Filed 1/10/11

**CERTIFIED FOR PARTIAL PUBLICATION***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

FRANKIE NAJERA,

Plaintiff and Appellant,

v.

IRENE HUERTA,

Defendant and Appellant.

F058850

(Super. Ct. No. VCU228251)

# OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Lloyd L. Hicks, Judge.

Sawl & Netzer and John R. Malmo for Plaintiff and Appellant.

Stammer McKnight Barnum & Bailey and Bruce J. Berger for Defendant and Appellant.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of sections D.1. and E. of Facts and Procedural History, and part I. of Discussion.

In this personal injury case arising out of an automobile-versus-motorcycle traffic collision, the jury found that defendant Irene Huerta was the sole negligent cause of the accident and awarded plaintiff Frankie Najera total damages of $728,703.83. According to the verdict form, the damages consisted of past medical expenses ($45,908.83), past wage loss ($12,540), future medical expenses ($480,855), future wage loss ($114,400) and future pain and suffering ($75,000). After judgment was entered on the verdict, defendant moved for a new trial on two grounds: (i) the award of future damages was excessive, and (ii) plaintiff's counsel engaged in improper conduct during trial. The trial court agreed that relief was warranted on the first ground and granted a new trial on the issue of future damages only. Meanwhile, in his memorandum of costs, plaintiff claimed entitlement to expert witness fees and prejudgment interest because defendant had allegedly failed to accept plaintiff's Code of Civil Procedure section 998 offer of settlement (section 998 offer).[1] Defendant moved to tax said costs, arguing that plaintiff's section 998 offer—which was served at the time of the original summons and complaint—was not made in good faith. The trial court granted defendant's motion and thereby denied recovery of the challenged costs.

Plaintiff appeals from both the order granting a new trial and the order taxing costs, arguing that each ruling constituted an abuse of the trial court's discretion. Defendant's response includes a protective cross-appeal contending that if the order granting a new trial on the ground of excessive damages is not affirmed, a new trial should still be required on the alternative basis of attorney misconduct. For reasons that follow, we affirm both of the trial court's orders and dismiss the cross-appeal as moot.

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[1] Unless otherwise indicated, all future statutory references are to the Code of Civil Procedure.

## FACTS AND PROCEDURAL HISTORY

A. The Accident

On November 9, 2007, defendant was driving her van westbound on Avenue 256 in Tulare County. She came to a complete stop at the stop sign where Avenue 256 intersects with Mooney Boulevard. At that location, Mooney Boulevard is a north/south highway on which the flow of traffic is not controlled by a stop sign or signal and the speed limit is 60 miles per hour. Defendant looked both to her right and left before proceeding into the intersection to make an intended left turn onto Mooney Boulevard. Unfortunately, defendant did not see plaintiff's motorcycle in the northbound lanes of Mooney Boulevard approaching the intersection at a speed of 55-60 miles per hour. When defendant pulled forward, she did so directly in front of plaintiff's oncoming motorcycle. Plaintiff's motorcycle immediately struck defendant's van and plaintiff was ejected into the air and thrown forward onto the pavement, thereby sustaining traumatic injuries to many parts of his body.

B. Facts Relating to Offer to Compromise

On April 28, 2008, plaintiff's attorney made a prelitigation policy limit demand on defendant's insurance carrier, State Farm Mutual Automobile Insurance Company (State Farm). The demand included a summary of plaintiff's injuries, medical bills to date, and alleged lost earnings. State Farm requested further information about certain of the damages claimed in the demand (i.e., lost earnings), but plaintiff's attorney never responded to that request. Instead, plaintiff's complaint was filed in Tulare County Superior Court on May 28, 2008.

On June 9, 2008, defendant was served with the summons and complaint, along with a section 998 offer to settle or compromise the action for the sum of $50,000. Defendant delivered the pleadings and other documents to State Farm, who then assigned the case to Attorney Bruce Berger to provide a defense. Mr. Berger's office purports to have received the file from State Farm on June 26, 2008. Mr. Berger was at that time

preparing for another trial and had an associate draft and file a general denial to answer the complaint. When Mr. Berger completed the other trial, he learned of the section 998 offer and sent a letter to plaintiff's counsel objecting that the offer was premature and not in good faith because there had been insufficient opportunity to review medical records and conduct basic discovery in order to substantiate plaintiff's damage claims. Mr. Berger's letter also stated it was his understanding that plaintiff's law firm had a policy to not extend the 30-day deadline for accepting a section 998 offer. Attorney John Malmo, a member of plaintiff's law firm, responded in writing that the section 998 offer *was* in good faith in light of the earlier policy limit demand that had been sent to State Farm. Mr. Malmo did not deny or otherwise comment on whether his firm had a *no extension* policy. In reply, Mr. Berger once again wrote to register his objection to the practice of serving section 998 offers before there was adequate time to conduct discovery and independently investigate and evaluate a case.

C. Trial and Verdict

Trial of this action commenced on May 18, 2009, and concluded on May 28, 2009, when the jury announced its verdict. A majority of the testimony at trial concerned the nature of plaintiff's injuries sustained in the accident, and the issue of what past and/or future medical treatment was reasonably necessary as a result of such injuries, including the cost of such medical treatment. Plaintiff called as his expert witnesses a chiropractor and three medical doctors. Defendant's expert witness was a board certified orthopedic surgeon. The respective experts were diametrically opposed on certain important questions relating to future medical treatment, in particular whether surgeries were warranted on plaintiff's neck, back, wrist, knee and ankle as a result of the injuries sustained in the accident. The jury found in favor of plaintiff and awarded him $728,703.83 in total damages. The verdict itemized the damages as follows: $45,908.83 for past medical expenses; $12,540 for past wage loss; $480,855 for future medical expenses; $114,400 for future wage loss; and $75,000 for future pain and suffering. The

jury awarded nothing ("$0.00") for past pain and suffering. Judgment was entered on the verdict on July 2, 2009.

D. Postjudgment Motions

1. New Trial Motion*

Defendant moved for a new trial. The two primary grounds raised by defendant for seeking a new trial were as follows: (1) the future damages awarded by the jury were excessive or the amount thereof was not justified by the evidence (§ 657, subds. 5 & 6); and (2) irregularity of the proceedings in the form of misconduct by plaintiff's attorney prevented defendant from having a fair trial (§ 657, subd. 1). In support of the first ground, defendant's motion compared the testimony of the medical experts for plaintiff and defendant, and argued that the credibility of plaintiff's medical experts was lacking and was far outweighed by that of defendant's medical expert in regard to future medical damages. In support of the second ground, defendant's motion pointed out numerous instances of alleged attorney misconduct on the part of plaintiff's counsel, including such things as allegedly asserting facts not in evidence, making improper arguments and making inflammatory and unfounded accusations against witnesses or opposing counsel. According to defendant's motion, such misconduct was prejudicial to defendant's case as evidenced by the excessively high verdict.

On August 27, 2009, the trial court issued its order granting a new trial on the ground that the jury's award of future damages was excessive. The grant of a new trial of future damages was made conditional on plaintiff declining to accept a reduced damage award of $133,448.83.[2] The trial court's order recited reasons for concluding that the future damages were excessive; namely, the testimony of plaintiff's medical experts regarding the need for future surgeries and other future medical treatment was not

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* See footnote, *ante*, page 1.

2 Obviously, plaintiff did not accept the reduction.

credible, while in contrast the testimony of defendant's medical expert on these points was both reasonable and credible, including the opinion that no surgeries would be necessary. It therefore appeared to the trial court that the jury's determination of future damages was clearly excessive, and thus a new trial of future damages was warranted. The trial court expressly denied the alternative ground for defendant's motion; namely, that of alleged attorney misconduct on the part of plaintiff's counsel.

2. Motion to Tax

In a second posttrial motion, defendant moved to tax (or strike) certain costs that were claimed by plaintiff in the memorandum of costs. Specifically, defendant challenged plaintiff's claim of entitlement to expert witness fees ($19,500) and prejudgment interest ($72,870.38). Plaintiff had alleged that such costs were recoverable under the provisions of section 998 (& Civ. Code, § 3291), because defendant failed to accept a section 998 offer to compromise the action within 30 days after service thereof and plaintiff thereafter obtained a damage award that exceeded the amount of the offer. Defendant's motion to tax costs argued that plaintiff should not be awarded such costs because plaintiff's section 998 offer was not made in good faith since it was served with the summons and complaint before there had been an adequate time for a reasonable investigation or discovery of facts to evaluate plaintiff's offer. The trial court agreed with defendant's position and granted the motion to tax costs.

E. The Appeal and Cross-Appeal*

Plaintiff timely filed the instant appeal from the order granting a new trial of future damages and from the order denying recovery of the challenged costs. Plaintiff's appeal contends that under the facts of this case, the trial court's orders were an abuse of discretion. Defendant has not only submitted responsive briefs, but has also filed a protective cross-appeal concerning the new trial order. Specifically, the cross-appeal

* See footnote, *ante*, page 1.

asserts that if we do not affirm the order granting a new trial of future damages on the ground that such damages were excessive, we should grant a complete new trial of the case on the alternative ground (rejected by the trial court) that plaintiff's counsel engaged in misconduct at trial that resulted in prejudice.

## DISCUSSION

### I. Order Granting New Trial*

Plaintiff contends the trial court abused its discretion when it granted a new trial of future damages. Plaintiff's primary argument is that the reasons specified by the trial court for granting the motion were contrary to *overwhelming evidence* presented at trial on the issue of future medical damages (i.e., the testimony of plaintiff's experts that future surgeries were necessary). As will be seen, plaintiff's argument fails to appreciate the deferential standard of review that is applicable in such cases when there is a statement of reasons. As to other elements of future damages that were not explicitly mentioned in the order, we conclude they were inextricably tied to the issue of future surgeries and therefore it was unnecessary for the trial court to separately discuss those matters in granting a new trial of all future damages.

#### A. Standard of Review

Section 657 permits the granting of a new trial upon the ground of excessive damages if "after weighing the evidence the [trial] court is convinced from the entire record, including reasonable inferences therefrom, that the … jury clearly should have reached a different verdict or decision." "'The new trial motion is addressed to the sound discretion of the trial judge. In ruling on it, he [or she] is vested with authority to disbelieve witnesses and reweigh the evidence.'" (*Martinides v. Mayer* (1989) 208 Cal.App.3d 1185, 1197.) Moreover, """"'The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed

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* See footnote, *ante*, page 1.

unless a manifest and unmistakable abuse of discretion clearly appears. This is particularly true when the discretion is exercised in favor of awarding a new trial, for this action does not finally dispose of the matter. So long as a reasonable or even fairly debatable justification under the law is shown for the order granting the new trial, the order will not be set aside. [Citations.]' [Citation.]"" (*Whitlock v. Foster Wheeler, LLC* (2008) 160 Cal.App.4th 149, 159.)

As explained at length by our Supreme Court in *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, at pages 411-412:

> "The standards for reviewing an order granting a new trial are well settled. After authorizing trial courts to grant a new trial on the grounds of '[e]xcessive … damages' or '[i]nsufficiency of the evidence,' section 657 provides: '[O]n appeal from an order granting a new trial upon the ground of the insufficiency of the evidence … or upon the ground of excessive or inadequate damages, … *such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons*.' (Italics added.) Thus, we have held that an order granting a new trial under section 657 'must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on [the trial court's] theory.' [Citation.] Moreover, '[a]n abuse of discretion cannot be found in cases in which the evidence is in conflict and a verdict for the moving party could have been reached ….' [Citation.] In other words, 'the presumption of correctness normally accorded on appeal to the jury's verdict is replaced by a presumption in favor of the [new trial] order.' [Citation.]
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> "The reason for this deference 'is that the trial court, in ruling on [a new trial] motion, sits … as an independent trier of fact.' [Citation.] Therefore, the trial court's factual determinations, reflected in its decision to grant the new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations.
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> "The trial court sits much closer to the evidence than an appellate court. Even the most comprehensive study of a trial court record cannot replace the immediacy of being present at the trial, watching and hearing as the evidence unfolds. The trial court, therefore, is in the best position to assess the reliability of a jury's verdict and, to this end, the Legislature has granted trial courts broad discretion to order new trials. The only relevant limitation on this discretion is that the trial court must state its reasons for

granting the new trial, and there must be substantial evidence in the record to support those reasons. [Citation.]"

As the last sentence of the above quoted language reflects, the broad discretion given to a trial court to grant a new trial is limited by the requirement to prepare a *statement of reasons*. And, as explained below, the absence of a sufficient statement of reasons has an impact on the standard of review. Because plaintiff has challenged the sufficiency of the trial court's statement of reasons in this appeal, we now explain the established legal principles concerning a trial court's statement of reasons in support of an order granting a new trial.

**B. Statement of Reasons for Granting New Trial**

When a new trial is granted, section 657 requires the trial court to state the statutory ground or grounds[3] upon which the motion is being granted (e.g., excessive damages), as well as the trial court's reason or reasons for granting the motion on each ground stated. Moreover, on appeal from an order granting a new trial upon the ground of excessive damages (as here) or upon the ground of insufficiency of the evidence to support the verdict, an appellate court must "conclusively presume[]" that the reasons specified in the order are the *only* reasons for granting the new trial on that ground, and "such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons." (§ 657.) The intent of these provisions is to encourage careful deliberation by the trial court in making new trial orders and to require sufficient specificity to facilitate meaningful appellate review of such orders. (*Mercer v. Perez* (1968) 68 Cal.2d 104, 113-115.)[4]

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[3] Section 657 lists the seven grounds upon which such an order may be granted.

[4] With respect to an appeal from an order granting a new trial on the ground of excessive damages or insufficient evidence, the effect of this language in section 657 is to narrow the scope of review to the reasons specified in the order, and the order may be affirmed on said grounds only for a reason actually stated in the order. (*Mercer v. Perez, supra,* 68 Cal.2d at p. 115.)

In construing the above statutory provisions, the Supreme Court has held that the presence or absence of a sufficient statement of reasons has implications on appellate review: "When the trial court provides a statement of reasons as required by section 657, the appropriate standard of judicial review is one that defers to the trial court's resolution of conflicts in the evidence and inquires only whether the court's decision was an abuse of discretion. [Citations.] But when there is no statement of reasons, an appellate court's use of an abuse of discretion standard of review would subvert the purposes that this court has identified as underlying section 657's statement of reasons requirement." (*Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 636.) If the sole ground for a motion for new trial is excessive damages or insufficient evidence to support the verdict, and the order fails to state the trial court's reasons for granting the motion on that ground, the order cannot be sustained on such ground and will be reversed. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 905-906.) However, if *other* grounds were raised in the motion, the reviewing court may sustain the order if a new trial was required on one of the other grounds specified in the motion. In such a case, the trial court's order is not entitled to deference and the burden is on the movant to advance any grounds stated in the motion upon which the order should be affirmed, and a record and argument to support it. (*Ibid*.; *Oakland Raiders v. National Football League*, *supra*, at pp. 636-640 [independent review standard applied].)[5]

What is an adequate statement of reasons? Generally, a statement of reasons is sufficient "if the judge who grants a new trial furnishes a concise but clear statement of the reasons why he finds one or more of the grounds of the motion to be applicable to the case before him. No hard and fast rule can be laid down as to the content of such a specification, and it will necessarily vary according to the facts and circumstances of each

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**5** Here, although the motion was granted on the ground of excessive damages, the motion itself raised two grounds: excessive damages and misconduct of counsel.

case." (*Mercer v. Perez, supra*, 68 Cal.2d at p. 115.) For example, "if the ground relied upon is 'insufficiency of the evidence,' the judge must [(1)] briefly recite the respects in which he finds the evidence to be legally inadequate [and] … [(2)] briefly identify the portion of the record which convinces the judge 'that the court or jury clearly should have reached a different verdict or decision.'" (*Id.* at p. 116, fn. omitted.) The identical rule applies when the ground is that of excessive damages; that is, the order should briefly indicate the respects in which the evidence dictated a less sizable verdict and identify the portion of the record that would tend to support the judge's ruling. (*Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 61-62.)

The statement of reasons should refer to evidence, and not to mere ultimate facts. (*Oakland Raiders v. National Football League*, *supra*, 41 Cal.4th at p. 635.) Although something more than a bare reference to an ultimate fact or a reiteration of the statutory ground is needed to comply with section 657's requirement of a statement of reasons, "'the trial judge is not necessarily required to cite page and line of the record, or discuss the testimony of particular witnesses,' nor need he undertake 'a discussion of the weight to be given, and the inferences to be drawn from each item of evidence supporting, or impeaching, the judgment.' [Citation.]" (*Scala v. Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d 359, 370.) The statement of reasons should simply be specific enough to facilitate meaningful appellate review and avoid any need for the appellate court to rely on inference or speculation. (*Oakland Raiders v. National Football League*, *supra*, at p. 634.)

*Meiner v. Ford Motor Co.* (1971) 17 Cal.App.3d 127, 131 (*Meiner*) furnishes an example of a sufficient statement of reasons in a case analogous to our own. In that case, as here, the trial court specified that a new trial was being granted because certain expert witnesses were not credible to establish an essential fact. In *Meiner*, the plaintiff alleged that the automobile accident in which he was injured was caused by a defect in the steering wheel. The jury awarded the plaintiff damages of $300,000 under a product

liability cause of action, and the trial judge granted the defendant's motion for a new trial on the ground of insufficiency of the evidence to support the verdict. The trial court's order specified the following reasons: "'The plaintiff's expert testimony, when weighed against the overwhelming expert testimony introduced by defendant, is completely lacking in probative force to establish the proposition of fact to which it is addressed; namely, that there was a temporary failure of the steering mechanism or that said steering mechanism or any other portion of the vehicle was defective. Further, upon weighing the evidence, resolving conflicting evidence and disregarding the testimony of those whose credibility is doubted, the [trial] Court is convinced that the defendant's evidence regarding the manner in which the accident happened is overwhelmingly more persuasive and probable than the evidence introduced by plaintiff.'" (*Id.* at p. 135.)

On appeal, the plaintiff in *Meiner* challenged the sufficiency of the trial court's statement of reasons. The Court of Appeal affirmed, holding that the statement of reasons was sufficient because it referred to evidence that convinced the trial court that the jury should have reached a different verdict and it specified why that evidence was inadequate to support the verdict. Thus, the statement satisfied the purposes of the law's requirement of a statement of reasons because it enabled the parties and appellate court to meaningfully consider the question of whether there was any substantial evidence to support the judge's reasons. (*Meiner, supra,* 17 Cal.App.3d at pp. 136-139.)

**C. Application**

We now consider whether the trial court set forth an adequate statement of reasons and, if so, whether the reasons stated were supported by substantial evidence.

The order granting a new trial on future damages stated as the ground for such relief that "the jury's award of future damages was *excessive*, and that the jury, on the evidence presented, clearly should have reached a different result." (Italics added.) The order stated that the excessive award was the result of passion or prejudice and suggested the jury may also have been confused about the standard for future medical damages. In

the order, the trial court prefaced its decision by summarizing the testimony of the respective medical experts, including plaintiff's four experts (namely Dale Charrette, D.C.; Archie Mays, M.D.; Charles O. Lewis III, M.D.; and Ron Y. Goldstein, M.D.) and defendant's sole expert (Hiram B. Morgan, M.D.). The trial court found that Dr. Morgan's testimony was highly credible on the issue of future medical damages, while the testimony of plaintiff's experts was not believable on that issue. The trial court then recited the following reasons for its determination:

> "To recover for further medical costs, plaintiff must prove the reasonable cost of reasonably necessary medical care that he is reasonably certain to need in the future. [¶] … [¶]
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> "Plaintiff's testifying doctors were not credible witnesses. Their opinions regarding future surgeries were not based on appropriate clinical findings. The doctors all had a personal interest in the outcome of the case, as all had liens against the recovery. The doctors had limited contact with the plaintiff. The doctors did not provide treatment, and Drs. Mays and Lewis were not in the business of providing treatment. All they did was refer to other doctors, the effect of which was to generate medical bills, but not providing palliative care. Plaintiff's doctors appeared to be for the purpose of treating the lawsuit, not the plaintiff.
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> "Dr. Morgan was more qualified than any of plaintiff's doctors, and engaged in a thorough review of the records and imaging. He gave clinical reasons for disputing the [plaintiff's doctors'] opinions.
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> "The court is well aware that Dr. Morgan is used extensively as a defense medical examiner and, in that sense, is also brought in to treat the lawsuit, but his testimony was credible and backed up by clinical findings, and plaintiff's doctors were not.
>
> "The court therefore grants defendant's motion for new trial on the grounds of excessive damages for the reasons set forth above, limited to future damages."

The order was clearly premised on the trial court's assessment of the credibility of the respective medical experts and it identified the relevant portions of the record (i.e., the testimony of each of the experts) upon which the trial court's decision was based.

There is no question that if, as the trial court reasoned, the jury should have believed Dr. Morgan regarding the issue of future surgeries, the award of future medical damages was excessive.[6] In support of the trial court's conclusions, the order specified a number of factors or reasons relevant to the trial court's credibility assessment, including defendant's expert's (Dr. Morgan's) qualifications, his thoroughness in reviewing the records and imaging data, and his careful recitation of clinical reasons for disputing the conclusions of plaintiff's doctors. Whereas, in contrast, it appeared to the trial court that plaintiff's experts were less qualified and did not adequately base their opinions on clinical findings. Additionally, the trial court noted in the order that Drs. Mays and Lewis did not actually provide palliative treatment to plaintiff, but were merely referring him to other doctors or "treating the lawsuit," and such services were provided on a lien basis. We conclude the statement of reasons was adequate because it not only referred to an identifiable portion of the record, but also explained the basis for the trial court's decision with sufficient specificity to permit meaningful appellate review. (*Meiner, supra,* 17 Cal.App.3d at pp. 135-137; *Mercer v. Perez, supra,* 68 Cal.2d at p. 116.)

We also find there was substantial evidence to substantiate a number of the factors mentioned by the trial court. For example, Dr. Morgan's qualifications included being a board certified orthopedic surgeon with several decades of experience. There is no indication in the record that any of plaintiff's experts had such extensive expertise. Further, Dr. Morgan's testimony provided medical or clinical reasoning that was

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**6** Dr. Morgan testified that *none* of the future surgeries (and other proposed future treatment) suggested by plaintiff's doctors was medically necessary. As to the contrary opinions offered by plaintiff's doctors, Dr. Charette, plaintiff's chiropractor, testified that plaintiff would need ongoing chiropractic care for the rest of his life, while Drs. Mays, Lewis and Goldstein together presented opinions that surgeries and other future treatment were needed on the cervical and lumbar areas of plaintiff's spine, along with plaintiff's wrist, ankle and knee. Other details regarding future care were also disputed by the respective experts, including the need of treatment for incontinence and depression allegedly caused by plaintiff's condition.

considerably more thorough and detailed than that of plaintiff's experts. These, of course, were reasonable factors to consider in evaluating credibility and were enough to support the conclusions set forth in the order. Additionally, the trial court observed the expert witnesses firsthand (including their qualifications, demeanors, and the bases of their opinions), and in ruling on the motion was vested with broad authority to disbelieve witnesses and reweigh the evidence. (§ 657; *Martinides v. Mayer*, *supra*, 208 Cal.App.3d at p. 1197.) Applying the highly deferential standard of review discussed previously herein, we conclude that the trial court did not abuse its discretion in granting a new trial with respect to future medical damages.

Plaintiff's argument that the evidence in support of the verdict was overwhelming misses the point entirely. An order granting a new trial that includes a statement of reasons is given such deference that it "'must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on [the trial court's] theory.'" (*Lane v. Hughes Aircraft Co.*, *supra*, 22 Cal.4th at p. 409.) The existence of conflicting evidence regarding the trial court's reasons for granting a new trial, rather than providing a basis for reversal of the order, merely confirms that an abuse of discretion "'*cannot be found*.'" (*Id*. at p. 412.) Whether or not plaintiff had four expert witnesses, as compared to defendant's one expert witness, the trial court provided a statement of reasons that was supported by substantial evidence. Accordingly, there was no abuse of discretion in granting a new trial on the issue of future medical expenses.

***Other* Future Damages**

What we have said thus far applies to the trial court's grant of a new trial on the issue of *future medical damages*. However, the trial court's new trial order broadly included *all* future damages, and not merely future medical damages. Two other components of future damages were also a part of the jury's award: (i) future wage loss ($114,400), and (ii) damages for future "physical pain/mental suffering" ($75,000). Yet no mention was made of these other future damages in the trial court's order.

Because the trial court's order did not explicitly mention future wage loss or future pain and suffering, plaintiff contends that we must reinstate the verdict as to those elements of the damage award. It is argued that this result follows once we recognize there was no effective statement of reasons to support the order with respect to future wage loss and future pain and suffering. The argument is a plausible one, at least on the surface. As we noted above, a new trial order based solely on the ground of excessive damages (or on the ground of insufficient evidence to justify the verdict) cannot be sustained on that ground if there was no legally sufficient statement of reasons. (*Sanchez-Corea v. Bank of America*, *supra*, 38 Cal.3d at pp. 905-906.) We noted further that if *other* grounds were raised in the original motion (other than excessive damages or insufficient evidence), the reviewing court may sustain the order if a new trial should have been granted on such other ground or grounds specified in the motion. (*Id*. at p. 905; see also *Oakland Raiders v. National Football League*, *supra*, 41 Cal.4th at pp. 636-641 [in such case, no deference is given to trial court's order].) Therefore, *if* we were to agree with plaintiff that there is no statement of reasons embracing the trial court's grant of a new trial on the issues of future wage loss and future pain and suffering, we would then have to reverse the order as to those particular components of future damages *unless* defendant were to prevail on the ground raised in her protective cross-appeal.[7]

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[7] Defendant's protective cross-appeal argues the alternative ground for defendant's original motion for a new trial—namely, that attorney misconduct by plaintiff's counsel constituted an irregularity in the proceedings that prevented defendant from having a fair trial. (See § 657, subd. (1).) Of course, the cross-appeal only comes into play if we are unable to fully affirm the trial court's order granting a new trial of all future damages on the ground that the award of future damages was excessive. If a portion of that order cannot be sustained on that ground, and would otherwise result in a partial reversal of the new trial order as to future wage loss and future pain and suffering, we would then reach the merits of the cross-appeal.

In the final analysis, however, we do not agree with plaintiff's line of argument because we disagree with its major premise. That is, we do not construe the trial court's order as failing to set forth a statement of reasons with respect to future wage loss and future pain and suffering. Rather, we conclude that the trial court's specification of reasons (i.e., the lack of credibility of plaintiff's experts in contrast to defendant's expert on the issue of future medical treatment) was intended to be applicable to *all* future damages, including wage loss and pain and suffering. After discussing its credibility assessment of the respective experts on questions of future treatment and surgery, the trial court then granted the motion as to all "future damages" without qualification. Why it did so should have been readily apparent in the factual context of this case without the need of further elaboration in the order. If Dr. Morgan's testimony is believed regarding plaintiff's condition and need for future medical care, it likely would have a profound impact on the extent of all future damages. As defendant put it, these other elements of future damages were "inextricably tied" to the proposed future medical treatment.[8]

For these reasons, we conclude the trial court did include a statement of reasons concerning its grant of a new trial of all future damages. And, as we indicated in our discussion above, the trial court's reasons were supported by substantial evidence. Applying the deferential standard of review, we affirm the trial court's order granting a new trial of all future damages. Accordingly, we have no need to address the protective cross-appeal, which is dismissed as moot. (*Kohan v. Cohan* (1988) 204 Cal.App.3d 915, 925.)

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**8** With respect to future wage loss, plaintiff's attorney made the connection explicit. In closing argument, he indicated that future wage loss should be awarded to allow plaintiff an opportunity to take time off work for, and recover from, the future surgeries.

## II. Order Taxing Costs

Plaintiff argues the trial court abused its discretion when it granted defendant's motion to tax costs and thereby denied plaintiff certain costs pursuant to section 998, namely expert witness fees and prejudgment interest (see also Civ. Code, § 3291). We disagree.

### A. Standard of Review

"A prevailing party who has made a valid pretrial offer pursuant to Code of Civil Procedure section 998 is eligible for specified costs, so long as the offer was reasonable and made in good faith. [Citation.]" (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 134.) "Whether a section 998 offer was reasonable and made in good faith is a matter left to the sound discretion of the trial court, and will not be reversed on appeal except for a clear abuse of discretion." (*Barba v. Perez* (2008) 166 Cal.App.4th 444, 450.) "'In reviewing an award of costs and fees under Code of Civil Procedure section 998, the appellate court will examine the circumstances of the case to determine if the trial court abused its discretion in evaluating the reasonableness of the offer or its refusal.' [Citation.]" (*Clark v. Optical Coating Laboratory, Inc*. (2008) 165 Cal.App.4th 150, 185.) On appeal, the burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown along with a miscarriage of justice, a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power. (*Nelson v. Anderson*, *supra*, at p. 136.) Such a discretionary ruling will not be disturbed on appeal absent a showing that discretion was exercised in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*Culbertson v. R.D. Werner Co., Inc*. (1987) 190 Cal.App.3d 704, 710.)

### B. Lack of Good Faith of Section 998 Offer

An important factor in deciding whether a section 998 offer is unreasonable or in bad faith is whether the offeree was given a fair opportunity to intelligently evaluate the offer. As stated in *Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692 at

page 699: "[T]he section 998 mechanism works only where the offeree has reason to know the offer is a reasonable one. If the offeree has no reason to know the offer is reasonable, then the offeree cannot be expected to accept the offer." (See also *Nelson v. Anderson, supra*, 72 Cal.App.4th at pp. 135-136.) As similarly expressed in *Wilson v. Wal-Mart Stores, Inc*. (1999) 72 Cal.App.4th 382, at page 390: "[L]itigants should be given a chance to learn the facts that underlie the dispute and consider how the law applies before they are asked to make a decision that, if made incorrectly, could add significantly to their costs of trial."

In *Barba v. Perez*, *supra*, 166 Cal.App.4th 444, a case cited by both parties, a section 998 offer was served by the plaintiff at the same time as the complaint and summons. (*Barba v. Perez* at p. 449.) The plaintiff later obtained a judgment that exceeded the amount of the offer, and sought recovery of prejudgment interest and expert witness fees. The defendant moved to tax these costs, but the trial court denied the motion. On appeal, the defendant argued the section 998 offer was not in good faith because when the offer was served he had no basis to determine if the offer was reasonable. (*Barba v. Perez* at pp. 449-450.) The Court of Appeal was not persuaded by the defendant's argument because "the parties had a close, semifamilial relationship, and there was free flow of information between them[,]" and information had actually been provided in connection with the section 998 offer. (*Barba v. Perez* at p. 450.) On these facts, the majority could not conclude the trial court abused its discretion in awarding costs pursuant to section 998, and the order was affirmed. (*Barba v. Perez* at p. 451.) The majority disagreed with the dissenting justice, who argued that a defendant should *always* "be entitled to complete minimal discovery before being expected to evaluate and respond to a 998 offer." (*Barba v. Perez* at p. 453 (dis. opn. of Sims, J.).)

In so holding, the majority commented further: "Even assuming a situation (unlike the one presented here) where a defendant has no information about the plaintiff's damages when served with an early section 998 offer, defense counsel may request that

plaintiff provide informal discovery on the damage issue and/or allow an extension of time to respond to the demand. If plaintiff's counsel refused to accord the defendant these courtesies and unyieldingly insisted that defendant respond without information, such conduct could then be presented to the trial court when it considered whether to award special fees and costs. Undoubtedly, such obstinacy would be viewed as potent evidence that plaintiff's offer was neither reasonable nor made in good faith." (*Barba v. Perez*, *supra*, 166 Cal.App.4th at p. 451 (maj. opn. of Butz, J.).)

Here, unlike the case in *Barba v. Perez*, *supra*, 166 Cal.App.4th 444, there was no free flow of information or preexisting relationship. Instead, the record reflects that when plaintiff's attorney served a prelitigation demand letter on State Farm and further information was requested by State Farm, none was provided. Although a demand served only on an insurer is *not* a section 998 offer (*Arno v. Helinet Corp*. (2005) 130 Cal.App.4th 1019, 1025), the exchange of letters was indicative in this case that gaining information would likely take time and effort. Thus, while the section 998 offer was served concurrently with the summons and complaint, there were no special circumstances present to show that at that early (and time-critical) juncture in the case, defendant's counsel had access to information or a reasonable opportunity to evaluate plaintiff's offer within the 30-day period.

The dissent in *Barba v. Perez*, *supra*, 166 Cal.App.4th at page 453, aptly explained why it is ordinarily not reasonable to expect defendants to jam basic discovery into the 30 days following the service of a summons and complaint in order to respond to a section 998 offer: "As a practical matter, here is what typically has to happen within 30 days following service of a personal injury complaint upon a defendant: (1) The defendant has to deliver the summons and complaint to his insurance carrier; (2) A claims adjuster for the insurer has to review the allegations of the complaint with the insured; (3) The claims adjuster has to line up counsel for the defendant; (4) Defense counsel has to discuss the allegations of the complaint with the insured and prepare an answer." This

appears to have been precisely the hectic scenario in the instant case, as reflected in the correspondence from defense counsel objecting to the timing of the section 998 offer, while unlike *Barba v. Perez*, no countervailing circumstances were present.[9]

We conclude that the trial court did not abuse its discretion in granting the motion to tax costs and thereby denying recovery of special costs pursuant to section 998.

## DISPOSITION

The orders granting a new trial and taxing costs are affirmed. The cross-appeal is dismissed as moot. Costs on appeal are awarded to defendant.

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Kane, J.

WE CONCUR:

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Wiseman, Acting P.J.

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Poochigian, J.

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[9] In addition, defense counsel's letter referred to the fact that plaintiff's law firm had a policy of serving section 998 offers with the summons and complaint and not granting extensions to section 998 offers. The reply letter from an associate at plaintiff's law firm did not deny that such a *no extension* policy existed.