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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE



ROBERTO DAVILA,

Plaintiff and Respondent,

v.

JAMES DERBY ET AL.,

Defendants, Cross-complainants and Appellants.

NAVAJO PIPELINE, INC.,

Cross-defendant and Respondent.

A149631

(Alameda County
Super. Ct. No. HG13708711)

James Derby and DeSilva Gates Construction, L.P. (collectively, DeSilva Gates) appeal from a judgment entered after a jury found them 100 percent at fault for respondent Roberto Davila's personal injury damages in the amount of $4,244,122. DeSilva Gates contends the jury's allocation of fault was prejudicially affected by improper references to an indemnification agreement, by which respondent Navajo Pipeline, Inc. (Navajo) would have to pay all of the liability of DeSilva Gates if the jury found Navajo as little as one percent at fault, such that DeSilva Gates would pay nothing even though it admitted negligence. DeSilva Gates also contends the court erred by awarding costs to Davila under Code of Civil Procedure section 998, because Davila and his wife jointly served an offer that did not allocate between their claims, and expert witness fees for non-retained experts is not permitted.

We conclude that the repeated references to the indemnity agreement and its terms were irrelevant and prejudicial, and that it is reasonably probable those references affected the jury's determination of negligence, allocation of responsibility, and damages, to DeSilva Gates's detriment. We will therefore reverse the judgment.

## I. FACTS AND PROCEDURAL HISTORY

DeSilva Gates Construction, L.P. was the general contractor for a road-widening project in Roseville. Navajo was a subcontractor responsible for underground utilities. Davila worked for Navajo.

### A. The Incident Injuring Plaintiff Davila

On September 21, 2012, Navajo's crew was driving around the construction site, taking measurements and stopping to pick up debris. Davila and the foreperson of Navajo's crew rode on the rear bumper. Whenever the truck stopped, Davila and the foreperson would dismount to grab debris or take measurements, and then climb back on the bumper.

Navajo's employee safety policy, of which Davila was aware, stated: " 'No one is permitted to ride on any machine or vehicle unless it is provided with a stationary seat and seat belt for each passenger. This includes construction equipment with roll-over protection and trucks. Seat belts must be worn at all times.' " It was the duty of Navajo's foreperson – who in this case was riding unseatbelted on the bumper – to ensure that employees complied with Navajo safety policies.

As the truck made one of its stops, Davila stepped down from the rear bumper. A skip loader, driven three-to-five miles per hour by James Derby, a worker for DeSilva Gates Construction, L.P., rear-ended the truck. Davila had one foot on the ground and one foot still on the bumper, and the skip loader forced his legs into a space between the truck's channel iron and the back of the truck; when the vehicles separated, Davila fell to the ground.

Davila sustained injuries to his knees, shoulders, and lower back, which exacerbated a previously existing degeneration.

B. Davila's Lawsuit and DeSilva Gates's Indemnity Claim Against Navajo

Davila and his wife sued the driver of the skip loader (Derby) and Derby's employer (DeSilva Gates) for personal injury and loss of consortium. He was prohibited from suing Navajo due to the workers compensation system.

DeSilva Gates admitted that Derby drove negligently and accepted vicarious liability for Derby's negligence. However, DeSilva Gates (1) disputed the amount of Davila's damages; (2) contended Davila shared some fault because his negligent conduct in riding on the back of a moving pickup truck on a construction site was a substantial cause of his injuries; and (3) contended Navajo was at fault, both directly due to its foreperson negligently riding on the bumper rather than discouraging Davila, and vicariously as Davila's employer.

DeSilva Gates also filed a cross-complaint against Navajo for express indemnity, based on the terms of their subcontract. The indemnity provision stated: "Subcontractor [Navajo] shall indemnify and save harmless Owner and Contractor [DeSilva Gates] . . . from any and all claims . . . arising out of or in connection with [Navajo's] operations to be performed under this Agreement, including but not limited to: [¶] (a) Personal injury . . . to . . . any employees or agents of [Navajo] . . . caused or alleged to be caused in whole or in part by any negligent act or omission of [Navajo] or anyone directly or indirectly employed by [Navajo]." The indemnity provision also stated: "[Navajo], however, shall not be obligated under this agreement to Indemnify Owner or [DeSilva Gates] for Claims arising from the sole negligence or willful misconduct of Owner or [DeSilva Gates]." The parties agreed that, pursuant to the indemnity clause, Navajo would have to indemnify DeSilva Gates for all damages awarded against DeSilva Gates if Navajo were found as little as one percent at fault due to its negligence or the negligence of an employee.

The amount of Davila's damages and the allocation of fault among Davila, Navajo, and DeSilva Gates were issues for the jury. Once the jury decided those issues, the trial court would determine whether the jury's fault allocation triggered Navajo's duty to indemnify under the subcontract, as alleged in DeSilva Gates's cross-complaint.

C. The Davilas' Section 998 Offer to DeSilva Gates

About a month before trial, Davila and his wife jointly served an Offer of Compromise on DeSilva Gates, pursuant to Code of Civil Procedure section 998 (section 998). The offer sought a total of $1.9 million, without specifying how much was sought to settle each plaintiff's individual claim. Later, but before trial began, Davila's wife dismissed her claim for loss of consortium in exchange for a waiver of costs.

D. Trial

At trial, the parties presented evidence concerning Davila's damages and the relative fault of the parties. In addition, the jury was repeatedly informed about the indemnity provision in the subcontract, even though the jury was not to decide any issues regarding that agreement.

1. Jury Selection and Statement of the Case

During jury selection, the court read to the jury panel a statement of the case proposed by Davila and Navajo. The statement explained that DeSilva Gates had acknowledged liability: "Derby and [DeSilva Gates] admit that Mr. Derby was negligent in his operation of the skip loader and in causing injury to [Davila] and they further admit that Mr. Derby was acting in the course and scope of his employment." It also explained that DeSilva Gates contended Davila and Navajo were responsible as well: "[Derby] and [DeSilva Gates] dispute the nature and extent of the Plaintiffs' injuries and damages and they also contend that [Davila] and his employer, [Navajo], a subcontractor of [DeSilva Gates], were also negligent in causing [Davila's] injuries." The statement then went on to discuss the indemnification provision in the subcontract: "[DeSilva Gates] alleges that [Navajo] is obligated under the terms of its subcontract to reimburse/indemnify [DeSilva Gates] for all damages for which it is liable to plaintiffs. [Navajo] denies the allegations of [DeSilva Gates] and contends that the negligence of [Defendants] was the sole cause of Plaintiffs' injuries and damages."[1]

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[1] DeSilva Gates's attorney submitted a declaration in the trial court, stating he had objected to this portion of the statement of the case in an unreported pretrial conference,

The court read this statement of the case to the jury panel when it was first assembled. It also read the statement during voir dire two days later.

2. Order Limiting References to Indemnity Provision

After the case statement had been read, DeSilva Gates filed a motion to exclude any further references and argument regarding the indemnity agreement, contending that the discussion of indemnity was irrelevant, unfairly prejudiced DeSilva Gates, and garnered sympathy for Navajo (because Navajo would have to bear the cost of "all damages" attributable to DeSilva Gates).

Navajo opposed the motion, arguing that the jury had already been told about the indemnity agreement in the statement of the case, and representing to the court that there were "myriad questions of fact" relating to the indemnity claim "that have been put at issue" by Navajo's general denial of the complaint. Navajo did not, however, identify any of those factual questions.

At the ensuing hearing, the court noted Navajo's representation of myriad factual issues related to indemnity and "wanted to know what some of them are." Navajo's attorney replied that Navajo "denied all material allegations in their complaint" and would "put them to their burden of proof on every element of proving up a contract-based cause of action," including "negotiation and formation of the contract." Beyond that, however, Navajo's attorney said, "I don't want to reveal my defense strategy at this point." At bottom, Navajo never identified any specific issue that would go to the jury regarding the indemnity provision.

The court ruled that Navajo could mention the existence and negotiation of the subcontract between Navajo and DeSilva Gates, but not the meaning of the indemnity clause without an offer of proof. Expressing concern with the statement of the case that it had read, the judge instructed counsel: "I just don't want you to interpret the contract or – honestly *as we did with the statement of the case*, looking back on it, that word. I think it

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protesting particularly the statement that "all damages" would be shifted to Navajo. Neither the court nor counsel disputed that he had asserted the objection.

was *all*—or something. That's . . . [¶] *I'm not sure that was the best thing in there*. The full consequences of that, I don't know were—why I was necessarily—so let's come back and revisit that later." (Italics added.)

3. Opening Statements

In opening statement, DeSilva Gates's attorney explained that, although Derby was at fault, the injury was also partly the fault of Davila and Navajo. Davila and Navajo contended otherwise, and in addition referred to the indemnification provision. In particular, Davila's attorney asserted that even though DeSilva Gates admitted Derby was negligent and accepted vicarious liability, "DeSilva Gates wants Navajo to pay any damages that DeSilva Gates has to pay to Mr. Davila." Navajo's attorney told the jury: "we know that DeSilva Gates brought Navajo in so that they can indemnify DeSilva Gates and Derby in this lawsuit." Despite his representation to the court that the jury had to resolve myriad factual issues regarding indemnity, Navajo's counsel did not mention any.

4. Juror Questions and a Further Reference to the Indemnity Agreement

After several witnesses had testified, a juror sent the court a note, asking: "Your Honor, I understand the Plaintiff's complaint against DeSilva/Gates. What complaint has come against Navajo Pipeline? Is DeSilva/Gates having to defend against the Plaintiff AND Navajo Pipeline? Restated: I need clarification concerning each party and their purpose in presenting their case. ([E]specially Navajo Pipeline!)"

The court presented the matter to counsel on June 2, 2016. Davila and Navajo suggested that the court should address the question by rereading the statement of the case to the jury. DeSilva Gates objected, arguing that the only issues for the jury were damages and fault allocation, and the case statement would only create more confusion about irrelevant issues. The next court day (June 6), the judge reread the case statement to the jury.

5. Navajo's Examination of Kloos

Navajo called DeSilva Gates's vice-president, Michael Kloos, as an adverse witness. (Evid. Code, § 776.) Navajo's attorney asked Kloos if he was aware of any

subcontractor who ever negotiated a change to the indemnity clause in the subcontract. Kloos answered yes, indicating that had happened more than once.[2] Navajo's counsel next inquired about Kloos's knowledge of the lawsuit, including that DeSilva Gates was seeking indemnity from Navajo.

Navajo's attorney then turned to the *meaning* of the indemnity clause, asking Kloos to state his "understanding as to what the parties agreed to in that indemnity clause." DeSilva Gates objected that the question was irrelevant and called for a legal conclusion; the court overruled the objections, despite its prior concerns about the relevance of the indemnity provision's meaning. Kloos answered, "[w]e agreed to what is written in the indemnity clause."

Navajo's attorney then asked Kloos, "[W]as it your understanding that the agreement was that *if Navajo was one percent at fault they had to pay everything*?" (Italics added.) DeSilva Gates objected that the question called for a legal conclusion and asked the court to admonish Navajo's attorney. The court sustained the objection and struck the testimony (although no testimony had been given), but did not admonish counsel or the jury.

Navajo's attorney persisted: ". . . [W]hat's your understanding of what the agreement was in the context of that paragraph?" The court sustained DeSilva Gates's objection that the question was irrelevant and called for a legal conclusion. Navajo's lawyer ended his examination.

6. Indemnity Agreement Admitted for Limited Non-Jury Purpose

The subcontract, which included the indemnity provision, was admitted into evidence outside the jury's presence, for the limited purpose of the *court's* determination of the rights and responsibilities of Navajo and DeSilva Gates as it related to indemnity. The subcontract was not provided to the jury. For purposes of the issues the jury was to decide, therefore, the content of the indemnity agreement was not in evidence.

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[2] There was also other evidence indicating that the subcontract was not an adhesion contract, but a product of negotiation.

7. Evidence of Fault

DeSilva Gates presented evidence to support its assertion that Davila and Navajo were partially at fault for Davila's injuries, claiming Davila negligently rode on the rear bumper and Navajo's foreperson negligently permitted this behavior in violation of Navajo's safety rules. Navajo's vice president testified that one reason for the safety rule was that an employee riding on the rear bumper could be injured in a rear-end collision. Navajo's vice president and another manager testified that if they caught someone riding on the rear bumper of a Navajo truck on a project, the person would be disciplined and, if the misconduct continued, fired. Davila's own safety expert agreed that Navajo's safety rule prohibited riding on the rear bumper and that one reason for the rule was to prevent workers from being caught between two vehicles in a collision. (The expert also testified, however, that the workers could disregard Navajo's safety rule if conditions at the moment made the risk of injury low.) Furthermore, because the collision occurred at very low speed and the truck's driver was not seriously injured, DeSilva Gates argued that Davila would not have been seriously injured if he too was riding in the truck's cab as required.

Navajo and Davila presented evidence and argument that they were not at fault. They claimed that, notwithstanding Navajo's safety rule prohibiting riding on the bumper, the workers determined it was reasonable to do so because the construction site was relatively empty and the truck was moving slowly. They also presented expert witness testimony that Navajo's safety rule did not apply once the truck stopped. Further, they contended, even if Davila was negligent, his negligence was not a substantial factor in causing his harm, because at the time of the impact he would have been behind the truck even if he had not been riding on the bumper. Navajo also presented evidence that Derby was not looking at the road while driving, which Navajo argued was the cause of Davila's injuries.

8. Jury Instruction Regarding Indemnity

At a hearing regarding proposed jury instructions, Navajo's attorney again represented there were factual issues for the jury related to the indemnity agreement,

including "whether or not there's a valid enforceable contract, and all of the myriad questions of fact that go with that." The court asked, "So what I am wondering, again, what exactly is it that we want the jury to decide with regard to Navajo?" Counsel asserted that DeSilva Gates should have to prove all of the elements of a breach of contact claim and that he had been "cut off" from showing the subcontract was a contract of adhesion. Navajo proposed jury instructions about breach of contract and the meaning of the term "indemnity." Davila agreed that the court should instruct on the meaning of indemnity because of the jury's notes indicating their confusion about it. DeSilva Gates objected to instructions on breach of contract since the issue of breach of the subcontract would not arise until a jury determined that Navajo was at fault and refused to indemnify. It also objected to instructing on indemnity except for perhaps a brief explanation to the effect that indemnity is an obligation of one party to cover another party if something has gone wrong.

The court declined to instruct on breach of contract but believed something had to be said about indemnity. After taking the matter under submission, the court drafted its own instruction. The court explained: "The jury will not be making any factual findings based upon the indemnity clause, so there is no need to go into great detail about the indemnity clause. Nevertheless, the jury has heard about its existence, and hence I am planning on using the following (I shall consider minor tweaks): [¶] [DeSilva Gates] contends that [Navajo] is obligated under the terms of their subcontract agreement to indemnify DeSilva Gates for any damages that DeSilva Gates is legally obligated to pay to Roberto Davila. [¶] In general, indemnity refers to the obligation resting on one party to make good a loss or damage another party has incurred. [¶] You should not consider the indemnity agreement in answering the questions on the special verdict form. Information about the indemnity agreement was given to you to explain [Navajo's] participation in this trial."

The instructions ultimately read to the jury included instructions on comparative fault, DeSilva Gates's admission of liability for Derby's negligence, calculation of Davila's damages, the court's indemnity instruction, and instructions not to consider

workers compensation benefits or insurance.[3] The jury was not instructed on any issue that needed to be decided regarding the subcontract or the indemnity agreement.

9. Closing Arguments

Each party gave closing argument through counsel. As discussed at greater length *post*, Davila and Navajo referred again to the indemnity agreement. Davila's attorney began his closing argument by attacking DeSilva Gates and Navajo for quarreling over who had to pay, contending they were fighting about DeSilva Gates's position that it should not have to pay because Navajo "signed a contract promising to pay damages for anything DeSilva Gates may have caused." Navajo's attorney asserted the following: "Let me begin by saying that Navajo needs to be vindicated. They need to be vindicated and vindication is absolute. It's not compromised. [¶] Right now [DeSilva Gates' attorney] threw out some percentages: Oh well, they have admitted liability. You can place 50 percent on each. [¶] I submit to you do not *fall into that trap*, because that's exactly what DeSilva Gates wants you to do. *They want you even to find one percent, two percent, three percent on Navajo*. That's what they want you to do." (Italics added.) Counsel further argued that DeSilva Gates "already admitted that [Derby] was negligent," but it "refuses to take 100 percent responsibility for its sole negligence in causing the accident, and not only the accident, but plaintiff's injuries."

10. Jury's Verdict and Court's Judgment

By a special verdict form, the jury calculated Davila's damages as totaling $4,244,122, found that neither Davila nor Navajo was negligent, and allocated 100 percent responsibility to "James Derby/DeSilva Gates."

The court entered judgment on the special verdict, and ruled that DeSilva Gates recover nothing from Navajo on its cross-complaint for indemnity.

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[3] The court initially omitted its indemnity instruction but, after a sidebar, read it as the final instruction before closing argument.

E. DeSilva Gates's New Trial Motion

DeSilva Gates filed a motion for a new trial, arguing (among other things) that the damages were excessive, and that the repeated references to the indemnity provision were irrelevant to the jury issues and prejudicial because they led the jury to assign all fault to DeSilva Gates despite the evidence that Navajo was at least partly at fault.

The court denied the motion. As to the indemnity references, the court stated: "There is no reason to think that the verdict was influenced by the dispute between the defendants over which would be liable for the judgment. There is nothing about [DeSilva Gates] and Navajo that would make the jury more sympathetic toward one over the other, other than their conduct as evidenced by testimony at trial."

F. Davila's Memorandum of Costs

Davila filed a cost memorandum seeking $187,819.08, including $105,812.32 in prejudgment interest and $51,164.75 in expert witness fees pursuant to section 998.

DeSilva Gates filed a motion to tax these costs, arguing that (1) the section 998 offer was invalid because it was filed jointly by Davila and his wife, with no allocation between Davila's personal injury claim and his wife's loss of consortium claim; and (2) expert witness fees for three doctors were improper because they were non-retained experts.

The court permitted recovery of nearly all of Davila's costs, awarding him $165,578.05. Its order did not explicitly address DeSilva Gates's argument concerning the expert witness fees.

G. DeSilva Gates's Appeal

DeSilva Gates filed a notice of appeal from the judgment and the order denying its motion to tax costs.

## II. DISCUSSION

A. References to Indemnification

DeSilva Gates contends the arguments, evidence, and instructions about indemnification – and particularly those statements indicating the jury would be saddling Navajo with having to pay all of Davila's damages if it found Navajo at fault by as little

as one percent – denied DeSilva Gates a fair trial by prompting the jury to assign DeSilva Gates all fault despite strong evidence that Navajo was at fault as well. We agree that the references to the terms of the indemnity provision were irrelevant, the cumulative impact of the improper references was prejudicial, the court's instruction did not cure the prejudice, and there is a reasonable probability that without these references (and the trial court's failure to avoid them or adequately address them), the jury would have decided the matter more favorably to DeSilva Gates.

1. The Indemnity Clause Was Irrelevant

" 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any *disputed fact that is of consequence* to the determination of the action." (Evid. Code, § 210. Italics added.) Where, as here, it is decided that the jury will determine specified issues and the court will determine others, the relevancy of evidence presented to the jury depends on what the *jury* is to determine. (E.g., *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1285–1286 (*Heppler*).)

Here, according to the jury instructions and the verdict form, the jury was to determine the amount of Davila's damages and the proportional fault of Davila, DeSilva Gates, and Navajo. Neither the jury instructions nor the verdict form assigned the jury any other task.

The terms of the subcontract between DeSilva Gates, and particularly the indemnity provision, had no "tendency in reason to prove or disprove" any disputed fact regarding the amount of damages Davila incurred or the parties' comparative fault. (Evid. Code, § 210.) While the subcontract and its indemnity provision were key parts of DeSilva Gates's cross-complaint and therefore germane to the *case*, they were not germane to the proceedings before the *jury*. (See *Heppler, supra,* 73 Cal.App.4th at pp. 1285-1286 [where jury was convened to decide disputed factual issues of negligence, causation and damages, the court properly rejected proposed instructions on breach of the indemnity contract and properly excluded evidence regarding the scope of the indemnity provisions, which concerned issues of law].)

Navajo argues that juries are often exposed to contract terms, including terms of indemnification agreements, citing *Pacific Gas & Electric Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33. Navajo's proposition is true where, as in *Pacific Gas & Electric*, the contract terms are *at issue*. (*Ibid.* [in contractual indemnity action arising out of a construction site accident, trial court should have admitted extrinsic evidence as to the meaning of an indemnity provision, where the controversy centered on the meaning of that indemnity provision].) But here, Navajo admits in its respondent's brief that "there was never a dispute among the parties as to the meaning and effect of the indemnity clause."

Certainly there *could* be factual issues for a jury with respect to a subcontract and its indemnity provision, but Navajo has never identified any in this case. Although Navajo denied the allegations of DeSilva Gates's cross-complaint, it did not specify for the court a single issue of disputed fact that the jury would have to decide, despite the court's repeated queries. To the contrary, there were no disputed issues as to the existence and meaning of the subcontract (including the indemnity provision), the issue of breach was not ripe because no liability had been incurred (*Valley Crest Landscape Development, Inc. v. Mission Pools of Escondido, Inc.* (2015) 238 Cal.App.4th 468, 481), and issues of causation and damages could be decided without mention of the indemnity provision. Even in their appellate briefs, Navajo and Davila fail to show that the indemnity provision had anything to do with the issues the jury was to decide.[4]

Navajo and Davila suggest that a discussion of the subcontract and indemnity agreement were necessary to apprise the jury why the parties were in the lawsuit and to

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[4] Although Navajo's attorney asked Kloos some questions about whether a subcontractor had successfully negotiated changes to the indemnity clause, no evidence was presented regarding the negotiation of *Navajo's* subcontract, Navajo did not call other witnesses to testify about unconscionability or make an offer of proof in that regard, and the jury instructions and verdict form did not mention adhesion contracts or unconscionability. Navajo's answer to DeSilva Gates's cross-complaint did not even contain an affirmative defense of unconscionability. Indeed, Navajo's brief in this appeal describes the indemnity agreement as a "perfectly legal and quite common arms-length agreement between two businesses."

give context for the dispute. Not so. The basic background facts that might help the jury go about its task, including why Navajo was in the proceeding and had a motive for minimizing Davila's damages, were communicated by simply telling the jury that DeSilva Gates admitted some liability but claimed that Navajo and Davila are also at fault. No reference to an indemnity agreement was needed.

Moreover, references to the indemnity clause and its shifting of all damages to Navajo were not just irrelevant, but obviously prejudicial, akin to the prejudice that precludes references to insurance policies and indemnity agreements in other contexts. As is well-recognized, evidence that a defendant is insured may cause the jury, when deciding issues of fault or damages, to consider improperly that another entity will ultimately bear the loss. (E.g., *McLaughlin v. National Union Fire Ins. Co.* (1994) 23 Cal.App.4th 1132, 1152; *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1122; Evid. Code, § 1155; *Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 469 [" 'The evidence [that a person was insured against the loss] 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.' "] (Italics added).) The same rule applies where it is an indemnity agreement, rather than an insurance policy, that would cause someone besides the defendant to pay the awarded damages. (*Larez v. Holcomb* (9th Cir. 1994) 16 F.3d 1513, 1519 (*Larez*); *Robins Engineering, Inc. v. Cockrell* (Ala. 1977) 354 So.2d 1, 2.)

Although these cases and Evidence Code section 1155 address prejudice to a defendant from the jury learning that a nonparty or indemnitor would bear its loss, the essential point applies here: rather than fixing the jury's attention on the injury suffered by the plaintiff and the actions of several parties that may have led to that injury, references to the indemnity agreement shifting the loss from DeSilva Gates to Navajo subjected the jury "to a flurry of largely irrelevant assertions and counter-assertions concerning who may or may not be financially harmed by a particular award."

(*Larez, supra,* 16 F.3d at p. 1519.) As we discuss next – and as Davila's counsel ultimately acknowledged in closing argument – that is precisely what happened here.

2. References to the Indemnity Clause Were Prejudicial

The court and the attorneys for Davila and Navajo referenced the indemnity agreement throughout the proceedings. Whether or not the following missteps were of great moment individually, their cumulative effect deprived DeSilva Gates of a fair trial.

*a. Improper Statement of the Case*

In its statement of the case, the court apprised prospective jurors that DeSilva Gates admitted Derby was negligent and caused Davila's injuries, and that DeSilva Gates contended that Davila and Navajo were also negligent in causing Davila's injuries. As discussed *ante*, that was sufficient to inform the jury of the parties' contentions and why those parties were present in the lawsuit. (See Alameda County Superior Court Local Rules, rule 3.35(h) [counsel shall meet and confer to agree upon "a brief, non-argumentative summary of the factual nature of the case and a brief statement regarding any alleged injuries and damages"].)

However, the statement of the case – prepared by Davila and Navajo and accepted by the trial court – unnecessarily went further, to also inform the jury panel that "[DeSilva Gates] allege[d] that [Navajo] is obligated under the terms of its *subcontract* to reimburse/*indemnify* [DeSilva Gates] for *all* damages for which it is liable to the plaintiffs." (Italics added.) As a result, the case statement – which the court read twice to prospective jurors over DeSilva Gates's objection – repeatedly suggested that a subcontract and its indemnification provision were relevant to the jury's task, and that DeSilva Gates was trying to shift all of its liability to Navajo.

This aspect of Davila's and Navajo's statement of the case was an improper attempt to put before the jury irrelevant information and indoctrinate the panel about the legal and financial impact of its verdict. (Cf. Code Civ. Proc., § 222.5, subd. (b)(3) [an improper voir dire question is one that, at its dominant purpose, attempts to precondition the prospective jurors to a particular result, indoctrinate the jury, or question the prospective jurors concerning the pleadings or the applicable law].) Since this was not

part of the factual nature of the case the jury needed to know, and in light of the potential prejudice it posed, the court erred in adopting and reading the portion of the case statement discussing indemnity.

*b. Continuing References to Indemnity*

The notion of indemnity was thereafter reinforced by Davila's counsel, when he told the jury in opening statement that "DeSilva Gates wants Navajo to pay any damages that DeSilva Gates has to pay to Mr. Davila." This emphasized not the issue of comparative negligence – which was before the jury – but the concept of indemnification, which was not. And the indemnification concept was further impressed upon jurors when the court, after a juror sought clarification about the role of Navajo and the other parties in the case, read the case statement a third time (over DeSilva Gates's objection), informing jurors that Navajo was in the trial because DeSilva Gates alleged it had to indemnify DeSilva Gates for *all* damages attributed to DeSilva Gates.

The ostensible importance of the irrelevant indemnity provision, and the evocative nature of the irrelevant damage-shifting argument, was not lost on the jury. Another juror submitted a question, asking the court to define "admemnity" [sic]. This question lingered until the last jury instruction before closing arguments, and even Davila's attorney agreed that an instruction on indemnity was needed because the third reading of the case statement had not ameliorated the jury's confusion.

*c. Improper Examination by Navajo's Attorney*

In addition to parading the concept of indemnity before the jury, Navajo's counsel made sure that the jury learned exactly what the indemnity provision *said*, even though the trial judge had indicated that the "all or nothing part" of the indemnification provision was irrelevant. Navajo's counsel asked DeSilva Gates's vice president, "So, was it your understanding that the agreement was that if Navajo was *one percent at fault* they had to pay *everything*?" (Italics added.) The court sustained DeSilva Gates's objection and the question went unanswered, but Navajo's counsel nonetheless succeeded in informing the jury that the agreement between DeSilva Gates and Navajo was that Navajo would have to pay "everything" if Navajo was as little as "*one percent* at fault." (Italics added.)

Although the judge ruled that the "testimony is stricken," the court did not instruct the jury contemporaneously that it must disregard the reference to the meaning of the indemnification agreement, which was not at issue in the case and not a matter for the jury's consideration. The court should have done so.[5]

*d. Improper References in Closing Argument*

By the close of evidence, the jury had been told repeatedly by the court's statement of the case, the opening statements, and questions from Navajo's counsel that DeSilva Gates admitted liability but that, under an indemnification agreement in a subcontract the jury never saw and was never in evidence for purposes of the jury issues, DeSilva Gates would end up paying nothing, and Navajo would end up paying everything, if the jury determined that Navajo was as little as one percent at fault. During closing argument, Davila's and Navajo's attorneys brought that message home.

Davila's attorney and Navajo's attorney both chose to start their closing arguments with a discussion of indemnity rather than the issues the jury would decide. Davila's attorney told the jury: ". . . I wanted to make sure that one thing that we talked about a lot in jury selection should now be abundantly clear to you, and that is: Why is this case here? Why didn't it get resolved? Why did we have to go through a four-week trial? It should be really clear to you now that Mr. Davila is caught in the middle of these two big companies who are slugging it out over who should pay the debt that they owe Mr. Davila. . . . DeSilva Gates says, yes, we hit him and we hurt him, but *we shouldn't have*

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[5] Later, the jury received a standard instruction that it must decide the facts based only on the evidence, statements and questions by attorneys do not constitute evidence, the jury "should not think that something is true just because an attorney's question suggested that it was true," and where an objection to a question was sustained, the jury should ignore the question and not guess why it was sustained or what the witness might have said in answer. In light of the circumstances of this particular case, however, that instruction was no substitute for a contemporaneous instruction to disregard all information concerning the terms of the irrelevant indemnification agreement. (See *City of Cleveland v. Peter Kiewit Sons' Co.* (6th Cir. 1980) 624 F.2d 749, 758 (*City of Cleveland*) [counsel's repeated questioning of witnesses about the fact that defendant was insured against liability denied the defendant a fair trial "even though [the judge] sustained the [defendant's] objections and admonished the jury"].)

*to pay because his employer signed a contract promising to pay damages for anything DeSilva Gates may have caused. It's called indemnity.* You pay for our mistakes or you don't get a job with us. [¶] Now, Navajo, on the other hand, says, no, no, we don't pay if you, DeSilva Gates, are *solely* responsible for causing injury to someone. *That is what they are fighting about.*" (Italics added.)

Counsel's representations to the jury were false and not based on the evidence. In regard to the issues that the jury was to decide – Davila's damages and the relative fault of the parties – DeSilva Gates was *not* relying on the indemnity provision, but on the fact that Navajo shared in the responsibility for Davila's injuries because they occurred when he was riding on the bumper, next to his foreperson, in violation of Navajo's safety policy. Neither the subcontract nor the terms of the indemnity provision were in evidence for purposes of the jury, since the irrelevant questions from Navajo's attorney were not answered. In short, counsel's closing argument was improper. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 796 (*Cassim*) [arguing facts not in evidence constitutes misconduct]; see also ABA Model Rules of Professional Conduct, rule 3.4(e) [counsel shall not "in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence"]; *State Compensation Insurance Fund v. WPS Inc.* (1999) 70 Cal.App.4th 644, 656 [California courts may look to ABA rules for guidance where there is no California rule on point].)

Davila's attorney continued: "Like you, I had to sit there as a silent observer as the lawyers for these two companies bicker over – and argue over who should be responsible. Remember that witness that we had to hear from two times; *what does indemnity mean*, was it negotiable? All of that stuff. Totally irrelevant, but they decided it was important enough to make you spend your time listening to it. [¶] And you are going to see you don't even have to make any decision about *that indemnity agreement.* It's not something that you even have to decide, but we had to sit here and listen to that because *that's what this case is about, from their perspective, who should have to pay.*" Not only did counsel miscast DeSilva Gates's position, his continued mention of the indemnity agreement attributed significance to it, even while he purported to downplay

its significance. (See *People v. Wrest* (1992) 3 Cal.4th 1088, 1107 ["Although the prosecutor's comments here were strategically phrased in terms of what he was *not* arguing, they embody the use of a rhetorical device— paraleipsis—suggesting exactly the opposite."])

Navajo's attorney reinforced the theme that DeSilva Gates was trying to shift responsibility to Navajo under the indemnity agreement: "Right now [DeSilva Gates's attorney] threw out some percentages: Oh well, they have admitted liability. You can place 50 percent on each. [¶] I submit to you *do not fall into that trap*, because that's exactly what DeSilva Gates wants you to do. *They want you even to find one percent, two percent, three percent on Navajo*. That's what they want you to do." (Italics added.) Given all the prior references to the indemnity agreement, counsel's comment was a clear reminder of that agreement and its shifting of all responsibility from DeSilva Gates to Navajo if Navajo was found just "one percent" liable, and counsel urged the jury not to fall into that "trap." Given his assertions throughout the case, it is difficult to see how counsel's comments were anything other than a strategic decision to influence the jury's fault allocation based on improper considerations.[6]

"[M]isconduct by counsel in closing argument in civil cases can constitute prejudicial error entitling the aggrieved party to reversal of the judgment and a new trial." (*Cassim, supra,* 33 Cal.4th at p. 802.) Although counsel is given wide latitude to argue permissible inferences from the evidence, it is misconduct for counsel to argue matters that are irrelevant or *not* in evidence. (*Id.* at pp. 795–796.) Counsel is also forbidden from "pandering to the prejudice, passion or sympathy of the jury," including making arguments "based on irrelevant financial aspects of the case." (*Martinez v. Department of Transportation* (2015) 238 Cal.App.4th 559, 566 (*Martinez*).) More specifically,

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[6] DeSilva Gates did not object to counsel's comments in closing argument or request an admonition, but it would have been futile to do so since the court had already overruled DeSilva Gates's objections to the statement of the case, refused to admonish Navajo's attorney after his question to Kloos, and instructed the jury that information concerning the indemnity agreement was given to the jury to explain Navajo's participation in the trial. (See *People v. Garcia* (2014) 229 Cal.App.4th 302, 312, fn. 2).

closing arguments about who will ultimately bear the loss for a plaintiff's damages due to insurance or indemnity agreements are improper because they distract the jury from its task of resolving the factual issues. (*Larez*, *supra*, 16 F.3d at pp. 1520–1521 [allowing jury to hear in closing argument that city might reimburse defendant for punitive damages award "could only have distracted the jury from its task of arriving at a punitive award appropriate to the wrongdoing of" the defendant].)

Here, the prejudice in emphasizing to the jury the content and meaning of the indemnity provision was that it could affect the jury's determinations, including its allocation of fault: the jury knew that, if it attributed so much as one percent of responsibility to Navajo, Navajo would end up having to pay all of the damages, while DeSilva Gates, who acknowledged liability, would not have to pay anything. Concerns of fairness, resentment towards DeSilva Gates, or sympathy to Navajo might lead the jury to attribute 100 percent to DeSilva Gates, rather than one percent or more to Navajo. In fact, the only way to make sure that DeSilva Gates, who admitted that its employee was negligent, would have to pay anything, would be for the jury to allocate all 100 percent of the responsibility to DeSilva Gates. (And indeed, the jury *did* allocate all 100 percent responsibility to DeSilva Gates.)

3. The Court's Indemnity Instruction Did Not Cure the Prejudice

Before closing arguments, the court had instructed the jury on indemnity as follows: "[DeSilva Gates] contends that [Navajo] is obligated under the terms of their subcontract agreement to indemnify DeSilva Gates for any damages that DeSilva Gates is legally obligated to pay to Roberto Davila. [¶] In general, indemnity refers to the obligation resting on one party to make good a loss or damage another party has incurred. You should not consider the indemnity agreement in answering the questions on the special verdict form. Information about the indemnity agreement was given to you to explain [Navajo's] participation in this trial."

Although the trial court attempted in one sentence to focus the jury away from the repeated prejudicial references to the irrelevant indemnity provision – and we assume in

most instances that the jury follows the court's instructions – in this particular case the instruction was insufficiently clear to have any curative effect.

First, rather than instructing the jury not to consider the indemnity agreement or its terms in its deliberations, the court told the jury it "should not" consider the indemnity agreement in answering the verdict form questions, but that "[i]nformation about the indemnity agreement was given to you to explain [Navajo's] participation in this trial." The latter sentence actually reinforced the importance of the indemnity provision, thereby diluting the curative effect of the prior sentence. Thus, the limitation on the jury's consideration of the indemnity agreement was eviscerated by reminding the jury that the indemnity agreement – which would attribute all damages to Navajo if Navajo was found one percent responsible – was the very reason for Navajo being in court.

Second, the court's instruction was insufficient in light of the significant number of times the jury was improperly informed of the indemnity provision and, particularly, the shifting of all damages from DeSilva Gates to Navajo if the jury found Navajo as little as one percent at fault. (See, e.g., *Squires v. Riffe* (1931) 211 Cal. 370, 373–374 [where counsel's question to witness was ostensibly designed to elicit evidence that the defendant had indemnity insurance, trial court's admonishment to jury to disregard the question and the witness's answer was insufficient to overcome the prejudice]; *Mangino v. Bonslett* (1930) 109 Cal.App. 205, 212 [trial court's repeated admonitions to jury to disregard counsel's remarks in closing that an insurance company seeking subrogation was behind plaintiff's personal injury case were insufficient to overcome the prejudice caused by the remarks, since "the remarks were of such a character, and the purpose of their injection into the case so apparent, that they could not have been completely obliterated from the minds of the jury by an admonition the court gave or could have given].) " '[T]he bench and bar are both aware that cautionary instructions are effective only up to a certain point. There must be a line drawn in any trial where, after repeated exposure of a jury to prejudicial information, . . . cautionary instructions will have little, if any, effect in eliminating the prejudicial harm.' " (*City of Cleveland, supra*, 624 F.2d at

p. 759 [counsel's repeated communication to jury that defendant was insured against liability denied fair trial despite curative instructions and admonishments].)

Third, the court's instruction was not the final word the jury heard about the indemnity agreement. Notwithstanding the instruction, Davila's counsel and Navajo's counsel each emphasized in closing argument – unabated – that DeSilva Gates was trying to make Navajo responsible for all of the damages DeSilva Gates caused by getting the jury to allocate to Navajo as little as one percent of the fault for Davila's injuries. Since the court's instruction did not even curb the lawyers from factoring the indemnity agreement into the issues before the jury, the record gives us grave concern that the instruction was insufficient to dissuade jurors from doing so either. (See *Martinez, supra*, 238 Cal.App.4th at p. 569 ["By simply ignoring the trial judge's rulings, [counsel] made it inevitable that the jury would conclude it didn't have to pay attention to the trial judge either."].)

Finally, far from curing the prejudice of earlier references to the indemnity agreement, the instruction's reiteration of the agreement's shifting of "all damages" to Navajo erroneously reinjected irrelevant and prejudicial information into the case.

4. Reasonable Probability of More Favorable Outcome for DeSilva Gates

Notwithstanding all of our discussion to this point, we do not reverse judgments entered after a jury verdict lightly. To the contrary, this court "cannot reverse a judgment based on instructional error, evidentiary error, or procedural error unless, based on 'an examination of the entire cause, including the evidence,' [it is] 'of the opinion that the error complained of has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13.)" (*Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163, 171, fn. 4 (*Cuevas*).) "Under this standard, a trial court's errors require reversal if it is reasonably probable that they affected the verdict." (*Ibid.*) Accordingly, we will reverse if there is "merely a *reasonable chance*, more than an *abstract possibility*" that the verdict was affected. (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)

It is reasonably probable that the errors of the court and the statements by Navajo's and Davila's counsel affected the verdict, by leading the jury to allocate all

negligence and responsibility to DeSilva Gates so that Navajo would not have to bear the burden of all of Davila's damages and DeSilva Gates would not avoid paying for its admitted liability. As we discussed *ante*, there was evidence from which a jury could reasonably conclude that Navajo and Davila *were* negligent and at least partially responsible: Navajo's safety policy prohibited riding on the back bumper, to protect an employee from a rear-end collision; it was the project foreman's job to enforce this rule; the project foreman did not enforce it; and if Davila had not been riding on the bumper but in the cab, where a non-injured driver was, he too would not have been seriously injured. A reasonable inference from the record is that the jury may well have decided nonetheless to ascribe all negligence and responsibility to DeSilva Gates, not because it rejected DeSilva Gates's evidence, but because the jury thought it unfair for DeSilva Gates to escape all damages, and for Navajo to bear all the damages, merely because Navajo was as little as one percent responsible (due to its own negligence, the negligence of the foreperson, or the negligence of Davila).

Davila and Navajo argue that ample evidence supported the jury's finding that Davila and Navajo were not at fault. In particular, Navajo urges that Derby was impeached as to his description of his conduct and the accident, and testimony from expert witnesses and independent percipient witnesses supported the finding that neither Davila nor Navajo was negligent. Indeed, Davila argues as if DeSilva Gates is challenging the jury's allocation of fault for lack of substantial evidence. The question presented by this appeal, however, is not whether there is substantial evidence to support the jury's findings, but whether it is reasonably probable that, in the absence of error and the prejudicial references before the jury, a result more favorable to DeSilva Gates would have been obtained. (*Cuevas, supra,* 11 Cal.App.5th at p. 171, fn. 4; *Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1161.) Because there is that reasonable probability, we must reverse the judgment.

Furthermore, there is a reasonable probability that the repeated references to the indemnity agreement and its terms not only led the jury to allocate all negligence and responsibility to DeSilva Gates, but also affected the jury's calculation of the damages it

was awarding against DeSilva Gates. The judgment will therefore be reversed in its entirety, vacating the jury's findings on all issues. This relief is consistent with Navajo's position at oral argument, when it was asked what remedy would be appropriate if we found the references to be prejudicial. A case cited by DeSilva Gates at oral argument (*Schelbauer v. Butler Mfg. Co.* (1984) 35 Cal.3d 442) is distinguishable, because it dealt with the scope of a trial court's order for a new trial in light of the trial court's findings; here, the question is the scope of remand where the jury was tainted by prejudicial references to an irrelevant indemnity agreement.

B. Other Issues

Because we reverse the judgment, we need not and do not decide whether the trial court erred in denying DeSilva Gates's motion for a new trial, or whether the trial court erred in its ruling on DeSilva Gates's motion to tax costs.

## III. DISPOSITION

The judgment is reversed, and the matter is remanded for further proceedings not inconsistent with this opinion. Respondents shall bear appellants' costs on appeal.

NEEDHAM, J.

We concur.

SIMONS, ACTING P.J.

BRUINIERS, J.

(A149631)