Not Reported in Cal.Rptr.3d, 2008 WL 2933731 (Cal.App. 4 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2008 WL 2933731 (Cal.App. 4 Dist.))

Court of Appeal, Fourth District, Division 3, California.
Kristine PAVLIK, Plaintiff and Respondent,
v.
Brian Leslie PARKER et al., Defendants and Appellants.

No. G038511.
(Super.Ct.No. 05CC10035).
July 31, 2008.

Appeal from a judgment and postjudgment order of the Superior Court of Orange County, Daniel J. Didier, Judge. Affirmed.
Dunn **Koes**, Pamela E. Dunn, Daniel J. **Koes** and Mayo L. Makarczyk for Defendants and Appel- lants.

Law Office of C. Brian Martin and C. Brian Martin for Plaintiff and Respondent.

OPINION

FYBEL, J.

INTRODUCTION

***1** Kristine Pavlik (Plaintiff) sued Brian Leslie Parker and his employer, Crosstown Electrical & Data, Inc. (Crosstown), to recover damages for personal injuries allegedly suffered when a van driven by Parker collided with the rear of a car driven by Plaintiff. Parker was driving the van within the course and scope of his employment with Crosstown. The jury awarded Plaintiff $10,384 for past medical expenses, $129,500 for future medical expenses, and $150,000 for pain and suffering, for a total verdict of $289,884.

Parker and Crosstown (together, Defendants) appeal from the final judgment entered on the jury verdict and from the order denying their motion to tax costs. They contend the trial court erred by denying their motion for a mistrial and motion for a new trial made on the ground that Plaintiff's trial counsel engaged in repeated acts of intentional misconduct that prevented them from receiving a fair trial.

In part II. of the Discussion section, we describe each asserted act of misconduct and explain whether Defendants' counsel did or should have objected and sought an admonition. We conclude that either the trial court's admonition cured any prejudice or Defendants' counsel failed to preserve the claim of misconduct for appeal by failing to object and request an admonition. In part III. of the Discussion section, we examine the cumulative effect of the asserted misconduct, notwithstanding the failure of Defendants' counsel to object and request admonitions. We conclude the cumulative effect of the misconduct did not deprive Defendants of a fair trial. Finally, in part IV. of the Discussion section, we address Defendants' contention the trial court erred by awarding Plaintiff expert witness costs incurred before making her Code of Civil Procedure section 998 offer. We conclude Defendants forfeited the argument by failing to present it to the trial court.

Accordingly, we affirm the judgment.

FACTS AND PROCEDURAL HISTORY

I.

Underlying Facts

On March 9, 2004, Parker drove a van into the rear of car driven by Plaintiff while it was stopped at a traffic light. Parker had been travelling about five to seven miles per hour. Plaintiff described the collision as feeling like an explosion, causing her to temporarily lose her senses. She sued Defendants for personal injury and property damage.

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In advance of trial, the parties stipulated: "This is an action for personal injuries and damages which arises from a motor vehicle collision which occurred when the front of Defendants' vehicle collided with the rear of Plaintiff's vehicle on March 9, 2004, on Goldenwest, in Huntington Beach. [¶] Plaintiff alleges injuries and damages arising out of such motor vehicle collision. Defendant admits the collision, but denies such collision resulted in injuries and damages to Plaintiff, if any." The parties also stipulated that Parker had been acting "within the course and scope of his employment with [Crosstown]" when the collision occurred and Crosstown "is legally responsible for the negligent acts of its employee."

II.

Testimony at Trial

***2** A jury trial was conducted on January 8, 9, 10, 11, and 12, 2007. The testimony and evidence at trial focused on damages because liability was not in dispute.

Plaintiff presented four medical experts. Dr. David Starr, a chiropractor, testified he started treating Plaintiff on March 10, 2004, the day after the collision. Dr. Starr testified that X-rays, videofluoroscopy studies, and MRI's confirmed Plaintiff suffered a permanent spinal injury that would degrade with time.

Dr. Michael Millar, also a chiropractor, testified he had been asked by Dr. Starr to examine Plaintiff. Dr. Millar testified that after examining Plaintiff, listening to her complaints, and reviewing a videofluoroscopy study from 2004, his conclusion was that Plaintiff had sustained a ligamentous injury to her neck, leaving her with unstable joints in the cervical spine, and causing her "mechanical" pain. He testified that the videofluoroscopy study showed a traumatically induced deterioration in Plaintiff's spinal stability and bone spurring that had not been present before the collision, and that an MRI of Plaintiff taken in October 2006 showed spinal instability created by the ligamentous injury led to shearing on the annular wall of the side of the disk, leading to disk failure.

Dr. Brian Irvine, another chiropractor, testified he examined Plaintiff and had her perform two videofluoroscopy motion studies. He concluded there was gross ligamentous instability in a section of Plaintiff's cervical spine. He also testified a study performed in 2006 showed bone spurring and disk degeneration in Plaintiff's cervical spine that was not present in a study performed in 2004. Dr. Irvine concluded an event at around the time of the collision caused the spurring and degeneration, although he could not say the collision was the cause.

Dr. Jeffrey Gross, a neurosurgeon, testified Dr. Starr referred Plaintiff to him for a surgical consultation. Dr. Gross testified he examined Plaintiff, reviewed the videofluoroscopy studies of her, and had an MRI taken of her cervical spine. Dr. Gross concluded ligaments and disks in Plaintiff's cervical spine were injured in the collision and the disks would continue to degenerate over time. He testified he was certain Plaintiff would require surgery to repair the injured cervical disks, and he estimated such surgery would cost about $125,000 in present day dollars.

Defendants presented one medical expert, Dr. Douglas Keister, a board-certified orthopaedist and professor of orthopaedic surgery. Dr. Keister reviewed the videofluoroscopy studies of Plaintiff and concluded they showed nontraumatic, degenerative changes in her spine that were "perfectly normal" for a person of her age. Dr. Keister examined Plaintiff's cervical spine, performed neurologic, sensory, and motor strength testing, and reviewed her medical records. He found no evidence of trauma, and testified, "[t]here was no evidence of chronic instability. Only some minor degenerative changes around the areas where you get degenerative change around this age." He concluded Plaintiff, as result of the collision, suffered "a mild cervical strain that was apparently resolved after one day," and at most needed three therapy treatments per week for two weeks.

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*3 In addition, Plaintiff, her husband Todd Pavlik, and Parker testified as percipient witnesses.

As discussed later, during the course of Todd Pavlik's testimony, Defendants' counsel objected when Plaintiff's counsel asked a question about filing a claim and again when Todd Pavlik mentioned a claims adjuster. The trial court read CACI No. 105 to the jury. At a break in the testimony, Defendants' counsel requested a mistrial on the ground Plaintiff's counsel had made "a deliberate attempt" to mention insurance. The trial court denied the motion, finding counsel had not acted deliberately.

III.

Jury Verdict and Posttrial Motions

On January 12, 2007, the jury returned a verdict in favor of Plaintiff, awarding her $10,384 for past medical expenses, $129,500 for future medical expenses, and $150,000 for pain and suffering, for a total verdict of $289,884. A judgment awarding Plaintiff $289,884 in damages was entered on February 13, 2007.

Defendants moved for a new trial on the ground damages were excessive. They argued, among other things, the references to insurance during Todd Pavlik's testimony caused them to suffer prejudice that was not cured by the trial court reading CACI No. 105 to the jury. The trial court denied the motion for a new trial on March 16, 2007, finding damages were not excessive and references to insurance did not "constitute[ ] error or materially affect[ ] the outcome of the trial."

Plaintiff requested $53,426.33 in her memorandum of costs. Defendants moved to tax costs. The trial court reduced costs by $800 (thereby awarding costs of $52,626.33) but otherwise denied the motion to tax costs.

DISCUSSION

I.

Standards of Review

"The decision to grant or deny a mistrial is within the discretion of the trial court, which may properly deny the motion if it is satisfied that no injustice will result from the occurrences about which the moving party complains." (*Santiago v. Firestone Tire & Rubber Co.* (1990) 224 Cal.App.3d 1318, 1335.)

We review a trial court's denial of a mistrial motion under an abuse of discretion standard. (*People v. Ayala* (2000) 24 Cal.4th 243, 283.) "A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged." (*People v. Bolden* (2002) 29 Cal.4th 515, 555.) " 'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' " (*People v. Williams* (2006) 40 Cal.4th 287, 323.)

In reviewing an order denying a motion for a new trial, we " 'must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial. [Citations.]' [Citation.]" (*Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal .App.4th 21, 46-47.) That standard differs from the one used to review an order granting a motion for a new trial, which we review for an abuse of discretion. (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412; *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 187, 194.)

II.

Asserted Instances of Misconduct by Plaintiff's Counsel

A. *References to "Claim" and "Claims Adjuster"*

1. Two Instances in Which "Claim" or "Claims Adjuster" Was Mentioned.

*4 Defendants contend Plaintiff's counsel committed misconduct by twice mentioning or eliciting testimony regarding insurance. The first instance occurred during counsel's examination of Plaintiff's husband. Todd Pavlik testified his wife called him soon after the accident. When he arrived at the accident scene, about one and one-half hours later, he found Plaintiff sitting in the car and holding her

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head. She was shaky and unsettled, and said her head hurt. After Todd Pavlik testified he and his wife went to get coffee and discussed how to get both cars home, the first mention of a "claim" occurred in this way:

"Q [Plaintiff's counsel] Did you go straight home or where did you go first?

"A [Todd Pavlik] We stopped at Prestige Auto on the way home.

"Q How did you know about Prestige Auto?

"A I had dealt with them before.

"Q In what capacity?

"A Somebody rear-ended me and I took my car there, and I liked the way they treated me and their work.

"Q Just out of curiosity, did you ever file any kind of a claim for-

"Mr. Phan [Defendants' counsel]: Objection, irrelevant, Your Honor.

"The Court: *Sustained.*

"Mr. Martin [Plaintiff's counsel]: May we approach?

"The Court: No.

"Q By [Plaintiff's counsel]: Have you ever filed a claim for injuries against anybody?

"Mr. Phan: Objection, relevance, Your Honor.

"The Court: Overruled. You may answer.

"The witness: No." (Italics added.)

The second instance occurred a few moments later, when Plaintiff's counsel asked Todd Pavlik a series of questions about the cost of repairing Plaintiff's car:

"Q [Plaintiff's counsel] When you picked the car up, was the car completely repaired?

"A No.

"Mr. Phan: Objection, Your Honor, what's the relevance of this line of questioning?

"The Court: Well, I suppose-

"Mr. Martin: May we approach?

"The Court: Well, I can understand that, and as long as it doesn't take too much time.

"Mr. Martin: It is not.

"The Court: It is really a remote issue.

"Mr. Martin: I understand.

"The Court: Okay.

"Q By Mr. Martin: Was the car completely repaired?

"A No.

"Q What was not repaired?

"A The front of it, the hood.

"Q Was there some damage to the hood that had not been there previously?

"A Yes.

"Q And was this the first time when you went back to pick the car up and pay for it that you saw the car after the accident?

"A Yes.

"Q Okay. What happened when you told them that the front hadn't been repaired-may I approach? I want to make sure of something.

"The Court: We don't have time for approaching, and I assume that the purpose of this is, is that defendant is going to argue there is so much dam-

age, you are going to say the damage was more. Ask him how much the total damage was and move on.

"Mr. Martin: It is a front-end collision that wasn't addressed, and there was damage to the front of the car.

***5** "The Court: I understand.

"Q By Mr. Martin: Did you ever have the front end damage repaired?

"A No.

"Q Why not?

"A *The claims adjuster said that is wasn't part of the accident.*

"Mr. Phan: Objection, Your Honor." (Italics added.)

A few moments later, the court asked, "[c]ounsel, do you want me to read CACI 105 at this point?" Defendants' counsel responded yes, and the court read CACI No. 105 to the jury. CACI No. 105 reads: "You must not consider whether any of the parties in this case has insurance. The presence or absence of insurance is totally irrelevant. You must decide this case based only on the law and the evidence." The court read CACI No. 105 again at the conclusion of trial.

At the next break, Defendants' counsel requested a mistrial on the ground Plaintiff's counsel made a "deliberate attempt" to mention insurance. The trial court denied the request, stating: "I can't say it was deliberate and I recall exactly how it transpired, and I think counsel wanted to alert the court to what was happening and requested a sidebar. [¶] ... The answer appeared to be inadvertent by the witness related to property damage, nothing else, and I tried to remedy by giving him [CACI No.] 105, the admonition. I have no reason to believe that that didn't have its desired effect."

2. The Trial Court Did Not Abuse Its Discretion by Denying Defendants' Request for a Mistrial.

Evidence that a party is insured is inadmissible to prove negligence or wrongdoing. (Evid.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.]' " (*Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 469.)

Plaintiff argues the references to "claim" and "claims adjuster," quoted previously, do not come within this prohibition because they were not made to prove negligence or wrongdoing. We will assume for the sake of argument they do. Nonetheless, the trial court did not abuse its discretion in denying Defendants' request for a mistrial. The court sustained the objection to the question whether Todd Pavlik had ever filed "any kind of a claim." When Todd Pavlik later mentioned the claims adjuster, the trial court read CACI No. 105 to the jury.

"[C]ourts have held that, as a general matter, cautionary admonitions and instructions must be considered a presumptively reasonable alternative-a presumption that can be overcome only in exceptional circumstances." (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1224.) " '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.' " (*Horn v. Atchison, T. & S.F. Ry. Co.* (1964) 61 Cal.2d 602, 610.) This is not such an extreme case: The trial court promptly and directly read CACI No. 105 to the jury. Defendants have not overcome the presumption the admonition cured any harm.

***6** Further, the trial court expressly found that Plaintiff's counsel did not deliberately elicit Todd Pavlik to mention insurance. "The trial court was in

the best position to gauge the exact nature of [Plaintiff's counsel]'s conduct and its likely effect on the jury." (*People v. Williams, supra,* 40 Cal.4th at p. 323.)

B. *Comment That Plaintiff Has Never Filed a "Claim" Against Anybody*

During closing argument, Plaintiff's counsel stated: "We have a plaintiff who is married to a pilot who makes good money. She is a flight attendant. Neither one of them h[as] ever filed a claim against anybody in their lives. Not a workers' comp claim, not a claim for damages. Mr. Pavlik didn't even file a claim when he was treating for neck and back injuries ... after he got rear-ended. Perfect opportunity if that is what he was going to do. But he doesn't. He doesn't even think of it. [¶] Ms. Pavlik has never filed a *claim.* We have someone who is very active. We have someone who is not a whiner. She could have easily gone on disability with this injury. She could have easily done a lot of things, but instead when they call her back to fly she goes back to work." (Italics added.)

Defendants' counsel did not object or request an admonition. " 'Generally, to preserve for appeal an instance of misconduct of counsel in the presence of the jury, an objection must have been lodged at trial.' [Citation.] In addition to objecting, a litigant faced with opposing counsel's misconduct must also 'move for a mistrial or seek a curative admonition' [citation] unless the misconduct is so persistent that an admonition would be inadequate to cure the resulting prejudice [citation]. This is so because '[o]ne of the primary purposes of admonition at the beginning of an improper course of argument is to avoid repetition of the remarks and thus obviate the necessity of a new trial.' [Citation.] The rule is the same for civil and criminal cases. [Citation.]" (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 794-795.) An exception to this rule arises when the trial court immediately overrules an objection to alleged attorney misconduct, thereby depriving the aggrieved party an opportunity to request an admonition and seek a mistrial. (*Id.* at p. 795.)

Defendants argue their counsel's earlier objections to the mention of claim and claims adjuster was sufficient to preserve the right to challenge later acts of misconduct. Citing *Dominguez v. Pantalone* (1989) 212 Cal.App.3d 201. Defendants argue, "[t]he jury only needs one admonition in order for the multiple instances of misconduct to be preserved on appeal." In *Dominguez v. Pantalone,* the court concluded a claim of repeated instances alleged attorney misconduct had not been forfeited for failing to object when counsel requested an admonition after the *last* instance of alleged misconduct. (*Id.* at p. 212.) The reverse is not necessarily true: An objection and request for admonition at the first instance of asserted misconduct do not necessarily preserve claims of future misconduct absent objection and request for admonition. The purpose of the rule requiring an objection and request for admonition is "to give the court the opportunity to admonish the jury, instruct counsel and forestall the accumulation of prejudice by repeating improprieties." (*Horn v. Atchison, T. & S.F. Ry. Co., supra,* 61 Cal.2d at p. 610.) This purpose is not served by objecting only after the first instance of claimed misconduct.

*7 Even if this particular claim of misconduct is not forfeited, it does not have merit. As Plaintiff points out, her trial counsel argued neither she nor her husband had ever made a "claim" in order to show Plaintiff was not a "malingerer" or a professional plaintiff. Counsel used the word "claim" broadly to include any claim of liability, including workers' compensation claims and lawsuits. By using the word "claim," counsel might have "approach[ed] close to the line between proper and improper conduct," but counsel "did not overstep the line." (*Dominguez v. Pantalone, supra,* 212 Cal.App.3d at p. 212.)

C. *Reference to Crosstown Paying the "Brunt" of Any Judgment*

Also during closing argument, Plaintiff's counsel stated: "[Parker] has got his motive, obviously,

for not wanting to have anything. Don't forget we do have a stipulation. It is not just this man. It is also Crosstown Electric. They are going to have to pay the brunt of this. [¶] I say that because we haven't seen Crosstown Electric here. We've only seen Mr. Parker that [*sic*] is trying to get sympathy. Don't hit me too hard." Defendants did not object to this statement or request an admonition.

These comments appear to be an improper reference to a defendant's financial ability to pay a judgment. (*Hoffman v. Brandt* (1966) 65 Cal.2d 549, 554, 555.) Plaintiff argues her counsel's comment that Crosstown would "have to pay the brunt of this" was a factual statement based on the parties' stipulation. The stipulation read: "At the time of the subject motor vehicle collision, Defendant BRIAN LESLIE PARKER was acting within the course and scope of his employment with Defendant CROSSTOWN ELECTRICAL & DATA, INC., which corporation is legally responsible for the negligent acts of its employee." (Bold omitted.) The record does not reveal whether this stipulation was read to the jury. The printed jury instructions included in the clerk's transcript do not include the stipulation, and the instructions read to the jury were not transcribed. However, Defendants do not deny the stipulation or assert it was not read to the jury at some point.

Defendants failed, in any case, to preserve a claim of attorney misconduct for appeal because their counsel did not object to the comments or request an admonition. (*Cassim v. Allstate Ins. Co., supra,* 33 Cal.4th at pp. 794-795.) Defendants argue a request for an admonition was unnecessary to preserve the issue because an admonition would not have cured the misconduct and eliminated any prejudice. The California Supreme Court has recognized that an admonition will not always eliminate the prejudice caused by a reference to the defendant's financial ability to pay a personal injury judgment. (*Hoffman v. Brandt, supra,* 65 Cal.2d at pp. 554, 555.) "Certainly it is not and should not be the law that in every case a reference to the financial ability of the defendant to respond in damages and arguments based thereon may be cured by an admonition. Obviously the effect of an admonition upon such misconduct depends upon the facts of each case." (*Id.* at p. 555.)

***8** " 'Whether counsel's improper reference to insurance constitutes prejudicial misconduct in a closely balanced case which cannot be cured by the court's admonition [citations] is determined by the court's view of the overall record, taking into account inter alia the nature and seriousness of the remarks, the good faith of counsel, whether the misconduct consisted of a single utterance or repeated, persistent reiteration thereof, the judge's control of the trial and the probable likelihood of prejudicing the jury [citations].' " (*Neumann v. Bishop, supra,* 59 Cal.App.3d at p. 473.)

Our review of the overall record leads us to conclude an admonition would have cured any harm caused by counsel's comment that Crosstown would have to pay the brunt of any judgment. An admonition would have reminded the jury not to consider any particular defendant's financial ability to pay a judgment. Plaintiff's counsel mentioned Crosstown as the source of payment of a judgment just this once. The remarks were made, according to Plaintiff, to counter defense efforts to curry sympathy for Parker. Crosstown's existence was no mystery to the jury because Crosstown was a defendant, and Parker had testified he was driving the van while working his job for Crosstown. The trial court was in firm control of the trial proceedings. An objection and request for admonition would have given the trial court the opportunity to decide whether the reference to Crosstown was a legitimate factual statement based on the parties' stipulation, and, if necessary, to read the stipulation to the jury. Although it has been said that "such an instruction may blow smoldering coals into a blazing fire of speculation," an instruction or admonition would have "soften[ed] the blow." (*Neumann v. Bishop, supra,* 59 Cal.App.3d at p. 473.)

D. *The "Golden Rule" Argument*

Defendants contend Plaintiff's counsel made an improper "golden rule" argument by stating during closing argument: "If someone were to walk up and chop her in the head she would be a surgery candidate for that surgery, which means she loses 70 percent of her rotation. Now, I don't know about you. That is a serious proposition. And let's talk about this. What would you pay or what would you take to take on her pain on a daily basis?" Defendant's counsel objected, but did not request an admonition. The trial court sustained the objection.

The trial court correctly sustained Defendants' objection to Plaintiff's golden rule argument. "The jury must impartially determine pain and suffering damages based upon evidence specific to the plaintiff, as opposed to statistical data concerning the public at large. The only person whose pain and suffering is relevant in calculating a general damage award is the plaintiff. How others would feel if placed in the plaintiff's position is irrelevant. It is improper, for example, for an attorney to ask jurors how much 'they would "charge" to undergo equivalent pain and suffering.' [Citation.] 'This so-called "golden rule" argument [citation] is impermissible. [Citations.]' " (*Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, 764-765, fn. omitted.)

***9** But Defendants failed to preserve the claim of misconduct for appeal by not requesting an admonition. (*Cassim v. Allstate Ins. Co., supra,* 33 Cal.4th at pp. 794-795; see also *Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 860 [golden rule argument not preserved for appeal because counsel "neither objected to the statements nor requested any admonition"].) Having sustained Defendants' objection, the trial court likely would have granted a request to admonish the jury. The record discloses no reason to believe an admonition would not have cured any prejudice from the golden rule argument.

Defendants assert Plaintiff's counsel again committed misconduct by arguing: "I guess what I'm trying to say to you is do you think that she would pay $3 an hour everyday, $45 a day to not have this problem? $3, that is all. Give her $3 an hour for this pain.... [¶] ... If you take $3 a day-I mean, an hour, times 15 waking hours is 45 times 365. That is 16,425 a year, times 44.2 years, that is $725,000." Defendants' counsel did not object. This argument is a permissible "per diem" argument. (*Loth v. Truck-A-Way Corp., supra,* 60 Cal.App.4th at p. 765, fn. 8.)

E. *Mentioning "The Lawyer Gets a Third" of any Recovery*

Defendants contend Plaintiff urged the jury to award her attorney fees. During closing argument, Plaintiff's counsel said the following about damages: "So what do we have in specials? As specials we weren't having the doctors paid up and ... we never thought of this case as, well, let's get her three times the medicals. That is the soft tissue baloney. Well, you got hurt and you get paid and you get a third and the lawyer gets a third." Defendants' counsel objected. The trial court sustained the objection and ordered the comments stricken.

Plaintiff argues her counsel was not requesting attorney fees, but was "making the point that this is *not* one of those 'soft tissue baloney' cases, where everyone hopes to simply take a third." Plaintiff acknowledges her counsel's comments, regardless of their purpose, brought before the jury the fact a portion of a plaintiff's recovery in a personal injury case usually is paid to counsel as attorney fees. By doing so, counsel's comments suggested the jury amplify the damages to compensate Plaintiff for her attorney fees. Attorney fees are not recoverable for personal injury, and a jury commits misconduct by agreeing to award them. (*Krouse v. Graham* (1977) 19 Cal.3d 59, 81.) "[A] jury may not properly consider such fees in assessing damages." (*Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920, 930-931.)

Plaintiff's counsel committed misconduct by mentioning a lawyer receiving one-third of a plaintiff's recovery. Defendants' counsel did not, however, request an admonition in addition to ob-

jecting. Because, under the facts of this case, an admonition would have cured any prejudice from the comment, Defendants did not preserve the claim for appeal. Moreover, "[a] plaintiff's obligation to pay attorneys' fees is so commonly understood by most jurors, however, that it would be undesirable to require that a verdict be set aside merely because" attorney fees were mentioned. (*Krouse v. Graham, supra,* 19 Cal.3d at p. 81.)

F. *Commenting on the Integrity of Defendants' Medical Expert Witness*

***10** During cross-examination of Defendants' medical expert witness, Dr. Keister, Plaintiff's counsel asked: "Would it be surprising to you to find out that the medical-legal community considers you a hired gun for the defense?" Defendants' counsel objected. The trial court sustained the objection and admonished Plaintiff's counsel. Defendants' counsel did not request the trial court to admonish the jury.

During closing argument, Plaintiff's counsel told the jury: "Dr. Keister is a defense medical. He spends his time when he is not treating patients working for the defense. He belongs to a group that caters to defense lawyers. How does he keep himself in business? He gives them what they want." Defendants' counsel neither objected nor requested an admonition.

In *Horn v. Atchison, T. & S.F. Ry. Co., supra,* 61 Cal.2d at pages 606-607, the plaintiff's counsel told the jury that a defense expert witness was dishonest and would " 'say anything if it will suit the bill.' " The court concluded, however, the defendants forfeited a claim of attorney misconduct because their counsel did not object or request an admonition to that comment or to any of the asserted incidents of misconduct. (*Id.* at p. 610.) The court stated: "[W]e are aware of no California case wherein a plaintiff's verdict was reversed for misconduct during his counsel's argument in the lack of timely objections and a request that the jury be admonished where such an admonishment could be effective." (*Id.* at p. 611.) The court concluded that counsel's misconduct was not "of such a character that it could not have been obviated by timely objections and instructions." (*Ibid.*)

Similarly here, comments by Plaintiff's counsel on Dr. Keister's integrity constituted misconduct. But here too, as in *Horn v. Atchison, T. & S.F. Ry. Co.,* Defendants' counsel did not request a jury admonition in either instance of misconduct, and the misconduct was not of such a character that an admonition would have been ineffective.

III.

Cumulative Effect of the Misconduct

Defendants argue the cumulative effect of the asserted misconduct was to deny them a fair trial, notwithstanding their counsel's failure to object and request admonitions. (See *Du Jardin v. City of Oxnard* (1995) 38 Cal.App.4th 174, 180.) "[E]ven in the absence of an objection and request for admonition, where there are flagrant and repeated instances of misconduct, an appellate court cannot refuse to recognize the misconduct." (*Simmons v. Southern Pac. Transportation Co.* (1976) 62 Cal.App.3d 341, 355 (*Simmons*).)

In *Simmons, supra,* 62 Cal.App.3d at page 351, the plaintiffs' counsel engaged in repeated misconduct from the outset of trial, described by the Court of Appeal as "a campaign of hate, vilification and subterfuge for the sole purpose of prejudicing the jury against defendant Southern Pacific and its employees." The acts of misconduct included the following: "Mr. Hurd [the plaintiffs' counsel] told the jury that 'if these people would lie and cheat and steal and thieve as they do, if they will elicit and suggest perjury, and when they get caught, they go, "So what?" ' Following a sustained objection to this language Mr. Hurd said, 'If it starts as high as the Vice-President or the President of the Head of the Legal Department, and it's going to pervade through the system....' [¶] He stated also that 'They are awfully big, the Southern Pacific; they are almost as big as the State, ... [T]hey don't care; they don't care from the very top, from-the Vice-President of Southern Pacific, Mr. Jaekle, stands

there and tells you, "No, I don't think pedestrians deserve that kind of protection; ..." let the pedestrian be damned in this situation .' Again he stated, '[T]he thread that weaves its way down from the Vice-President to his brother, the Claims man, the thread that says it's okay to cheat, to lie, to steal, to deceive, it's okay.' [¶] In the same line, Mr. Hurd stated, '[W]hen older people get struck down, that fits even more succinctly into the statistics of the railroad, because they know they don't have to pay the gigantic figures connected with the wage loss.' [¶] He also stated, 'And I don't understand if perjury is a built-in part of a defense of a lawsuit, or what, but it just seems to pass unnoticed.' " (*Id.* at pp. 351-352.) In addition, the plaintiffs' counsel badgered witnesses, used deceptive questioning, interrupted defense counsel's examination of a witness, and, in violation of the trial court's order, showed the jury evidence that was not part of the record. (*Id.* at pp. 353-354.)

***11** Defense counsel objected to much of the plaintiffs' counsel's misconduct and sometimes requested admonitions. (*Simmons, supra,* 62 Cal.App.3d at p. 355.) The Court of Appeal stated, however, "[t]he court's admonitions, when given, were mostly inadequate." (*Ibid.*) The Court of Appeal reversed the judgment in the plaintiffs' favor, because "the misconduct was such that admonishing the jury would not have unrung the bell." (*Id.* at p. 359.)

In *Love v. Wolf* (1964) 226 Cal.App.2d 378, a medical malpractice case against a treating physician and drug manufacturer, the plaintiff's attorney engaged in misconduct from the first day of trial to its conclusion. Among other things, the plaintiff's counsel referred to the drug manufacturer's earnings, made false references to the profits made on those earnings, failed to keep promises to prove facts suggested by innuendo, verbally abused opposing counsel, suggested opposing counsel suborned perjury, and told opposing counsel to " 'shut up' " when they tried to make objections. (*Id.* at pp. 386-391.) Defense counsel objected to some misconduct and requested admonitions, but failed to object to other misconduct. (*Id.* at pp. 391-392.)

The Court of Appeal reversed the judgment in the plaintiff's favor, although it was supported by substantial evidence, on the ground the cumulative effect of counsel's misconduct was to deny the defendants a fair trial. (*Love v. Wolf, supra,* 226 Cal.App.2d at pp. 392, 394.) In response to the plaintiff's contention that defense counsel did not always object and request admonitions, the court stated: "As any experienced trial lawyer knows, multiple objections have a tendency to alienate a jury's good will; particularly when, as in this case, the judge fails to rule on the objections made. And here many instances of misconduct *were* objected to. As for curing error by admonishing a jury, while this may be possible when error is isolated and unemphasized, an attempt to rectify repeated and resounding misconduct by admonition is, as counsel here has expressed it, like trying to unring a bell." (*Id.* at p. 392.)

The Court of Appeal concluded the misconduct was prejudicial: "The misconduct here was intentional, blatant, and continuous from opening statement, throughout the trial, to closing argument. It was committed by a seasoned and experienced trial lawyer and the record leaves no doubt it was carefully contrived and calculated to produce a result. That sought-for result was so to arouse and inflame the jury that it would render a large verdict. The verdict *was* a large one; maximally so. Counsel now argues we should assume, as the trial court did in denying a new trial, that the jury was not influenced. He both underrates his own persuasive powers and argues inconsistently. When a skillful lawyer whose reputation bespeaks his power to influence juries strives advertently to achieve a given result and where the result is in fact achieved, how can a court reasonably say that his conduct played no role in the result?" (*Love v. Wolf, supra,* 226 Cal.App.2d at pp. 393-394.)

***12** In this case, Defendants concede the instances of asserted misconduct are fewer than in

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Simmons or *Love v. Wolf,* but argue "the focus of the court's inquiry is not on how much misconduct took place, but on the likelihood of prejudice in view of the *nature* of the misconduct."

Plaintiff's trial counsel committed misconduct in these ways: (1) once mentioning "claim" and eliciting Todd Pavlik to mention a claims adjuster; (2) referring to Crosstown as paying the brunt of any judgment; (3) making the golden rule argument (but not the per diem argument); (4) making "the lawyer gets a third" of the recovery comment; and (5) impugning Dr. Keister's integrity.

In the first instance, the trial court (at its own instance, not on counsel's request) instructed the jury with CACI No. 105. In denying Defendants' request for a mistrial, the trial court found that Plaintiff's counsel had not acted deliberately. The comment on Crosstown paying the brunt of the judgment was consistent with the parties' stipulation Crosstown was legally responsible for Parker's negligent acts. Neither the golden rule argument nor the proper per diem argument appears to have influenced the jury, which awarded Plaintiff $150,000 for pain and suffering rather than the $725,000 her counsel requested.

While Defendants' counsel objected to some of the instances of misconduct, counsel *never* requested the court to admonish the jury. In stark contrast, in *Simmons* and *Love v. Wolf,* counsel on at least some occasions requested admonitions. The misconduct here, while more than an isolated incident, was not so "repeated and resounding" that requests for admonition would have alienated the jury or rerung the bell. (*Love v. Wolf, supra,* 226 Cal.App.2d at p. 392.) The trial court appeared willing to give adequate admonitions, if requested to do so, and admonitions would have cured any harm from the cumulative effect of the misconduct.

But with or without admonitions, the cumulative effect of the misconduct was not prejudicial. "An error is prejudicial and results in a miscarriage of justice only if the reviewing court concludes, based on its review of the entire record, that it is reasonably probable that a result more favorable to the appellant would have been reached absent the error." (*Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1051, citing *Cassim v. Allstate Ins. Co., supra,* 33 Cal.4th at p. 800.) This does not mean, as Plaintiff asserts, misconduct is prejudicial only if it resulted in damages excessive as a matter of law or unsupported by the evidence. Error is prejudicial whenever the appealing party would have received a better result at trial in the absence of the error.

In *Garden Grove School Dist. v. Hendler* (1965) 63 Cal.2d 141, 143, footnote 1, a condemnation action, the plaintiff's counsel told the jury the defendants were speculators who had bought the property knowing it would be condemned. The jury awarded the defendants $73,000, which was $7,500 more than the highest value placed on the property by the plaintiff's expert witnesses and $47,000 less than the amount the defendants had sought. (*Id.* at p. 144.) The court concluded the plaintiff's counsel engaged in misconduct and the "clear inference" from the amount of the award was that the misconduct influenced the jury. (*Ibid.*)

***13** Looking at the amount of the award in this case, the clear inference is the jury was not influenced by the misconduct. The jury apparently believed Plaintiff's experts and awarded her the approximate amount of her current and projected future medical expenses, which totaled about $140,000-but no more. The jury then added $150,000 for pain and suffering, an amount far less than the $725,000 requested by Plaintiff based on the per diem argument.

Our review of the entire record thus leads us to conclude it was not reasonably probable Defendants would have received a more favorable result absent the cumulative effect of the misconduct. The verdict reflects the jury made its decision based on a studied examination of the evidence rather than passion or prejudice. The cumulative effect of the misconduct did not deprive Defendants of a fair tri-

al.

IV.

Motion to Tax Costs

In her memorandum of costs, Plaintiff sought a total of $24,207.92 in expert witness fees under Code of Civil Procedure section 998. The trial court denied Defendants' motion to tax costs, but reduced the expert witness fees by $800 for an unpaid cancellation fee charged by one expert.

Defendants argue the trial court erred by failing to tax expert witness costs incurred before the date of the Code of Civil Procedure section 998 offer. Defendants waived this argument by failing to present it to the trial court in their motion to tax costs. (*People ex rel. Dept. of Transportation v. Superior Court* (2003) 105 Cal.App.4th 39, 46.) "It is unfair to the trial judge and to the adverse party to take advantage of an alleged error on appeal where it could easily have been corrected at trial." (*Children's Hospital & Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 776.)

Defendants contend we may consider the argument because it raises a pure question of law on undisputed facts. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742.) We disagree: Resolution of the argument requires a determination of which expert costs were incurred before the date of the Code of Civil Procedure section 998 offer. Even if we had discretion to address the argument, we would decline to exercise our discretion. (*Hussey-Head v. World Savings & Loan Assn.* (2003) 111 Cal.App.4th 773, 783, fn. 7.)

DISPOSITION

The judgment and postjudgment order are affirmed. Because we conclude Plaintiff's counsel did commit misconduct during trial, in the interest of justice, no party shall recover costs incurred on appeal.

WE CONCUR: RYLAARSDAM, Acting P.J., and ARONSON, J.

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