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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

TOM MIGLAS et al., Plaintiffs and Appellants, v. A-ABLE, INC., Defendant and Respondent.	B276461 (Los Angeles County Super. Ct. No. BC535908)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary Ann Murphy, Judge. Reversed and remanded.

Biren Law Group, Anne M. Huarte, Matthew B.F. Biren, and Andrew G.O. Biren for Plaintiffs and Appellants.

Horvitz & Levy, Mitchell C. Tilner, Steven S. Fleischman; Law Offices of Wolf & O'Connor and Zojeila I. Flores for Defendant and Respondent.

Tom Miglas (Miglas) and his wife, Regina Maria Miglas,[1] appeal from a judgment entered after a jury trial. The jury awarded Miglas $1,136.18 in damages for personal injuries suffered in a 2012 automobile collision and awarded Regina $500 for loss of consortium. Miglas and Regina had sought $6 million and $500,000 in damages, respectively. A-Able, Inc., doing business as Fume-A-Pest & Termite (A-Able), admitted liability, but contested causation and damages.

A central issue at trial was whether injuries to Miglas's neck were caused by the 2012 accident or an earlier automobile collision in 2007, for which he had spine surgery. Dr. James Kayvanfar, an orthopedic surgeon, testified for the defense based on his review of photographs of damage to the vehicles that when A-Able's pickup truck rear-ended Miglas's car, the car bumper absorbed most of the energy from the impact, and the force transferred to Miglas would have been "very small." He opined that because of the nature of the accident, Miglas "might have sustained a minor muscular strain," which would have resolved in at most two months and would not have required any subsequent treatment.

Miglas contends the trial court erred in admitting Dr. Kayvanfar's expert testimony on biomechanics and accident reconstruction because it lacked foundation and was speculative. We agree and conclude the error was prejudicial. We reverse.

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[1] Because appellants share the same last name, we refer to Regina Maria Miglas by her first name to avoid confusion.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Complaint*

On February 11, 2014 Miglas and Regina filed a complaint alleging causes of action for negligence (Miglas) and loss of consortium (Regina). A-Able admitted liability, but contested causation and damages.

B. *Expert Discovery*

On October 27, 2015 A-Able designated Dr. Kayvanfar as a defense expert. The expert designation stated: "Dr. Kayvanfar will testify as to his opinion concerning his examination of [Miglas] and the alleged injuries sustained by [Miglas] in connection with this incident. In addition, Dr. Kayvanfar will render an opinion as to the course of treatment prescribed for [Miglas], and the reasonableness and necessity of each treatment. Dr. Kayvanfar may also be called upon to review and comment upon the testimony of all experts who offer opinions within his field of expertise." A-Able provided Miglas with Dr. Kayvanfar's first three reports dated June 29, July 20, and September 8, 2015.

In his June 29, 2015 report, Dr. Kayvanfar attributed "the cause of Mr. Miglas' C4-5 degeneration and need for cervical fusion at this level" to be 80 percent segment degeneration resulting from the first surgery after his 2007 accident and 20 percent from the 2012 motor vehicle accident. In his July 20, 2015 report, Dr. Kayvanfar stated he had reviewed the 2008 and 2013 CT scans and MRI images, and concluded that his "review of the images do[es] not alter [his] prior findings." He stated further that Miglas "would have likely needed the 2013 neck

surgery even if he did not have the motor vehicle accident due to the severe degeneration of the adjacent disk at C4-5 which started in 2008 and progressed gradually over the next five years as the CT scans show."

In his third report dated September 8, 2015, Dr. Kayvanfar stated he had reviewed two July 2015 medical reports from Dr. Hopkins and 2015 MRI images and CT scans. Dr. Kayvanfar opined: "The need for [Miglas's] C4-5 fusion . . . , based on the medical evidence available, was not related to the motor vehicle accident but, rather, to the natural progression of his degenerative disease related to the previous cervical fusion." However, he added, "At this point, there is no information which would alter my previous determinations, except as noted above."

At his January 8, 2016 deposition, Dr. Kayvanfar offered an opinion for the first time about the nature of the 2012 accident. He acknowledged he did not have any "[s]pecific training on accident reconstruction." However, as to biomechanics he stated, "I was an instructor of biomechanics in my residency program. I gave almost all of the biomechanic[s] lectures in the program. I'm an electrical engineering student from MIT. I studied biomechanics myself and I understand biomechanics and physics involved and mechanism of injury better than, probably, 99 percent of surgeons that do the same type of work. Therefore, it makes me an expert in the field and understanding how the accident may cause injury to body parts."

Dr. Kayvanfar opined: "Based on the information that was provided to me, . . . it appeared that the accident involved was a relatively minor rear-end accident, did not cause any structural damage to either of the two cars. There was [a] minor bumper injury to one vehicle and the vehicles were both operable and

drove away from the scene. They [were] not required to be towed, and I have had a number of patients with different severity of motor vehicle accidents over the last 20-some years. And based on my own personal experience with different accidents, you know, I have an idea of the degree of impact that that vehicle sustained."

Dr. Kayvanfar later prepared a fourth report, dated February 4, 2016, which was provided to Miglas. Dr. Kayvanfar opined: "[T]he damages to the vehicle were minor, suggesting that the impact was not of high magnitude. In addition, [Miglas] was driving a late model Lexus IS250, which is five-star rated in crash tests, by the National Highway Traffic and Safety Administration and has important safety features which dissipate[] the impact of an accident and prevent[] injuries to the occupants, even at higher speeds. Therefore, it is my opinion that any injury which he may have sustained in that accident was minor and would not have caused more than short term muscular aches and pains which would have resolved within weeks to months after the accident, and would not have required any further surgical intervention, but may have required use of medications and physical therapy and/or neck bracing on short term basis."

On February 19, 2016 Miglas took a second session of Dr. Kayvanfar's deposition. Dr. Kayvanfar testified to other factors that contributed to degeneration in Miglas's C4-5 vertebrae, including an injection during a discography of the C4-5 disc, the fact a plate was placed during his first surgery "in very close proximity of the C4-5 disc," and "significant distraction with the disc" placed at the C5-6 and C6-7 vertebrae during his first surgery. Dr. Kayvanfar did not provide any additional analysis

of Miglas's vehicle, its bumper, or the accident, other than his description that the accident was "minor."

C. *Motion in Limine No. 2 (MIL 2)*

On January 25, 2006 Miglas filed two motions in limine to exclude Dr. Kayvanfar and any lay witnesses from stating opinions concerning accident reconstruction or biomechanics. In MIL 2, Miglas asserted that Dr. Kayvanfar had not been designated as an accident reconstruction or biomechanics expert and was not qualified to testify on those issues. Miglas also contended Dr. Kayvanfar failed to provide a foundation for his biomechanical and accident reconstruction opinions that the accident was minor and did not cause Miglas's neck injury. Miglas argued that Dr. Kayvanfar based his opinions on photographs of the damaged vehicles, not a scientific analysis. Specifically, Dr. Kayvanfar did not calculate the speed of the vehicles, the change in the vehicles' velocities, the forces on Miglas's neck, how the direction of force impacted the severity of the collision, or whether the forces on Miglas's neck were sufficient to injure his neck or aggravate his preexisting condition. In addition, Dr. Kayvanfar did not reference scientific principles or cite any scientific literature to support his opinions.

In its opposition, A-Able argued that "[t]he term 'minor accident' is not a scientific term solely reserved to the realm of biomechanics experts. Doctors often form an opinion as to the severity of an accident based on interaction with their patients, medical records reviews, diagnostic testing, and information from outside sources."

On February 11, 2016 Miglas filed a supplemental brief, in which he argued that Dr. Kayvanfar's February 4, 2016 report

contained additional biomechanics and accident reconstruction opinions that went beyond his expert designation and expertise, including his opinion that the vehicle Miglas was driving had a five-star crash test rating and had "important safety features which dissipate[d] the impact of an accident and prevent[ed] injuries to the occupants, even at higher speeds."

On April 13 and 15, 2016 the trial court heard argument on MIL 2. The court also allowed the parties to file supplemental briefs. On April 15, 2016 the trial court stated its tentative ruling that "in giving an opinion whether this accident caused this injury, the doctor can talk about the underlying facts, how fast the cars were going, what they were driving, where they were in the car, was it a T-bone. . . . That's data that the experts typically and normally rely on. [¶] So he will be able to give that as a basis for his opinion. He's not going to say minor accident. And I have no problem with their saying that the plaintiff was driving a car that did well in crash tests because if the plaintiff was driving a little tin can like an old Datsun from the 1960's with nothing to hold his head back in a whiplash situation, that would be fair game, too. [¶] . . . [Y]ou can't prevent doctors from coming in and stating matters upon which they typically, ordinarily, and customarily rely in treating and diagnosing their patients. . . . They don't have to be accident reconstructionists, although he does have an engineering degree."

After noting that Dr. Kayvanfar had not been designated as an expert in biomechanics, the court ruled that Dr. Kayanfar could not use the words "biomechanics," "biomechanically," or "minor accident" in his testimony. However, Dr. Kayvanfar could rely on "the type of things that doctors normally ask about when they're treating a patient that's been in an accident, which I've

already outlined, those can be described if they are the basis for his opinion." The trial court sustained Miglas's hearsay objection to Dr. Kayvanfar describing to the jury the crash tests that had been performed by the National Highway Traffic Safety Administration, but clarified that as an expert he could rely on the hearsay.

D. *Testimony at Trial*

1. *The 2007 accident and spine surgery*

Miglas was driving to work on the 101 Freeway in 2007 when the traffic came to a stop. He stopped his car and heard a "smash," as he was rear-ended by another car. He then felt a second impact from behind. Miglas was able to drive away from the scene. He did not experience neck pain until later that evening, when he felt pain at the base of his neck. He also felt tingling in his hand, then his arm went completely numb. Following the accident, Miglas had constant numbness in his hand and arm, a sharp shooting pain from his shoulder blades to his waist, and an aching pain in his neck.

Miglas saw his family physician, Dr. Sally Frankel, who referred him to Dr. Thomas Hopkins, an orthopedic spine specialist. Dr. Hopkins initially treated Miglas with steroids, but they made Miglas sick and "racy," so he only took them for one week. In late 2007 Dr. Hopkins performed surgery on Miglas's neck, fusing two levels in his cervical spine (C5-6 and C6-7). Miglas recovered from the surgery after three months and experienced no further neck pain. He did not see a doctor for neck pain until after his second accident in December 2012.

2. *The 2012 accident and second spine surgery*

On December 10, 2012 Miglas was driving home from work on the 101 Freeway when he was involved in a second accident. He was driving a Lexus IS 250 and was wearing a seatbelt. The traffic came to a halt, and he stopped his car and was rear-ended by a pickup truck. When the truck hit Miglas's car, he heard a loud crash and felt a jolt. His foot lifted off the brake pedal, and his car moved forward six or seven feet. The impact caused the visor on the car's sunroof to open about three inches. Miglas estimated the truck was traveling about 25 or 30 miles an hour before the impact.

Miglas pulled to the side of the freeway, exchanged information with the other driver, and took photographs of the damage to his vehicle. He felt no pain at that time. At around 9:00 that night, he experienced a severe pain in his neck. He saw Dr. Frankel the following morning. Dr. Frankel determined the X-rays did not show any damage to the fused levels of Miglas's cervical spine, but suggested Miglas see Dr. Hopkins again if he wanted a further evaluation.

Miglas continued to experience constant pain in his neck. In approximately May 2013 Miglas decided he could no longer live with the pain, and saw Dr. Hopkins. Dr. Hopkins advised Miglas that a second surgery was necessary to fuse another level of his spine (C4-5). On May 31, 2013 Dr. Hopkins performed the second surgery, involving a three-level fusion of Miglas's cervical spine (C4-7).

Miglas recovered from the second surgery in three to six months. His initial neck pain went away. However, he continued to have aches at the back of his neck, a dull headache, and difficulty swallowing. Miglas returned to Dr. Hopkins in early

2014 to address these issues, which restricted his normal activities and interfered with his sleep. Miglas saw Dr. Hopkins again in July 2015, by which time the pain had become "pretty unbearable at times."

3. *Expert Testimony*

a. *Dr. Bray*

Dr. Robert S. Bray, a neurological surgeon specializing in spine disorders, testified as an expert for the Miglases. In 2007 Miglas sought a second opinion from Dr. Bray about treatment options for his neck injury. Dr. Bray saw Miglas again after Miglas's 2013 surgery.

Dr. Bray testified that a two-level spinal fusion of vertebrae C5-6 and C6-7, which Miglas received in 2007, accelerates the "wear and tear" of the cervical spine above the fusion. A CT scan and MRI taken after the second accident but before the 2013 surgery showed "accelerated degenerative disease at C4-5 with retrolisthesis or movement, so this disc had collapsed and slipped from the comparative point of the 2008 films." Dr. Bray opined that the December 2012 accident was a proximate cause of the accelerated deterioration because Miglas could not have experienced that degree of degeneration before the accident without being symptomatic. Dr. Bray also opined he would not have expected Miglas to need a second surgery until 20 years after the 2007 surgery, absent trauma to his neck.[2] Miglas's second surgery in May 2013 involved a three-level fusion of his cervical spine. A three-level fusion increases the loss of neck

[2] Dr. Bray testified approximately 50 percent of patients with a two-level cervical spine fusion would need a second surgery after 20 years.

mobility and deterioration of the cervical spine compared to a two-level fusion.

On direct examination, Dr. Bray was asked if he had any criticisms of Dr. Kayvanfar's opinions. He responded that Dr. Kayvanfar "opines about biomechanics and those are irrelevant to this case because there aren't any biomechanic studies that exist on people they put in the study that had two-level fusions and subject them to trauma." Dr. Bray used an anatomical drawing of the spine to opine: "[T]his is [a] demonstration of just adjacent segment disease, which is that when the neck bends forward or backward, if the segment in between doesn't move, the stresses get placed to the one above or below. [¶] . . . [¶] . . . That's been going on over time, but then if an accident happens and the head goes back and forth forcefully it can accelerate that injury."

At a break, the trial court raised a concern that "[Dr. Bray] just testified that the way the accident happened, the head bent back and forth forcefully and he just got into biomechanics and a biomechanical opinion." Miglas's attorney responded that he "[d]idn't see it coming." The trial court ruled, "[T]he door is open now. If [Miglas's] expert did it, their expert can do it." Miglas's attorney stated, "That's fine." When the court responded, "All right," Miglas's attorney repeated, "That's fine." The trial court added, "So I'm backing out the ruling on that motion in limine about the biomechanical. Your expert can now do that. . . . [¶] . . . [¶] . . . He just opened the door. You just heard the sound of a door opening with that testimony."

b. Dr. Kayvanfar

Dr. Kayvanfar testified as an expert for the defense. He reviewed Miglas's 2007 and 2008 CT scans taken before and after the surgery and concluded that Miglas "already had some degenerative changes at the adjacent . . . C4-5 segment, even before he had the first surgical fusion [of C5-6 and C6-7] in 2007. And this process gradually worsened. [¶] And yes, this can lead to adjacent segment degeneration, which is a term that's commonly used to refer to [a] symptomatic . . . degenerative disc after a previous fusion develops at the segment adjacent to a fusion, which is more commonly seen at the segment above a fusion rather than the segment below." Comparing the 2013 CT scans with the 2007 CT scans, he opined the changes were "not consistent with a recent injury to the spine."

Dr. Kayvanfar described his training in biomechanics, including physics classes he took in college as part of his electrical engineering training. He also studied and gave lectures on biomechanics during his orthopedic residency training.[3] When Miglas's counsel began to object to Dr. Kayvanfar's testimony on biomechanics, the trial court commented, "I know what's coming here." Miglas's counsel argued Dr. Kayvanfar was not an expert in biomechanics and his testimony violated the trial court's ruling on MIL 2. The trial court overruled Miglas's objection, noting

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[3] Dr. Kayvanfar testified that biomechanics "involves the forces that act on a human body and how it affects the body, specifically, how it affects different joints in the body and how the body responds to those forces." The parties interchangeably refer to Dr. Kayvanfar's opinions on how Miglas's bumper absorbed the impact, causing the forces on Miglas to be minor, as either biomechanics or accident reconstruction opinions. The characterization of the opinions does not affect our analysis.

that Dr. Kayvanfar had opined at his deposition that the forces from the impact did not produce a significant impact on Miglas and that "Dr. Bray's testimony opened the door to some extent." The trial court added, "Dr. Bray testified about the mechanism of accident such that you would think he was a biomechanic[s] person." The court indicated it would "hear an objection if it's something that [Dr. Kayvanfar] didn't say at his [deposition]."

Dr. Kayvanfar opined as to the accident: "Mr. Miglas was involved in a motor vehicle accident in December of 2012, where he was rear-ended by a small pickup truck, and he sustained some damage to the rear bumper of his vehicle, which appeared to have absorbed most of the impact of the accident. . . . Mr. Miglas did not sustain any significant injury in the motor vehicle accident. And at most, based on what I have reviewed, he might have sustained a minor muscular strain, which, typically, would have resolved within a few weeks, at most, maybe one or two months or so after the accident. . . . [A]ny subsequent treatment that he had is not related to the effect of the motor vehicle accident of December of 2012."

He concluded, based on his review of Miglas's deposition testimony, the parties' discovery responses, photographs, and repair estimates that "[t]he small pickup truck sustained relatively minor damage to its bumper, the front bumper. And Mr. Miglas's vehicle sustained damage to the bumper of the vehicle. [¶] And based on the images[4] that I reviewed, there was a significant amount of energy that was dissipated in that impact by his bumper. In essence, the bumper performed as expected and protected the vehicle and its occupant from the

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4 Dr. Kayvanfar later clarified the images were photographs of the damage to the vehicles.

impact. [¶] And as a result, the amount of force that would have been transferred to the occupant of Mr. Miglas's vehicle would have been a relatively very small force. The driver of the pickup truck would have had a much greater amount of force imparted on him as a result of that collision, because his bumper did not absorb much energy. There was not much deformity or damage to his bumper."

On cross-examination, Dr. Kayvanfar read into the record portions of his first report dated June 29, 2015, in which he attributed "the cause of Mr. Miglas's C4-5 degeneration and need for cervical fusion at this level to be 80 percent to pre-existing disease and adjacent segment degeneration at C4-5 after his previous cervical fusion at C5-6 from his initial injury eight years ago, and the remainder would be attributed to the 2012 motor vehicle accident." He prepared this report after his medical examination of Miglas. At the time of this report, Dr. Kayvanfar agreed with Dr. Bray that absent the 2012 accident, Miglas might not have needed surgery for another 20 years, with some people never requiring additional surgery, and others needing surgery before then. Dr. Kayvanfar testified as to his second report, dated July 20, 2015, that he reviewed additional imaging studies, and concluded they did not alter the conclusions from his first report.[5]

Dr. Kayvanfar testified that "after reviewing all the information, all the records," his opinion had changed from the

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[5] On redirect examination, Dr. Kayvanfar read from his second report his opinion that Miglas would have likely needed the 2013 neck surgery even if he did not have the 2012 accident because of severe degeneration of the C4-5 disc following the 2007 accident and surgery.

first report, and now he was of the opinion that "as a result of the motor vehicle accident of December 10, 2012, the force that was imparted to . . . Mr. Miglas, was a small force, because his vehicle's bumper absorbed most of the impact. . . . [¶] [A]t most, he would have sustained a relatively minor upper back strain based on his complaints, that's consistent with his complaints, and would have resolved within a couple of weeks after the accident, and certainly would not have lasted more than a couple of months after the accident."[6] On recross-examination, Dr. Kayvanfar acknowledged Miglas testified he thought the truck was traveling at 20 to 30 miles an hour before the impact. But Dr. Kayvanfar opined the truck was traveling 10 to 15 miles per hour, based on his review of the photographs of damage to the vehicles.

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[6] On redirect examination, Dr. Kayvanfar testified about a medical report introduced by Miglas dated December 28, 2012, which appeared to be a note from a medical provider. The trial court sustained Miglas's objection to admission of the medical report, but Dr. Kayvanfar was allowed to testify about the meaning of the report. The report had space for subjective complaints from Miglas, but none was provided. Dr. Kayvanfar testified this suggested that Miglas had no subjective complaints as of this date. In the objective portion of the report, the report indicated "negative" as to the neck. Dr. Kayvanfar opined that this report "suggests that approximately 18 days after the accident, [Miglas] may have been asymptomatic, he didn't have any complaints when he saw this provider. So it would suggest that the effect of the accident was either resolved or significantly decreased to the point he wasn't complaining about it."

E. *The Jury Verdict and Judgment*

On April 26, 2016 the jury returned a verdict finding A-Able's negligence was a substantial factor in causing harm to Miglas. The jury found Miglas suffered $136.18 in past economic damages and $1,000 in past noneconomic damages as a result of A-Able's negligence and Regina suffered $500 in damages for loss of consortium.[7] On May 9, 2016 the trial court entered a judgment on the jury's verdict.

F. *The Motion for New Trial*

On June 3, 2016 Miglas moved for a new trial. He argued the trial court erred by ruling that Dr. Bray's testimony opened the door on biomechanics opinions and allowing Dr. Kayvanfar to testify on that subject. He also contended Dr. Kayvanfar was not qualified to testify as a biomechanics expert and his biomechanical opinions lacked scientific foundation and were speculative. Miglas contended the verdict was contrary to the evidence that Miglas was pain-free following the first surgery, but had significant pain after the 2012 accident, requiring a second surgery.

The trial court denied the motion. Miglas timely appealed from the judgment and denial of his motion for a new trial.

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[7] Miglas's counsel had requested over $6 million in damages for Miglas and $500,000 for Regina. The parties stipulated at trial that Miglas incurred $78,259.80 in medical bills following the 2012 accident. Defense counsel argued in her closing that the jury should award Miglas $136.18 for his first visit to Dr. Frankel on December 11, 2012 because the other medical costs resulted from Miglas's preexisting degenerative condition.

DISCUSSION

A. *Standard of Review*

The trial court's ruling to exclude or admit expert testimony is reviewed for an abuse of discretion. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773 (*Sargon*); *People v. Doolin* (2009) 45 Cal.4th 390, 447.) A ruling constitutes an abuse of discretion only if it is "'so irrational or arbitrary that no reasonable person could agree with it.'" (*Sargon*, at p. 773; accord, *Sanchez v. Kern Emergency Medical Transportation Corp.* (2017) 8 Cal.App.5th 146, 154.) "But the court's discretion is not unlimited, especially when . . . its exercise implicates a party's ability to present its case. Rather, it must be exercised within the confines of the applicable legal principles." (*Sargon*, at p. 773; accord, *ABM Industries Overtime Cases* (2017) 19 Cal.App.5th 277, 293 (*ABM Industries*).)

Even if the trial court abused its discretion, the judgment will not be reversed based on an erroneous admission of evidence, unless the error was prejudicial. (*ABM Industries, supra*, 19 Cal.App.5th at p. 293; *Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc.* (2014) 225 Cal.App.4th 786, 799 (*Grail Semiconductor*); Cal. Const., art. VI, § 13 ["No judgment shall be set aside . . . on the ground . . . of the improper admission or rejection of evidence, . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."].)

"The record must show that the appellant 'sustained and suffered substantial injury, and that a different result would

have been probable if such error . . . had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown.'" (*Grail Semiconductor, supra*, 225 Cal.App.4th at p. 799, quoting Code Civ. Proc., § 475; Evid. Code, § 353, subd. (b) [a judgment may not be reversed "by reason of the erroneous admission of evidence" unless "the error or errors complained of resulted in a miscarriage of justice"].)

"'In civil cases, a miscarriage of justice should be declared only when the reviewing court, after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*Grail Semiconductor, supra*, 225 Cal.App.4th at p. 799; accord, *ABM Industries, supra*, 19 Cal.App.5th at p. 293.) The appellant has the burden of demonstrating the error was prejudicial. (*Kim v. The True Church Members of Holy Hill Community Church* (2015) 236 Cal.App.4th 1435, 1444; *Grail Semiconductor*, at p. 799.)

B. *Dr. Kayvanfar's Biomechanics Testimony Was Speculative and Lacked Foundation*

1. *Miglas preserved the issue for appeal.*

A-Able contends Miglas forfeited his argument that Dr. Kayvanfar's biomechanics and accident reconstruction opinions were speculative and lacked foundation by failing to object to his testimony at trial. Generally, when an in limine ruling has been made that evidence is admissible, the party seeking exclusion must object at the time the evidence is offered at trial in order to preserve the issue for appeal. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 159; *People v. Brown* (2003) 31

Cal.4th 518, 547.) However, as the *Brown* court acknowledged, "a sufficiently definite and express ruling on a motion in limine may also serve to preserve a claim. . . ." (*People v. Brown*, at p. 547.) As the Supreme Court concluded in *People v. Thompson* (2016) 1 Cal.5th 1043, if an in limine motion asserts the same specific legal grounds to exclude a "specific body of evidence" and "the trial court ruled on the motion at a time when it could 'determine the evidentiary question in its appropriate context,'" no objection at trial is required to preserve the issue for appeal. (*Id*. at pp. 1108-1109; accord, *People v. Whisenhunt* (2008) 44 Cal.4th 174, 210 [issue is preserved on appeal where "(1) a specific legal ground for exclusion was advanced through an in limine motion and subsequently raised on appeal; (2) the in limine motion was directed to a particular, identifiable body of evidence; and (3) the in limine motion was made at a time, either before or during trial, when the trial judge could determine the evidentiary question in its appropriate context."].)

Miglas's MIL 2 clearly argued that Kayvanfar's accident reconstruction and biomechanics opinions should be excluded because there was no foundation for his opinions that the accident was minor and did not cause Miglas's neck injury. Miglas pointed out that Dr. Kayvanfar failed to calculate the speed of the vehicles, the change in velocity, how the direction of force impacted the severity of the collision, the forces on Miglas's neck, or that those forces were insufficient to aggravate his preexisting condition. He also argued that Dr. Kayvanfar failed to set forth scientific principles or to cite to the scientific literature supporting his opinions.

At the April 13, 2016 hearing on MIL 2, Miglas's attorney argued that Miglas needed to "designate an accident

reconstructionist to talk about speeds, delta-V, crush damage, et cetera. And then you would have a bio-mechani[cs expert] to testify that, given the accident reconstruction parameters, this injury could not have occurred from the parameters." The trial court later observed during the hearing on Miglas's motion for a new trial, "At no point did I say that you didn't object to the defense expert testimony. You did object and the ruling's in the record . . . ."

In addition, the extensive record of the hearing on MIL 2 shows that the trial court ruled on the motion at a time when it understood the evidentiary context of the issues and ruled on Miglas's objections. On April 15, 2016 the trial court granted MIL 2 in part, ruling that Dr. Kayvanfar could not use the words "biomechanics," "biomechanically," or "minor accident" in his testimony. However, the trial court ruled that Dr. Kayvanfar could rely on "the type of things that doctors normally ask about when they're treating a patient that's been in an accident, which I've already outlined, those can be described if they are the basis for his opinion." The trial court had earlier described these allowable areas as "the underlying facts, how fast the cars were going, what they were driving, where they were in the car, was it a T-bone. . . . That's data that the experts typically and normally rely on. [¶] So he will be able to give that as a basis for his opinion. He's not going to say minor accident. *And I have no problem with their saying that the plaintiff was driving a car that did well in crash test*s because if the plaintiff was driving a little tin can like an old Datsun from the 1960's with nothing to hold his head back in a whiplash situation, that would be fair game, too." (Italics added.)

Finally, any objection to Dr. Kayvanfar's biomechanics testimony would have been futile because the trial court stated it would only "hear an objection if it's something that [Dr. Kayvanfar] didn't say at his [deposition]." (See *People v. Brooks, supra*, 3 Cal.5th at p. 92; *People v. Clark, supra*, 52 Cal.4th at p. 960). As we discuss *ante* in footnote 8, all of Dr. Kayvanfar's opinions were expressed in his deposition or his expert reports provided to Miglas. Although the better practice would have been for Miglas to renew the objection at trial, he did not forfeit this issue. (See *People v. Thompson*, *supra*, 1 Cal.5th at p. 1109.)

2. *The trial court failed to perform its gatekeeping responsibility to exclude unsupported expert opinions.*

Evidence Code section 802[8] permits the trial court to inquire into the reasons for an expert's opinion and exclude opinion testimony if it is "based on reasons unsupported by the material on which the expert relies." (*Sargon*, *supra*, 55 Cal.4th at p. 771; accord, *Apple Inc. v. Superior Court* (2018) 19 Cal.App.5th 1101, 1114, 1118, 1120 (*Apple Inc.*) [reversing certification of class based on unsupported expert opinions as to common harm to prospective class members at the time they purchased their defective iPhones].) "This means that a court may inquire into, not only the type of material on which an

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[8] Evidence Code section 802 provides: "A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion."

expert relies, but also whether that material actually supports the expert's reasoning. 'A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.'" (*Sargon*, at p. 771*;* accord, *Apple Inc.*, at p. 1118.)].)

"'Evidence Code section 801, subdivision (b)[9] states that a court must determine whether the matter that the expert relies on is of a type that an expert reasonably can rely on "in forming an opinion *upon the subject to which his testimony relates*." (Italics added.) We construe this to mean that the matter relied on must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible.'" (*Sargon*, *supra*, 55 Cal.4th at p. 770; accord, *David v. Hernandez* (2017) 13 Cal.App.5th 692, 698-699 [trial court did not abuse its discretion in excluding defense expert testimony that plaintiff was under the influence of marijuana at the time of a traffic accident because the expert's conclusion that test results for the active ingredient in marijuana showed plaintiff was impaired was speculative].)

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9 Evidence Code section 801 provides: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and [¶] (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion."

"Thus, under Evidence Code sections 801, subdivision (b), and 802, the trial court acts as a gatekeeper to exclude expert testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." (*Sargon*, *supra*, 55 Cal.4th at pp. 771-772; accord, *Apple Inc., supra*, 19 Cal.App.5th at p. 1118.) The Supreme Court in *Sargon* explained, "The court does not resolve scientific controversies. Rather, it conducts a 'circumscribed inquiry' to 'determine whether, as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert's general theory or technique is valid.' [Citation.] The goal of trial court gatekeeping is simply to exclude 'clearly invalid and unreliable' expert opinion. [Citation.] In short, the gatekeeper's role 'is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" (*Sargon*, at p. 772; accord, *Apple Inc.*, at p. 1118.)

Dr. Kayvanfar offered an expert opinion on the force transferred to Miglas in the accident based on photographs of the damage to the vehicles, stating: "The small pickup truck sustained relatively minor damage to its bumper, the front bumper. And Mr. Miglas's vehicle sustained damage to the bumper of the vehicle. [¶] And based on the images that I reviewed, there was a significant amount of energy that was dissipated in that impact by his bumper. In essence, the bumper performed as expected and protected the vehicle and its occupant from the impact. [¶] And as a result, the amount of force that

would have been transferred to the occupant of Mr. Miglas's vehicle would have been a relatively very small force."

In reaching this opinion, Dr. Kayvanfar reviewed two photographs of the front of A-Able's pickup truck. He observed as to the photograph marked as trial exhibit 102, "[t]he bumper sustained minor damage, and there was no structural damage to the bumper that's visible." After looking at the second photograph marked as trial exhibit 56, Dr. Kayvanfar added that the left side of the front bumper "appears to be hanging a little bit lower than the other side, which would suggest that . . . the mechanism by which the bumper is attached to the vehicle may have been damaged on that side, and probably required repair."

Viewing one of the photographs of the rear bumper of Miglas's vehicle, marked as trial exhibit 101, Dr. Kayvanfar testified: "There's impact from the—what appears to be the license plate area of the vehicle that rear-ended it in the center of the bumper, indentation of the bumper, [is] deformed. And the bumper is somewhat detached from the vehicle and hangs down, suggesting some of the supporting structures that hold it to the vehicle are damaged, you can see the foam that's inside the bumper in the picture. [¶] . . . [¶] . . . So the significance of the picture is that this bumper absorbed significantly more energy in the impact than the other vehicle. Mainly, it[] performed its job. It was designed to absorb the energy instead of transferring the energy to the vehicle and its occupant. [¶] So it's a physical principle that when a structure gets deformed and it uses energy absorbing material in that construct. So, namely, the bumper is made of material that cushion the impact and deform as a result, instead of transferring the force to the vehicle. [¶] And then inside the bumper, there's foam padding, which is similar to the

foam that's used in packing, which absorbs or cushions the impact, protecting the structure behind it, which is the vehicle."

Looking at a second photograph of the rear bumper of Miglas's vehicle, marked as trial exhibit 52, Dr. Kayvanfar opined: "This photograph, in particular, shows the foam that's in the bumper that absorbs . . . the energy. And basically, as I said, it did its job." Dr. Kayvanfar later reiterated his opinion that "the bumper, in particular, absorbed most of the energy; therefore, the force that would have been passed on to the occupant, which is Mr. Miglas, would have been minimal, or very low degree of force that would have been transferred to him."

Dr. Kayvanfar's opinions that the bumper absorbed and dissipated most of the energy, and that minimal force was transferred to Miglas during the collision, lacked factual foundation and was speculative. As Miglas argued, a biomechanics expert, working with an accident reconstructionist, would have calculated, among other things, the speed of the vehicles, the change in the vehicles' velocity, and the forces on Miglas's neck. Dr. Kayvanfar did not conduct any of these scientific analyses, instead basing his opinions on the photographs showing damage to the vehicles' bumpers and foam coming from Miglas's bumper. (See *Stephen v. Ford Motor Co.* (2005) 134 Cal.App.4th 1363, 1370 [amateur photographs were insufficient to support tire expert's opinion that defendant's tire caused plaintiff's injury, and thus expert opinion was "mere speculation"].) The trial court failed to perform its gatekeeping responsibility to "'make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'"

(*Sargon*, *supra*, 55 Cal.4th at p. 772; accord, *Apple Inc., supra*, 19 Cal.App.5th at p. 1118.)

Further, Dr. Kayvanfar's lay assessment of photographs of the vehicles, offered under the guise of an expert opinion on application of force to Miglas's vehicle, did not relate "to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) Although the trial court could have allowed the jury to consider the vehicle photographs in assessing how significant the collision was, the court improperly allowed Dr. Kayvanfar to offer an expert opinion about the level of force from the accident transferred to Miglas based on his lay interpretation of the damage to the bumpers reflected in the photographs. (See *Christ v. Schwartz* (2016) 2 Cal.App.5th 440, 449 [trial court did not abuse its discretion in allowing jury to "consider photographs of vehicles damaged in a collision without a foundation based on expert testimony"].)

We conclude it was an abuse of discretion for the trial court to admit Dr. Kayvanfar's speculative accident reconstruction and biomechanics opinions.

C. *Dr. Bray's Testimony Did Not "Open the Door" to Dr. Kayvanfar's Testimony That Miglas's Bumper Absorbed the Impact of the Collision*

1. *Miglas did not forfeit his objection to Dr. Kayvanfar's testimony.*

A-Able contends Miglas forfeited his challenge to the trial court's admission of Dr. Kayvanfar's testimony by failing to object to the trial court's ruling that Dr. Bray's testimony had "opened the door" to biomechanics opinions. In response to the trial

court's statement that Dr. Bray had offered a "biomechanical opinion," Miglas's counsel stated, "Didn't see it coming." When the trial court ruled that Dr. Bray had opened the door and both experts could therefore opine on biomechanics, Miglas's counsel twice stated, "That's fine."

Even assuming this response showed assent to the ruling, there is nothing in the record to suggest Miglas acquiesced to the admission of expert testimony that the bumper of Miglas's vehicle "absorbed most of the impact of the accident" and that, as a result, Miglas did not "sustain any significant injury" from the 2012 accident. Rather, at the time Miglas's attorney indicated the court's ruling was "fine," Dr. Bray had only testified that "if an accident happens and the head goes back and forth forcefully it can accelerate that injury." We do not read the lack of an objection by Miglas's attorney to the court's ruling to mean he agreed this would open the door to extensive testimony about a specific bumper's absorption of the force from a collision.

Further, Miglas objected to this entire line of questioning in his motions in limine. In addition, prior to Dr. Kayvanfar offering his expert testimony about the bumper, Miglas's attorney objected to his testimony about his biomechanics training. The trial court overruled the objection, stating, "Dr. Bray's testimony opened the door to some extent. So I'll hear an objection if it's something that [Dr. Kayvanfar] didn't say at his [deposition]." Given the trial court's instruction that it would only hear objections to biomechanics opinions that were not disclosed in Dr. Kayvanfar's deposition, Miglas was not required to make a further futile objection to preserve this issue for appeal. (*People v. Brooks* (2017) 3 Cal.5th 1, 92 ["'[R]eviewing courts have traditionally excused parties for failing to raise an issue at trial

where an objection would have been futile or wholly unsupported by substantive law then in existence.'"]; *People v. Clark* (2011) 52 Cal.4th 856, 960 ["The failure to timely object and request an admonition will be excused if doing either would have been futile, or if an admonition would not have cured the harm."].)

2. *Dr. Bray's testimony did not open the door to Dr. Kayvanfar's biomechanics opinions.*

When a party opens the door through trial testimony, the trial court has discretion to permit questioning on the subject area "to present a more balanced picture and to aid the jury in evaluating [the] claim." (*People v. Melendez* (2016) 2 Cal.5th 1, 29 [defendant's testimony that he did not report a shooting because he was threatened by the codefendant's gang supported questioning of defendant about his former gang membership to help the jury evaluate defendant's claim that he was afraid of codefendant's gang]; accord, *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 72 [defendant's denial during direct examination that he wanted to kill victim "'or anybody else'" opened the door to cross-examination on murder in neighboring county]; *Notrica v. State Comp. Ins. Fund* (1999) 70 Cal.App.4th 911, 937-938 [trial court did not err in admitting evidence of defendant workers' compensation carrier's financial condition during liability phase where defendant opened the door by presenting unfavorable information about the adequacy of its reserves].) "Where a party "'has opened the door'" on an area, it is estopped from complaining that its opponent has profited by it." (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1683; see *id.* at p. 1682 [testimony that company did not market to minors and funded youth antismoking measures enabled

opposing counsel to argue in closing that tobacco company was not giving up its targeting of teenage smokers]; *Morris v. Frudenfeld* (1982) 135 Cal.App.3d 23, 32 [defendant's cross-examination of doctor about his offer to perform an abortion without charge for the plaintiff "opened the door" on this otherwise objectionable subject].)

The trial court concluded Dr. Bray opened the door to Dr. Kayvanfar rendering opinions on biomechanics because Dr. Bray "testified that the way the accident happened, the head bent back and forth forcefully and he just got into biomechanics and biomechanical opinion." The trial court later stated, "Dr. Bray testified about the mechanism of [the] accident such that you would think he was a biomechanic[s] person."

However, this does not accurately reflect Dr. Bray's testimony. Rather, he opined that "when the neck bends forward or backward, if the segment in between doesn't move, the stresses get placed to the one above or below. [¶] . . . [¶] [I]f an accident happens and the head goes back and forth forcefully it can accelerate that injury." Dr. Bray did not offer any opinion about "the way the accident happened," the "mechanism" of the accident, or the force of the impact on Miglas's neck. He only opined that adjacent segment disease can be accelerated "*if* an accident happens and the head goes back and forth forcefully." (Italics added.) It was for a biomechanics or accident reconstruction expert to say whether the force from this particular accident caused Miglas's head to go back and forth forcefully. This was not part of Dr. Bray's testimony.

Further, even had Dr. Bray opened the door to biomechanics testimony, that would not have meant that Dr. Kayvanfar could offer inadmissible testimony. Rather, this

potentially could have opened the door to expert testimony by a biomechanics expert based on an adequate foundation.

Dr. Bray did criticize Dr. Kayvanfar's opinions about biomechanics as "irrelevant to this case because there aren't any biomechanic studies that exist on people they put in the study that had two-level fusions and subject them to trauma." The trial court could have concluded this testimony opened the door to rebuttal evidence of relevant biomechanics studies. But Dr. Kayvanfar's opinions about how the Lexus bumper absorbed and dissipated the impact from the collision did not rebut Dr. Bray's testimony or "present a more balanced picture and . . . aid the jury in evaluating [Dr. Bray's] claim." (*People v. Melendez, supra*, 2 Cal.5th at p. 29.)

D. *The Admission of Dr. Kayvanfar's Biomechanics Testimony Was Prejudicial Error*

The erroneous admission of Dr. Kayvanfar's biomechanics testimony was prejudicial. (See *ABM Industries, supra*, 19 Cal.App.5th at p. 293; *Grail Semiconductor, supra*, 225 Cal.App.4th at p. 799.) Dr. Kayvanfar repeatedly testified about the bumper, including its design and construction, and how it "performed its job" by absorbing the impact during the collision. He opined that a "relatively very small force" was transferred to Miglas in the 2012 accident because a "significant amount of energy . . . was dissipated in that impact by his bumper." As a result, Miglas "might have sustained a minor muscular strain, which, typically, would have resolved within a few weeks, at most, maybe one or two months or so after the accident. [A]ny subsequent treatment that he had is not related to the effect of

the motor vehicle accident of December of 2012." No expert testimony was presented to rebut Dr. Kayvanfar's conclusions.

Further, Dr. Kayvanfar testified that he changed his opinion from that expressed in his June 29, 2015 report, in which he attributed the cause of degeneration in Miglas's C4-5 vertebrae 80 percent to his prior injury and 20 percent to the 2012 accident. At the time of his June 2015 report, Dr. Kayvanfar agreed with Dr. Bray's testimony that absent the 2012 accident, Miglas might not have needed surgery for 20 years after his 2007 surgery. As of his second report dated July 20, 2015, Dr. Kayvanfar had reviewed additional imaging studies, but they did not change his opinion. It was not until Dr. Kayvanfar's fourth report on February 4, 2016 that he provided an opinion that the bumper of Miglas's Lexus "dissipate[d] the impact of [the] accident and prevent[ed] injuries" to Miglas, "even at higher speeds."

The jury's award to Miglas of only $136.18 for the single medical visit to Dr. Frankel in 2012 was inconsistent with Dr. Kayvanfar's initial opinion that 20 percent of Miglas's neck injury was attributable to the 2012 accident, especially given the stipulation that Miglas incurred $78,259.80 in medical expenses following the 2012 accident. Further, Miglas's testimony that his pain went away after his first surgery, but returned after the 2012 accident, was consistent with Dr. Kayvanfar's first two reports (prior to his analysis of the bumpers), as was Dr. Bray's testimony that Miglas would not have needed a second surgery for 20 years after his 2007 surgery if the 2012 accident had not happened. Dr. Bray also opined that the 2012 accident was a proximate cause of the deterioration of Miglas's C4-5 vertebrae because Miglas could not have had the level of deterioration

reflected in his 2013 CT and MRI before the accident without being symptomatic.

A-Able contends the admission of Dr. Kayvanfar's biomechanics testimony was not prejudicial because it formed only a "small part" of the basis for his conclusion that the accident did not cause Miglas's neck injuries. A-Able points to Dr. Kayvanfar's testimony about the postsurgery 2013 CT scans that showed Miglas's neck had preexisting adjacent segment degeneration, which worsens over time as part of the ordinary aging process; showed bone spurs at C3-4 and C4-5, which cannot be attributed to the recent spine injury; and did not show recent significant trauma to Miglas's neck, such as a bone fracture. But this testimony only supported Dr. Kayvanfar's opinion that Miglas's injury was mostly caused by the degeneration from the 2007 injury, consistent with Dr. Kayvanfar's conclusion in his initial report that the degeneration in Miglas's spine was attributed 80 percent to the preexisting condition and 20 percent to the 2012 accident.

A-Able also points to Dr. Kayvanfar's opinion that if the 2012 accident caused significant injury to the spine, Miglas would have suffered immediate pain and symptoms, rather than feeling pain later that night. However, Miglas similarly did not feel pain after the 2007 accident until later that evening. Likewise, although the jury could consider that Miglas did not see Dr. Hopkins until five months after the 2012 accident, Miglas explained the delay by testifying he "tried to live with the pain" and was afraid of the medical diagnosis. The jury could consider this evidence to reduce the percentage contribution allocated to Miglas's injuries from the 2012 accident, but the evidence does not explain why Dr. Kayvanfar changed his opinion from his

conclusion in the first report that 20 percent of Miglas's injury resulted from the 2012 accident to, in essence, zero percent as of Dr. Kayvanfar's fourth report, in which he concluded Miglas "might have sustained a minor muscular strain" that would typically resolve at most within two months and would not have required additional treatment. The only changed circumstance from Dr. Kayvanfar's conclusion in his first report to that in his fourth report and at trial was his inadmissible biomechanics testimony that the bumpers absorbed all the impact such that Miglas would not have suffered anything other than a minor muscular strain that would quickly heal.[10]

On this record, we conclude "it is reasonably probable that a result more favorable to [Miglas] would have been reached in the absence" of the erroneous admission of Dr. Kayvanfar's speculative testimony.[11] (*Grail Semiconductor, supra*, 225

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[10] A-Able also asserts the surveillance video showing Miglas leading a normal life in 2016 undercuts Miglas's claims regarding the severity of his injuries. However, this video, taken three years after his 2013 surgery, could be relevant to damages, but not to whether the 2012 accident contributed to Miglas's need for a second spine surgery.

[11] Because we conclude it was prejudicial error to admit Dr. Kayvanfar's opinions on accident reconstruction and biomechanics, we do not reach Miglas's contentions that Dr. Kayvanfar's biomechanics and accident reconstruction opinions should have been excluded because he was not designated as an expert in these disciplines in his expert witness disclosure, and he was not qualified to testify as an expert in these fields. Likewise, we do not reach Miglas's contention that Dr. Bray should have been allowed to testify about the absence of biomechanics studies on people who have had a two-level fusion of their neck. The parties' objections to the expert testimony will

Cal.App.4th at p. 799; accord, *ABM Industries, supra*, 19 Cal.App.5th at p. 293.)

DISPOSITION

The judgment is reversed and the case is remanded for a new trial. Tom Miglas and Regina Maria Miglas shall recover their costs on appeal from A-Able, Inc., doing business as Fume-A-Pest & Termite.

FEUER, J.

WE CONCUR:

ZELON, Acting P. J.

SEGAL, J.

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need to be addressed by the trial court in a new trial in the context of the experts the parties call at that trial.