point of view as a taxpayer." (*Id*. at p. 533.) The Court of Appeal held this constituted misconduct because it "appeal[ed] to [the jurors'] self-interest, which violates the fundamental concept of an objective trial by an impartial jury." (*Id*. at p. 534.) In *Beagle v. Vasold* (1966) 65 Cal.2d 166, 182, fn. 11, it was improper for counsel to ask jurors to put themselves in the plaintiff's shoes and ask what compensation they would personally expect.

Here, although plaintiffs' counsel's argument, perhaps ill advisedly, asked the jurors to consider the danger to society as a whole ("all of us") in reaching their verdict, we do not believe the argument could have converted the jurors into "partisan advocates" (*Cassim v. Allstate Ins. Co*., *supra*, 33 Cal.4th at p. 797) for plaintiffs. The clear point of the argument was that defendants should be required to take responsibility for their actions. Plaintiffs' counsel never urged the jurors to put themselves in plaintiffs' position, or to view the case from a personal perspective. We therefore conclude that the disputed argument was not improper for either appealing to the jurors' self-interest or urging them to decide the case subjectively rather than objectively.

Finally, we agree with the trial court that the comment regarding "clicking champagne glasses at AC Transit" was "gratuitous," but that it did not rise to the level of prejudicial attorney misconduct. An attorney does not commit misconduct by questioning the "persuasive force" or merits of the other side's argument. (*People v. Hajek & Vo* (2014) 58 Cal.4th 1144, 1229–1230 [prosecutor's multiple remarks that defense counsel was engaging in "salesmanship" in advancing certain arguments not misconduct, as remarks were aimed at the "persuasive force" of defense counsel's arguments and "not at counsel personally"], abrogated on another ground by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; *People v. Spector* (2011) 194 Cal.App.4th 1335, 1406 [prosecutor's remarks that jury should be insulted by defense counsel's argument regarding self-defense was "likely interpreted as 'an admonition not to be misled by the defense interpretation of the evidence, rather than as a personal attack on defense counsel' "].) Plaintiffs' counsel's arguments, which were geared towards emphasizing the defendants' act of trying to downplay and minimize Francisco's injuries and damages, was proper advocacy.

Unlike in the cases defendants cite, plaintiffs' counsel did not disparage defendants or their counsel by making personal attacks against their character. (*E.g.*, *Stone v. Foster* (1980) 106 Cal.App.3d 334, 355 [calling the defendant "disgraceful" and "the lowest"]; *People v. Herring* (1993) 20 Cal.App.4th 1066, 1074–1075 [the prosecutor calling the criminal defendant a "primal man in his most basic level," "like a dog in

heat," and accusing defense counsel of fabricating a defense and instructing his client to commit perjury].) It was appropriate for plaintiffs' counsel to tell the jury that defendants were trying to obscure the evidence and obtain a discount. (*Walling v. Kimball* (1941) 17 Cal.2d 364, 370 [plaintiff's counsel's remark conveying that defense counsel was "attempting to confuse the issues" was not misconduct]; *Roemer v. Retail Credit Co.* (1975) 44 Cal.App.3d 926, 941–942 [plaintiff's closing argument that defendant is "a large, snooping monopoly which makes huge profits by specializing in destroying people's reputation" was "entirely within the bounds of legitimate advocacy"].) Thus, the trial court reasonably determined that the statement did not constitute an inappropriate "attack" on defense counsel.

"The judge who presides over the trial, who hears the testimony and the arguments, and whose own experience gives him a fine sense of the general atmosphere of trial proceedings, is in a far better position than appellate judges to evaluate the effect of disputed argument." (*Henninger v. Southern Pacific Co.* (1967) 250 Cal.App.2d 872, 881.) We conclude the trial court did not err in determining there was no prejudicial attorney misconduct.

2. Judicial Misconduct

Defendants contend a new trial is warranted because the trial court committed judicial misconduct by making several comments that displayed a bias in favor of plaintiffs. We disagree.

In conducting trials, judges " 'should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side of the other.' " (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237–1238.) A trial court commits misconduct, for example, if it " ' "persists in making discourteous and disparaging remarks to [an attorney or witness] and utters frequent comment from which the jury may plainly perceive that the testimony of the witness is not believed by the judge." ' " (*Ibid.*) " ' "[O]ur role . . . is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so

prejudicial that it denied [a party] a fair . . . trial." ' " (*People v. Abel* (2012) 53 Cal.4th 891, 914.)

a. Francisco's discomfort on the witness stand

We reject defendants' argument that the trial court engaged in prejudicial judicial misconduct by improperly "validating" Francisco's pain and "bolstering her credibility" by commenting that she appeared uncomfortable, and calling for a short break. The record shows that during cross-examination, after she had been testifying for some time, Francisco began responding, "I can't remember" and "I don't remember" to one question after another. The court said, "Okay. Let me just make an observation. You're obviously in discomfort, I can see that. Is that true?" Francisco responded that she was, and the court asked whether Francisco was having trouble concentrating because of the discomfort. Francisco agreed a short break would help her "get more comfortable so that you can concentrate. . . ." A juror then asked, "Your Honor, can she get a footstool or something? Her feet can't touch the ground." Francisco said a footstool would help; it appears one was provided to her during the break.

Later, in moving for a new trial, defendants' counsel argued that the trial court's statements "prejudiced the defense in this case." The court responded, "that is a function of the Court, to notice what's going on with witnesses. It was very obvious that she was fidgeting in her chair. That had gone on for a long time, and at one point she began to answer all of your questions, 'I don't remember; I don't remember.' That's not what she had been doing previously. [¶] And my observation was either she really doesn't remember or, because she's in pain, she just doesn't care any more, and she's answering everything, 'I don't remember.' So I inquired."

Plaintiffs' counsel commented that it was "apparent to everyone—myself, jurors included—that Ms. Francisco was in obvious pain and she was answering, it seemed, just to get it over with. . . ." Counsel noted that Francisco "was moving in her chair, fidgeting, leaning back, putting her head down. . . ." "And after the break, she was able to come back, and the same questions, answer all of the questions without saying, I don't remember; I don't remember,' and give appropriate response to counsel's questions."

The trial court agreed, "It was noticeably different after the break." Counsel for defendants did not disagree with the court's or plaintiffs' counsel's characterization of how Francisco appeared, but responded that if it was so "obvious" that she needed a break, "all the Court had to do was say, 'Let's take a break,' and not make the comments that were made, which were prejudicial."

While we agree the trial court could have simply called for a break, the court was simply trying to determine whether Francisco truly did not remember anything, or was uncomfortable and needed a break. In light of the fact that Francisco was fidgeting and had started responding almost all questions with "I don't remember" or "I can't remember," the court's comments can be seen as "nothing beyond the expression of a natural and humane interest in the condition of a person . . . . Such solicitude . . . could hardly have been interpreted by the jurors as a 'comment on the credibility of the [witness]' when it came to a consideration [of the witness's] testimony." (*Petersen v. Rieschel* (1953) 115 Cal.App.2d 758, 762–763 [trial court's comment that the defendant was "obviously sick," which corroborated the defendant's representation that he was unable to appear at trial because he was ill, did not constitute improper commentary regarding the defendant's credibility].)

Berguin v. Pacific Electric Ry. Co. (1928) 203 Cal.116, on which defendants rely, is distinguishable. There, the trial court made comments suggesting that the personal injury plaintiff was trying to fake or exaggerate her injuries by having a family member assist her to the witness stand. (*Id.* at pp. 118–119.) When plaintiff's counsel took issue with the court's statements, the court responded to go ahead and "take your exception," but that it was going to "examine [the plaintiff] and find out" whether she really needs assistance. (*Ibid.*) The court added, "Whenever anything of that kind happens in my department, I [expect] to speak about it," and reiterated its belief that the plaintiff did not need assistance. (*Ibid.*) The court interrupted counsel and, "throughout the trial," "subjected [counsel] to the severest strictures," "many of which seem unwarranted." (*Id.* at p. 120.) Under such circumstances, and in light of the strong evidence supporting a verdict for the plaintiff, the Supreme Court held that the court's conduct was

prejudicial. (*Ibid*.) Here, in contrast, the court's brief, isolated comments, which did not attack anyone's credibility, fell far short of the "intemperate or biased judicial conduct which warrants reversal." (*See People v. Melton* (1988) 44 Cal.3d 713, 754 [court's comment to defense clinical psychologist Dr. Podboy whether it could call him "John Boy for short," and its remark, "permission granted," in response to a hypothetical that involved shooting the public defender, "while unfortunate" were not misconduct requiring reversal].) We conclude the court's comments did not constitute prejudicial judicial misconduct.

b. Dr. Barchuk's testimony

We conclude the comments the trial court made during the testimony of plaintiffs' expert Dr. Barchuk also did not constitute prejudicial judicial misconduct. Dr. Barchuk, a specialist in physical medicine and rehabilitation, prepared a life care plan for Francisco in which he opined on various issues, including how much attendant care Francisco needed. In the first report, he opined that Francisco needed four to eight hours of attendant care per week; in the second report, he said she needed six hours of care *per day*. He explained the difference by saying that in the first report, he was opining as to the number of hours Francisco needed *at the time*, whereas in the second report, he was opining as to the average number of hours she would need over the course of her lifetime. By the time he prepared the second report, he had read the physicians' deposition transcripts and had more information from which to make an opinion. In preparing his second report, he relied in part on Dr. Abeles's deposition testimony that Francisco's need for attendant care would increase as she aged.

Defendants' counsel cross-examined Dr. Barchuk about the difference in the two reports, referring to it as a "change [of] opinion." Dr. Barchuk responded, "I didn't change my opinion. The second version is I put in a lifelong average." Counsel then said, "But then you change yours from an average of six hours a week to six hours a day?" Dr. Barchuk explained: "For the remainder of her life, yes." Counsel then said, "That's a sevenfold, a 700-percent increase; true?" At that point, plaintiffs' counsel objected that it was a misstatement of his testimony.

The trial court said, "It does. I mean, he indicated that that was, if I understood it correctly, that that four to eight hours per week average that you . . . were giving was for that time, not for her lifetime." Dr. Barchuk responded, "Correct." The court continued, "It then changed subsequently in our latest report to an average of six hours per day for life?" Dr. Barchuk responded, "On average throughout her life, yes."

Defendants argue the trial court committed judicial misconduct because it "inserted itself, usurped the jury's factfinding role on a disputed issue, and handcuffed defense counsel." They argue they were entitled to question Dr. Barchuk regarding the discrepancy but that the court "stopped counsel's questioning and led Dr. Barchuk to reiterate his own farcical claim." A trial court, however, has the power to ask questions of witnesses to elicit material facts and make comments to clarify testimony; indeed, it should be encouraged to do so when testimony needs clarification. (*People v. Hawkins* (1995) 10 Cal.4th 920, 948 [trial court may ask questions and make comments to clarify expert testimony], abrogated on another ground by *People v. Lasko* (2000) 23 Cal.4th 101, 110.) Such questioning or commentary does not constitute misconduct or show bias. (*Hernandez v. Kieferle* (2011) 200 Cal.App.4th 419, 439–440 [in probate proceeding arising from a trust amendment that made decedent's stepdaughter trustee and sole beneficiary, the judge's questioning of stepdaughter as to whether she helped decedent after caretaker left addressed relevant issue of stepdaughter's relationship with decedent and did not render the judge an advocate for the stepdaughter].)

Here, the record shows that defense counsel was given a full opportunity to cross-examine Dr. Barchuk regarding this issue, and that Dr. Barchuk repeatedly explained the reason for the discrepancy. The trial court's comments, made in response to an objection by plaintiffs' counsel, did not endorse Dr. Barchuk's opinion; rather, it simply clarified and accurately recapped Dr. Barchuk's testimony. (See *People v. Friend* (1958) 50 Cal.2d 570, 577 [trial judge "may analyze the testimony and express his views with respect to its credibility"].) The record does not reflect—as defendants suggest—that the

court's comments led the jury to simply accept Dr. Barchuk's testimony regarding the services Francisco needed.[6]

Defendants also take issue with the comments the trial court made when defense counsel was trying to elicit testimony from Dr. Barchuk that Francisco's third surgery—in which hardware was removed from her back—was not reasonable and necessary. During cross-examination, Dr. Barchuk testified that one of the purposes of the third surgery was to reduce Francisco's pain. Defense counsel asked, "Well, you read Dr. Abeles said, 'We should take out the hardware to try to reduce, if not eliminate, her pain complaints'; right?" Dr. Barchuk responded, "Yes." Counsel then elicited testimony from Dr. Barchuk that the third surgery "destabilized" Francisco's spine and that he "would expect her to get much worse because now you've taken out that splint that was keeping that segment together." Defense counsel asked, "So you're saying when Dr. Abeles went in, took out the screws, the hooks, and the rod, he destabilized the lumbar spine; is that your testimony?" Dr. Barchuk responded, "I think so, yes."

At that point, the trial court said, "Well, let me interrupt here. I think that mischaracterizes the testimony. My understanding from the testimony of Dr. Adey was that there was an infection that required the hardware to come out so he agreed with Dr. Abeles . . . So I just want to bring that out, and if there's some misunderstanding about that, then we should clear that up." Thereafter, defense counsel did proceed to clarify—and Dr. Barchuk agreed with defense counsel—that what Dr. Abeles said was that the surgery was done in order to *reduce Francisco's pain*, not because there was an infection.

The trial court's comments did not constitute prejudicial judicial misconduct. As noted, a trial court has the power to ask questions of witnesses to elicit material facts and

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[6]In fact, the jury independently asked for any clarification it needed by asking Dr. Barchuk its own questions about chore services, and by requesting from him a "breakdown of your average of chore services . . . that explains what you think she needs now and then through time." The trial court instructed the jury not to "guess what I think your verdict should be from something I may have said or done," and there is nothing in the record to suggest the jury did not heed that instruction.

make comments to clarify testimony. (*People v. Hawkins*, *supra*, 10 Cal.4th at p. 948.) Defense counsel had just stated—and Dr. Barchuk had agreed—that Dr. Abeles performed the third surgery in order to "try to reduce" Francisco's pain. The court, which apparently recalled Dr. Abeles's testimony differently, suggested that "if there's some misunderstanding about that, then we should clear it up." It turned out there was no misunderstanding, and that the court was mistaken about what prompted the third surgery. Defendants argue the court "usurped the jury's role as fact-finder," but we fail so see how it did, when it was simply trying to clarify what prompted the third surgery. To the extent defendants complain that the court interrupted counsel when he was trying to elicit testimony that the third surgery was not reasonable and necessary, we note there was nothing preventing counsel from resuming that line of questioning after Dr. Abeles's testimony was clarified.[7]

Finally, we reject defendants' argument that the trial court committed judicial misconduct by commenting at one point during cross-examination that defense counsel was "belaboring" a point. The record shows that during cross-examination, counsel asked Dr. Barchuk why he removed the phrase "vocational evaluation when pain is under control" from the final version of his life care plan report. Dr. Barchuk explained that the "vocational evaluation" language should have been in the final report, and that he did not remove the language and did not know who had. In other words, his position was that the language must have been mistakenly taken out of the final report. He clarified that it was still his opinion that "there should be vocational evaluation when pain is under control."

Even after the clarification, defense counsel continued to repeat the same questions about the same topic, prompting the trial court's observation that he was "belaboring the point." The court also asked counsel to explain the relevance of this line of inquiry, prompting counsel to respond, "I'm done, Your Honor. I'll move on."

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[7]In any event, Dr. Barchuk's testimony that the third surgery "destabilized" Francisco's spine and increased her discomfort does not amount to an opinion that the surgery was not reasonable or necessary. Rather, it merely shows that the surgery had a negative side-effect.

Defendants argue that "the court's halting of questioning prevented defense counsel from challenging the overall credibility of Dr. Barchuk and his reports." However, they offer no explanation as to why they needed to continue to ask him the same question, after Dr. Barchuk had already explained multiple times that it must have been a mistake. Moreover, defense counsel did in fact ask many other questions related to other discrepancies he saw in the various versions of the reports; he was not prevented from doing so. The court did not commit judicial misconduct by questioning the relevance of the repetitive nature of the inquiry, and in prompting defense counsel to "move on."

3. Expert Testimony Regarding Future Surgery

Defendants contend the trial court prejudicially erred in declining to allow Dr. Bradshaw—their physical medicine and rehabilitation expert—to provide expert testimony on the issue of Francisco's future surgeries. We reject the contention.

A trial court has "wide discretion to admit or exclude expert testimony" (*People v. Page* (1991) 2 Cal.App.4th 161, 187) and may exclude such testimony when it would add nothing to the jury's "common fund of information" (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1169). The court may exclude expert testimony if it is cumulative, or if it will waste time or mislead the jury. (*Horn v. General Motors Corp.* (1976) 17 Cal.3d 359, 371; *South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861, 906.) It may also exclude testimony if the expert is not qualified to testify on the subject matter. (Evid. Code, § 720, subd. (a) [expert witness must possess adequate knowledge, training, and experience]; *Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 219 [party offering expert must demonstrate the expert's knowledge of the subject].)

Plaintiffs argue that Dr. Bradshaw was not qualified to testify regarding future surgeries because he is not a surgeon, and that even if he were qualified, any testimony would have been cumulative to the testimony that another defense expert—orthopedic spine surgeon Dr. Jones—gave on the same issue. Defendants respond that if

Dr. Bradshaw was not qualified to testify, neither was plaintiffs' expert Dr. Barchuk, who is also not a surgeon, but was allowed to provide his opinion regarding future surgeries.[8]

Even assuming the trial court abused its discretion in precluding Dr. Bradshaw's testimony on the issue of future surgeries, we conclude defendants have not shown prejudice. In *Pebley v. Santa Clara Organics* (2018) 22 Cal.App.5th 1266, 1281, the defendants argued the trial court erred in excluding their expert's testimony regarding the reasonable value of medical services, because the exclusion precluded them from "effectively engag[ing] in a 'battle of the experts.' " The Court of Appeal rejected the argument, noting that another defense expert *was* allowed to testify on the issue. (*Ibid*.) The court stated: "[Defendants'] contention would be more persuasive if [the other defense expert] had not been allowed to opine on the same subject. The fact that [the proffered testimony] was cumulative to [the other expert's] testimony undercuts defendants' claim of prejudice." (*Ibid*.)

Similarly, here, defense expert Dr. Jones provided expert testimony on the issue of future surgeries. He provided his own expert opinion regarding recommended future surgical procedures and thoroughly critiqued Dr. Abeles's (Francisco's treating physician) opinions. He testified that Dr. Abeles's recommendation that Francisco should undergo future global surgery was "horrible." The fact that a defense expert other than Dr. Bradshaw was allowed to provide expert testimony on the issue of future surgeries "undercuts defendants' claim" that the trial court in this case prejudicially erred. (*Ibid*.) Under these circumstances, it is not "reasonably probable" that allowing Dr. Bradshaw to testify regarding future surgeries would have altered the verdict on this

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[8]Defendants argue that plaintiffs' counsel improperly elicited Dr. Barchuk's opinion regarding future surgeries. Plaintiffs disagree with this characterization; they assert that Dr. Barchuk made only "a fleeting remark"—which plaintiffs' counsel did not explore further—that Francisco's "degenerative changes would worsen without surgery." The record shows defendants did not object at the time Dr. Barchuk provided this testimony. (See *Pineda v. Los Angeles Turf Club* (1980) 112 Cal.App.3d 53, 61 [objection to expert opinion untimely where it was not made until after the expert completed his testimony].)

aspect of the award. (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069–1070 [standard for prejudice is whether it is reasonably probable the appellant would have obtained a more favorable result but for the error].)

4. Past Medical Expenses

Defendants contend the trial court erroneously admitted into evidence undiscounted medical bills and excluded from evidence any self-pay discounts that had been applied to the bills. We reject the contention.

An injured plaintiff with health insurance may not recover economic damages that exceed the amount paid by the insurer for the medical services provided. (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 566.) Because a prenegotiated agreement between the medical provider and the insurance company reducing the billing is already in place at the time the plaintiff signs the patient agreements, the plaintiff's "prospective liability [is] limited to the amounts [the insurance company has] agreed to pay the providers for the services they [are] to render. Plaintiff cannot meaningfully be said ever to have incurred the full charges." (*Ibid.*) Because an insured plaintiff never "incurs" the "full bill," the full bill is therefore not relevant to prove the insured plaintiff's past or future medical expenses and/or noneconomic damages. (*Id*. at p. 567; *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1330–1331.)

In contrast, the amount or measure of economic damages for an *uninsured* plaintiff "will usually turn on a wide-ranging inquiry into the reasonable value of medical services provided, because uninsured plaintiffs will typically incur standard, nondiscounted charges that will be challenged as unreasonable by defendants." (*Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1330–1331.) Thus, an uninsured plaintiff, such as Francisco, may introduce evidence of the amounts billed for medical services to prove the services' reasonable value. (*Id*. at pp. 1330–1331, 1335.) "[T]he measure of medical damages is the lesser of (1) the amount paid or incurred, and (2) the reasonable value of the medical services provided." (*Id*. at p. 1330.)

Here, defendants moved in limine to exclude Francisco's unpaid medical bills. Plaintiffs moved for a ruling that the medical bills be received into evidence. During

argument on the motions, defense counsel said they did not dispute approximately $720,000 of the medical bills, but that there was approximately $150,000 "that we show having been written off or deducted." The court stated, "where amounts were already paid by other sources prenegotiated and accepted by healthcare providers, the plaintiff can only introduce those negotiated paid amounts. However, unpaid past medical bills or future unpaid bills, the full billed amount can be offered and admitted with proper expert testimony regarding reasonableness."

Plaintiffs' counsel said, "And, Your Honor, there's nothing that's been paid in this case. So it's all billed amount." "Nothing's been paid and she has no contractual arrangements in these other cases." The court said, "I thought [there] were prenegotiated accepted reductions, and you're saying that there were none." Plaintiffs' counsel responded, "There are none, that's correct. And counsel knows that it's correct." Defense counsel said, "Well, here's what I know. I got a gross bill from one provider, and then they wrote off or reduced it substantially. For what reason or why, I don't know." Plaintiffs' counsel explained that sometimes, a provider who has already billed the full amount, sees at a later date that the patient is self-paying, "and they go, 'Okay, we've got somebody who's self-paying and they've got no money.' And they do a gratuitous write-down on these bills.' " Citing *Sanchez v. Strickland* (2011) 200 Cal.App.4th 758, counsel explained that Francisco's original bills should be admitted into evidence because any bills containing writeoffs occurred "after the fact," were "gratuitous," and did not constitute a prenegotiated reduction. The trial court agreed and denied defendants' motion to exclude Francisco's unpaid medical bills from evidence.

The trial court did not err in allowing Francisco—an uninsured plaintiff—to prove the reasonable value of medical services by introducing full, unpaid medical bills into evidence. (*Bermudez v. Ciolek*, *supra*, 237 Cal.App.4th at pp. 1330–1331.) Defendants complain that this prevented them from presenting evidence of any "self-pay discounts," but they fail to point to any offer of proof on that issue. (See *Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 886 ["failure to make a specific offer of

proof constitutes waiver of a contention that the court erroneously excluded evidence"]; *Ferreira v. Quik Stop Markets, Inc.* (1983) 141 Cal.App.3d 1023, 1031 [same].)

Where a medical provider has (1) rendered medical services to a plaintiff, (2) issued a bill for those services, and (3) subsequently written off a portion of the bill gratuitously, the amount written off constitutes a benefit that may be recovered by the plaintiff under the collateral source rule. (*Sanchez v. Strickland*, *supra*, 200 Cal.App.4th 758, 769.) There was no evidence in this case that Francisco received, negotiated, or qualified for any pre-service discount. Defendants argue that the testimony of their life care expert, Linda Olzack, supported a finding that Francisco incurred less than the full bill amount. However, Olzack testified only generally about the availability of discounts for self-paying patients; she did not establish that Francisco's billed medical costs had been reduced by any prenegotiated obligation or arrangement on the part of the providers to reduce their fees. This distinction is well-established, and if such evidence existed, defendants could have produced it at the time they argued the pre-trial motion, or at trial, or in a post-trial motion to reduce damages. They did not. Under these circumstances, the trial court properly allowed Francisco to prove the reasonableness of her medical costs by referring to the full, unpaid bills, and by eliciting testimony from various witnesses that the bills were reasonable.[9]

5. Excessive Damages

Defendants contend "the noneconomic damages [the jury awarded] are grossly disproportionate to plaintiffs' harm, indicating that they were tainted by passion and prejudice induced by the pervasive misconduct and other errors at trial." We disagree.

A damages award is excessive if the record, viewed most favorably to the judgment, indicates the award was rendered "as the result of passion and prejudice on the

[9]For example, plaintiffs elicited testimony from the employee in charge of billing at the medical center where Francisco received emergency treatment, that the billed amounts were reasonable. Two witnesses from the billing department of John Muir Hospital, testified that Francisco owed the full billed amounts and that the charges were reasonable. Francisco's physicians testified regarding the reasonableness of the bills.

part of the jurors." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65, fn. 12.) When a trial court denies a motion for new trial based on excessive damages, its decision is "accorded great weight, because, having been present at the trial the trial judge was necessarily more familiar with the evidence." (*Id.* at p. 64; *Ortega v. Pajaro Valley Unified School Dist.* (1998) 64 Cal.App.4th 1023, 1059–1060.)

Under the substantial evidence standard of review, an appellate court "must accept as true all evidence and all reasonable inferences from the evidence tending to establish the correctness of the trial court's findings and decision, resolving every conflict in favor of the judgment. . . [¶] . . . If this 'substantial' evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment must be upheld." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631 (*Howard*).) The reviewing court does not "reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses." (*People v. Cochran* (2002) 103 Cal.App.4th 8, 13.) That role is the "province of the trier of fact." (*Howard*, *supra*, 72 Cal.App.4th at p. 630.)

Defendants argue that the noneconomic damages awards to Francisco and Mia are so large that they must have been the result of passion and prejudice. A verdict's size alone, however, does not establish passion or prejudice. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 615 [a verdict cannot be attacked merely by showing it is excessive compared to other verdicts in other cases].) Moreover, the record contains substantial evidence that Francisco suffered a catastrophic injury that has severely impaired the quality of her life for the rest of her life.

We cannot conclude that the $3 million past noneconomic damages award for the three-year period between her injury and the trial was so unreasonable that it requires reversal. It was undisputed that Francisco suffered a serious injury after defendant Gilmore drove over a speed bump at over twice the speed limit. Gilmore belittled and threatened Francisco, accused her of lying, humiliated her in front of her family and other passengers, and delayed seeking medical attention. Francisco underwent three major,

painful surgeries with lengthy hospitalizations followed by even longer periods of recovery and physical therapy.

During those three years, Francisco suffered extreme pain, multiple intrusive and painful medical treatments, severe restrictions in her daily life functions, the embarrassment of having others take care of her basic needs such as dressing or shaving her legs, and depression from not being able to tend to or play with her daughter, maintain her friendships, or enjoy any of the activities she did before her injury. For this extreme suffering, the jury's award equates to approximately $1 million per year. (See *Truhitte v. French Hospital* (1982) 128 Cal.App.3d 332, 352 [it is proper to consider yearly breakdown of damages in determining future noneconomic damages].) There was substantial evidence to support the award.

The record also contains substantial evidence to support the $7 million future pain and suffering award. Francisco was 23 years old at the time of trial. There was evidence to support a finding that her injury had left her disabled for the rest of her life—almost 60 more years. Francisco's back condition will prevent her from working and bearing any more children. All experts on both sides agree she is depressed and will have chronic pain for the rest of her life. She will need ongoing medical care for her injuries, including another "global surgery." (See *Garcia v. Duro Dyne Corp.* (2007) 156 Cal.App.4th 92, 97–98 ["It is for the jury to determine the probabilities as to whether future detriment is reasonably certain to occur in any particular case"].)

Moreover, the injury has left Francisco with a premature curvature of the spine. Francisco will never be able to regain her ability to perform normal physical and life activities, and her relationship with her daughter has been compromised because she cannot care for or play with her as she once did. Divided into 58 years, the future pain and suffering award translates to a little more than $120,000 per year. There was sufficient evidence to support the award.

As to Mia, defendants assert that the $1 million for past and future emotional distress was so excessive that it must have been based on sympathy and prejudice. There was, however, ample testimony regarding the severe emotional distress Mia suffered as a

result of witnessing her mother's injury, including developing post-traumatic stress disorder. There was testimony that she was frightened, worried, and saddened, and repeatedly reenacted the trauma in her play. She had nightmares, which is not unusual for a child her age, but the nightmares increased, there was disturbance in her sleep, she had considerably increased irritability and anger, and was fearful of riding the bus. Defendants present no evidence to the contrary, and in fact, do not even discuss the evidence relating to Mia in their appellate briefs. Rather, they simply question whether a four-year-old is even "aware" that her mother's injuries and pain are the result of the accident.[10]

Viewing the record in the light most favorable to the judgment, we decline to conclude that the jury's award was excessive, or that it was rendered as a result of passion and prejudice.

DISPOSITION

The judgment is affirmed. Plaintiffs Maria Francisco and Mia Cisneros shall recover their costs on appeal.

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[10]Defendants cite to *Nelson v. County of Los Angeles* (2003) 113 Cal.App.4th 783 (*Nelson*), but the case is inapposite. *Nelson* was a wrongful death case in which the Court of Appeal reversed a damages award for emotional distress to the parents of someone killed while in sheriff's custody, concluding that because the parents were estranged from their son and had not seen them for 20 years, the award was likely motivated by the jury's desire to punish the County. (*Id*. at p. 794.) Our Supreme Court has disapproved of the practice of attacking a verdict by comparing it "to other plaintiffs for other injuries in other cases based upon different evidence." (*Bertero v. Nat'l Gen. Corp.* (1974) 13 Cal.3d 43, 65, fn. 12.) Defendants do not explain how a wrongful death case involving an award to parents for loss of an estranged adult son bears on the emotional distress suffered by Francisco or Mia.

_____
McGuiness, Acting P.J.*

We concur:

_____
Siggins, J.

_____
Jenkins, J.

* Retired Presiding Justice of the Court of Appeal, First Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.