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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

OGANES SAAKYAN, et al., Plaintiffs and Appellants, v. MODERN AUTO, INC., Defendant and Appellant.	B146328 (Super. Ct. No.VC013709)

APPEALS from a judgment and order of the Superior Court of Los Angeles County, Daniel Solis Pratt, Judge. Judgement affirmed; order reversed.

Mardirossian & Associates, Inc. and Garo Mardirossian for Plaintiff and Appellant Oganes Saakyan.

O'Reilly & Hobart and Charles B. O'Reilly for Plaintiff and Appellant Garnik Paronyan.

Yoka & Smith, Walter M. Yoka and Anthony F. Latiolait; Greines, Martin, Stein & Richland, Kent L. Richland and Barbara S. Perry for Defendant and Appellant.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for partial publication. The portion of this opinion not to be published is that portion of the Discussion identified as section I.

INTRODUCTION

In this personal injury lawsuit, we deal with a narrow question concerning statutory offers to compromise under Code of Civil Procedure section 998.[1] The issue arises because this case was tried twice. The first trial resulted in a defense verdict and judgment for defendant, Modern Auto, Inc., which were then set aside by the grant of a motion for new trial. The second trial resulted in a verdict for plaintiffs, Oganes Saakyan and Garnick Paronyan. Following the second trial, the court denied plaintiffs' motions for expert witness fees (§ 998, subd. (d)) and prejudgment interest (Civ. Code, § 3291) on the ground the first verdict extinguished any rights plaintiffs may have acquired by virtue of their section 998 offers.

In the published portion of this opinion, we hold a statutory offer to compromise under section 998 is not extinguished by a judgment that is vacated by a subsequent order for a new trial. Accordingly, we reverse the order taxing costs and remand for reconsideration consistent with this opinion.

In the unpublished portion of this opinion, we hold that there was no jury misconduct in the second trial, and affirm the judgment.

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[1] All further statutory references are to the Code of Civil Procedure, unless otherwise noted.

FACTUAL AND PROCEDURAL BACKGROUND

This lawsuit arose after teenagers, Saakyan and Paronyan, along with two others, were involved in a serious accident on the 605 freeway in June 1992.

The evidence adduced at the second trial shows Saakyan, the driver of the 1986 Honda Accord involved in the accident, had the vehicle lowered. Then, he began looking for new rims for his wheels. Attracted to "Aerofin wheels" in an advertisement in Low Rider magazine, Saakyan inquired at Modern Auto about their availability and price.

On June 29, 1992, plaintiffs and two others arrived at Modern Auto only to discover the Aerofins had been sold. At the suggestion of Modern Auto's owner, Saakyan agreed to purchase a new six-spoke, 15-inch wheel and tire made for a BMW vehicle, which wheel was wider than those normally found on a Honda Accord.

After Modern Auto installed the new wheels and tires on Saakyan's Honda, Saakyan and the three other teens rode the vehicle a mile or two to the 605 freeway. Once on the southbound side of the freeway, Saakyan remained in the number four lane. The car drove beautifully. Saakyan had been traveling at about 50 or 55 miles an hour for a mile, when suddenly, the car jerked to the left. Despite Saakyan's attempts to control the vehicle, it drove to the right, off the road. Until the accident, the Honda had been operating just as it had before the wheels and tires were installed at Modern Auto.

Saakyan suffered irreversible injury to the spinal cord, is confined to a wheelchair, and has a shortened work-life expectancy.

Paronyan sustained chest trauma, multiple rib fractures, and a burst fracture of the first lumbar vertebral body. He suffers from chronic pain. He is 35 percent disabled and is capable of semi-sedentary work.[2]

The focus of the case was causation. Both defendant and plaintiffs put on expert testimony addressing this aspect. Defense expert Ernest Klein concluded nothing about the vehicle, as equipped at the time, would have caused the Honda to veer to one side or cause the car to do anything unusual on the smooth surface of the 605 freeway. There being no physical evidence that the car veered to the left, Klein concluded Saakyan had swerved to the right to avoid a vehicle in front of him.

Plaintiff's expert, Gerald Rosenbluth, brought a "buck," -- a section of a car used as a courtroom model -- as demonstrative evidence. Admitted into evidence, the buck consisted of the fender assembly and suspension of the rear portion of a 1986 Honda Accord. Rosenbluth opined the catalyst of the accident was that the left rear wheel was retarded, deflecting the vehicle to the left, followed by an over-correction causing the car to turn to the right almost 90 degrees. The two precipitating mechanical reasons the left rear wheel became trapped were: (1) the incorrect application of the BMW rims to a Honda, and (2) an out-of-balance

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[2] The other two in the car are not parties to this appeal.

condition on the left front tire caused by the manner in which the lug nuts had been tightened. Rosenbluth explained that the BMW wheel that Modern Auto installed on Saakyan's car was not designed for a Honda. The BMW wheel is "hub centric," whereas the Honda is a "lug centric" system.

The jury returned its special verdict finding Modern Auto was negligent; its negligence was a cause of Saakyan's and Paronyan's injuries and damage; and that Saakyan suffered $12,232,744 in economic and non-economic damages while Paronyan suffered a total of $566,928.32 in damages. The jury also found Saakyan was not negligent.

Defendant moved for a new trial and judgment notwithstanding the verdict on the ground, among others, of juror misconduct. The trial court denied defendant's motions. Defendant's appeal followed.

Plaintiffs moved for more than $8,000,000, in expert witness fees (§ 998, subd. (d)) and prejudgment interest (Civ. Code, § 3291). The court denied the request. Plaintiffs' timely appeal from that order followed.

Additional facts will be recited in the relevant discussion below.

DISCUSSION

I. *Defendant's appeal.*

A. *Standard of review*.

On appeal from the denial of a motion for new trial based on jury misconduct, we are constitutionally bound to review the entire record to determine

independently whether there was misconduct, and if so, whether it prejudiced the moving party. (*English v. Lin* (1994) 26 Cal.App.4th 1358, 1364.)

" 'Declarations recounting statements, conduct or events "open to sight, hearing, and the other senses and thus subject to corroboration" are admissible to establish juror misconduct. Declarations submitted as proof of an individual juror's subjective reasoning processes, which can be neither corroborated nor disproved, are not.' [Citation.]" (*English v. Lin, supra,* 26 Cal.App.4th at p. 1364.)

In reviewing a trial court's order denying a motion for new trial based on juror misconduct (§ 657, subd. (2)), "[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.] Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination." (*People v. Nesler* (1997) 16 Cal.4th 561, 582.)

It is also well settled that " ' "a presumption of prejudice arises from *any* juror misconduct. . . . However, the presumption may be rebutted by proof that no prejudice actually resulted." ' [Citation.] ' "A denial of a motion for new trial grounded on jury misconduct implies a determination by the trial judge that the misconduct did not result in prejudice." ' [Citation.] ' "In reviewing the denial of a motion for new trial based on jury misconduct, the appellate court 'has a constitutional obligation [citation] to review the entire record, including the

evidence, and to determine independently whether the act of misconduct, if it occurred, prevented the complaining party from having a fair trial.' . . .' ' [Citation.] We 'must examine the record to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct. Some of the factors to be considered in this connection are "the strength of the evidence that misconduct occurred, the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued." ' [Citation.]" (*English v. Lin, supra,* 26 Cal.App.4th at p. 1364, original italics.)

From the trial court's ruling, we infer it denied the new trial motion on the ground there was no jury misconduct.

B. *Reenactment not misconduct.*

Defendant contends the trial court erred in denying its motion for new trial because the jury committed misconduct in reenacting the testimony and demonstration of plaintiffs' expert Rosenbluth during trial.

1. *Facts*.

At trial, Rosenbluth demonstrated to the jury how the left rear tire would have hit the fender well and leave a "witness mark" on the left rear fender well of the buck. After putting the buck under load and exercising the suspension, he had the buck tilted a bit so the jury could see where the tire intersected with the inner fender well lip. Rosenbluth then testified, "If we look at this tire we're going to see a witness mark that goes all the way around to where this tire was making

contact with the fender well while the vehicle was in motion. . . . . [W]e have a vehicle going down the road . . . . We retard the left rear, it's going to draw the car to the left."

During deliberations, the jury requested "permission to examine the Honda buck along with the left rear wheel/tire. Also request permission to exercise cable assembly. Left rear lug nuts, hand tightened."

Defendant objected to the jury's request based on its concern the jury might not accurately reenact the events of the accident, thereby creating new evidence, that defendant would be unable to rebut. Defendant observed Rosenbluth's exhibit was not a replica of the vehicle on the day of the accident because the left-rear fender lip had not been bent back to match the fender lip of Saakyan's Honda as it was on the day of the accident. Defendant also claimed hand tightening the lug nuts, as the jury requested, differed from the wrench tightening Rosenbluth did. Plaintiffs responded that the jury had been made quite aware, through direct and cross-examination of Rosenbluth, just how the exhibit differed from Saakyan's Honda.

The court overruled defendant's objection and allowed the jury to be alone in the courtroom with the buck and court personnel.

After the plaintiffs' verdict was returned, defendant moved for new trial on the ground, in reenacting Rosenbluth's demonstration, the jury actually conducted

an experiment resulting in newly created evidence, upon which the jury then relied in rendering its verdict.

Defendant submitted juror declarations in support of its new trial motion. Viewing the admissible portions of the jurors' affidavits (Evid. Code, § 1150, subd. (a); *Krouse v. Graham* (1977) 19 Cal.3d 59, 80), they show Juror M. "placed a wheel and tire on the 'buck' and hand-tightened the lug nuts. [Juror V.] then deployed the crank as far as it could possibly go so that the fender came down over the tire. The shock absorber/coil springs were compressed to a maximum stress. Thereafter, four or five jurors stepped forward and placed their hands between the top of the tire and the wheel well to check clearance. Then the wheel was turned and the tire was rotated to see if any marks would be created on the tire. The demonstration produced a mark on the tire . . . ." This description by Juror I., was corroborated by Jurors M., T., and R.

The trial court concluded there was no misconduct, stating, "Defendant contends that when the jurors 'experimented' with the buck of the car, that became jury misconduct, and that same type of 'experiment' was not done with the benefit of expert testimony, attorneys' input or direction of the Court. [¶] Plaintiffs contend that no jury misconduct took place. [¶] After considering the moving papers and hearing oral argument, the Court determines that an 'experiment' did not take place, but was part of the deliberations of the jury of an admitted exhibit as reflected in the notes of the official court reporter."

2. *Law*.

As our Supreme Court declared, "It is a fundamental rule that all evidence shall be taken in open court and that each party to a controversy shall have knowledge of, and thus be enabled to meet and answer, any evidence brought against him. It is this fundamental rule which is to govern the use of . . . exhibits by the jury. They may *use the exhibit according to its nature* to aid them in weighing the evidence which has been given and in reaching a conclusion upon a controverted matter. They may carry out experiments *within the lines of offered evidence*, but if their experiments shall *invade new fields* and they shall be influenced in their verdict by discoveries from such experiments which will not fall fairly within the scope and purview of the evidence, then, manifestly, the jury has been itself taking evidence without the knowledge of either party, evidence which it is not possible for the party injured to meet, answer, or explain." (*Higgins v. L.A. Gas & Electric Co*. (1911) 159 Cal. 651, 656-657, italics added.)

In *People v. Cumpian* (1991) 1 Cal.App.4th 307, members of the jury attempted to replicate oral testimony by placing a duffel bag over their torsos in a manner similar to that described in testimony. They then removed the bag to determine the ease and length of time it would take to be removed in an effort to ascertain how easy that act might have been for the accused. (*Id.* at p. 311.) Such conduct, although experimentation, was held not to be misconduct in receiving extrinsic evidence or subjecting the jury to outside influence because there had

been plenty of testimony about the manner in which the defendant held the bag and the bag's position; the bag itself was received into evidence; a witness demonstrated how the bag was held; and the jury had strapped the duffel " '[i]n a fashion similar to that described by the witnesses. . . .' " (*Id.* at pp. 313-314.) Because the jury's use of the exhibit did not invade "new fields" and did not exceed the scope and purview of the evidence, it was held not to be misconduct. (*Id.* at p. 315.)

In *People v. Bogle* (1995) 41 Cal.App.4th 770, the defendant had been convicted of the murder of a couple with whom he lived. During trial, the prosecution presented evidence of the couple's safe, found in the defendant's room. The trial court admitted into evidence the defendant's key, about which the defendant had testified. Defendant did not say any of the keys opened the safe. (*Id.* at p. 777.) During deliberations, the jury tested the keys and found one worked. The defendant moved for a mistrial arguing the jury's discovery was new evidence, which evidence he had no opportunity to rebut. (*Id.* at p. 778.) The *Bogle* court affirmed the trial court's denial of the mistrial motion explaining, "[p]alpation of the safe and the keys was 'within the lines of offered evidence' [citation]" (*id.* at p. 779) and "did not invade a new field" (*id.* at p. 780), but "used the evidence at hand to come to its own conclusion concerning the true facts." (*Ibid.*) The defendant's access to the safe was at issue in the trial, and trying the keys in the safe was an attempt to resolve that issue. (*Ibid.*) Moreover, the jury

was utilizing the keys to determine the truth of the defendant's testimony. (*Ibid.*) The jury was entitled to reexamine the evidence using a slightly different context. (*People v. Bogle, supra*, 41 Cal.App.4th at p. 781.)[3]

Here, as in *Cumpian*, during trial, verbal and demonstrative evidence was admitted concerning Rosenbluth's theory of causation, namely that the improper wheel, improperly mounted, came in contact with the fender. The buck was received into evidence. Rosenbluth used it to demonstrate how a "witness mark" was made on the fender well. The declarations demonstrate that the jury replicated Rosenbluth's testimony. The reenactment of Rosenbluth's testimony does not constitute receipt of evidence *out of court*, and did not exceed the scope and purview of Rosenbluth's evidence, but was merely a reexamination of Rosenbluth's demonstration using only proffered evidence. (*People v. Cumpian, supra*, 1 Cal.App.4th at pp. 313-316.)

Defendant points to two ways in which it believes the jury's conduct differed from Rosenbluth's evidence. First, noting that the jury exercised the suspension much more than Rosenbluth had, defendant suggests that such conduct rose to the level of new and different experimentation, which, because it was performed outside the presence of the parties, precluded defense cross-examination.

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[3] Defendant's attempts to distinguish *Bogle* and *Cumpian* are unavailing.

During his direct examination, Rosenbluth exercised the buck's suspension "just a few clicks," and still, the BMW tire came close to the fender. After noting he had not fully exercised the suspension, Rosenbluth testified "*we're going to see a witness mark that goes all the way around to where this tire was making contact with the fender well while the vehicle was in motion*." (Italics added.) Hence, the tire would have come close to the fender regardless of whether the jury exercised the suspension a little, as Rosenbluth had, or maximally, as the jury had. In exercising the suspension as it did, the jury did nothing more than to reexamine the evidence using a slightly different context, as it was permitted to do (*People v. Bogle, supra*, 41 Cal.App.4th at p. 781) to confirm Rosenbluth's prediction, and so the fact it compressed the buck more is not misconduct. (*Id.* at pp. 779-781.)

Next, defendant argues when the jury rotated the wheel, it created a new mark, which new evidence defendant was unable to rebut.[4] Rotating the wheel was absolutely within the purview and scope of the testimonial evidence. (*People v. Cumpian*, supra, 1 Cal.App.4th at p. 315; *Higgins v. L.A. Gas & Electric Co., supra,* 159 Cal. at p. 657.) More important, Rosenbluth testified that rotating the

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[4] Defendant surmises that "[*p*]*resumably*, had the jury expressly requested permission to rotate the tire the court would have denied the request." (Italics added.) Not only do we not engage in speculation about what the court would have done, it is clear to this Court that rotating the tire was well within the bailiwick of a diligent jury. (*People v. Bogle, supra,* 41 Cal.App.4th at p. 781, quoting from *Higgins v. L.A. Gas & Electric Co., supra*, 159 Cal. at p. 657 [examining evidence in a slightly different context not misconduct if within the " 'scope and purview of the evidence' "]).

tire *would* create a "witness mark."[5] Just as in *Bogle*, when the jury here rotated the tire and made a mark on the fender well, it did not invade a new field, but remained within the lines of offered evidence (*People v. Bogle, supra,* 41 Cal.App.4th at p. 779), and so the jury used the introduced evidence "to come to its own conclusion concerning the true facts." (*Id.* at p. 780.)

Stated otherwise, as approved in *Bogle*, causation was at issue here, and the jury tested Rosenbluth's theory of causation by using his own evidence, which evidence had been admitted into evidence without objection, in an attempt to resolve that issue. (*People v. Bogle, supra*, 41 Cal.App.4th at p. 780.)

Defendant's suggestion to the contrary, it has long been settled that "not every experiment constitutes jury misconduct." (*People v. Cumpian, supra,* 1 Cal.App.4th at p. 316.) " '[Juries] may carry out experiments within the lines of offered evidence.' " (*Id*. at p. 315.) " '[J]urors must be given enough latitude in their deliberations to permit them to use common experiences and illustrations in reaching their verdicts. [Citations.]' [Citation.]" (*Id.* at p. 316.) "What jurors *can* do, as a body during deliberations, is engage in experiments which amount to no more than a careful evaluation of the evidence which was presented at trial.

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5 Defendant's assertion that rotating the tire to create a mark was something "Rosenbluth deliberately refrained from performing" is an overstatement. What Rosenbluth said at the cited page was "all I'm going to attempt to do is touch it because there are witness marks on the tire I want to show the jury after." Continuing, Rosenbluth predicted, "If we look at this tire *we're going to see a witness mark that goes all the way around to where this tire was making contact with the fender well while the vehicle was in motion*." (Italics added.)

[Citations.]" (*Bell v. State of California* (1998) 63 Cal.App.4th 919, 932, original italics.)

Considering the whole record, as we are required, together with the declarations, patently, the jury merely attempted to test the validity of Rosenbluth's theory of causation by performing activities within the lines of his demonstration and trial testimony. (*People v. Bogle, supra,* 41 Cal.App.4th at p. 779.) Rather than to invade a new field, the jury "used the evidence at hand to come to its own conclusion concerning the true facts." (*Id.* at p. 780.)

Where the jury's action was "based on evidence received in court," it committed no misconduct. (*People v. Cumpian, supra,* 1 Cal.App.4th at p. 317.) Therefore, the new trial motion was properly denied.

C. *Mention of defendant's insurance not misconduct*.

Defendant next contends the jury engaged in improper discussions of defendant's insurance coverage. Defendant further contends that such misconduct was "compounded by plaintiffs' misconduct in introducing evidence of insurance during trial." Not so.

Again, viewing the admissible portions of the jurors' affidavits (*Krouse v. Graham, supra,* 19 Cal.3d at p. 80), it shows some jurors declared that insurance or the amount of insurance coverage was discussed, and one juror confirmed that "*the discussion was quickly halted . . . .*" (Italics added.)

" '[T]o establish misconduct requiring reversal, juror declarations must establish "*[a]n express agreement by the jurors to include such [consideration of insurance] in their verdict, or extensive discussion evidencing an implied agreement to that effect*." [Citations.]' [Citation.]" (*Gorman v. Leftwich* (1990) 218 Cal.App.3d 141, 147, italics added; see also *Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 820 [rule declarations must demonstrate express agreement applies to any impermissible category of damages].)

None of the three declarations mentioning insurance suggests " 'an express agreement was reached and the discussion [they] relate[d] could hardly be characterized as extensive.' [Citation.]" (*Gorman v. Leftwich, supra*, 218 Cal.App.3d at p. 147.) Likewise, we are also unpersuaded by defendant's contention that the effect of the juror's discussions about insurance coverage "was compounded by plaintiffs' misconduct in introducing evidence of insurance during trial." Defendant argues that "in the wake of the jury's disclosure that it did indeed discuss insurance coverage in deliberations, it is clear that the trial references to insurance were prejudicial." Obviously, where the jury did not meaningfully discuss insurance, and thus did not commit misconduct, its actions were not "compounded" and it was not influenced by, the mention of insurance during trial. We conclude there was no misconduct here.

D. *Mention of personal experiences not misconduct*.

Quoting from the declarations, defendant contends it was misconduct for the jury to interject into deliberations extraneous comments about personal experiences with disabilities and the high cost of medical care. Reversal is not warranted. "A juror does not commit misconduct merely by describing a personal experience in the course of deliberations." (*Iwekaogwu v. City of Los Angeles, supra*, 75 Cal.App.4th at p. 819.) There is no evidence the jury decided this case based on these three comments rather than on the evidence presented. Moreover, these comments are more innocuous than those made in *Moore v. Preventive Medicine Medical Group, Inc*. (1986) 178 Cal.App.3d 728, at pages 741-742 where no misconduct was found.

E. *No prejudice*.

Although "a presumption of prejudice arises from *any* juror misconduct . . . ." which may be rebutted by proof that no prejudice actually resulted (*English v. Lin, supra,* 26 Cal.App.4th at p. 1364), the presumption only arises once misconduct has been shown. "Obviously, prejudice is not presumed until misconduct has been shown. . . . When there is no misconduct, there cannot be any prejudice." (*People v. Cumpian*, *supra*, 1 Cal.App.4th at p. 316.) As we have concluded no misconduct occurred, we need not reach the question of prejudice.

II. *Plaintiffs' cross-appeal.*

A. *The trial court erred as a matter of law in ruling plaintiffs' rights under section 998 were extinguished by the first judgment.*

1. *Facts*.

Plaintiffs made their statutory offers to compromise in February 1994, before the first trial. Saakyan offered to have judgment entered "in the total amount of $820,000.00." The same document included an offer by Paronyan "in the total amount of $115,000.00." The offers were not accepted. No other offer was made.

The first trial resulted in a special verdict for defendant. Judgment thereon was entered in January 1995. Thereafter, the court granted plaintiffs' motion for a new trial based on serious juror misconduct and ordered the judgment on special verdict be vacated and set aside. In an earlier, unpublished opinion, this Court affirmed the trial court's order for a new trial.

Following the second trial, as noted, the jury returned a special verdict, this time in favor of plaintiffs, awarding Saakyan $12,233,744 and Paronyan $566,928.32 in damages. Plaintiffs' memorandum of costs ensued, requesting prejudgment interest in the amount of $7,976,420.00 for Saakyan, and $369,667.78 for Paronyan, as of the February 1994 offers (Civ. Code, § 3291), together with approximately $204,000.00 in expert witness fees (§ 998, subd. (d)).

Defendant opposed the motion for prejudgment interest and moved to tax costs. As one ground for its opposition, defendant argued the entry of judgment in favor of defendant after the first trial extinguished any rights plaintiffs might have acquired pursuant to section 998.

Observing that "so many things occurred" in this case, and that it felt "strongly" it "couldn't in good faith grant the motion on prejudgment interest," the trial court struck plaintiffs' request for prejudgment interest (Civ. Code, § 3291) and denied the request for expert witness fees (§ 998, subd. (d)). The trial court explained: "1) The Code of Civil Procedure section 998 offer filed by plaintiff [*sic*] in 1994 is extinguished due to the verdict for the defendant in the first trial. [¶] 2) There was not a Code of Civil Procedure section 998 offer filed in the second trial." The court taxed plaintiffs' requested costs and denied them prejudgment interest. Plaintiffs filed their timely appeal.

2. *Law*.

Pursuant to section 998, subdivision (d), if the plaintiff's statutory offer to compromise is not accepted and the defendant fails to obtain a more favorable judgment, the prevailing plaintiff becomes eligible to seek reasonable and actually incurred expert witness fees and costs.[6]

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[6] At the time plaintiffs' offers were made, section 998, subdivision (d) stated in pertinent part, "If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment, the court in its discretion may require the defendant to pay a reasonable sum to cover costs of the services of expert witnesses . . . actually incurred and reasonably necessary in either, or both, the

Additionally, in a personal injury action, if the conditions of Civil Code section 3291 are met, the plaintiff has the right to obtain prejudgment interest. Specifically, under Civil Code section 3291, if the defendant does not accept the plaintiff's offer pursuant to section 998, and the plaintiff obtains a more favorable judgment, the court must award interest at 10 percent per annum on that judgment, from the date of the plaintiff's first section 998 offer until the judgment is satisfied.[7] The right to prejudgment interest under Civil Code section 3291 is dependent on whether the plaintiff receives a more favorable judgment under section 998. (*Gilman v. Beverly California Corp*. (1991) 231 Cal.App.3d 121, 126.)

Plaintiffs contend the trial court erroneously ruled that the jury verdict in the first trial extinguished any right plaintiffs may have acquired under section 998 based on their statutory offers to compromise made in 1994, which offers were not

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preparation or trial of the case by the plaintiff, in addition to plaintiff's costs." (§ 998, subd. (d).) Between 1994, when plaintiffs' offers were made, and 2000, when the trial court entered its order taxing costs, the Legislature amended subdivision (d) of section 998. None of these amendments has an impact on the discrete issue presented here.

[7] Civil Code section 3291 states in relevant part, "If the plaintiff makes an offer pursuant to Section 998 of the Code of Civil Procedure which the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to Section 998 of the Code of Civil Procedure which is exceeded by the judgment, and interest shall accrue until the satisfaction of the judgment."

accepted. They request that we remand the case to the trial court with instructions to reevaluate the validity and reasonableness of the offers, and if they are valid, calculate reasonable witness fees (§ 998, subd. (d)), and add prejudgment interest (Civ. Code, § 3291) from February 1994.

Where the issue is the application of law to undisputed facts, we review the trial court's order de novo. (*Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 797.) We hold the trial court erred here in ruling plaintiffs' benefits pursuant to their statutory offers to compromise made in 1994 were "extinguished due to the verdict for the defendant in the first trial."

Nothing in the wording of these statutes indicates a judgment operates to terminate rights under section 998, where that judgment is later vacated and a new trial is held. (Cf. *Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc.* (1996) 50 Cal.App.4th 1542, 1550 [language of Civil Code section 3291 does not indicate interest tolls during intervening, unsuccessful appeal].) The right to witness fees and prejudgment interest is triggered by a more favorable *judgment*. Section 998 applies when plaintiff's offer "is not accepted and the defendant fails to obtain a more favorable judgment." Likewise, Civil Code section 3291 makes a "simple comparison" between the judgment and the statutory offer to compromise. (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 662-663, fn. 13.)

Under California law, when the trial court grants a new trial as to all of the causes of action, the judgment is vacated. (*Beavers v. Allstate Ins. Co*. (1990) 225 Cal.App.3d 310, 329.) The effect of an order granting a new trial is " 'as though no trial had ever been had . . . . The case [is] before the court for trial *de novo*.' [Citation.]" (*Guzman v. Superior Court* (1993) 19 Cal.App.4th 705, 707, original italics.)[8] The grant of a new trial "[leaves] the case at large and the parties [are] placed in the same position as if it had never been tried . . . .' " (*Sichterman v. R.M. Hollingshead Co*. (1931) 117 Cal.App. 504, 506; see also *Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 751.) Hence, any verdict or judgment entered in advance of a new trial order was merely ephemeral, because superceded by the judgment entered after new trial.

Here, the effect of trial court's grant of a new trial was to nullify the first judgment entered in 1995, with the result neither the judgment entered after the first trial, nor the special verdict upon which it was based, exists to extinguish any benefits that may have arisen under section 998. The order granting plaintiffs a new trial, which order we affirmed in the first appeal, vacated the 1995 judgment and placed the parties in the same position as if the case had never been tried (*Sichterman v. R.M. Hollingshead Co*., *supra,* 117 Cal.App. at p. 506), with any

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8 "Whether by appellate reversal of a judgment . . . or by the trial court granting a new trial motion, the effect is the same . . . ." (*Guzman v. Superior Court, supra*, 19 Cal.App.4th at p. 708.)

rights under plaintiffs' statutory offers extant.[9] It matters not to the result that the intervening 1995 judgment was for defendant because that judgment was superceded by the second judgment in favor of plaintiffs. Therefore, as a matter of California civil procedure, no intervening verdict or judgment existed to expunge benefits that may have arisen from the earlier statutory offers to compromise.[10]

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[9] We are not persuaded by defendant's reference to new trial orders "*ressurect[ing*] a plaintiff's section 998 rights." There was nothing to *resurrect* where the benefits arising as the result of defendant's failure to accept the offer remained extant. (*Beavers v. Allstate Ins. Co*., *supra*, 225 Cal.App.3d at p. 329; cf. *Hess v. Ford Motor Co*. (2002) 27 Cal.4th 516 [reversal of summary judgment after plaintiff's 998 offer rejected; there was no discussion that reversed judgment terminates right to prejudgment interest]; *Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc., supra*, 50 Cal.App.4th at pp. 1550-1551 [multiple intervening new trial orders after plaintiffs' 998 offer rejected; there was no discussion that new trials terminate right to prejudgment interest].)

[10] *Hess v. Ford Motor Co., supra,* 27 Cal.4th 516, and *Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc*., *supra*, 50 Cal.App.4th 1542, are instructive because they both affirmed awards of prejudgment interest notwithstanding intervening judgments that had been set aside. In *Hess*, summary judgment *in favor of the defendant* was reversed and the jury eventually returned a verdict *against the defendant* in the ensuing trial in an amount that exceeded the plaintiff's early statutory offer to compromise. (*Hess v. Ford Motor Co., supra*, at pp. 522-523.) In *Steinfeld*, the case was tried three times after the statutory offer to compromise had been made because the trial court granted motions for new trial, and eventually the plaintiff secured a verdict in excess of the section 998 offer. (*Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc*., *supra*, at p. 1545.) Although in neither of the cases did the defendant argue the intervening judgment terminated rights under the earlier section 998 offer, in both cases, the award of prejudgment interest (Civ. Code, § 3291) from the date of the statutory offer to compromise (§ 998) was upheld. (*Hess v. Ford Motor Co., supra,* at pp. 530-533; *Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc*., *supra*, at pp. 1550-1551.)

We reject defendant's argument that our holding functions as a disincentive to settlement and undermines the policy behind these statutes.[11] To the contrary, the vagaries of litigation, including the possibility of juror misconduct or reversal on appeal, which increases the opposing party's costs, are part of the risk inherent in rejecting a section 998 offer. In any event, an order for new trial does not preclude either party from attempting to settle anew, thereby fostering the public policy in favor of settlement. Furthermore, one of the foremost purposes behind Civil Code section 3291 is "to provide just compensation to the injured party for loss of use of the award during the prejudgment period--in other words, to make the plaintiff whole as of the date of the injury." (*Lakin v. Watkins Associated Industries, supra,* 6 Cal.4th at p. 663.) Defendant should not be allowed to take advantage of juror misconduct (which misconduct neither plaintiffs nor defendant caused) to avoid the consequences of the risk it took, by rejecting the statutory

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11 The Supreme Court in *Fairmont Ins. Co. v. Superior Court* (2000) 22 Cal.4th 245, at page 253, held that when a new trial is required, the parties are entitled to reopen discovery. The court reasoned, inter alia, without renewed discovery, the parties would face substantial barriers to effective trial preparation in frustration of one of discovery's purposes, namely to promote settlement. Defendant cites *Fairmont Ins. Co. v. Superior Court, supra,* at pages 252-253 to argue that just as the policy favoring settlements is fostered by reopening discovery upon a new trial order, the policy behind section 998 and Civil Code section 3291 are served by holding the 1995 judgment in defendant's favor terminated any benefits to which plaintiffs may have been entitled by virtue of their statutory offer to compromise. The argument is extremely attenuated. The Supreme Court in *Fairmont Ins. Co*. recognized the well-settled fact that "a new trial begins trial proceedings anew, ' "as though no trial had ever been had . . . ." ' [Citation.]" (*Id.* at p. 252.) Nothing in the general legal principal allowing

offers to compromise and forcing the matter to trial. Otherwise, defendant would obtain a windfall at the expense of plaintiffs who could never be made whole as of the date of their injuries. Were intervening, invalid judgments to extinguish a section 998 offer, that risk would be reduced and the purposes of the statutes -- to encourage reasonable settlements in personal injury actions, reduce demand on our overburdened courts, penalize those who refuse reasonable settlement offers, and compensate plaintiff for the loss of use of the award while awaiting the outcome (*ibid.*; *Hrimnak v. Watkins* (1995) 38 Cal.App.4th 964, 980-981) -- would be undermined.

Therefore, the trial court erred as a matter of law in concluding the first judgment entered in 1995 in favor of defendant, which was vacated by the grant of a new trial, extinguished any benefits plaintiffs may have had pursuant to section 998.

2. *The matter must be remanded to reconsider the motions for and against costs and prejudgment interest*.

Our conclusion, that nothing about the first, vacated judgment extinguished any rights that may have arisen as the result of plaintiffs' statutory settlement offers, does not end the matter. Defendant's motion to tax costs and opposition to prejudgment interest raised a number of other arguments why the trial court should not grant plaintiffs their request for witness fees and prejudgment interest.

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additional discovery after an order for a new trial operates to terminate extant rights under a statutory offer to compromise.

Although the trial court mentioned two reasons for taxing costs during oral argument, the minute order cited only extinguishment as the court's reason for granting defendant's motions.

Because the court below gave no real consideration to the other arguments raised by the parties in support of and in opposition to the motion to tax costs, the trial court must revisit the issue and determine whether the offers were valid and reasonable under all of the circumstances, at the time they were was made, and if so, fix the fees and interest. (*Wickware v. Tanner* (1997) 53 Cal.App.4th 570, 575-576; *Elrod v. Oregon Cummins Diesel, Inc*. (1987) 195 Cal.App.3d 692, 699-700; *Wear v. Calderon* (1981) 121 Cal.App.3d 818, 821; *Moffett v. Barclay* (1995) 32 Cal.App.4th 980, 982-984 [invalid statutory settlement offer causes reversal of all benefits under section 998, including prejudgment interest].) We do not address the validity or reasonableness of the offers, and take no position on how the trial court should rule. In light of this opinion, the order on defendant's motion to tax costs entered November 15, 2000, must be reversed and remanded for reconsideration of the validity and reasonableness of the section 998 offer in light of all of the circumstances.

DISPOSITION

The judgment is affirmed; the order on defendant's motion to tax costs dated November 15, 2000, is reversed and remanded for further proceedings consistent with this opinion. Each party to bear its own costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.