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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

BETTIE MOSLEY, Individually and as Successor in Interest, etc. et al., Plaintiffs and Respondents, v. PACIFICA BAKERSFIELD, LP, et al., Defendants and Appellants.	F084699 (Super. Ct. No. BCV-19-103078) **OPINION**
BETTIE MOSELY, Individually and as Successor in Interest, etc. et al., Plaintiffs and Appellants, v. PACIFICA COMPANIES, LP, Defendant and Respondent.	F085726

APPEAL from a judgment of the Superior Court of Kern County. Bernard C. Barmann, Jr., Judge.

Manning & Kass Ellrod, Ramirez, Trester, Louis W. Pappas, Robert E. Murphy, Dane C. Cummaro, and Steven J. Renick; Greines, Martin, Stein & Richland, Gary J. Wax, and Tina Kuang for Defendants, Appellants, and Respondents Pacifica Bakersfield LP, Pacifica Senior Living Management LLC, and Pacifica Companies LLC.

Law Offices of Victor L. George, Victor L. George, and Wayne C. Smith; Esner, Change, Boyer & Murphy, Stuart B. Esner, and Kevin K. Nguyen; Angarella Law and Steven V. Angarella, for Plaintiffs, Respondents, and Appellants Bettie Mosley, Robert L. Mosley, Robert Mosley, Jr., and Camille Mosley-Moran.

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An 81-year-old man died after sustaining injuries while residing at Pacifica Senior Living Bakersfield. His family brought a wrongful death and elder abuse action against the two Pacifica entities licensed to operate the senior care facility. After a multiweek trial, the jury awarded $149,000 in economic damages, $8 million in noneconomic damages, and $15 million in punitive damages. After posttrial motions reduced the noneconomic damages to $4.25 million, the Pacifica entities appealed, contending the prejudicial misconduct of plaintiffs' attorneys deprived them of a fair trial. As explained below, the Pacifica entities have not demonstrated reversible error entitling them to a new trial.

As an alternative to a new trial, the Pacifica entities contend the punitive damages award should be vacated or reduced because it is unsupported by the evidence and is excessive under state law and the Due Process Clause of the Fourteenth Amendment. In accordance with established precedent, we conclude the Pacifica entities' inadequate discovery response estops them from challenging the sufficiency of the evidence supporting the award of punitive damages. We also conclude they have failed to demonstrate the punitive damages are excessive under either state law or constitutional standards.

In a consolidated matter, plaintiffs appealed a posttrial order denying their motion to tax just over $28,000 in costs claimed by a third Pacifica entity dismissed before the jury's deliberations began. The dismissed codefendant qualifies as a "prevailing party" under Code of Civil Procedure[1] section 1032, subdivision (a)(4). Therefore, section 1032, subdivision (b) entitles it to recover costs as a matter of right. Furthermore, based on the plain meaning of the current version of section 1032, we conclude the so-called unity of interest exception does not deprive the dismissed codefendant of its prevailing party status or otherwise bar it from recovering costs. Plaintiffs also present the alternate arguments that the dismissed codefendant failed to establish (1) it actually incurred the costs claimed, (2) the costs were reasonably necessary for its conduct of the litigation, and (3) the costs were reasonable in amount. (See § 1033.5, subd. (c)(1)–(3).) We uphold the trial court's implied finding that plaintiffs forfeited these arguments, which were raised for the first time in the reply brief plaintiffs filed in that court.

We therefore affirm the judgment and the order denying the motion to tax costs.

FACTS

Parties

The plaintiffs in this elder abuse and wrongful death suit are Bettie Mosley, individually and as successor in interest to her deceased husband, Robert L. Mosley (Mosley); their son, Robert Mosley, Jr.; and their daughter, Camille Mosley-Moran. Bettie, Robert, Jr. and Camille are referred to collectively as "plaintiffs."

The named defendants are (1) Pacifica Bakersfield LP, a California limited partnership, (2) Pacifica Senior Living Management LLC, a limited liability company, and (3) Pacifica Companies LLC, a California limited liability company. Pacifica Companies LLC was dismissed with prejudice before the case went to the jury.

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1 Undesignated statutory references are to the Code of Civil Procedure.

The named defendants are part of a family-owned group of entities based in San Diego and referred to as the Pacifica Companies. The group's ventures include owning and operating hotels, senior housing, and shopping centers. Ash Israni started the business in the 1970's. Pacifica Companies' website lists him as the chairman and founding principal. Some of their ventures are outside the United States. For instance, Rocky Israni is the managing director of India Investments and he lives in India and works on projects there.

The Pacifica entities run 34 senior living facilities in California, and they own senior housing facilities in 12 other states, according to Adam Bandel, the managing director of Pacifica Senior Living Management LLC. Bandel testified he was "aware of several LP's and LLC's that have been formed when we acquire senior housing assets and/or operate them."[2]

"Pacifica Senior Living Management LLC" is the name under which Pacifica Senior Living LLC is registered to transact business in California. Bandel testified the LLC is "our operating arm for all our senior housing communities." He also described it as the corporate operating company that provides basic administrative management services including "nurses, clinical support, marketing, regional ops, HR, [and] accounting" to the facilities.

Pacifica Senior Living Management LLC has 10 regional directors who support approximately 75 senior living communities across the country. The regional directors are overseen by Carl Knepler, the senior vice president of operations. Knepler reports to Bandel, the managing director. Bandel works exclusively in the senior housing business for Pacifica Senior Living Management LLC. Bandel's boss is Deepak Israni. Bandel stated that Deepak Israni "oversees on partner level our senior housing and apartment

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[2] During the trial, plaintiffs spent much time trying to obtain testimony about how the various entities were related to one another, who was employed by which entity, and which entities were responsible for Mosley's care.

business." When asked who were the equity principals of Pacifica Senior Living Management LLC, Bandel answered: "The Israni family."

Deepak Israni, Bandel, and Knepler work in an office located in San Diego. The regional and national support personnel, like Bandel and Knepler, are paid by Pacifica Senior Living Management LLC.

Pacifica Senior Living Management LLC generates its income by collecting management fees in exchange for its services. According to Bandel, its "income stream for management goes up and down depending on how well the [facilities] perform, how highly occupied they are, what happens with rent levels." When asked if Pacifica Senior Living Management LLC had any assets, Bandel answered: "No. No real assets. The assets that show on the tax return … are accounts receivable." The Schedule L balance sheet included in the LLC's 2020 Form 528 reported total assets of $15,337,581, including approximately $2.8 million in cash, $7.0 million in accounts receivable (less a bad debt allowance), and $5.4 million in "other assets." The balance sheet's lines for inventories and land were blank. The statement or schedule identifying the "other assets" was not included in the documents produced by Pacifica Senior Living Management LLC. The LLC's 2020 Form 568 reported the members' capital accounts as $14,587,763 at year end, an increase of $980,661 over the previous year.

The Bakersfield Facility

Bandel explained the relationship between Pacifica Senior Living Management LLC and Pacifica Bakersfield LP by testifying that "Pacifica Bakersfield LP manages the day-to-day operations at the Bakersfield facility" and Pacifica Senior Living Management LLC provides the support—"HR, accounting, regional ops, regional marketing, clinical"—that the facility needs.[3] The facility has two buildings—one for assisted senior

[3] Bandel also used the terms "buildings" and "communities" to describe senior living facilities.

living and another for memory care. The memory-care building serves residents with Alzheimer's disease or dementia and has a capacity of 40 residents. The buildings are separated by a grassy area and a walking path.

Bandel testified that Pacifica Bakersfield LP "is the tenant that operates the day-to-day" and the individuals who work in Bakersfield are paid by that entity. Pacifica Bakersfield LP does not own the buildings at the Bakersfield location. The facilities were sold in 2014 to a real estate investment trust located in Boston. Pacifica Bakersfield LP operates the facilities under a triple net lease with the owner.

Pacifica Senior Living Management LLC and Pacifica Bakersfield LP are on the licenses issued by California's Department of Social Services (DSS) for the two care facilities at the Bakersfield location. The facility's residence and care agreement with Mosley stated it was made by "Pacifica Senior Living, an Assisted Living Community we [*sic*] and Robert Mosley ('you' or 'Resident') and Bettie Mosley (Resident's 'Responsible Person', if any)." The agreement stated: "We own Pacifica Senior Living Bakersfield a licensed residential care facility for the elderly located at 3209/3115 Brookside Dr. … which provides residence, care and services to person 60 years of age and older." The agreement made no reference to Pacifica Bakersfield LP, but stated: "We have engaged Pacifica Senior Living Management LLC to manage the Community." The agreement identified the DSS as "[t]he appropriate licensing agency to contact regarding complaints," gave a Fresno address, and listed its telephone number. The agreement was signed on behalf of "PACIFICA SENIOR LIVING Bakersfield" by Cassondra Bradford, Executive Director, and by Bettie, as the responsible person.[4]

[4] Executive director is the title Pacifica gives to the person who acts as a facility's manager. Bradford also acted as regional director for Pacifica's senior living facilities located in Modesto, San Luis Obispo, Northridge, and Santa Clarita. She reported to senior vice president Knepler.

In their appellants' opening brief, defendants described their relationship and the Bakersfield facility as follows: "Pacifica Senior Living Bakersfield/Pacifica Bakersfield LP is a licensed residential care facility" with two separate facilities providing assisted care and memory care. The brief stated that "Pacifica Senior Living Management LLC … manages both facilities" and referred to the separate legal entities collectively as "Pacifica" except when necessary to distinguish between them. This opinion adopts the same convention.

Mosley

Mosley was 73 years old when he retired in 2010. In 2013, Bettie noticed he was becoming forgetful. When Mosley's forgetfulness increased, Bettie took him to a neurologist and, in 2015, he was diagnosed as having dementia with Parkinson's disease. Although the medication prescribed initially helped, he reached the point where he had fallen a few times and it became difficult for Bettie to care for him. Bettie could not watch him constantly and sometimes Mosley would leave the house on his own.

In early 2018, Bettie, Camille, and Robert, Jr. began discussing whether it would be safer if Mosley was in a facility. One of the facilities they toured was Pacifica Senior Living Bakersfield. Bettie liked the facility because it had activities and Mosley was very active, even with dementia. Also, it was clean, close to her house, and she thought it was a safe place.

In April 2018, Bettie and executive director Bradford signed the residence and care agreement and, at the end of the month, Mosley was admitted to the Bakersfield facility. He lived in unit A-104 of the memory care building.[5] The total monthly fee charged Mosley under the agreement was $4,400, which consisted of a $3,000 fee for residential services and a $1,400 care fee. Mosley also was charged a one-time "Community Fee" of $3,700 to cover costs incurred by Pacifica in reviewing and

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[5] The license number for this facility is 157204131.

processing the application, the resident's physician's report, and other materials, performing a preadmission appraisal, developing the resident's care plan, and admitting the resident to the facility. To pay the fees, Bettie obtained a bank loan by refinancing their home.

The agreement contained a section addressing emergency response and fire protection, which stated in part:

> "In accordance with California law, there is on the premises and on duty at all times at least one staff member who is trained in CPR (cardiopulmonary resuscitation) and first aid. Our staff are trained to call 911 if an injury or other circumstance results in an imminent threat to a resident's health including, but not limited to, an apparent life-threatening medical crisis. Staff are not required to perform CPR, but in accordance with California law, we cannot prevent a staff member who is trained in CPR from administering it."

Irma Luna, the resident care director of the memory care facility and a licensed vocational nurse since 1991, completed a preplacement appraisal form with Bettie. The form reported that Mosley wore glasses, walked with a cane for support and balance, was occasionally incontinent, was unable to verbalize his needs, his speech was not always understood, and, although alert to familiar faces, was confused, disoriented and forgetful. It also classified him as nonambulatory, which meant he did not demonstrate the mental and physical ability to leave the building without assistance and without the use of a medical device—in his case, a cane. Luna checked the "Yes" box before a preprinted line stating, "Needs special observation/night supervision (due to confusion, forgetfulness, wandering)" and wrote the word "safety" in the space immediately after that text.

Luna also prepared an admission entry for Mosley's charting that described him as pleasant and able to follow simple commands. Luna's follow-up charting entry from the next afternoon stated:

> "Alert, confused and disoriented, Respirations even and non-labored, Abdomen soft, non-distended, walking with his can[e] for support and balance, Appetite is very good, drinking liquids very well, requires

assistance with toileting, adjusting very well to new environment, all needs attended and met."

When Mosley moved into the facility, Bettie was told to give him a couple of weeks to get use to his new surroundings. Bettie went to see him before the two weeks expired, found him attending a church service, and sat beside him. She described him as fine, singing along with the others.

Executive director Bradford testified that Mosley was pleasant, that she said good morning or how are you doing but could not have a conversation with him because he mumbled, that she did not recall ever seeing him walk with a cane or walker, and that he walked a lot on his own.

Memory care residents are never allowed to leave their facility unassisted. To prevent residents from leaving—what Pacifica refers to as eloping and plaintiffs refer to as escaping—the doors throughout the facility were alarmed. To enter through the doors in front, a person had to enter a code to open the first door and get through the second door before the locks reset. The facility also had alarmed doors for two hallways leading to a fenced perimeter area and for doors in a hallway that only staff was supposed to use. If a resident reached the perimeter area, they could not go beyond the fenced area so long as the locks and latches in the perimeter fence's gates were working properly.

A factual issue disputed at trial was Pacifica's awareness that memory care residents had been able to leave the facility (i.e., elope or escape). Executive director Bradford answered, "Yes," when asked if Mosley was the first person to leave the memory care unit in her 18 years there. In contrast, Cathy Blackmon, the activities director at the Bakersfield facility from 2014 until she retired in 2020, testified there were five or six times that she was in the memory care unit and found residents in the alcove between the two sets of front doors. Blackmon also testified that there were two occasions when a memory care resident got out past the front doors, and she returned the

resident to the memory care building. When asked, Bradford testified that she was not aware of the incidents described in Blackmon's testimony.

Irma Langston is the resident services director for the assisted living unit. Langston testified she had been employed by Pacifica for about 15 years, reported to executive director Bradford, and, about once a month, would act as the manager on duty for both units. Langston testified that about half the time she was the manager on duty, she had seen residents go through the first set of doors but not outside through the second set of doors.

Michelle Stansbury, who worked for Pacifica as a personal care assistant for six months in 2018, testified that before Mosley's incident, a female resident left the facility through the front door and went outside, the alarm sounded, and two personal care assistants retrieved the resident.

Deanna Rivero worked as a personal care assistant for Pacifica for almost 12 years from January 2009 until December 2020. While Rivero was placed on light duty during her pregnancy, she was assigned to Hallway A where Mosley's room was located. Rivero testified that Mosley was a nice, active man who walked around a lot and would often test or push on hallway doors. She testified that Mosley would attempt to open the alarmed doors about 10 times a day, he seemed particularly fond of trying the front door, and he set off the front door alarm on many occasions. Rivero described Mosley as one of five or six residents who would frequently set off the front door alarm. Rivero and other personal care assistants discussed their concerns that Mosley and these other residents seemed to be trying to get out and might someday succeed. Rivero testified that these concerns about a resident eventually getting out were conveyed, more than a few times, to executive director Bradford and Luna during standup meetings for a shift switch. She also testified the concerns would be written up in the daily reports.

Rivero also testified that during the standup meetings where the personal care assistants expressed a concern for Mosley's safety, Luna said she would "let the rest of

the staff know, the other shift that would come in — let them know that Mr. Mosley is very active at the moment so keep an eye out on him."

July 22, 2018

On Sunday, July 22, 2018, Bettie went to the facility and attended church service with her husband, which was their usual routine. Bettie stayed at the facility until about 2:00 p.m. When she left, she told Mosley she would see him in the morning. At 3:00 p.m., personal care assistant Stansbury began her shift. Stansbury testified that at approximately 3:10 p.m. she helped Mosley shower, which took about 15 minutes, and then took him to the dining area for a snack. Stansbury then assisted two other residents of Hallway A with their showers before bringing them to the dining area. Stansbury did not recall seeing Mosley again when she brought the other two residents to that area.

Stansbury first noticed Mosley's absence when she began getting the residents seated for the 4:45 p.m. dinner, a process that began around 4:15 p.m. She thought Mosley was either in his room or wandering the hallways. Stansbury started looking for him and, after an initial search of about 10 minutes, got on her walkie-talkie and asked if anyone had seen Mosley. After learning no one had seen him, a general search of all hallways and rooms was begun. When Mosley was not found in the building, Stansbury went out the front door and checked inside of the fenced area. Another person checked outside the perimeter fence. When Mosley was not located, Stansbury reported it to the manager at the facility, but could not recall who that was. The staff expanded the search, with some getting into their cars and driving around the neighborhood looking for Mosley. The drivers did not locate Mosley, and Stansbury ended her search to go back to the dining area to watch the other residents.

Around 5:16 p.m., personal care assistant Rivero was in a resident's room in the back of the building, looked out a window, and saw through gaps in the perimeter fence what she thought was a human body lying on the ground. While leaving the building to investigate, Rivero told someone she might have seen Mosley. What Rivero saw was

Mosley lying in a dirt area behind the building about five feet from the perimeter fence. Rivero used her cellphone to alert the facility. Mosley was lying on his back with his legs pulled up, slacks pulled down below the knees, adult diapers exposed, one shoe off, and ants crawling on his body. Rivero also noticed very heavy sweating from the waist down and heavy perspiration on his head. The temperature was around 100 degrees.[6] When Rivero first saw Mosley, his eyes were closed, and she thought he was dead. She called his name and received a mumbled response.

Shortly after Rivero realized Mosley was alive, executive director Bradford, her husband, and Blackmon arrived. Rivero phoned someone for a wheelchair. Stansbury was called on her walkie-talkie and told that Mosley had been found outside and to quickly bring a wheelchair. Blackmon had a bottle of water, but Mosley was unable to take if from her. Blackmon placed the bottle to his mouth and tried to pour it in and then poured water over his head to try to cool him down. Bradford was trying to talk to Mosley, but he did not say anything. Bradford testified that she saw scrapes on both his knees and left elbow, but did not see anything on his forearms, hands or neck. When the wheelchair arrived, Bradford, her husband, and Blackmon lifted Mosley into the wheelchair. Mosley was "dead weight"—that is, he was unable to assist them in getting him into the wheelchair.

Once in the wheelchair, Mosley was taken to the building's front lobby and then to his room. Mosley was placed in a shower chair and Stansbury gave him a shower, which lasted about 15 to 20 minutes. After the shower, Mosley was dressed in a T-shirt and shorts and put in bed. Langston administered basic first aid, applying bandages to his knees and left elbow. Langston testified that she did not see any blistering at the time.

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[6] Plaintiffs' safety expert visited the site, collected data, and testified that, "generally, when it's 100 degrees out, the surface temperature on the dirt is up to 150 to 160 degrees or more." He also testified those temperatures were high enough to cause burn injuries if a person is in contact with it for enough time.

The charting entry prepared by Luna for that day refers to skin tears on Mosley's knees and elbow. After the bandaging was finished, Mosley was given a sandwich, fruit, and chips along with Gatorade and water.

When Mosley was found, Stansbury suggested calling 911, but Bradford decided not to call. Bradford, when asked if she had thought about calling 911, testified that, "[O]nce I found him to be stable, I didn't." Langston testified that after Mosley was bandaged, she did not call 911 because he appeared alert, was eating, was tracking and nothing gave her "any indication that he needed to be sent out." Activities director Blackmon testified that she did not have the authority to call 911 for a resident and would need to be authorized by Bradford to make such a call. An employee statement prepared by Bradford and signed by Bradford, Blackmon, Langston and other employees described the incident by stating: "Staff member assigned 1:1, continued hydration, monitoring for any change of condition. Staff informed to call 9-1-1 immediately with any changes."

Stansbury testified she stayed in Mosley's room and watched him until the end of her shift at 11:00 p.m. After Mosley fell asleep, he remained asleep for the duration of her shift, except for when his temperature was taken. Stansbury also testified that when she left, she remembered someone coming in to continue the one-on-one monitoring, but she did not recall whom. Langston testified Bradford gave instructions on monitoring Mosley and checking his temperature.

The Sunday Mosley went missing, Luna, the resident care director of the memory care facility, was at Pismo Beach celebrating her son's birthday. While there, Luna received a telephone call from Bradford and was told Mosley was missing. About an hour later, Bradford telephoned Luna and said he had been found. A few minutes later, Bradford telephoned again and asked Luna to contact Bettie. Luna telephoned Bettie, reached her voicemail, and left a message that there had been an emergency involving her husband and to call Pacifica at her earliest convenience. Luna did not attempt to reach the other family members of Mosley listed on the emergency contact form. Section 8 of

the "IDENTIFICATION AND EMERGENCY INFORMATION" form completed by Bettie was labeled "OTHER PERSONS TO BE NOTIFIED IN EMERGENCY." Bettie listed her daughter and son-in-law, with their Bakersfield address and phone numbers, along with her son, who lived in Porter Ranch, California.

The parties agree that there is no direct evidence addressing where Mosley was and what he was doing between 3:30 and 5:16 p.m., including how he got out of the building and beyond the perimeter fence. Pacifica asserts the most likely explanation is that Mosley followed a visiting family out of the building. The day after Mosley got out, Pacifica posted signs warning visitors that a resident might follow them out of the building.

July 23, 2018

On Monday morning, when Luna arrived at the facility at 8:00 a.m., the first thing she did was check on Mosley. After removing the dressing and observing the wounds, Luna concluded they were burns, not skin tears, and applied some ointment. Later that day, Luna completed an injury report on a DSS form that described the injuries as skin tears, not burns. When asked why she wrote skin tears instead of burns, Luna replied that she could not diagnose, but had to write what it looks like to her eyes and it looked like skin tears, open skin, cuts, wounds. Luna, a licensed vocational nurse, testified that she had the most medical knowledge of all the employees at the assisted living and memory care units at the Bakersfield facilities.

Bettie did not learn about the incident until the morning of July 23, 2018. When Bettie arrived at the facility, Mosley was sitting in a wheelchair in Bradford's office. Bradford mentioned an injury to Mosley's knee and, after Bettie pulled up a pant leg, Bradford removed the dressing. Bettie testified "it didn't look good at all." She called Mosley's primary care physician, Dr. Ashokkumar Ghadia, M.D., and said Mosley needed to be seen as soon as possible. Bettie was told the doctor could see Mosley the next day.

Doctor Visits

On July 24, 2018, Mosley, Bettie and Rivero went to the doctor's office. Camille met them there. After Mosley's clothes were removed, Dr. Ghadia cut away some burned skin and Bettie noticed for the first time the extent of the burns. After the doctor dressed the wounds, he told Bettie they were second-degree burns. Dr. Ghadia also gave instructions for the further care of the wounds, which involved washing them with saline water, applying an antibiotic ointment, and putting on a dressing. Dr. Ghadia testified he did not feel at the time that Mosley's wounds were severe enough to require intervention from a healthcare provider with greater knowledge than him in the treatment of burns. As a result, he sent Mosley back to Pacifica rather than to a hospital for a higher degree of care. Dr. Ghadia referred the treatment of the wounds to a local home health agency, Around the Clock. The term "home health" refers to skilled nursing, which is distinct from hourly home care; home health nurses can provide wound care.

On July 24, 2018, Luna notice blisters in places other than Mosley's knees and elbow, including the back of his leg and his neck. She also noticed redness on the back of his head. Luna completed an in-house skin integrity monitoring form that included a diagram. Luna marked on the diagram where she found blisters. On July 26, 2018, Luna wrote on the form that all open blisters were red, dry, odorless, and healing slowly. On July 31, 2018, Luna's entry reported that the right and left knee were 60 percent brownish color and 6 percent yellowish color and noted Mosley's wife and doctor had been called.

On July 31, 2018, Dr. Ghadia examined Mosley for a second time. The notes from that visit state the chief complaint was "[k]nees look bad per home health." Mosley's dressings were changed, and Dr. Ghadia reported that there was no sign of infection. Dr. Ghadia reported his assessment as sunburn of the second degree and recommended a follow up visit in one week. Dr. Ghadia testified, at that point, he did not see any reason to have Mosley hospitalized and understood that Mosley would return to the senior living facility.

The morning of August 1, 2018, Bettie called Pacifica and instructed its staff to take Mosley to the emergency room at Bakersfield Memorial Hospital. After an initial assessment of his injuries, Mosley was admitted to the hospital's burn unit. Over the next few months, six or seven different surgeries were performed to treat Mosley's burns. Between the surgeries, Mosley was discharged to a skilled nursing facility.

Dr. Jonathan Wilensky, a plastic surgeon, testified Mosley's burns covered seven or eight percent of his body surface and, after multiple debridements and excisions, he learned that the burns on the knees went down to and involved the bone. Dr. Wilensky testified that such burns are classified as fourth degree to denote their depth and extreme severity. Dr. Michael Tivnon, an orthopedic surgeon, determined the patella in Mosley's left knee was not viable and removed it.

The point was reached when Mosley's family decided against having further surgeries, including amputating Mosley's leg, because the surgeries would not necessarily improve Mosley's health. Mosley was placed in palliative care and died on December 17, 2018, about five months after the incident.

Investigation

Bradford testified an internal investigation looked into two separate issues—how Mosley got out and how to prevent it from happening again. She gave an oral report of the investigation to her boss, Carl Knepler. Bradford prepared a document referred to as an employee statement that summarized the incident. Bradford presented the statement to employees at a management meeting and told them to sign it, including Luna who was not at the facility on the Sunday the incident occurred. The statement said Mosley "was found behind the community lying face up, responding with normal baseline" and described his injuries as follows: "Noted visible [i]njuries that top skin pealed to bilateral knees and left elbow, no bleeding present, first aide applied, no other visible injuries noted." Rivero, the personal care assistant who first saw Mosley on the ground, did not sign the statement.

As a facility licensed by the DSS, Pacifica prepared and submitted an "UNUSUAL INCIDENT/INJURY REPORT." Luna completed the report using an in-house incident report provided to her. Bradford read and submitted the injury report to the DSS. The description of the incident stated: "On Sunday, July 22, 2018, at approximately 5:16PM, [Mosley] was found outside, in the back of the Building, lying on the floor, Face up, was assisted back in the Building, during Body Assessment noted: Four Skin tears, one on each Knee, left Foot and left Elbow, no other visible injuries noted." The report described the action taken by stating: "First Aid done to all affected areas, [Mosley] was hydrated, placed on close supervision for Safety. Wife Bettie, Nursing Supervisor and Dr Kubo were informed." The treatment given was described as "all Wounds cleansed with Normal Saline, Triple Antibiotic applied, covered with dry Dressing."

A DSS investigation was initiated after Bettie telephoned to complain about how Pacifica handled the incident. Initially, DSS investigator Shelley Faulconer telephoned Bettie to get additional details. On August 1, 2018, Faulconer visited the Pacifica facilities to conduct interviews. She made two other visits and interviewed about 12 people. Faulconer testified that on her October 25, 2018 visit, she checked in with Luna and asked to speak with other staff. Luna said she wanted to speak to Faulconer. Faulconer testified Luna said she was upset about the incident with Mosley, made some comments about executive director Bradford, and said she was worried about her job but wanted the truth to come out about what happened to Mosley. Faulconer stated Luna said she was worried Bradford would find out what she and other staff were saying and possibly fire them. Faulconer responded that the DSS expected staff at licensed facilities to tell the truth, that she would attempt to speak with Luna that day, and that she would return later if time constraints prevent them from talking.

On November 1, 2018, Faulconer returned and interviewed Luna. Faulconer testified Luna said Bradford micromanaged everything, did not allow Luna to do anything without her approval, was concerned only with bringing in revenue, and was not

concerned with residents' safety. Faulconer stated Luna told her that when Luna saw Mosley's injuries the day after the incident, Luna could tell right away that they were not skin tears, and that Luna classified them as second-degree burns. Faulconer asked if Luna had taken any pictures and Luna replied that she had taken pictures with the cellphone provided by the facility. When Faulconer asked to see the pictures, Luna opened the cellphone, could not find them, and stated she had been sick and had given the cellphone to someone at the facility and that someone must have deleted the pictures. Faulconer also testified that Luna stated any person working in the industry should have recognized the skin missing from Mosley's knees was caused by a sunburn, not skin tears, because there was no bleeding. When Faulconer asked Luna if she felt she could not call 911 or send Mosely out by ambulance when she saw him the morning of July 23, 2018, Luna said Bradford had told her Mosley did not need to be sent out and Luna felt she could not go over Bradford's head. Luna also stated that, based on what she saw that morning, she would have sent Mosley to the hospital. When Luna was questioned about what she told Faulconer, she denied making many of the statements described by Faulconer or stated she could not remember.

Faulconer also interviewed Bradford twice. Faulconer testified that she asked Bradford about a written statement and Bradford provided her a copy of the statement that Bradford had prepared and had employees sign. Faulconer asked Bradford about the statement's reference to Mosley responding within normal baseline and what it meant. Faulconer testified that Bradford "told me Mr. Mosley was alert, talking, and responding within his normal limits when they found him outside" and, of course, had he normal confusion. Faulconer also testified that Bradford said Mosley's normal baseline included being able to answer yes to questions, such as whether he was hungry and if he was okay. When asked about ants crawling on Mosley, Bradford told Faulconer that she did not recall seeing ants that day. Bradford also stated the pink areas on Mosley's knees were

about the size of a lemon and his temperature as around 101 to 101.7. Faulconer also testified:

> "When I had questioned [Bradford] about why she would assume that Mr. Mosley was at his normal baseline because he answered yes to a question of being hungry or if he was okay because of his dementia, she started crying, and I said what was wrong. She said, and I quoted her, I get what you are saying. [¶] And then I did ask her if she felt that is adequate, to rely solely on the answers from a person with dementia. And I again quoted her and she said No. I totally get what you are saying."

On December 7, 2018, the DSS completed an investigation report stating that, based on interviews and a review of the records, the allegation that the staff failed to report the resident's injury to the responsible person was unfounded because "responsible person P1 received a timely verbal report over the phone on the day of the incident" and a timely written report was furnished. The report determined the allegations that staff failed to provide adequate care and supervision and, after the burns were sustained, failed to obtain timely medical care were substantiated.

Pacifica's Conduct

Plaintiffs asserted a variety of shortcomings in the Pacifica facility and its staff's conduct were a substantial factor in causing Mosley's injuries. Plaintiffs' safety expert, Brad Avrit, testified that the only way to get out of the building and beyond the perimeter fence is through the front door and that area was not adequately monitored. He testified there were two ways to monitor the front door, stating that "they didn't have any cameras on the front door of the facility, nobody monitoring the cameras. And they don't have a front desk or a receptionist or anybody that's permanently stationed in the front area to monitor the one primary exit." Avrit testified it would be very simple and easy to monitor the one exit and entry point at the Bakersfield facility. He also stated an alternative to monitoring the front door would be to use wander monitors that are worn as a bracelet or necklace and can be used to determine the resident's whereabouts at any time.

Bradford acknowledged that the front door of the memory care facility was not monitored and there were no cameras in the facility. She testified that other Pacifica facilities she supervised (Modesto, Northridge and Santa Clarita) had cameras and described some of the issues with their use. Counsel for both parties mentioned the use of cameras in their opening statements, with defense counsel asserting the evidence would "show even if we had security cameras, it's not going to prevent Mr. Mosley from exiting the facility." Addressing this point and the use of unmonitored camera, plaintiffs' counsel asked Bradford, if video could have been played back when they were looking for Mosley, "[W]ould you agree you could see at least how he … g[o]t out, what time he … g[o]t out, what happened[?]" Bradford answered, "Yes."

Also, conflicting testimony was presented about how often staff should check on a resident. Bradford was asked, "[H]ow often do you believe the residents should be checked, if not in the activity area, if not visual?" She answered: "Every two hours." She also testified that every resident's care plan is individualized, the minimum is two hours, and some residents may be checked more often. In comparison, personal care assistant Stansbury testified that she was trained to check on residents every 15 minutes if they were not in the activity area. Stansbury testified these directions were given at meetings and came from Bradford, Luna and Langston. When asked, Bradford testified that Stansbury was mistaken about 15-minute checks. On the question of checking on Mosley around the time he disappeared, Stansbury also testified that she did not see Mosley after escorting him to the activity area at around 3:30 p.m. that Sunday and did not notice he was missing until around 4:15 p.m. when she began getting the residents seated for dinner.

Plaintiffs contend Pacifica also was at fault for failing to call 911 after finding Mosley—an idea suggested by Stansbury but rejected by Bradford. This contention is consistent with the DSS's finding that Pacifica's staff had failed to obtain timely medical care. Plaintiffs also assert that, after failing to get timely medical care for Mosley,

Pacifica attempted to justify that failure by repeatedly minimizing the significance of his injuries rather than accurately conveying their severity. Plaintiffs support this assertion by, among other things, referring to inaccuracies and omissions in the injury report faxed to the DSS and the employees' statement prepared by Bradford stating Mosley was within normal baseline when found.

Plaintiffs also assert problems with the front half gate at the facility may have allowed Mosley to get outside the perimeter area. Faulconer testified that she had noticed the gate was not latching during her first visit to the facility in August 2018 and informed Bradford about it. Faulconer also testified that later, when she asked Luna if any changes had been made since the incident, Luna stated that the half gate at the front had been repaired so that it closed correctly. Plaintiffs argue that, even if the latch was working, a person of Mosley's height could reach over and unlatch the gate.

PROCEEDINGS

In October 2019, plaintiffs filed a complaint alleging elder abuse and wrongful death. In June 2020, they filed a second amended complaint alleging elder abuse, negligence, and wrongful death. The procedural history of the plaintiffs' discovery requests relating to Pacifica's financial condition and organization is addressed in part II.B. of this opinion.

In January 2022, the trial was trailed several times, the last being to January 31, 2022. That morning the trial court and counsel addressed pretrial motions and matters relating to jury selection. In discussing the motion in limine seeking bifurcation, the court suggested the (1) first phase address liability, compensatory damages, and the findings of malice, oppression or fraud necessary to support an award of punitive damages and (2) the second phase address only the amount of punitive damages. The parties agreed. As described in part II.B.2. of this opinion, the discussion of the second phase included plaintiffs' counsel raising the concern that Pacifica promptly comply with

a notice to appear directed to Pacifica's person most knowledgeable (PMK) of the entities' financial condition.

On February 7, 2022, the selection of the jury and alternates was completed, the trial court gave the jury preliminary instructions, and plaintiffs' counsel began his opening statement. The next day, the opening statements were completed, and plaintiffs called their first witness, executive director Bradford. On March 10, 2022, the last witness for phase one finished testifying and the parties rested.

On Monday, March 14, 2022, the attorneys completed their closing arguments for phase one of the trial, the trial court instructed the jury, and the jury began its deliberations. The jury was given a special verdict form containing 12 questions. At plaintiffs' request, Pacifica Companies LLC was not included in the special verdict form, and the trial court subsequently dismissed that entity with prejudice.

The morning of March 15, 2022, after an ill juror was replaced with an alternate, the jury resumed deliberations and reached a verdict. The jury found Pacifica Bakersfield LP and Pacifica Senior Living Management LLC liable for negligence and elder abuse. The jury found plaintiffs' noneconomic damages from Mosley's death, which included love, companionship, comfort, care, assistance, affection, society, and moral support, was $3 million (past) and $1 million (future). The jury found Mosley's noneconomic damages, which included his physical pain and mental suffering, was $4 million. Thus, the compensatory damages totaled $8,148,913.57, which included Mosley's past medical expenses of $148,913.57. The parties stipulated that was the amount of economic damages.

The jury also found clear and convincing evidence that an employee, officer, director, or managing agent of the two defendants acted with malice, oppression or fraud toward Mosley. This finding triggered the second phase of the jury trial addressing punitive damages.

During the second phase, two witnesses testified—Bandel as the PMK of Pacifica's financial condition and plaintiffs' expert, certified public accountant Gary Margolis. (See pt. IV.B.2. [Evidence of Ability to Pay], *post*.) Their testimony addressed the documents produced by Pacifica Senior Living Management LLC and Pacifica Bakersfield LP for the second phase's inquiry into their financial condition, which consisted of two monthly bank statements for December 2021 and nine pages from 2020 income tax returns. Those documents are described in part II.B.4. of this opinion.

In his second phase closing argument, plaintiffs' counsel suggested punitive damages of $60 million against Pacifica Senior Living Management LLC and $10 million against Pacifica Bakersfield LP. The jury awarded plaintiffs $15 million in punitive damages against Pacifica Senior Living Management LLC and no punitive damages against Pacifica Bakersfield LP.

Judgment, Posttrial Motions and Appeal

In April 2022, the trial court filed a judgment on jury verdict that incorporated the jury's findings and award of damages. In May 2022, Pacifica filed a motion for judgment notwithstanding the verdict, a motion for partial judgment notwithstanding the verdict asserting the compensatory damages for elder abuse must be reduced to $250,000 (Civ. Code, § 3333.2, subd. (b)), and a motion for a new trial. Plaintiffs opposed the motions.

In June 2022, the trial court heard arguments on the motions. The court denied the motion for new trial, denied the motion for judgment notwithstanding the verdict, and granted the motion of partial judgment notwithstanding the verdict by reducing the $4 million in damages for the elder abuse suffered by Mosley to $250,000. The court directed plaintiffs' counsel to prepare an amended judgment for the court's signature. On July 14, 2022, the court signed and filed the amended judgment on jury verdict.

Two weeks later, Pacifica timely appealed from the April 2022 judgment, the amended judgment filed on July 14, 2022, and the June 28, 2022 order denying its new trial motion and denying its motion for judgment notwithstanding the verdict. A

subsequent appeal by plaintiffs challenging the denial of their motion to tax costs claimed by the dismissed defendant, Pacifica Companies LLC, is addressed in part V. of this opinion.

DISCUSSION

I. ATTORNEY MISCONDUCT AS GROUNDS FOR A NEW TRIAL

Pacifica contends it should be granted a new trial because plaintiffs' counsel engaged in prejudicial misconduct that prevented it from receiving a fair trial. First, Pacifica argues the trial court erred by denying its request for a mistrial after plaintiffs' counsel improperly referred to a $7.5 million jury verdict in an unrelated case where its accident reconstructionist and safety expert had testified. Second, Pacifica argues the court permitted plaintiffs' counsel to ask improper, prejudicial questions and make argumentative remarks throughout the trial. In Pacifica's view, the cumulative effect of the many instances of misconduct made prejudice likely and, thus, warrants reversal.

Plaintiffs contend overwhelming evidence supports the jury's verdict and Pacifica cannot demonstrate the trial court abused its discretion in denying a mistrial due to one question posed to Pacifica's expert. Plaintiffs also contend Pacifica waived its other objections of misconduct by failing to complete the procedural steps of contemporaneously objecting and requesting an admonition. Plaintiffs contest the existence of some misconduct by arguing their counsel's use of the terms "lies" and "liar" was allowable because their use was fairly supported by the evidence. Plaintiffs address the element of prejudice by arguing Pacifica presented no meaningful analysis of why it was reasonably probable that the claimed misconduct caused the verdict.

Our analysis of the parties' contentions begins with an overview of the legal principles governing motions for new trial, the definition of attorney misconduct, the procedural steps that must be taken to raise misconduct as a basis for a new trial, and applicable principles of appellate review. With that legal foundation, we will consider

Pacifica's claims of (1) attorney misconduct during phase one of the trial, (2) trial court err in ruling on discovery and procedural issues before or near the start of phase two of the trial, and (3) attorney misconduct during phase two of the trial.

A. Basic Legal Principles

The granting of a motion for new trial is authorized for an "[i]rregularity in the proceedings of the court, jury or adverse party" that prevents any party from having a fair trial. (§ 657, subd. 1.) Attorney misconduct qualifies as such an irregularity and, thus, may be grounds for a new trial. (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 870 (*Decker*).) One practice guide states attorney misconduct is the most common ground for motions for mistrial and motions for new trials. (Fairbank, et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2023) ¶¶ 12:21, 18:139, pp. 12-7, 18-37 (Civil Trials and Evidence).)

Attorney misconduct has been defined as "*purposeful disregard* for the rules of evidence or procedure in an *attempt to prejudice* the adverse party's case. It implies a 'dishonest act or attempt to persuade the jury by using deceptive or reprehensible methods.' " (Civil Trials and Evidence, *supra*, ¶ 12:23, p. 12-7, italics added.) An often-quoted description of misconduct states: "The law, like boxing, prohibits hitting below the belt. The basic rule forbids an attorney to pander to the prejudice, passion or sympathy of the jury." (*Martinez v. Department of Transportation* (2015) 238 Cal.App.4th 559, 566; see Civil Trials and Evidence, *supra*, ¶ 12:23, p. 12-7.) Examples of attorney misconduct include improper questions during voir dire of prospective jurors, referring to matters during an opening statement that have been ruled inadmissible or without a good faith belief in evidentiary support, improper examination of witnesses, and misstating the law or evidence in closing arguments. (Civil Trials and Evidence, *supra*, ¶¶ 5:318, 6:43, 6:44, 12:23, 13:58, pp. 5-77, 6-11, 12-7, 13-14.) Improper examination of witnesses includes asking questions that are argumentative,

assume facts not in evidence, or misstate the evidence. (*Id*. at ¶¶ 10:65, 10:66, 10:70, pp. 10-15, 10-17.)

Generally, "a trial judge is accorded a wide discretion in ruling on a motion for new trial and … the exercise of this discretion is given great deference on appeal." (*Decker*, *supra*, 18 Cal.3d at pp. 871–872.) A trial court deciding a motion for new trial based on attorney misconduct must resolve two questions. First, did the challenged actions constitute attorney misconduct? Second, if misconduct occurred, was it prejudicial to the moving party? (See Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1122 (*Bell*).)

As a general rule, appellate courts will not consider a claim of attorney misconduct in a civil case unless two conditions are satisfied. The record must show a timely and proper objection and a request that the jury be admonished. (*Horn v. Atchison*, *T. & S.F. Ry. Co.* (1964) 61 Cal.2d 602, 610.) The rule's purpose is "to give the court the opportunity to admonish the jury, instruct counsel and forestall the accumulation of prejudice by repeated improprieties, thus avoiding the necessity of a retrial." (*Ibid*.)

The general rule requiring an objection and request to admonish is subject to an exception "where there are flagrant and repeated instances of misconduct," and it is clear from the record that objecting and asking for admonitions would have overemphasized the objectionable material and would have alienated the jury. (*Simmons v. Southern Pac. Transportation Co.* (1976) 62 Cal.App.3d 341, 355 (*Simmons*).) In such situations, an appellate court may consider the claimed instances of misconduct despite the absence of objections or requests that the jury be admonished. (*Ibid*.) Also, when the trial court does not admonish the jury despite a number of requests, an appellate court may excuse an attorney from making further requests for admonitions and consider the issue on appeal. (*Love v. Wolf* (1964) 226 Cal.App.2d 378, 392 (*Love*).)

When the procedural conditions have been satisfied or excused and misconduct has been shown, an appellate court reviewing the *denial* of a motion for new trial does not apply the deferential abuse of discretion standard of review to whether the misconduct was prejudicial. (*Decker*, *supra*, 18 Cal.3d at p. 872.) Appellate courts must independently determine whether prejudice resulted from the misconduct. (*Ibid*.; *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 296, fn. 16 ["Supreme Court has held that the appropriate standard of review for a trial court's denial of a motion for new trial based on attorney misconduct is de novo, at least on the issue of prejudice"].) Prejudice exists if it is reasonably probable that the party moving for a new trial would have obtained a more favorable verdict absent the attorney misconduct. (*Decker, supra,* at p. 872; *Bell*, *supra*, 181 Cal.App.4th at p. 1122.)

B. Improper Question about a Jury Verdict in an Unrelated Case

On March 1, 2022, Kenneth Solomon, Ph.D., an accident reconstruction and safety expert, testified for Pacifica. The law firm representing Pacifica had retained Solomon about 30 or 40 times. During cross-examination by plaintiffs' counsel, Solomon stated he recalled testifying on behalf of Starbucks in a 2014 San Diego case called *Azacjian v. Starbucks Coffee Company*, but he did not remember the details of the case. After that testimony, the following exchange occurred:

> "Q. Do you recall testifying that as far as you were concerned Starbucks was not liable and had handled their duties in a pristine manner?
>
> "A. I don't recall what the opinions were, sir. That was seven years ago, sir.
>
> "Q. Do you recall the jury disagreeing with your analysis and there was a jury verdict of $7.5 million against you?
>
> "[DEFENSE COUNSEL]: Objection, your Honor. This is way –
>
> "THE COURT: Sustained. Lacks foundation.

"[DEFENSE COUNSEL]: Sir, can the jury be instructed that's stricken.

"THE COURT: Question will be disregarded.

"[DEFENSE COUNSEL]: And counsel admonished for that type of --

"THE COURT: Counsel, we're not going to re-try that case, so be careful.

"[PLAINTIFFS' COUNSEL:] Okay. Sir, now that you remember the case of Anthony Azacjian vs. Starbucks Coffee Company in San Diego in 2014, do you recall you were the expert witness for Starbucks that did an accident reconstruction?

"A. I recall being the expert witness for Starbucks. I don't recall the extent of the details, sir.

"Q. Do you recall providing testimony at the jury trial to – with John Gomez cross-examining you where that you testified that Starbucks had done everything appropriately and they had no liability in the case?

"[DEFENSE COUNSEL]: Objection, your Honor. This is not relevant to this case.

"THE COURT: Sustained."

Plaintiffs' counsel then asked Solomon a couple of questions about the use of cameras at the Bakersfield facility before concluding his cross-examination. The trial court then excused the jury for the noon recess, and, out of the presence of the jury, defense counsel referred to the questions about the $7.5 million verdict and stated:

"Your Honor, this is woefully inappropriate cross-examination. Counsel knows that. And I am moving for a mistrial at this point. I think what counsel has done has intentionally damaged this jury. This jury now has heard a dollar amount that some other jury awarded in a case where we don't have the facts, the facts are irrelevant to this case, and I believe [Pacifica] cannot get a fair trial moving forward based on the actions and comments made by plaintiff's counsel on cross-examining this witness.

"Because he knew that was inappropriate questioning of this witness. He knew that the objection was going to be sustained so he said it

anyway. It's out there. We can't unring the bell. And, again, I respectfully, unfortunately, will be requesting that a mistrial be granted in this case."

The trial court stated the motion was noted and would be taken up at 1:00 p.m. when counsel returned to meet with the court regarding jury instructions. When counsel returned, the court heard arguments on the motion for a mistrial. Among other things, plaintiffs' counsel argued no prejudice occurred because of all the times he had told the jury plaintiffs were asking for millions in damages. After hearing the arguments, the court stated: "I agree with the defense that [the question] was improper in the first place, and it should not have been asked, not in that fashion." Explaining its conclusion, the court stated, "that mentioning, without foundation, or even with foundation, a jury verdict award in another case is improper." Addressing how to remedy the misconduct, the court stated it thought the admonition given the jury on the record was "technically sufficient, but may not be enough to cure any potential [un]fairness with respect to the defense." The court stated it would entertain a request to give a further admonishment to the jury. Defense counsel declined, stating it would only reemphasize the problem and nothing short of a mistrial was appropriate under the circumstances.

The trial court denied the motion for mistrial. It also stated: "I will admonish plaintiff's counsel in particular, but all counsel to refrain from asking a question that you know in the first place is improper, that you know doesn't have foundation, it's not going to, ultimately come in, and where I'm going to sustain an objection and ask the jury to disregard it." The court stated that asking such questions was "highly improper" and constituted misconduct.

With the foregoing background, we turn to the question of whether attorney misconduct occurred. Regardless of whether we conduct an independent review or apply a more deferential standard, we conclude plaintiffs' attorney, Victor L. George, committed attorney misconduct by asking Solomon about a $7.5 million jury verdict in a 2014 case where Solomon had testified as an expert.

First, the question assumed a fact that was not in evidence. (*Love*, *supra*, 226 Cal.App.2d at p. 390; Civil Trials and Evidence, *supra*, ¶ 10:66, p. 10-15.) Second, the assumed fact could not come into evidence because a verdict rendered in another case is inadmissible. (*Menchaca v. Helms Bakeries, Inc.* (1968) 68 Cal.2d 535, 545 [misconduct for defense counsel to argue to jury that he had never experienced or known of any $25,000 verdict in another case involving the death of a 22-month-old child] (*Menchaca*); *Stevenson v. Link* (1954) 128 Cal.App.2d 564, 574 [verdict of acquittal in criminal case charging plaintiff with resisting arrest was clearly inadmissible in his tort action against officers; judgment reversed due to prejudicial misconduct].) Third, like the trial court, we infer that Attorney George knew the question was improper when he asked it and did so with the purpose (i.e., intent) of placing before the jury clearly incompetent evidence. (See *Tingley v. Times Mirror* (1907) 151 Cal. 1, 23 [definition of attorney misconduct].) This inference as to state of mind is supported by, among other things, the attorney's statement to the trial court that he had "tried a ton of jury trials." Any experienced trial attorney would know the question was improper.

Consequently, plaintiffs' counsel committed attorney misconduct by referring to a $7.5 million verdict in a question asked during the cross-examination of Solomon. The same conclusion was reached in *Liberty Bank v. Nonnenmann* (1929) 96 Cal.App. 478, where defense counsel asked a witness during cross-examination about a jury verdict in another case. (*Id*. at p. 487.)

The second step of the analysis considers whether the conduct was prejudicial. That step will be addressed after an examination of the other instances of attorney misconduct claimed by Pacifica.

C. Phase One: Other Misconduct Claimed

Pacifica contends plaintiffs' counsel asked many other inappropriate and prejudicial questions during the trial. Here, we consider Pacifica's claims that prejudicial

attorney misconduct occurred during the first phase of the trial. Pacifica has asserted at least 42 questions asked during that phase and three statements made in rebuttal closing argument prevented it from receiving a fair trial.

As an appellate court, we cannot consider these instances of claimed misconduct unless defense counsel requested the jury be admonished or, alternatively, is excused from making such a request. (*Horn v. Atchison, T. & S.F. Ry. Co.*, *supra*, 61 Cal.2d at p. 610.) Besides the admonition requested after the objection to the question about the $7.5 million verdict was sustained, we have located only three instances where defense counsel requested an admonition in connection with a question now claimed to constitute attorney misconduct.

The first occurred on the second day of testimony during plaintiffs' counsel direct examination of Bradford.

> "Q. Okay. And the staff is trained to get medical professionals in the event the witness has a change of condition, correct?
>
> "A. Yes, sir.
>
> "[DEFENSE COUNSEL]: Objection as to the word witness. Vague and ambiguous.
>
> "[PLAINTIFFS' COUNSEL]: I apologize. He's correct.
>
> "[DEFENSE COUNSEL]: Strike the answer, then.
>
> "THE COURT: Yes. Let's strike the witness's answer to the last questions and the jury will disregard it just so we're clear."

Plaintiffs' counsel then repeated the question with the word "victim" substituted for "witness." Defense counsel's objection to the use of the word "victim" was overruled.

Another request for an admonishment by defense counsel occurred during the 13th day of testimony when plaintiffs' counsel was cross-examining Bradford about Luna's statements to Faulconer, the DSS investigator.

"Q. If the main person that runs the memory unit is telling the state investigator that you are putting profits over safety and don't care about the safety of the residents, isn't that something that you as the boss need to say, why are you saying this? That's not true?

"A. No because it's not true and she knows it. But you need to ask her that question.

"Q. We, of course, did, ma'am. She followed you as a witness. And she explained that she needed to tell the truth. It was a state investigation.

"[DEFENSE COUNSEL]: Objection. It misstates the testimony.

"THE COURT: Sustained."

"[DEFENSE COUNSEL]: Thank you.

"[PLAINTIFFS' COUNSEL]: You may want to ask [Luna] how she responded since you see her each day.

"[DEFENSE COUNSEL]: Objection. This is an unnecessary and unwarranted instruction.

"THE COURT: Agreed. Sustained. Counsel, let's ask questions.

"[PLAINTIFFS' COUNSEL]: I understand.

"[DEFENSE COUNSEL]: I'm sorry, your Honor. At this point can we have counsel admonished to stop doing this.

"THE COURT: I've admonished counsel to ask questions.

"[PLAINTIFFS' COUNSEL]: Thank you, your Honor.

"THE COURT: Time for argument will be at the end of the trial.

"[PLAINTIFFS' COUNSEL]: Thanks, your Honor."

Defense counsel also requested an admonishment during the 15th day of testimony when plaintiffs' counsel was cross-examining Steve Bradford, executive director Bradford's husband. The cross-examination began with a series of questions about his understanding of why he was called as a witness and what he was told about testifying. Defense counsel objected to 10 of the questions. Six objections were sustained and four

overruled. Then plaintiffs' counsel asked Steve Bradford whether he hoped Pacifica could win the case, which was prefaced with statements that recognized his wife was the executive director of the Bakersfield facility and that he loved his wife. Defense counsel objected and asked to have plaintiffs' counsel admonished or to have a sidebar. After a sidebar without a court reporter, the trial court sustained the objection and admonished the jury to disregard the question. Plaintiffs' counsel then resumed the cross-examination by asking questions about what occurred on the day of the incident.

The foregoing shows that when defense counsel requested an admonition in connection with the claimed misconduct, the trial court gave one. Therefore, the failures to request that the jury be admonished cannot be excused on the ground the trial court had refused earlier requests. (See *Love*, *supra*, 226 Cal.App.2d at p. 392 [where a number of requests do not result in the jury being admonished, an attorney is excused from making further requests for admonitions].)

Another excuse for failing to object and request an admonition arises where "there are flagrant and repeated instances of misconduct" and the record shows "that objecting would have overemphasized the objectionable material and would have alienated the jury." (*Simmons*, *supra*, 62 Cal.App.3d at p. 355.) Pacifica asserts this excuse applies to the trial's first phase but offers no explanation of how, after having made successful objections, the additional act of requesting an admonition is what would have alienated the jury or focused the jury's annoyance on him and Pacifica rather than plaintiffs' counsel.

Pacifica relies on *Simmons* to explain its failure to ask for admonitions. We conclude the determination in *Simmons* that the failure to object and request admonitions did not bar the claim of attorney misconduct does not compel the same conclusion in this case. There, defense counsel sometimes asked for admonitions and "[t]he court's admonitions, when given, were mostly inadequate." (*Simmons*, *supra*, 62 Cal.App.3d at p. 355.) Also, the appellate court concluded it was clear from the record that objecting

would have overemphasized the objectionable material and alienated the jury. (*Ibid*.) Here, requesting admonitions as to questions—most of which were argumentative—that covered a variety of subjects would not have overemphasized or validated the embedded argument, but would fall within the general rule that jury are presumed to follow admonitions except in cases of extreme misconduct. (*Bell*, *supra*, 181 Cal.App.4th at p. 1123; see 7 Witkin, Cal. Procedure (6th ed. 2024) Trial, § 229 [cure by admonition].) Thus, *Simmons* is distinguishable.

Consequently, we conclude Pacifica was not excused from requesting admonitions in connection with the claims of misconduct occurring during the trial's first phase. As a result, our analysis of whether the asserted misconduct prejudiced the outcome of phase one of the trial is limited to three instances when defense counsel requested an admonition. To recap, that misconduct was (1) asking a question that referred to a jury verdict in another case during the cross-examination of Pacifica's expert, (2) making an unwarranted comment to Bradford about Luna's testimony, and (3) asking questions during the cross-examination of Steve Bradford about his motive for testifying and his hope that Pacifica would win.

An admonition was requested after plaintiffs' counsel inadvertent use of the word "witness" for the word "victim." We conclude that question, while objectionable, does not constitute attorney misconduct because it was not a purposeful disregard of the rules of evidence in an attempt to prejudice the adverse party's case. (See Civil Trials and Evidence, *supra*, ¶ 12:23, p. 12-7.)

D. Phase One: Prejudice

Appellate courts must independently determine whether the attorney misconduct was prejudicial after reviewing the entire record, including the evidence. (*Decker*, *supra*, 18 Cal.3d at p. 872.) Prejudice is shown if there is reasonable probability that the appellant would have obtained a more favorable verdict absent the attorney misconduct.

(*Ibid*.) Before setting forth our independent analysis of whether the attorney misconduct during the first phase was prejudicial, we describe two decisions of our Supreme Court addressing whether attorney misconduct was prejudicial.

1. Supreme Court Decisions

In *Menchaca*, *supra*, 68 Cal.2d 535, the parents of a 22-month-old boy sued a bakery for wrongful death after a bakery truck ran over and killed the boy. (*Id*. at p. 538.) The bakery denied any negligence and asserted the contributory negligence of the boy's mother as a bar to liability. (*Id*. at p. 539.) The jury found for the bakery. The parents appealed, asserting (1) error in the trial court directing the jury there was no evidence the truck was negligently equipped, (2) three errors in the jury instructions, and (3) defense counsel's misconduct in referring to his personal knowledge of verdicts in other cases. (*Ibid*.)

Our Supreme Court determined the trial court committed cumulative errors in removing from the jury's consideration the factual issue of negligent equipage and in failing to give two instructions about the duties of the driver. (*Menchaca*, *supra*, 68 Cal.2d at p. 545.) The court viewed the evidence as closely balanced on both the issues of the driver's negligence and the mother's contributory negligence, determined the errors were prejudicial, and reversed the judgment. (*Ibid*.)

The defense counsel's misconduct occurred when, in arguing to the jury, he stated: " 'Never in my experience have I heard of a disposition of a death of a 22-month-old child with a recovery representing even a low fraction of the amount of money ... asked for.' " (*Menchaca*, *supra*, 68 Cal.2d at p. 544.) Initially, the trial court overruled plaintiffs' objection, but shortly thereafter corrected the error, mentioned counsel's reference to verdicts in other cases, and then " 'caution[ed] the jury that the only and the sole issue to be determined by the jury in this case is their determination of, first, liability, if any, of the defendant; and, secondly, what damages should be awarded these plaintiffs

as based solely and exclusively upon the evidence here without any reference to what happens in some other case, because in some other case the evidence may be entirely different than it is in this case.' " (*Id*. at p. 545.) Our Supreme Court considered the circumstances and stated: "Plaintiffs show no cause for complaint; misconduct, when promptly corrected by a trial judge, does not entitle the complaining party to reversal." (*Ibid*.) In short, the improper argument by defense counsel was not prejudicial.

In comparison to *Menchaca*, the Supreme Court determined the improper argument by counsel in *Decker*, *supra*, 18 Cal.3d 860, was prejudicial and entitled the appellant to a new trial. (*Id*. at p. 872.) There, the city initiated an eminent domain action to condemn Decker's single-family residence for an airport expansion project. (*Id*. at p. 863.) The parties disputed what constituted just compensation for the residence and, more particularly, what was the highest and best use of the property. Part of the city's misconduct occurred when its attorney argued to the jury that there was no need for additional airport parking and that Decker's argument to the contrary was speculative, despite knowing the city's airport board had determined there was such a need and Decker's property was suitable for that purpose. (*Id*. at p. 871.) The court determined this misconduct was prejudicial because "the purported need for airport parking and the suitability of defendant's property for that purpose were critical to the issue of valuation[.]" (*Id*. at p. 872.)

2. Preserved Instances of Misconduct Were Not Prejudicial

The misconduct preserved for consideration on appeal is (1) the March 1, 2022 reference to a jury verdict of $7.5 million in an unrelated case; (2) the March 1, 2022 question and comment to executive director Bradford about Luna's testimony and asking Luna about it because Bradford saw Luna every day; and (3) the March 9, 2022 questions to Steve Bradford about how he came to be called to testify and whether he would testify favorably to Pacifica because his wife worked there. Based on the evidence presented,

the jury instructions given, and the arguments presented to the jury in the first phase of the trial, we conclude there is not a reasonably probability that these instances of misconduct affected the jury's finding on liability or damages.

The impact of the improper reference to the $7.5 million verdict in a 2014 case was reduced by the trial court's immediate statement that the question was to be disregarded and subsequent comment to plaintiffs' counsel and the jury that "we're not going to re-try that case." The court's statements were reinforced nine days later in the extensive jury instructions given about how to determine damages for the noneconomic harm suffered by Mosley before and as a result of his death, plaintiffs' past and future noneconomic harm, and how to reduce future damages to present value. In addition, the jury was directed not to include in its award any damages to punish or make an example of one or both defendants and to award only the damages that would fairly compensate the plaintiffs for their loss. The jury was told that "arguments of the attorneys are not evidence of damages" and the "award must be based on your reasoned judgment applied to the testimony of the witnesses and the other evidence that has been admitted during the trial." In light of these instructions, the reference to a $7.5 million verdict in a case where the grounds for recovery were unknown and the injuries suffered by the plaintiff were unknown, would not have had a significant effect on the jury. In particular, the jury was not told whether the San Diego case involved a wrongful death claim, what damages were past and future economic damages, and what damages were for noneconomic harm. As a result, it was not reasonably probable that plaintiffs' counsel mention of the jury verdict affected the jury's determination of the damages to fairly compensate the plaintiffs in this case or the determination of liability.

The comments about Luna's testimony during the questioning of executive director Bradford are unlikely to have affected the jury's decisions because the trial court sustained the objection on the ground that plaintiffs' counsel had misstated the testimony. The jury, having been told plaintiffs' counsel had misstated the testimony, is likely to

have believed the trial court and, as a result, is unlikely to have been misled by the inaccurate description of Luna's testimony. Furthermore, the matters to which Luna testified were addressed at length in plaintiffs' counsel's phase one closing argument. Defense counsel's closing argument also addressed Luna's testimony and the role she played the day after Mosley' collapse. It is not reasonably probable that plaintiffs' counsel's misstatement of Luna's testimony overshadowed those arguments and the jury's own recollection of Luna.

Similarly, the argumentative questions of executive director Bradford's husband are unlikely to have affected the jury's decisions. Plaintiffs' counsel repeated the arguments that during closing arguments, making the point that Steve Bradford was not on the witness list and called to testify at the last minute. Counsel stated in part: "Who do [defendants] try to come in and sell their cockamamie story? The husband of the biggest liar in the case. You will probably [ask] yourself who would tell the truth, the ex-employee who had the same statement to Department of Social Services, or Cassondra Bradford's husband who we first learned about last week?" In the circumstances presented, plaintiffs' challenges to Steve Bradford's credibility are relatively obvious—a late called witness may favor his wife and her employer. Thus, the arguments improperly embedded in the questions asked of Steve Bradford were not so penetrating and profound that they would have imprinted on the juror's minds an unshakeable idea that would not otherwise have occurred to the jurors or foreclosed the jury from considering defense counsel's argument in support of Steve Bradford's credibility.

In sum, there is not a reasonable probability that the three instances of misconduct preserved for consideration on appeal prevented Pacifica from obtaining a more favorable outcome during the trial's first phase.

3. Shell Game

Here, we separately address Pacifica's contention that plaintiffs' counsel engaged in misconduct by accusing Pacifica of playing games to avoid liability, which was supported by three cites to the reporter's transcript. The one instance during the first phase of the trial occurred when plaintiffs' counsel was examining executive director Bradford about the Pacifica entities and who worked for what entity. Bradford stated she did not know the entity for which her boss, Carl Knepler, worked and she did not know the entity on her paycheck, which was direct deposited. The examination continued:

> "Q. Have you ever wondered who you work for?
>
> "A. I know – no. To be honest, I work for my residents and staff. That's who I work for. As long as the check's coming, I'm happy.
>
> "Q. Has anyone ever shared with you that there is some type of a shell game where Pacifica has four different corporate entities some licensed, unlicensed, that is out there?
>
> "[DEFENSE COUNSEL]: Objection. Argumentative.
>
> "THE COURT: Sustained."

Defense counsel did not request that the jury be admonished. Bradford was the first witness called and, chronologically, this was the first instance of attorney misconduct asserted by Pacifica. Thus, Pacifica is not excused from requesting an admonishment by the trial court's refusal to admonish the jury despite a number of earlier requests. (*Love*, *supra*, 226 Cal.App.2d at p. 392.)

The other two cites provided by Pacifica to support its claim that plaintiffs' counsel committed misconduct by accusing Pacifica a playing games to avoid liability refer to points made during the first phase's rebuttal closing argument. To put plaintiffs' counsel's statements in context, we describe some of the arguments made by defense counsel during his first phase closing argument. Defense counsel addressed the uncertainty of the entities who employed certain witnesses by blaming plaintiffs' counsel

for not conducting appropriate discovery, stating: "In the course of the last four years I found it absolutely dumb-founding that they don't know who the heck they are suing. It just doesn't happen." Defense counsel argued that no one was hiding the ball, that plaintiffs did not depose the right persons, and that the plaintiffs' claims about hiding the ball was a red herring, a smoke screen. Later, defense counsel argued:

> "I submit to you folks that there's no evidence whatsoever anyone at Pacifica, or *anyone they think they're suing*, did anything to the point where they knew that they were doing something that was highly probable that that conduct would cause harm to Mr. Mosley. Submit to you there is absolutely no evidence of recklessness here." (Italics added.)

Defense counsel also referred to question No. 11 of the special verdict form, which asked: "Do you find by clear and convincing evidence that an employee, officer, director, or managing agent of any of the following defendants acted with malice, oppression, or fraud toward Robert Mosley, Sr.?" The question was followed by lines for separate answers for Pacifica Bakersfield LP and Pacifica Senior Living Management LLC. Defense counsel stated that plaintiffs would argue Bradford was such a person and that there was "no evidence of any of that. Heck, they couldn't even figure out which entities to sue, much less who works for who." After asserting that plaintiff should have obtained that information during discovery and working up the case, defense counsel stated: "And they still don't know who's who. [¶] You don't even know if Pacifica Bakersfield LP or Pacifica Senior Living Management, LLC really have anything to do with this case, and that's after six, eight weeks of trial." Later, in connection with question No. 12 of the special verdict form, defense counsel reiterated the point stating: "There's no evidence of Cassondra Bradford being an officer, director, or managing agent, but that's the only name they have."

In plaintiffs' counsel's rebuttal closing argument, he addressed the argument whether the entities licensed to operate the facility, Pacifica Bakersfield LP or Pacifica Senior Living Management LLC, had anything to do with this case by asserting:

> "But the fraud that we saw where no one knows where they're working for in such high positions of power, I can't imagine that any of you came away from that not thinking Cassondra Bradford is lying and Carl Knepler is lying. They know who they work for. They know who pays them. They know who the CEO and the national director work for. It's all a shell game to fool you, but I'm going to say it's the opposite. You're not an unsuspecting jury. I think you guys are smart as hell."

Later in the rebuttal closing argument, plaintiffs' counsel referred to the testimony of witnesses who did not know the entity they were working for and again referred to a shell game, stating: "This is a corporate shell game where Pacifica has all these different entities we're trying to flesh out. They come in here lying. It makes it hard. We're not going [to] surrender. You're not going to surrender. You're not an unsuspected jury that watched that, that knows it's total BS."

Based on the arguments made by defense counsel about plaintiffs not knowing who they were suing or if they knew "Pacifica Bakersfield LP or Pacifica Senior Living Management, LLC really have anything to do with this case," the arguments made by plaintiffs' counsel about a shell game were a justified response to Pacifica's approach, not attorney misconduct. Accordingly, there is a separate ground for concluding Pacifica's claim of misconduct involving references to a shell game has failed to establish prejudicial attorney misconduct.

Before we address whether prejudicial attorney misconduct occurred during phase two of the trial, we consider discovery and procedural issues that affected how phase two was conducted. Whether the trial court properly ruled against Pacifica on these issues impacts our analysis of whether plaintiffs' counsel engaged in misconduct during the punitive damages phase of the trial.

II. PHASE TWO PROCEDURAL ISSUES RELATED TO PUNITIVE DAMAGES

A. Basic Principles Prohibiting Excessive Awards

Under California law, a defendant's liability for punitive damages is governed by statute. (See Civ. Code, §§ 3294, 3295.) Plaintiffs who prove "by clear and convincing

evidence that the defendant has been guilty of oppression, fraud, or malice … may recover damages for the sake of example and by way of punishing the defendant." (Civ. Code, § 3294, subd. (a).) The statutory objective "is to punish wrongdoing and thereby to protect [the public] from future misconduct, either by the same defendant or other potential wrongdoers." (*Adams v. Murakami* (1991) 54 Cal.3d 105, 110 (*Adams*).) Our Supreme Court has recognized this statutory objective " 'is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter.' " (*Ibid*.) In other words, the purpose of punitive damages is not to financially destroy a defendant, but to deter. (*Id*. at p. 112.) Accordingly, courts are responsible for determining whether a trier of fact's award of punitive damages is excessive as a matter of law. (*Id*. at pp. 109–110.)

The California Supreme Court has identified three factors that courts must consider when assessing whether an award of punitive damages is excessive for purposes of state law. (*Neal v. Farmers Insurance Exchange* (1978) 21 Cal.3d 910, 927–928; *Adams*, *supra*, 54 Cal.3d at p. 110.) These factors are (1) the degree of reprehensibility of the defendant's misconduct; (2) the amount of compensatory damages awarded; and (3) the wealth of the particular defendant. (*Neal*, at p. 928.) Where an award is reasonable in light of the first two factors, it "can be so disproportionate to the defendant's ability to pay that the award is excessive for that reason alone." (*Adams*, at p. 111; see *Mathews v. Happy Valley Conference Center, Inc.* (2019) 43 Cal.App.5th 236, 268 [$500,000 punitive damages award was not disproportionate to defendants' ability to pay where defendants were properly treated as a single employer and their joint net worth was over $179 million].)[7]

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[7] California is one of many states that have recognized the relevance of the defendant's wealth in determining the amount of punitive damages. (See Perry & Kantorowicz-Reznichenko, *Income-Dependent Punitive Damages* (2018) 95 Wash. U.L. Rev. 835, 881.)

In this case, the parties agreed that CACI No. 3949 would be used to instruct the jury about awarding punitive damages. That instruction, which is designed for use in the second phase of a bifurcated trial, addresses the three factors and the deterrence function of punitive damages.

In addition to the state law constraints on awards of punitive damages, the Due Process Clause of the Fourteenth Amendment to the United States Constitution imposes limits on state court awards of punitive damages. (See *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416–418 (*State Farm*); *BMW of North America v. Gore* (1996) 517 U.S. 559, 568 (*BMW*).) That clause entitles a tortfeasor "to ' "fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." ' " (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1171 (*Simon*).)

The United States Supreme Court established three "guideposts" for determining whether a punitive damages award is unconstitutionally excessive: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages awarded; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." (*State Farm*, *supra*, 538 U.S. at p. 418; see *BMW*, *supra*, 517 U.S. at p. 575; Schwartz & Appel, *Perspectives on the Future of Tort Damages: The Law Should Reflect Reality* (2022) 74 S.C. L. Rev. 1, 44.) The first two guideposts parallel the first two factors used in the state law analysis. (See *Doe v. Lee* (2022) 79 Cal.App.5th 612, 618–619.) Principles developed for the application of the third guidepost are discussed later in this opinion.

B. Procedural History

1. Plaintiffs' Discovery Requests

The procedural events relevant to Pacifica's challenges to the award of punitive damages begin in October 2021 when plaintiffs served Pacifica with a "Notice to Appear and Produce Documents" pursuant to section 1987. The notice was directed to the PMK of the net worth of the Pacifica entities and demanded that person appear at the trial set in November and produce the entities' financial records. Four days later, Pacifica served plaintiff with objections to the notice, asserting the documents were protected from disclosure by the constitutional right to privacy, the attorney-client privilege, and the attorney work-product doctrine. (See § 1987, subd. (c) [written objection to production of documents may be served within five days after service of the notice to appear and produce].) In addition, the objections stated Pacifica would be filing a motion in limine to bifurcate the trial and phase two, if necessary, would address punitive damages.

In November, Pacifica filed an ex parte application to continue the trial. The trial court granted the application and moved the trial and final case management conference to January 10, 2022.

On December 16, 2021, plaintiffs served Pacifica with another "Notice to Appear and Produce Documents" demanding the PMK of the net worth of the Pacifica entities appear at the January 10, 2022 trial and produce financial records evidencing the entities' net financial worth. The notice, like the previous one, listed seven categories of documents regarding the financial condition of the entities and three categories relating to the entities' structure and operations. Pacifica made no written objections to this notice to appear and produce.

2. Phase One of the Trial Begins

The trial was trailed to January 31, 2022. On that day, the trial court and counsel discussed how the trial would proceed and addressed the motions in limine. Pacifica's motion in limine for an order bifurcating the issues of liability and damages from the

issues of punitive damages was unopposed. The court stated that one way to bifurcate the trial would be to have the initial phase address liability, damages, and the findings necessary for the foundation for an award of punitive damages and have "a second phase trial on just the amount so that we wouldn't be getting into defendant's finances in the first phase." Defense counsel agreed, and the court confirmed that in the first phase the issue of malice, oppression and fraud would be presented to the jury and if the jury answered affirmatively, the trial would move to the second phase to establish the amount of punitive damages.

After discussing issues about the jury instructions related to punitive damages, the trial court and plaintiffs' counsel had the following exchange:

> "[PLAINTIFFS' COUNSEL]: Your Honor, one other thing on the bifurcation motion, just so the Court is aware, obviously, you know, we're going to have a second, you know, bifurcated session, if we find clear and convincing evidence. We also have at this point a notice to appear of their PMK of net worth. So the anticipation is, assuming we get to that second session, that they will then have a -- they will have a PMK.
>
> "THE COURT: Okay. Has this person been deposed? I assume not.
>
> "[PLAINTIFFS' COUNSEL]: No. Obviously it's punitive damages. I like the idea.
>
> "THE COURT: If you issue a notice, I guess we'll take it up when we get to that point.
>
> "[PLAINTIFFS' COUNSEL]: I wanted a smooth flow and not an interruption that we can't have this PMK show up for the second bifurcated session.
>
> "THE COURT: Well, as we get close to that, they'll be on notice and we will take it up.
>
> "[PLAINTIFFS' COUNSEL]: I wanted to put that on the Court's radar."

The trial court then moved on to the next motion in limine without any comment from Pacifica's counsel about the validity of the notice to appear and produce documents

or the potential need for a delay of the trial's second phase to allow Pacifica to identify and organize the responsive documents.

3. Phase One of the Trial Ends on March 15, 2022

On March 15, 2022, the jury returned its verdict on the trial's first phase and found personnel of Pacifica Bakersfield LP and Pacifica Senior Living Management LLC acted with malice, oppression or fraud towards Mosley. After the jury was polled, the verdict was confirmed, and the jury was given a break. During the break, the court talked with counsel off the record about the schedule for the second phase. On the record, the court stated it anticipated that the second phase would begin at 9:30 a.m. the next day. The court summarized the components of that phase by stating there would be "opening statements, two witnesses, one is a representative of the defendant and the other is an expert proffered by plaintiff and then closing arguments and then instruction[s] to the jury." The court then addressed the document production issue.

> "[THE COURT:] Plaintiff has raised a concern that the materials they subp[o]enaed reflecting the amount of the defendants[']' net worth, those documents are not present in court to be exchanged by defendants. And we've inquired of defense counsel when they can have those documents produced. At this point I'm going to let the parties make their own record.
>
> "[PLAINTIFFS' COUNSEL]: Thanks, your Honor. I made the record twice last week [on] Tuesday and Thursday. We specifically talked about that if we got the punitive damages verdict, which I was confident of, was that it was imperative that the defense have the subp[o]enaed documents here. Your Honor heard it. You agreed. And I knew that whenever the punitive verdicts came in the defense would say the following, we don't have any documents. We don't know when they're coming. We don't know who's producing them. We don't know how many pages there are. Are there 13 pages or 10,000 pages. That [is] the whole reason I did this. I certainly expected this behavior. I hope the Court won't tolerate it.
>
> "The idea that it's not here -- and, apparently, they're arguing they're clueless about even the amount -- that flies in the face of the whole punitive statute. What it does, as your Honor well knows, it slows down this already

glacially slow trial where tonight whatever we get -- whatever we get -- I know we have to be back in front of you. I will assume whatever they give me is insufficient, not enough, and will be another fight [before] you.

"They just indicated Adam Bandel is going to be the person on the stand. We will have a CPA that will testify as to net worth. I'm assuming that we won't be able to enter into a stipulation regarding the net worth, particularly in this case where I believe, and, apparently, the jury found there was such a corporate shell game with Pacifica Senior Management and Bakersfield LP and LLC that brought about the puni's.

"I would ask the judge at this time to make an assertive order that they get the documents to me no later than 5:00, and we be able back and forth tonight if you really want to start at 9:30 a.m. tomorrow email hopefully including the Court to say these are insufficient."

Plaintiffs' counsel continued by addressing concerns that would arise if the documents supplied were insufficient and ended by stating the concerns were "certainly something I predicted to your Honor last Tuesday or Thursday, which is why I'm so disappointed now." The trial court asked for defense counsel's response.

"[DEFENSE COUNSEL:] We have been in touch with our clients since this discussion became an issue last week, whenever it was. They've been on notice to let us know who they're going [to] produce and what documents they were going to be producing. I haven't received the documents yet. I hope I can get the documents here shortly. They'll be coming to us by way of PDF. I do have not hard copies of any of the documents. I was advised this morning that it was Adam Bandel who would be the gentleman that they would be producing and that is the sum total of what I know. I don't know the volume of the documents, the extent of the documents, and if I did, I'd tell the Court. I have nothing to hide. I just don't know.

"I will hopefully have that information -- I can probably get to you by 4:30 today if I can be excused from the courtroom to make a call. I haven't left the courtroom since the jury came back with this verdict so I have not had an opportunity to discuss any of this with the client."

"[THE COURT:] All right.

"[PLAINTIFFS' COUNSEL]: If I may.

"[THE COURT:] Very briefly.

> "[PLAINTIFFS' COUNSEL]: Certainly. He just says he hopes to find something out shortly. That's too vague when he first knew about this last week. This was a subpoena sent out before the trial started. This was a punitive case. We all knew that from day one.
>
> "I recognize [defense counsel] is blaming the clients, I don't know anything about anything, but he's the attorney, and he's the person that your Honor specifically addressed last week when I said this was going to happen if puni's came in. I hope your Honor will do something affirmative, and certainly have them come back and report to us what's going to happen.
>
> "[DEFENSE COUNSEL:] And last week, your Honor, there was even an additional defendant in this case, which is no longer a defendant in this case. You know, this case has been a moving target in that regard. Who knew which of these three defendants was going to ultimately remain on this special verdict form."

The trial court then directed defense counsel to go somewhere private, contact his client, and determine when the materials would be produced to plaintiffs' counsel. The court also stated: "You know I am disappointed and somewhat surprised given the preview [plaintiffs' counsel] gave us about the timing of this that the materials are not sitting on a thumb drive to be handed to him." The court directed counsel to come back in 20 minutes to conference at 4:10 p.m. Defense counsel replied: "That's fine."

When defense counsel returned, he stated: "We have spoken with the clients, and they have advised us that we should be receiving an email here within the next ten minutes or so with the documents that we requested." Based on that representation, the court ordered defense counsel to have the documents to plaintiff's counsel by 4:45 p.m. or "5:00 at the very latest." A further discussion was held before the court brought the jury back, dismissed them for the day, and directed the jurors to be ready to resume the trial at 9:30 a.m. the next day.

4. Phase Two of the Trial Begins

The next morning, the trial court went on the record with counsel outside the presence of the jury. They agreed to use CACI No. 3949 as the jury instruction and have it read before closing arguments. The court then raised the issue of document production

and pages from the two defendants' 2020 tax returns that were provided to plaintiffs' counsel at 7:43 a.m. Plaintiffs' counsel stated documents had not been provided by 5:00 p.m. the previous day and, later that evening, he received some checking account information for Pacifica Bakersfield LP. Plaintiffs' counsel argued defendants "certainly violated the subpoena" and violated the court order to deliver the documents by 5:00 p.m. He asked to court to instruct the jury that Pacifica had violated the subpoena and court order and to allow him wide latitude so he could find out what was going on. The court stated it had not seen a copy of the subpoena and asked for a copy "so I understand exactly what you've asked for."

Upon seeing the document, defense counsel stated it was not a subpoena. Plaintiffs' counsel replied: "This is what's called a notice to appear." After counsel disagreed about whether there was a distinction between a subpoena and a notice to appear, the court stated: "What I'm looking at here is the notice to appear and produce documents. Has this been previously filed with the court? I don't think so." Plaintiffs' counsel stated it had not been filed and the court stated that, "[W]e're going to need to make this part of the court record."

The court then reviewed what the notice had requested and went through the documents provided by Pacifica. Those documents were (1) five pages from a 2020 California tax return on Form 568 for Pacifica Senior Living Management LLC, which was listed on the return as "PACIFICA SENIOR LIVING, LLC DBA PACIFICA," (2) four pages from a 2020 federal tax return on Form 1065 for Pacifica Bakersfield LP, (3) a bank statement of Pacifica Senior Living Management LLC for the month of December 2021, and (4) a bank statement of Pacifica Bakersfield LP for the month of December 2021. The court confirmed that defense counsel had sent plaintiffs' counsel everything he had received from Pacifica.

Defense counsel stated that he had given Pacifica a copy of the request for production of documents and reiterated that "[t]here was never a subpoena sent." The

trial court stated: "No. I think th[at] subpoena's the wrong word, but there is this notice to appear and produce." The court asked defense counsel if he had disputed his office's receipt of the notice on or about December 16, 2021. Defense counsel said "No."

The trial court expressed its concern that Pacifica did not take the production request seriously, that it was "somewhat baffled that this is the grand total of what's been produced," and that the documents produced appeared "to be maybe barely minimally compliant with the notice to appear and produce." The court asked plaintiffs' counsel how he wanted to proceed. Counsel asked (1) for an instruction that Pacifica had disobeyed the section 1987 notice to appear and produce and had not complied with the court's order and (2) to be given wide latitude in questioning Bandel, who would testify at the PMK. Counsel stated he wanted to make sure that Pacifica did not benefit from "this type of sandbagging" and emphasized he had predicted it the previous week. The court decided that it would not give any instructions until it had heard all the second-phase evidence and, if plaintiffs were right that there was a lot of information Pacifica should have produced but did not, it was inclined to give plaintiffs "a fairly wide degree of latitude to make their arguments."

C. Failure to Obtain a Court Order Compelling Production

1. Contentions

Pacifica contends a punitive damages award cannot be sustained unless competent, meaningful evidence of the defendant's net worth or financial condition is submitted by the plaintiffs. Pacifica argues plaintiffs did not meet this evidentiary burden and attributes the failure to a lack of diligence by plaintiffs. In particular, Pacifica asserts it had no duty to have its financial records immediately available after the trial's first phase ended because (1) it objected to the notice to appear and produce documents and (2) plaintiffs did not comply with the procedures set forth in section 1987, which involve filing a motion to compel production and obtaining a court order. Based on the

foregoing, Pacifica concludes the insufficient evidence presented about its net worth and financial condition fatally undermines plaintiffs' claim for punitive damages.

Plaintiffs disagree with Pacifica's argument on several levels. They begin by asserting Pacifica had ample notice it was required to have the requisite financial documents available following the first phase. n This notice, and the resulting actual knowledge of Pacifica's attorneys, arose in part from the second "Notice to Appear and Produce Documents," which plaintiffs served on December 16, 2021, and the oral reminders given by plaintiffs' attorneys during phase one of the trial. The second notice was served three months before the second phase of the trial began on March 16, 2022.

Next, plaintiffs accurately assert that Pacifica did not object to the second notice to produce. They note that Pacifica has cited no law supporting the argument that the objection to the first notice to produce was sufficient to require plaintiffs to file a motion to compel and obtain a court order directing production of the documents requested in the second notice. In addition to the lack of supporting authority, plaintiffs assert this ground for justifying Pacifica's lack of production was never raised until Pacifica filed motions after both phases of the trial were completed. In effect, plaintiffs argue Pacifica's failure to serve written objections in accordance with the procedures in section 1987, subdivision (c) and its subsequent inadequate production of documents explain why only minimal evidence of Pacifica's financial condition was presented during phase two of the trial. Plaintiffs contend these omissions estop Pacifica from arguing the evidence was insufficient.

2. Legal Principles

In *Adams*, our Supreme Court addressed which party bears the burden of introducing evidence of the defendant's financial condition. (*Adams*, *supra*, 54 Cal.3d at p. 119.) The court concluded the burden is properly placed on the plaintiff. (*Ibid*.; see Civil Trials and Evidence, *supra,* ¶ 4:387, p. 4-112.)

A plaintiff seeking punitive damage may obtain information about a defendants' financial condition for the punitive damages phase of a trial by using the subpoena procedure set forth in Civil Code section 3295 or, alternatively, by using a notice to appear and produce documents in accordance with section 1987. Subdivision (b) of section 1987 addresses the relationship of these two methods of discovery by stating: "The giving of the notice shall have the same effect as service of a subpoena on the witness, and the parties shall have those rights and the court may make those orders … as in the case of a subpoena for attendance before the court."

When a section 1987 notice is served at least 20 days before the person is required to attend, it may include a request that the person bring documents to court. (§ 1987, subd. (c).) If a defendant served with the request serves written objections within five days, the defendant is excused from complying with the notice unless the plaintiff files a noticed motion and obtains a court order for the production of the items to which objections were made. (*Ibid.*; *Garcia v. Myllyla* (2019) 40 Cal.App.5th 990, 997 (*Garcia*).) In contrast, if the defendant does not serve timely objections pursuant to section 1987, subdivision (c), the notice to appear and produce documents is "the equivalent of a court order." (*Garcia*, *supra*, at p. 996.)

Although the burden of proving the defendant's financial condition is allocated to the plaintiff, a defendant who thwarts a plaintiff's ability to meet that burden forfeits the right to complain about the lack of evidence of the defendant's financial condition. (*Garcia*, *supra*, 40 Cal.App.5th at p. 995.) Thus, punitive damage awards are upheld "where the dearth of evidence of the defendant's financial condition is attributable to the defendant's failure to comply with discovery obligations or orders." (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194.)

In *Garcia*, the defendant landlord was served with two section 1987 notices. The first notice sought his presence to testify at the trial and the second notice sought both his presence and the production of various documents relating to his financial condition.

(*Garcia*, *supra*, 40 Cal.App.5th at p. 996.) The defendant made no objections to the section 1987 notices and then failed to comply with the requests. (*Ibid*.) The appellate court concluded the defendant's refusal to produce documents or appear to testify was the reason the plaintiffs did not have evidence of the defendant's net worth and, as a result, the defendant was "estopped from challenging the punitive damage award on the ground the Plaintiffs failed to introduce such evidence." (*Id*. at p. 997; see *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1337–1338 [failure to comply with court order to produce documents estopped defendant from challenging punitive damage award based on lack of evidence of his financial condition].)

3. Application of Law to the Facts Presented

In this case, Pacifica did not object to the second notice to appear and produce documents served by plaintiffs in December 2021. Pacifica's opening brief omitted this material fact. Plaintiffs' respondents' brief raised the fact that there were no objections to the second notice. Pacifica's reply brief ignored the point. Some cases treat a reply brief's failure to respond to a point as an implicit concession of the point. (*Ross v. Superior Court* (2022) 77 Cal.App.5th 667, 681; *Rudick v. State Bd. of Optometry* (2019) 41 Cal.App.5th 77, 89–90 [appellants implicitly conceded a point by failing to respond in their reply brief to respondent's argument].)

In this appeal, however, we will interpret Pacifica's appellate briefing as impliedly arguing its objections to the first notice also operated as legally valid objections to the second notice. During oral argument, Pacifica's counsel explicitly addressed the issue and asserted a second set of objections should be unnecessary where the second notice to appear and produce documents mirrors the first. Counsel acknowledged he found no case law addressing the issue. Our independent review of section 1987's text, the case law discussing its application, and secondary authorities has located nothing suggesting objections to an earlier notice to appear and produce documents operate as valid

objections to a subsequent notice. Rather, a literal interpretation of the statute supports the opposite conclusion. The statute refers to the service of written objections "[w]ithin five days thereafter." (§ 1987, subd. (c). Read in context, "thereafter" refers to the service of the notice to appear and produce documents. Service of the notice is required to be done "at least 20 days before the time required for attendance, or within any shorter period of time as the court may order." (*Ibid*.; see Black's Law Dict. (11th ed. 2019) ["thereafter" means afterward, later].) Here, Pacifica's October 2021 objections to the first notice do not comply with the statute's timing requirement because they were served before, not after, the service of the second notice in December 2021.

Adopting a literal reading of section 1987's text, we reject Pacifica's argument that the written objections it served in October 2021 also qualified as written objections to the notice plaintiffs served in December 2021. Without valid objections, the notice itself was "the equivalent of a court order." (*Garcia*, *supra*, 40 Cal.App.5th at p. 996.) It necessarily follows that all of Pacifica's arguments based on plaintiffs' failure to obtain a court order directing Pacifica to produce documents lack merit.

D. The Reference to a Subpoena Did Not Mislead the Trial Court

Pacifica contends plaintiffs' counsel incorrectly referred to the notice to appear and produce documents as a subpoena and thereby misled the trial court. Our analysis of this contention is divided into two parts. First, we will examine whether the court could have been misled *after* the court stated a notice to appear and produce document was "not a subpoena," looked at a copy of the notice, and said: "What I'm looking at here is a notice to appear and produce documents." Second, we will look at what occurred *before* the trial court saw the notice to appear and produce documents.

It is obvious that the rulings made by the trial court *after* it saw the notice to appear and produce documents would not have been influenced by plaintiffs' counsel referring to the notice as a subpoena because, upon seeing the notice, the court was aware

of the discovery method employed by plaintiffs. Furthermore, the court's statements show it could distinguish between a subpoena and a section 1987 notice to appear. As a result, plaintiffs' counsel's earlier use of the term subpoena no longer had any potential to mislead the court. The trial court saw the notice to appear and produce documents the morning of March 16, 2022, when the second phase of the trial was scheduled to begin. It logically follows that all the rulings made after reviewing the notice, such as the decision to give plaintiffs' counsel wide latitude in making arguments, were based on the court's accurate understanding of the type of discovery request plaintiffs had made.

Consequently, Pacifica's claim that the trial court was misled by the references to a subpoena makes sense only with respect to rulings made by the trial court before it saw the notice to appear and produce documents. Those proceedings took place after the jury returned its phase-one verdict. When the first phase ended on March 15, 2022, the court spoke with counsel "off the record about the schedule for tomorrow." Back on the record, the court summarized the components of the second phase from opening statements to closing arguments and told counsel it anticipated having the jury ready to go at 9:30 the next morning. The court raised the pending discovery issue by stating plaintiffs had "raised a concern that the materials they subp[o]enaed reflecting the amount of the defendants net worth" and directing counsel to make their own record. Plaintiffs' counsel also used the term "subpoenaed" in asserting there had been earlier discussions addressing that, if jury's findings resulted in a second phase, "it was imperative that the defense have the subp[o]enaed documents here."

Defense counsel did not object to these uses of the term "subpoenaed" or otherwise mention any procedural defects in plaintiffs' discovery request. He began making his record by stating: "We have been in touch with our clients since this discussion became an issue last week, whenever it was." Defense counsel stated he did not have the documents, he hoped he could get them shortly, and he had nothing to hide. He asked to be excused so he could telephone his client to get more information. Before

defense counsel was excused to make the call, plaintiffs' counsel stated defense counsel's response was "too vague when he first knew about this last week. This was a *subpoena* sent out before the trial started. This was a punitive case. We all knew that from day one." (Italics added.) The foregoing quotes from the reporter's transcript show the two times the verb "subpoenaed" was used—once by the court and once by plaintiffs' counsel—and the only time plaintiffs' counsel used the noun "subpoena" in that afternoon's discussion on the record.

Having identified when the terms were used, we consider whether the trial court was misled in a way that affected any ruling. For the reasons described below, we conclude the references to a subpoena did not mislead the court and, thus, did not impact a ruling.

Subdivision (b) of section 1987 addresses the relationship of between the subpoena procedure set forth in Civil Code section 3295 and section 1987 notices by stating: "The giving of the notice shall have the same effect as service of a subpoena on the witness, and the parties shall have those rights and the court may make those orders … as in the case of a subpoena for attendance before the court." More significantly, we have concluded that the December 2021 notice to appear and produce documents was "the equivalent of a court order." (*Garcia*, *supra*, 40 Cal.App.5th at p. 996.) Accordingly, we conclude the references of plaintiffs' counsel to a subpoena, while technically imprecise, did not mislead the court about the substantive effect of plaintiffs' discovery request for documents relating to Pacifica's financial condition. In short, the December 2021 notice obligated Pacifica to produce documents for the second phase of the trial. Therefore, the distinction between a subpoena and a section 1987 notice was of no importance when the trial court ordered defense counsel to deliver documents to plaintiffs' counsel by 4:45 p.m. or "5:00 at the very latest." We have identified no other potentially affected ruling made before the court saw the notice to appear and produce documents the next morning. Consequently, we reject Pacifica's claim that the trial court

was led into error by plaintiffs' counsel's use of the terms "subpoena" and "subpoenaed" to describe the notice to appear and produce documents.

E. The Order to Produce Records Within One Hour

Pacifica contends the trial court abused its discretion in imposing an unreasonable one-hour deadline for Pacifica to produce its financial records. Pacifica describes the abuse of discretion standard of review by quoting the following principle. " 'The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown.' " (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.) We conclude this no-reasonable-basis test is met when the trial court's decision "exceeded the bounds of reasons, all of the circumstances … being considered." (*In re Marriage of Connolly* (1979) 23 Cal.3d 590, 598.) A third way of describing an abuse of discretionary authority is that the trial court's "application of the law to the facts is … arbitrary and capricious." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 712.)

In the circumstance of this case, we conclude the trial court had a reasonable basis for ordering defense counsel to deliver documents relating to Pacifica's financial condition to plaintiffs' counsel by 4:45 p.m. or "5:00 at the very latest." The court acted reasonably in making the order because it obtained input from defense counsel and relied on that input. In particular, defense counsel had just telephoned Pacifica and represented to the court that he had been advised "that we should be receiving an email within the next ten minutes or so with the documents that we requested." Also, delivery by 5:00 p.m. was suggested by defense counsel in the following exchange:

> "THE COURT: Okay. All right. My expectation, then, would be that you should be able to have that to plaintiff's counsel by --
>
> "[DEFENSE COUNSEL]: By 5:00.

> "THE COURT: Quarter to 5:00, 5:00 at the very latest. So I'm going to order defense to do that. [¶] What I'm going to ask the parties to do overnight is work with each other on that production.… In the morning we can take up whatever issues there might be."

When this exchange occurred, Pacifica had had a copy of the December 2021 notice to appear and produce documents for three months. For nearly all of that time, the section 1987 notice had been "the equivalent of a court order" (*Garcia*, *supra*, 40 Cal.App.5th at p. 996) because Pacifica did not serve any written objections within the five-day period specified in section 1987, subdivision (c). Under the circumstances of this case, the trial court acted reasonably in setting the deadline for the delivery of the financial records. Pacifica's appellate briefing has not demonstrated otherwise because it again ignored relevant facts. In particular, its briefing failed to acknowledge the timeframe adopted in the court's order was based on representations made by Pacifica's counsel on the record.

F. Granting Plaintiffs Wide Latitude in Their Phase-Two Arguments

Pacifica contends the trial court committed a prejudicial abuse of discretion when it granted plaintiffs' counsel wide latitude in making arguments during the trial's second phase. Pacifica argues this "wide latitude" sanction was based on the court inappropriately blaming it for not producing its financial documents any faster. In contrast, plaintiffs characterize the trial court's response to Pacifica's paltry discovery response as measured and well within the court's discretion.

Because Pacifica's challenge to the "wide latitude" sanction is based on the view that it did nothing wrong and the trial court erred in its rulings on issues relating to the production of financial documents, we need not discuss this challenge at length. As described earlier, Pacifica did not comply with the notice to appear and produce documents and the court acted reasonably in setting a delivery deadline. Pacifica failed to meet that deadline, and its response, when given, was minimal. Pacifica's failures provided a reasonable basis for granting plaintiffs' counsel wide latitude in questioning

about Pacifica's financial condition and presenting arguments on that subject, a sanction that was tailored to the harm caused by Pacifica's failures. (See *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 991 [trial court has board discretion in selecting discovery sanctions; court should attempt to tailor the sanction to the harm].) Thus, we conclude Pacifica has not established the trial court abused its discretion in granting plaintiffs' counsel wide latitude in its phase two questioning and arguments.

III. PHASE TWO ATTORNEY MISCONDUCT CLAIMS

Our determination that the trial court did not err in deciding procedural issues relating to how the second phase of the trial would be conducted results in our rejection of Pacifica's argument that plaintiffs' counsel committed misconduct in taking advantage of the wide latitude allowed in phase two questioning and arguments. Pacifica's own ill-advised tactical choices and other conduct caused the court to appropriately grant that wide latitude.

For example, Pacifica contends that plaintiffs' counsel engaged in misconduct during the phase-two opening statements when he referred to "hiding the ball" and asserted "the evidence will show that Pacifica hasn't learned anything in the last 24 hours." The court overruled defense counsel's objection asserting this was argument. Plaintiffs' counsel then predicted that Pacifica's behavior would continue into the second phase with Bandel's testimony about the financial condition of the Pacifica entities. We conclude these statements do not constitute misconduct because they were consistent with Pacifica's inadequate production of documents in response to plaintiffs' notice to appear and they were within the wide latitude appropriately granted by the trial court.

1. Opening Statement

Pacifica's claims of misconduct during the phase-two opening statement also includes plaintiffs' counsel's assertion that defense counsel would get up "and say I'm so sorry. We have heard your message. We apologize." Defense counsel objected on the

ground the statement was argument, and the objection was sustained. No request for an admonition was made. Based on the absence of such a request, we apply the rules of law discussed earlier and conclude this instance of purported attorney misconduct has not been preserved for consideration on appeal. (See *Horn v. Atchison*, *T. & S.F. Ry. Co.*, *supra*, 61 Cal.2d at p. 610 [timely request for admonition required].)

2. Questions During the Second Phase

Pacifica contends plaintiffs' counsel committed misconduct in asking Bandel whether he would agree that the net worth of all the Pacifica entities throughout the world exceeds $3 billion. Defense counsel objected on the ground it was "irrelevant as it relates to these two entities that are defendants in this case." The trial court sustained the objection. Defense counsel did not request an admonition. Based on the absence of such a request, we will not consider this instance of purported attorney misconduct. (See *Horn v. Atchison*, *T. & S.F. Ry. Co.*, *supra*, 61 Cal.2d at p. 610 [timely request for admonition required].)

The next four instances of argumentative questions or witness badgering raised by Pacifica also did not prompt defense counsel to ask for an admonition. Consequently, we will not consider those instances of purported attorney misconduct.

In his subsequent examination of Bandel, plaintiffs' counsel asked whether Bandel was aware of a Dunn and Bradstreet report on Pacifica Senior Living Management LLC and whether he disbelieved the report's statement that the entity had 22 employees across all its locations and generated $20.46 million in sales. The trial court sustained objections to the questions, directed the jury to disregard one question, and responded to a request to admonish counsel by stating: "Well – well, counsel let's refrain from introducing hearsay in our questions. Okay?" Because an admonition was requested, we will consider whether the improper questions resulted in prejudice to Pacifica.

We conclude the attorney committed misconduct by including facts—namely, the number of employees and sales volume—in the question without having established a foundation for those facts and without a reasonable expectation of being able to get the report admitted into evidence. (See Civil Trials and Evidence, *supra*, ¶ 10:66, p. 10-15 [improper to ask a question that assumes facts for which no evidence has been admitted or likely to be admitted].)

Our evaluation of whether this misconduct was prejudicial to Pacifica includes a review of the jury instructions given. Before any witnesses were called, the jury was told that an "attorney[']s questions are not evidence. Only the witness's answers are evidence. You should not think that something is true just because an attorney's questions suggests that it is true." The trial court also told the jury that the lawyers' "statements and arguments are not evidence." Our evaluation of prejudice also considers the evidence admitted on the facts referred to in the question. Pacifica Senior Living Management LLC's California tax return for 2020 showed its gross receipts at $9.28 million and total income of $9.3 million. Also, plaintiffs' accounting expert referred to these figures and estimated the total sales of Pacifica Senior Living Management LLC and Pacifica Bakersfield LP at $21 million, noting that Pacifica Senior Living Management LLC only provided a portion of its California tax return and nothing from its federal return. Because of the admissible evidence presented and the jury instructions given, we conclude that asking a question including facts taken from the hearsay report was not prejudicial to Pacifica.

4. Closing Argument: Statements About Pacifica and Its Business

During his closing argument, plaintiffs' counsel referred to the California tax return of Pacifica Senior Living Management LLC and its inclusion of "dba PACIFICA," stated "dba means, doing business as, Pacifica," and, on the question what is Pacifica, argued Bandel kind of "scammed us" in saying the defendant entities did not have much

money and were broke. Plaintiffs' counsel then asserted it was pretty easy to answer, "What's Pacifica." Counsel referred to the Pacifica Companies' Web site that he discussed with Bandel and to a Web page (which was admitted into evidence) that referred to ventures, team, philosophy, and contact, and listed seven principals, six with the last name Israni. Plaintiffs' counsel argued that because Pacifica Senior Living Management LLC was doing business as Pacifica, the jury could consider all the Pacifica entities' projects and ventures in evaluating the defendants' financial condition. At that point, defense counsel asked for "a running objection to this reference to Pacifica so I don't have to keep interrupting." The trial court stated: "Yes, you may. And it's overruled. [¶] Go ahead, counsel."

The trial court's decision to overrule the objection was part of the wide latitude given as a result of Pacifica's inadequate production of documents. The notice to produce requested all documents referring or relating "to any equity interest in Defendants" and records relating to their organizational documents and identity of officers and directors. Pacifica failed to produce *any* documents in response to these requests. The trial court explained why it allowed plaintiffs "to go into information pertaining to the value of the entire Pacifica enterprise" by stating: "In my view the size of the entire enterprise is relevant here. We need to know how big is the entire pie, and what's the portion of that pie that relates to Pacifica Bakersfield LP and Pacifica Senior Living Management, LLC. And given the dearth of information provided by the defendants, I think [using CACI No. 204 is] an appropriate approach to figure this out." We agree that Pacifica's inadequate discovery responses provided a reasonable basis for the approach adopted by the trial court and its giving plaintiffs' counsel wide latitude in arguing about what constituted "Pacifica" and the wide scope of its businesses. Accordingly, we conclude plaintiffs' counsel's statements about Pacifica and its wide-ranging business interests did not constitute attorney misconduct.

5. Closing Argument: Reptile and Golden Rule Arguments

During his closing argument, plaintiffs' counsel criticized how Pacifica's personnel reacted after Mosley was found unconscious:

> "Bob was found on the ground pants down, ants on him[,] all the things you heard for so many weeks you probably have memorized as well as me. [¶] What did they do? He's baseline. He doesn't need any help. No 911. Call his wife. She didn't answer. They didn't call the rest of his family on the emergency sheet. No. Don't call anyone. Okay. Cheating. Lying. He's baseline. Cheating. Lying. No 911 call even though we saw the documents, the contract, call 911 if someone has an imminent health issue that's imminent. [¶] Guarantee you find any of your mom or dads laying like that –"

At that point, defense counsel objected, adding "Golden rule. Reptile." The trial court overruled the objection. After thanking the court, plaintiffs' counsel said: "Any of you find Mr. Mosley, you would call 911 in a heartbeat. You wouldn't overburden 911." Plaintiffs' counsel then addressed what Pacifica's personnel did the next day.

The reptile theory "encourages jurors to favor personal safety and protection of family and the community." (*Giant of Maryland LLC v. Webb* (2021) 249 Md.App. 545, 567.) In *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, the plaintiff's attorney in a negligence and premises liability case argued during closing argument that the jury is " 'the conscience of this community,' " that it will " 'speak on behalf of all the citizens,' " and that it will " 'make a decision what is right and what is wrong; what is acceptable, what is not acceptable; what is safe, and what is not safe.' " (*Id*. at pp. 597–598.) The appellate court concluded these remarks were improper, but they were so brief that they were not prejudicial. (*Id*. at p. 599.) In comparison, a "golden rule" argument is one where "counsel asks the jurors to place themselves in the plaintiff's shoes and to award such damages as they would 'charge' to undergo equivalent pain and suffering." (*Beagle v. Vasold* (1966) 65 Cal.2d 166, 182; see *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 797.)

In the context of phase two of the trial, we conclude the references to what a juror would have done if they found a parent in Mosley's situation or what they would have done if they had found Mosley does not rise to the level of being prejudicial. The references primarily address the reasonableness of Pacifica's personnel's responses to finding Mosley. In phase one, the jury determined the response was inadequate and, moreover, had found clear and convincing evidence that an employee, officer, director, or managing agent of Pacifica acted with malice, oppression or fraud toward Mosley. It also had determined the amount necessary to compensate for Mosely's pain and suffering and to compensate plaintiffs for their noneconomic losses. In these circumstances, we conclude the references to how the jurors would have reacted, which is different from asking what they would have charged to undergo what Mosley experienced, had no prejudicial impact on the jury's determination of the amount of punitive damages.

IV. PUNITIVE DAMAGES AWARD WAS NOT EXCESSIVE

Pacifica contends that, if it is not entitled to a new trial, the award of punitive damages cannot stand. First, Pacifica contends the entire $15 million award must be vacated because it is unsupported by sufficient evidence of its financial condition. Second and alternatively, Pacifica contends that the award is excessive must be reversed or reduced because (1) it is disproportionate to Pacifica's ability to pay and (2) it exceeds the constitutionally permitted ratio between compensatory damages and punitive damages.

As an appellate court asked to decide whether the jury's award of punitive damages was excessive, we must review the award de novo, making an independent assessment of the relevant factors and guideposts. (*Simon*, *supra*, 35 Cal.4th at p. 1172.) This independent review is designed to ensure an award of punitive damages is the product of the application of law, rather than the jury's caprice. (*Ibid*., citing *State Farm*, *supra*, 538 U.S. at p. 418.)

A. Insufficient Evidence

We first address Pacifica's contention that the award of punitive damages must be vacated because it is unsupported by sufficient evidence of its financial condition. We reject this contention on the ground that Pacifica is estopped from raising this argument because of its inadequate response to plaintiffs' section 1987 notice. (See *Garcia*, *supra*, 40 Cal.App.5th at p. 997 [defendant's failure to comply with a section 1987 notice estopped it from challenging punitive damages award on the ground of insufficient evidence].) In short, Pacifica is responsible for the lack of evidence about its financial condition, not plaintiffs. (See *Soto v. BorgWarner Morse TEC Inc.*, *supra*, 239 Cal.App.4th at p. 194 [dearth of evidence of the defendant's financial condition was attributable to the defendant's failure to comply with discovery obligations].)

B. Awards Disproportionate to Ability to Pay

1. Contentions

Pacifica's contends that the $15 million in punitive damages awarded against Pacifica Senior Living Management LLC was disproportionate to its ability to pay and, therefore, excessive. Pacifica cites cases in which awards of one-third of the defendant's net worth were deemed excessive. (E.g., *ENA North Beach, Inc. v. 524 Union Street* (2019) 43 Cal.App.5th 195, 213-215 [upheld trial court's reduction of punitive damage award from $916,925 to $131,500; jury's award was 35 percent of net value of defendant landlord's primary asset]; *Zhadan v. Downtown L. A. Motors* (1976) 66 Cal.App.3d 481, 500 [award excessive because it was one-third of defendant's net worth]; *Merlo v. Standard Life & Acc. Ins. Co.* (1976) 59 Cal.App.3d 5, 18 [punitive damages award of more than 30 percent of defendant's net worth was excessive].) Pacifica also refers to cases setting forth the general guideline that punitive damage awards are "not allowed to exceed 10 percent of the defendant's net worth." (*Storage Services v. C.R. Oosterbaan* (1989) 214 Cal.App.3d 498, 515; see *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1596 [same].)

Plaintiffs contend the minimal evidence Pacifica produced about the financial condition of its entities should be viewed with skepticism, which makes it difficult to accurately assess Pacifica Senior Living Management LLC's ability to pay. Plaintiffs argue the very inadequacies in the evidence raised by Pacifica are the result of Pacifica's failure to disclose relevant financial information. Plaintiffs also assert net worth alone is easily manipulated and, thus, is not a reliable indicator of ability to pay. As support, plaintiffs cite cases upholding a punitive damages award against defendants with a negative net worth. (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 83 [corporate defendant has ability to pay $4.5 million in punitive damages despite negative net worth]; *Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal.App.4th 577, 580–581 [award of $300,000 upheld where corporate defendant's financial statements showed a negative net worth of $6.3 million].) Plaintiffs also argue that more recent cases have rejected limiting punitive damages to 10 percent of a defendant's net worth. (*Bankhead*, *supra*, at p. 83 [disagreeing with argument that 10 percent of net worth sets a ceiling on the amount of punitive damages].)

2. Evidence of Ability to Pay

During the second phase of the trial, plaintiffs' accounting expert, Gary Margolis, testified about the inadequacy of the documents produced by Pacifica about its financial condition. For Pacifica Senior Living Management LLC, five pages from its 2020 California tax return and a bank statement for December 2021 were produced. The tax return pages were sides 4 (Schedules A & B), 5 (Schedule K), and 6 (Schedules L, M-1, M-2 & O) from the Form 568 and two pages of statements showing calculations for some entries on the schedules. Margolis described these pages as lacking, stating that "you need to see the whole tax return. That's the key to it. That's why they have all those pages, you know. The detail you have to tell the government. But we were given something far, far less than that."

Margolis also criticized the production of the state tax return instead of the entity's federal tax return, Form 1065, stating:

> "I believe that Pacifica does business in more than one country and they also do business in lots of other states, so this seems like a manipulated number. I've never - - in all the times I've ever appeared in court I've never seen anyone try to give Form 568, the California LLC numbers instead [of] giving Form 1065. It's so suspicious on the surface."

After the parties had presented their evidence in the trial's second phase, the trial court discussed jury instructions with counsel. The court stated it planned to read CACI No. 3949 as approved by the parties and CACI No. 204, which was not agreed upon by the parties. CACI No. 204 addresses the concealment of evidence. During the discussion of that instruction, the court stated it did not want to usurp the jury's role in deciding how helpful the documents produced were and giving CACI No. 204 would allow the jury to decide that. It also stated:

> "I would be inclined to give plaintiff very wide latitude in arguing in closing argument about this production by the defendants which in the Court's view is pretty pathetic, perhaps more foundation would have been made about what other documents were out there that would have been available. I don't think it's appropriate for counsel to have, essentially, punted their own responsibility to make sure that their client complies with that notice to produce over to the client and simply accept what their client has produced and just produce, essentially, nine sheets of paper that provide information about the financial condition and net worth of these two parties.
>
> "I know there were bank statements produced for the month of December of last year, but those are virtually meaningless in the Court's view in determining a party's financial condition."

Later the court stated that there was a lot of information that an organization the size of Pacifica Senior Living Management LLC should have been able to produce that they did not and that was "why I allowed [plaintiffs] to go into information pertaining to the value of the entire Pacifica enterprise. In my view the size of the entire enterprise is relevant here. We need to know how big is the entire pie, and what's the portion of that

pie that relates to Pacifica Bakersfield LP and Pacifica Senior Living Management, LLC. And given the dearth of information provided by the defendants, I think [using CACI No. 204 is] an appropriate approach to figure this out."

After the discussion, the trial court decided to give a modified version of CACI No. 204 that stated: "You may consider whether one party intentionally concealed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party."

For a reviewing court to determine whether an award of punitive damages is disproportionate to a defendant's ability to pay, it must have reliable evidence about the defendant's financial condition. Here, Pacifica's claim that the punitive damage awards is disproportionate to the ability of Pacifica Senior Living Management LLC to pay is difficult to analyze because of the dearth of information about that entity's financial condition.[8]

As described in part II., *ante*, the minimal evidence about Pacifica Senior Living Management LLC's financial condition is attributable to Pacifica's failure to comply with discovery obligations. (See *Soto v. BorgWarner Morse TEC Inc.*, *supra*, 239 Cal.App.4th at p. 194.) Consequently, we conclude Pacifica is estopped from arguing the punitive damages award is disproportionate to that entity's ability to pay.

C. Ratio of Punitive Damages to Compensatory Damages

Pacifica argues the punitive damages must be reduced because the ratio between the punitive damages and the compensatory damages is unconstitutional. Pacifica contends punitive damages are recoverable only on the elder abuse claim and the

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[8] The record does contain some evidence about the scope of its operations. Bandel also testified that Pacifica Senior Living Management LLC was "our operating arm for all our senior housing communities." Based on context, the jury could reasonably infer that "our" refers to the Pacifica Companies. Bandel also testified that there are 34 senior living facilities in California that are run by Pacifica Companies and it owns senior housing facilities in 12 other states.

damages awarded on that claim—after the partial grant of its motion for judgment notwithstanding the verdict—totals $398,913.47. This total is the sum of $250,000 in noneconomic damages and $148,913.47 in economic damages. Comparing $398,913.47 to the $15 million punitive damage award produces a ratio of 37.6:1. Pacifica argues this ratio is far beyond the constitutionally-allowable 10:1 ratio and should be presumed excessive because there is no special justification, such as extreme reprehensibility, in this case.

Plaintiffs contend Pacifica's claim that the punitive damage award is unconstitutional because of the ratio between compensatory and punitive damages fails because (1) reprehensibility is the paramount of the three due process guideposts and Pacifica's conduct was reprehensible; (2) a proper comparison looks at the actual or potential harm suffered by the plaintiff and not the amount of compensatory damages recovered after a statutory cap is applied; (3) the comparison of $15 million to $4 million produces a ratio of less than 4:1; and (4) Pacifica forfeited the argument by leading the jury to believe during its closing argument that plaintiffs would recover the entire $4 million awarded on the elder abuse claim, which was one of its tactics for getting the jury to lower the amount of punitive damages awarded. Pacifica's reply brief did not address these arguments.[9]

In *BMW*, the United States Supreme Court described one of the constitutional guideposts as "the disparity between the harm or potential harm suffered by [plaintiff] and his punitive damages award." (*BMW*, *supra*, 517 U.S. at p. 575.) In *State Farm*, the court repeated this description. (*State Farm*, *supra*, 538 U.S. at p. 418; see *Nickerson v.*

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9 The reply brief's failure to respond to plaintiffs' points provides an alternate ground for rejecting Pacifica's argument about the excessively high ratio of punitive damages to compensatory damages. (See *Ross v. Superior Court*, *supra*, 77 Cal.App.5th at p. 681 [reply brief's failure to respond to a point treated as an implicit concession of the point]; accord, *Rudick v. State Bd. of Optometry*, *supra*, 41 Cal.App.5th at p. 89–90.)

Stonebridge Life Ins. Co. (2016) 63 Cal.4th 363, 372.) The court rejected "a bright-line ratio which a punitive damages award cannot exceed," but stated that, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." (*State Farm*, *supra*, at p. 425.) Consequently, the California Supreme Court has stated "that 'ratios between the punitive damages award and the plaintiff's actual or potential compensatory damages significantly greater than 9 or 10 to 1 are suspect and, absent special justification ..., cannot survive appellate scrutiny under the due process clause.' " (*Nickerson*, *supra*, at p. 372.)

Nearly 20 years ago, our Supreme Court recognized that "a large number of federal and state courts have, in a variety of factual contexts, considered *uncompensated* or potential harm as part of the predicate for a punitive damages award." (*Simon*, *supra*, 35 Cal.4th at p. 1174, italics added; see *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 760–761 [harm to decedents not compensable under California law was considered in analyzing punitive damages award].) This principle about uncompensated harm was applied more recently in a case where a former employee sued her employer for allegedly terminating her employment because she had cancer. (*Rubio v. CIA Wheel Group* (2021) 63 Cal.App.5th 82, 85.) The plaintiff died before completion of the trial. The trial court found she had been terminated due to her medical condition, awarded her successors in interest $15,057 in economic damages, found her noneconomic damages to be in the range of $100,000 to $150,000, and awarded $500,000 in punitive damages. (*Ibid*.) Pursuant to section 377.34, the noneconomic damages suffered by the plaintiff were not recoverable because of her death. On appeal, the employer argued the punitive damages award was unconstitutional because it was 33 times the amount of economic damages awarded. (*Rubio*, *supra*, at p. 85.) The plaintiff's successors in interest argued that the proper comparison was to the total harm caused by the employer, which included the noneconomic damages barred by statute. (*Id*. at p. 91.) The Second District agreed, concluding the trial court properly considered harm to the plaintiff beyond her economic

damages. (*Ibid*.) Taking the midpoint in the range of actual harm between $115,057 and $165,057, the court identified the punitive damages to actual harm ratio as approximately 3.5:1 and concluded the punitive damages were not excessive. (*Id*. at p. 100.)

In *McGee v. Tucoemas Federal Credit Union* (2007) 153 Cal.App.4th 1351, the plaintiff sued her employer and supervisor for employment discrimination after occurred after she took time off to undergo chemotherapy. (*Id*. at pp. 1355–1356.) The jury awarded approximately $2 million in compensatory damages and $1.2 million in punitive damages. (*Id*. at p. 1356.) The trial court conditionally granted a motion for new trial based on excessive damages unless the plaintiff accepted a $750,000 reduction in compensatory damages. The court refused to remit any of the punitive damages. (*Ibid*.) On appeal, the employer argued the compensatory damages reduction required a corresponding punitive damages reduction. (*Id*. at p. 1361.) This court rejected that argument, concluding that "a reduction in compensatory damages does not mandate a corresponding reduction in punitive damages" and "[t]here is no requirement that the original ratio between compensatory and punitive damages as measured by the jury remain." (*Id*. at p. 1362.)

Based on the foregoing cases, we conclude both the economic and noneconomic damages found by the jury on the elder abuse claim should be considered when comparing the disparity between the harm suffered by Mosley and the punitive damages award. Therefore, the $4 million in noneconomic damages plus the $148,913.47 in economic damages should be compared to the $15 million in punitive damages. The resulting ratio is slightly above 3.6:1, which is below the ratios of 10:1 and 4:1 listed in Pacifica's opening brief.

Consequently, we reject Pacifica's argument that the relevant ratio is 37.6:1. We conclude that the legally appropriate comparison of punitive damages to actual harm suffered produces a ratio of approximately 3.6:1 and that ratio does not violate the due process clause. (See *Pacific Mutual Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 23–24

[punitive damages award of more than four times the amount of compensatory damages might be close to the line but was not unconstitutional]; *Bennett v. American Medical Response, Inc.* (9th Cir. 2007) 226 Fed.Appx. 725, 728-729 [ratio of 6.49:1 punitive damages to compensatory damages was unconstitutional; case remanded with instructions that the punitive damages award not exceed a 4:1 ratio].)

V. PLAINTIFFS' APPEAL OF DENIAL OF MOTION TO TAX COSTS

A. Background

In May 2022, Pacifica Companies LLC, the entity that had been dismissed before the jury began its deliberations, served a memorandum of costs seeking to recover $28,105.39 from plaintiffs. The costs claimed included filing and motion fees ($3,041.60), jury fees ($1,980.00), deposition costs ($16,840.94), service of process ($2,112.20), fees for electronic filing and service ($470.00), and 32 separate fees paid to Nationwide Legal, LLC for filing documents at the superior court ($3,660.95).

Plaintiffs responded by filing a motion to tax the costs along with a supporting declaration from one of their attorneys. The declaration asserted the attorney had reviewed the costs bill filed by Pacifica Companies LLC and related attachment and asserted in conclusory fashion that "[a]ll of the costs claimed in that memorandum were jointly incurred with Pacifica Bakersfield LP and Pacifica Senior Living Management LLC" and each of the costs would have been incurred even if Pacifica Companies LLC had never been named as a defendant. The declaration did not address the costs claimed individually or categorically. For instance, the declaration did not list the 32 fees paid to Nationwide Legal, LLC for filing documents with the superior court and demonstrate that the documents filed were on behalf of all three named defendants and none were filed on behalf of Pacifica Companies LLC alone.

Plaintiffs' motion argued that, because each of the defendant entities had an unquestioned unity of interest and were represented by the same counsel, Pacifica

Companies LLC's memorandum of costs should be taxed in its entirety. In other words, the motion challenged the costs claimed as a whole. The motion did not challenge specific items of costs claimed and did not argue Pacifica Companies LLC was required to prove that the items (1) were actually "incurred" by Pacifica Companies LLC, (2) were "reasonably necessary to [its] conduct of the litigation," or (3) were "reasonable in amount." (§ 1033.5, subd. (c)(1)–(3).) The motion did not cite section 1033.5 or refer to the discretionary determinations made under its provisions.

Pacifica Companies LLC opposed plaintiffs' motion to tax costs, tailoring its response to plaintiffs' argument that the claimed costs of $28,105.39 should be taxed in their entirety. First, it argued that, under section 1032, Pacifica Companies LLC was a prevailing party entitled to recover its costs as a matter of right. (§ 1032, subd. (a)(4), (b).) Second, it addressed the unity of interest theory raised in plaintiffs' motion and argued that theory was no longer valid under the version of section 1032 adopted in 1986. Pacifica Companies LLC argued its statutory construction adopted the literal meaning of the statutory text and was supported by *Zintel Holdings, LLC v. McLean* (2012) 209 Cal.App.4th 431 and *Charton v. Harkey* (2016) 247 Cal.App.4th 730 (*Charton*).

Plaintiffs' reply argued the trial court was not bound by the conclusions reached in *Charton*, *supra*, 247 Cal.App.4th 730 because there was a conflict among the decisions of the Courts of Appeal. Plaintiffs contended that certain cases, such as *Wakefield v. Bohlin* (2006) 145 Cal.App.4th 963 and *Slavin v. Fink* (1994) 25 Cal.App.4th 722, supported the view that the unity of interest theory remained viable. Plaintiffs' reply also presented a new argument, asserting that if the trial court followed *Charton* and concluded that a unity of interest did not automatically preclude a prevailing defendant from recovering costs shared with a codefendant, it "did not mean that the prevailing defendant in that case was entitled to all of the costs claimed." Plaintiffs asserted their motion to tax costs based on the unity of the defendants' interests "obligated the party seeking costs to justify

the amount sought" and, for the first time, referred to the requirements of section 1033.5, subdivision (c)(1) through (3).

On December 16, 2022, the trial court heard plaintiffs' motion to tax costs. At the beginning of the hearing, the court stated that plaintiffs were making a blanket objection to the entire memorandum of costs submitted by Pacifica Companies LLC "and so they don't have to itemize the objections to each cost." The court stated the basis for the motion was the unity of interest between Pacifica Companies LLC and the other defendants. The court announced that it was inclined to deny the motion based on *Charton* and the current version of the statute along with plaintiffs' failure to cite any statutory authority supporting the denial of the memorandum of costs.

At the hearing, plaintiffs' counsel focused on the theory first raised in plaintiffs' reply to Pacifica Companies LLC's opposition, contending the amendment of section 1032 that removed the unity of interest provision did not change the requirement that a defendant must establish the costs claim were reasonably necessary to the conduct of the litigation, were reasonable in amount, and were related to its defense of the action. Plaintiffs' counsel argued section 1033.5 provided the statutory basis for the court to exercise its discretion and deny the costs based on a determination that the costs claimed were not reasonably necessary to the defense. Plaintiffs' counsel argued that "this defendant in fact has failed to establish that these costs were reasonably necessary for its defense, and that this court has the discretion under [section] 1033.5(C) to conclude that the defendant failed to establish entitlement to those costs, all of which were jointly incurred with the defendants against who[m] plaintiff clearly prevailed."

Defense counsel responded by contending, among other things, that the argument Pacifica Companies LLC had failed to establish the cost claims were reasonably necessary to its defense should have been included in the moving papers and was a new argument that could not be raised in a reply. Defense counsel also argued that it is well established that a verified costs memorandum is prima facia evidence of the

reasonableness and necessity of the costs claimed and it was up to plaintiff to challenge those points in their motion, which they did not do. In response, plaintiffs' counsel argued its motion challenging all the costs obligated Pacifica Companies LLC to establish the costs were reasonably necessary for its defense and it failed to do so.

After hearing the arguments, the trial court stated it was satisfied with the tentative ruling denying the motion and directed defense counsel to prepare an order for the court signature pursuant to California Rules of Court, rule 3.1312. The minute order filed by the clerk stated the court denied the motion to tax costs. From the record on appeal, which includes the superior court's register of actions, it appears the defense counsel never prepared and submitted a proposed order to the court.[10]

In February 2023, plaintiffs filed a notice of appeal, which referred to the December 16, 2022 order denying the motion to tax costs. In April 2023, we granted the parties' joint motion and consolidated Pacifica's appeal (No. F084699) with plaintiffs' appeal (No. F085726).

Plaintiffs' appellate briefing asserted their motion to tax costs should have been granted because (1) there was a unity of interest between Pacifica Companies LLC, the dismissed defendant, and the other two defendants against whom plaintiffs prevailed; (2) all the costs claimed would have been incurred even if Pacifica Companies LLC had never been named as a defendant; and (3) Pacifica Companies LLC supplied no evidence that the costs claimed were incurred on its behalf. Our analysis of plaintiffs' arguments begins with the relevant statutory text.

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10 Because defense counsel did not obey the trial court and prepare an order, we conclude that, in the interests of justice, the parties should bear their own costs in the appeal from the order denying the motion to tax costs. (Cal. Rules of Court, rule 8.278(a)(5).) Before consolidation, that appeal was assigned case No. F085726.

B. Prevailing Party Status

1. Statutory Provisions Addressing Entitlement to Costs

Subdivision (b) of section 1032 states: "Except as otherwise expressly provided by statute, a *prevailing party* is entitled as a *matter of right* to recover costs in any action or proceeding." (Italics added.) Thus, the first question we address is whether Pacifica Companies LLC was a prevailing party. The term "prevailing party" is defined in subdivision (a)(4) of section 1032. The first sentence of that provision states:

> " 'Prevailing party' includes the party with a net monetary recovery, *a defendant in whose favor a dismissal is entered*, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant." (§ 1032, subd. (a)(4), italics added.)

This sentence identifies four categories of litigants who must be treated as a prevailing party for purposes of awarding costs. In other words, the superior court has no discretion to deny them prevailing party status. (*Michell v. Olick* (1996) 49 Cal.App.4th 1194, 1197.) Consequently, litigants who qualify as prevailing parties under any of the four categories are entitled to recover costs as a matter of right pursuant to subdivision (b) of section 1032.

2. Pacifica Companies LLC is a Prevailing Party

The April 2022 judgment on jury verdict stated the plaintiffs requested that Pacifica Companies LLC not be included in the special verdict form for the trial's first phase and, "therefore, the action of the plaintiffs against Defendant PACIFICA COMPANIES, LLC is hereby dismissed with prejudice." The July 2022 amended judgment on jury verdict included the same provision dismissing Pacifica Companies LLC.

The judgment and amended judgment plainly establish Pacifica Companies LLC is "a defendant in whose favor a dismissal is entered" and, therefore, qualifies as a prevailing party under the first sentence of subdivision (a)(4) of section 1032. As a

result, Pacifica Companies LLC "is entitled as a matter of right to recover costs in [this] action" pursuant to subdivision (b) of section 1032.

There is no ambiguity in how the statutory language applies to Pacifica Companies LLC in the circumstances of this case. When statutory text, standing alone, is clear and unambiguous, courts adopt the plain or literal meaning of that text unless that construction would produce absurd consequences or would frustrate the manifest purpose of the statute that appears from its provisions when considered as a whole and in the context of its legislative history. (*Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, 239.) Here, plaintiffs have not demonstrated we should apply either exception to implementing a statute's plain meaning. (Cf. *Provigo Corp. v. Alcoholic Beverage Control Appeals Bd.* (1994) 7 Cal.4th 561, 567 [plain meaning of constitutional provision rejected to avoid absurdity].)

3. The second sentence of subdivision (a)(4) of section 1032

Plaintiffs contend that the award of costs to Pacifica Companies LLC is not a matter of statutory right, but the award of costs is committed to the trial court's discretion. Plaintiffs rely on the language contained in the second sentence or prong of subdivision (a)(4) of section 1032. That sentence states:

> "If any party recovers other than monetary relief and *in situations other than as specified*, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed, may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034." (§ 1032, subd. (a)(4), italics added.)

Plaintiffs contend that the situation presented in this case—that is, a prevailing defendant and nonprevailing defendants sharing a unity of interest in the litigation and being represented by the same counsel—was a "situation[] other than as specified" under the second sentence of subdivision (a)(4) of section 1032. We disagree with plaintiffs' application of the statutory text in the second sentence. Pacifica Companies LLC is "a

defendant in whose favor a dismissal is entered" and, as a result, is a party specified in the first sentence of subdivision (a)(4) of section 1032. Restated using the text of the second sentence of subdivision (a)(4) of section 1032, Pacifica Companies LLC is not in a "situation[] other than as specified" in the provision's first sentence. Consequently, plaintiffs' argument that the second sentence of subdivision (a)(4) of section 1032 applies to Pacifica Companies LLC fails to accurately apply the plain meaning of the statutory text to the undisputed procedural facts of this case.

4. Unity of Interest Principle Does Not Affect Prevailing Party Status

Plaintiffs' motion to tax the costs argued that, because of the unity of interest between Pacifica Companies LLC and the two defendants found liable and because all the costs claimed would have been incurred even if Pacifica Companies LLC had not been named as a defendant, the costs claimed by Pacifica Companies LLC should be taxed in their entirety. Our analysis breaks this argument into three specific issues.

First, we consider the narrow legal issue of whether the unity of interest principle *requires* a trial court to deny Pacifica Companies LLC prevailing party status. Stated another way, when an otherwise prevailing defendant has a unity of interest in the litigation with nonprevailing defendants, is that defendant barred from recovering any costs? Second, we consider whether the unity of interest principle gives a trial court the *discretion* to deny a defendant prevailing party status when that defendant meets the statutory definition of a prevailing party. Third, we consider whether the unity of interest principle plays a role in a trial court's determination of the amount of a particular cost recoverable by the prevailing party. (See § 1033.5, subd. (c).)

The first legal issue of whether the unity of interest principle requires a trial court to deny a defendant prevailing party status and, thus, the entitlement to recover costs as a matter of right, is resolved by the plain meaning of section 1032 described earlier in part V.B.2. of this opinion. The statute plainly states that a defendant who qualifies as a

prevailing party under the first sentence of section 1032, subdivision (a)(4) is entitled to costs as a matter of right under section 1032, subdivision (b). Thus, we conclude the unity of interest principle or exception does not operate to bar that prevailing defendant from recovering costs in accordance with the statute.

In reaching this conclusion, we have examined the cases relied upon by plaintiffs to support their argument that the unity of interest principle bars Pacific Companies LLC from recovering any costs and are not convinced the analysis adopted in those cases justifies rejecting the plain meaning of the version of section 1032 enacted in 1986.[11] (See *Wakefield v. Bohlin, supra,* 145 Cal.App.4th at pp. 984-985, disapproved of on other grounds by *Goodman v. Lozano* (2010) 47 Cal.4th 1327; *Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061, 1075, disapproved on other grounds by *Zhang v. Superior Court* (2013) 57 Cal.4th 364, 382; *Webber v. Inland Empire Investments, Inc.* (1999) 74 Cal.App.4th 884, 920; *Slavin v. Fink, supra,* 25 Cal.App.4th at pp. 725–726.) To the extent there is a split of authority on the narrow issue of whether the unity of interest principle operates as a bar to recovering any costs, we join *Charton, supra,* 247 Cal.App.4th 730, in concluding that none of those cases are persuasive because they do not explain how the unity of interest exception survived the 1986 repeal of former section 1032 and the omission of the unity of interest exception from the current version of section 1032. (*Charton*, at p. 734.) Thus, we think the court in *Charton* reached the correct result when it affirmed the trial court's determination that the

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11 The unity of interest principle was based on the second sentence in former section 1032, subdivision (b), which addressed actions where the plaintiff had a favorable judgment against some defendants and other defendants had judgment in their favor: "When there are several defendants in any action mentioned in subdivision (a) of this section, not united in interest, and making separate defenses by separate answers, and plaintiff fails to recover judgment against all, the court must award costs to such of the defendants as have judgment in their favor."

respondent was a prevailing party entitled to recover costs as a matter of right despite its unity of interest with three nonprevailing defendants.

The second legal issue we consider is whether "the unity of interest exception … provides a trial court *with discretion to deny prevailing party status* to a defendant who otherwise would be entitled to recover costs as a matter of right when that defendant is united in interest with, and asserted the same defenses in the same answer as, other defendants who did not prevail and are not entitled to recover their costs"? (*Charton*, *supra*, 247 Cal.App.4th at p. 734, italics added.) Because granting the trial court the discretionary authority to deny prevailing party status to a defendant who qualifies for that status under the first sentence of section 1032, subdivision (a)(4) would contradict the statute's plain meaning, we conclude no such discretionary authority exists. (See § 1858 [when construing a statute, a judge's role is "not to insert what has been omitted"].) Concluding otherwise would rewrite the statute.

The third legal issue we consider is whether the unity of interest principle plays a role in identifying the specific cost items a prevailing party may recover or in limiting the amount of a cost item that may be recovered. The statutory provision that governs this issue is contained in section 1033.5, which the Legislature enacted in 1986 "to identify the specific cost items a prevailing party may recover, and to limit the recoverable costs to those that are incurred by the prevailing party, reasonably necessary to that party's conduct of the litigation, and reasonable in amount." (*Charton*, *supra*, 247 Cal.App.4th at pp. 734–735.) We resolve this legal issue by adopting the following conclusions:

> "When less than all of a group of jointly represented parties prevail, these limitations require the trial court to apportion the costs among the jointly represented parties based on the reason for incurring each cost and whether the cost was reasonably necessary to the conduct of the litigation on behalf of the prevailing parties. The court may not make an across-the-board reduction based on the number of jointly represented parties because doing so fails to consider the reason for incurring the costs and whether they were reasonably necessary for the prevailing party." (*Charton*, *supra*, at p. 735.)

We further conclude that whether a trial court is required to undertake this inquiry and apply the requirements contained in section 1033.5, subdivision (c) to particular cost items claimed depends upon the issues raised in the motion to tax costs. Stated another way, trial courts do not have a sua sponte obligation to address the requirements of section 1033.5, subdivision (c) when they have not been properly raised by the party moving to tax costs.

C. Recovery of Specific Costs Items and Forfeiture

The foregoing interpretation and application of sections 1032 and 1033.5 brings us to plaintiffs' arguments about whether the particular items of cost claimed are recoverable by the prevailing party and, if so, the amount of that recovery. Pacifica Companies LLC presents several arguments for why the trial court did not abuse its discretion in denying the motion to tax costs, including that plaintiffs forfeited the argument by failing to properly present it in their motion to tax costs.

The reporter's transcript for the December 16, 2022 hearing on the motion to tax costs does not contain the trial court's rationale for rejecting plaintiffs' argument that Pacifica Companies LLC was required to establish that it actually incurred the costs claimed, those costs were reasonably necessary for the conduct of the litigation, and the costs claimed were reasonable in amount. (See § 1033.5, subd. (c)(1)–(3).)

Based on the presumption that a trial court's order is correct and the principle that all intendments and presumptions are indulged to support the order on matters as to which the record is silent, we are required to infer that the trial court found plaintiffs had forfeited the argument because it was raised for the first time in their reply brief. (*Schram Construction, Inc. v. Regents of University of California* (2010) 187 Cal.App.4th

1040, 1052, fn. 7 [party waived alleged error by asserting it "for the first time in its reply brief in the trial court"].)[12]

Next, we conclude the trial court's implied forfeiture determination is not legally erroneous. The argument that the burden shifted to Pacifica Companies LLC and Pacifica Companies LLC failed to carry that burden and show the costs were reasonably necessary for its defense should have been raised in plaintiffs moving papers. (See *Thompson v. County of Los Angeles* (2022) 85 Cal.App.5th 376, 382 [plaintiff forfeited an argument by failing to raise it in her motion to tax costs].) Moreover, the arguments raised in the reply brief were conclusory and did not provide an analysis of the reasonableness and necessity of any specific item of cost claimed. Thus, those undeveloped arguments were insufficient to shift the burden to Pacifica Companies LLC. Similarly, the record on appeal is inadequate for this court to undertake an item-by-item review of the costs claimed to determine their reasonableness and necessity. For instance, plaintiffs have made no attempt to show that the 32 separate fees paid to Nationwide Legal, LLC for filing documents at the superior court ($3,660.95) involved documents that were, in fact, filed jointly by all three defendants.

Consequently, we will uphold the trial court's implied determination that plaintiffs' conduct in that court forfeited their argument that Pacifica Companies LLC failed to carry the burden of showing the items claimed were reasonable and necessary to its defense. Accordingly, the trial court did not err in denying plaintiffs' motion to tax costs claimed by Pacifica Companies LLC.

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12 Sometimes, the terms "waiver" and "forfeiture" are used interchangeably. (*People v. Simon* (2001) 25 Cal.4th 1082, 1097, fn. 9.) When used in a precise technical sense, waiver refers to the intentional relinquishment or abandonment of a known right. (*Ibid*.) In comparison, forfeiture refers to the loss of a right or objection by failing to assert it in a timely manner. (*Ibid*.) Consequently, in the next two paragraphs, we "shall refer to the issue as one of forfeiture." (*Ibid*.)

DISPOSITION

The judgment is affirmed. Plaintiffs shall recover the costs reasonably incurred in case No. F084699.

The order denying plaintiffs' motion to tax costs is affirmed. The parties shall bear their own costs that were incurred solely because of the appeal of that order, which appeal was designated case No. F085726 before consolidation. (Cal. Rules of Court, rule 8.278(a)(5).)

FRANSON, Acting P. J.

WE CONCUR:

MEEHAN, J.

SNAUFFER, J.