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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

ANNE KNIFFIN, Plaintiff and Appellant, v. MANUEL BRAGANZA GARCIA, Defendant and Respondent.	B264199 (Los Angeles County Super. Ct. No. BC522530)

APPEAL from a judgment of the Superior Court of Los Angeles County, John J. Kralik, Judge. Affirmed.

Doumanian & Associates and Nancy P. Doumanian for Plaintiff and Appellant.

Gilbert, Kelly, Crowley & Jennett, Timonthy W. Kenna, Paul A. Bigley and Rebecca J. Smith for Defendant and Respondent.

In the underlying action, appellant Anne Kniffin asserted claims for negligence against respondent Manuel Braganza Garcia (Braganza). After a jury returned special verdicts finding that Braganza's negligence was not a substantial factor in causing harm to Kniffin, the trial court denied Kniffin's motion for a new trial and entered a judgment against her and in favor of Braganza. Kniffin challenges the denial of the new trial motion and the judgment on the grounds of inconsistency in the special verdicts, insufficiency of the evidence, instructional error, and misconduct by Braganza's counsel. We reject Kniffin's contentions of error and affirm.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. *Complaint*

On September 25, 2013, Kniffin initiated the underlying action for negligence and negligence per se against Braganza.[1] Her complaint alleged that on January 11, 2013, as she was lawfully walking across Genevieve Avenue in Los Angeles, Braganza negligently hit her with his car. The complaint further alleged that Braganza's

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[1] The complaint also asserted a claim for negligent entrustment against Braganza's wife Zenaida, who was dismissed as a defendant during the trial and is not a party to this appeal.

conduct caused physical, mental, and financial injury to Kniffin.

B. *Trial*

1. *Kniffin's Evidence*

a. *Background*

The underlying incident occurred at the intersection of Genevieve Avenue and Colorado Boulevard. There is an unmarked crosswalk across Genevieve Avenue where it meets Colorado Boulevard from the north. Vehicles travelling south on Genevieve Avenue encounter a stop sign at the unmarked crosswalk. A limit line is on Genevieve Avenue north of the stop sign and the crosswalk.

b. *Evidence regarding Accident*

Kniffin testified that at the time of the trial, she was 74 years old. On January 11, 2013, she left her apartment and walked east toward a bus stop on Colorado Boulevard, approximately half a block east of the intersection of Genevieve Avenue and Colorado Boulevard. She was using a walker she sometimes employed for errands. At approximately 1:45 p.m., she reached the northwest corner of the intersection of Genevieve Avenue and Colorado Boulevard. There, she saw that a car on Genevieve Avenue had halted for the stop sign, and felt confident to enter the crosswalk. After she took "[b]arely one" step into the crosswalk, the car moved forward and hit her, causing her to

fall backward. The car's driver left his vehicle and said, "'I'm sorry.'"

Braganza testified that at the time of the trial, he was 69 years old.[2] He was familiar with the intersection of Genevieve Avenue and Colorado Boulevard, as he had lived near it for 30 years. On January 11, 2013, he drove carefully as he approached the intersection because he knew that pedestrians used the crosswalk. He stopped approximately six feet north of the stop sign, with the intention of making a right turn onto Colorado Boulevard. According to Braganza, he believed that he activated his right turn signal, as that was his customary practice. Because foliage on the east side of Genevieve Avenue obstructed his view to the left, he eased forward -- at approximately two miles per hour -- in order to check for traffic from that direction on Colorado Boulevard. After moving four or five feet, his car struck something. Braganza stated that he never saw Kniffin before his car made contact with her.

Los Angeles Police Department Officer Edgar Soto testified that he responded to the incident. When he arrived, Kniffin was on her feet and receiving treatment from paramedics. Soto determined that Braganza's car contacted Kniffin less than one foot east of the west curb of Genevieve Avenue, and "one foot north of the north [side] of Colorado

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[2] Because Braganza developed health problems limiting his ability to speak, excerpts of Braganza's prior sworn testimony were read to the jury.

Boulevard." That point was within the unmarked crosswalk, "as you take your first step." Soto further estimated that after the contact, Kniffin fell back, hitting the ground two feet west of the west curb of Genevieve Avenue and one foot south of the north side of Colorado Boulevard. According to Soto, a driver moving south toward Colorado Boulevard would have an unobstructed view of a pedestrian standing at the curb next to the stop sign.

Officer Soto further testified that he interviewed Braganza and Kniffin. At the scene of the incident, Braganza told Soto that after driving south on Genevieve Avenue, he saw the stop sign and halted at the limit line. With the aim of making a right turn onto Colorado Boulevard, Braganza looked to his left and then continued south at two to three miles per hour. Braganza said that he never observed Kniffin until his car made contact with her walker. Later, when Soto interviewed Kniffin at a hospital, she said that when she stepped off the curb, a car collided with the left side of her walker, causing her to lose her balance and fall backwards.

c. *Evidence Regarding Kniffin's Injuries*

i. *Kniffin*

Kniffin testified that between 1978 and the January 2013 accident, she underwent back surgery five times, the last occurring in 2004. According to Kniffin, those surgeries never prevented her from engaging in her ordinary activities. In 2007, under a physician's care, she began

taking morphine as pain medication. In 2008, she began seeing pain management specialist Dr. Christian Charbonnet, who prescribed pain medication, epidural injections, and physical therapy to control her pain. In 2009, following a flare-up of Kniffin's lower back pain, Dr. Charles Holzner, Kniffin's family physician, referred her to neurosurgeon Dr. Ayman Salem. In 2009 and 2011, Salem recommended that Kniffin undergo back surgery, but she declined to do so. Kniffin stated that prior to the January 2013 accident, her pain was under sufficient control to permit her to function, despite an occasional flare-up of back pain; although she used a walker and cane, she never needed a wheelchair.

Kniffin further testified that on January 11, 2013, when Braganza's car caused her to fall, she felt immediate pain. After the accident, she was taken to an emergency room, where she stayed for six or seven hours.[3] She then lived with her daughter for two weeks, during which she experienced constant "excruciating" pain in her back and legs. Her pain significantly impaired her ability to engage in ordinary activities. She visited Drs. Holzner and Charbonnet, who increased her pain medication and prescribed physical therapy. At some point, Kniffin became aware that these measures were ineffective to control her

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[3] Officer Soto also testified that when he interviewed Kniffin in the emergency room, she complained of pain in her neck, lower back, and stomach.

pain. In late 2013, Holzner referred her to neurosurgeon Dr. Frank Acosta, who recommended that she undergo back surgery. In November 2014, Kniffin began using a wheelchair.

On cross-examination, Kniffin acknowledged that her medical records prior to the January 2013 accident reflected complaints relating to her level of pain and ability to walk. In 2007, she told her physicians that her pain had worsened; in addition, she planned to have a hip replacement, but never did so. In 2009, Kniffin repeatedly complained to Dr. Salem that she was experiencing significant pain in her lower back and legs, and scheduled surgery on her back, but decided that it was unnecessary. In late 2009, she was admitted to a hospital because she felt severe pain and was unable to walk. In 2011, on several occasions, Kniffin told Salem that her pain was interfering with certain activities, including her ability to participate in physical therapy. She again scheduled back surgery. According to Kniffin's medical records, that surgery was cancelled when she developed pneumonia.

Kniffin further acknowledged that she experienced falls several times before and after the January 2013 accident. One such fall occurred shortly before she began using a wheelchair in November 2014. According to Kniffin, knee pain motivated her to use the wheelchair. She attributed that knee pain to the pain she experienced

following the January 2013 accident, which she stated impaired her ability to walk.[4]

ii. *Dr. Charbonnet*

Dr. Charbonnet testified that he first consulted with Kniffin regarding her lower back pain in December 2008. According to Charbonnet, Kniffin suffered from persistent pain not resolved by prior back surgery. He prescribed pain medication, including oral morphine and epidural injections, as well as physical therapy. Kniffin took two types of oral morphine, a "long acting" form for ordinary daily use known as "MS Contin," and a "fast acting" form intended to address "break-through" pain, that is, severe pain.

On direct examination, Charbonnet opined that the January 2013 accident marked a change in Kniffin's experience of pain. Prior to the accident, he generally prescribed daily doses of morphine ranging from 30 to 60 milligrams (excluding additional morphine to address break-through pain), which was ordinarily sufficient to control her pain. In March 2013, when Kniffin made her first post-accident visit to Charbonnet, he learned that Dr. Holzner had prescribed a daily morphine dosage totaling 180 milligrams. Kniffin reported that her pain level -- measured

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[4] Kniffin also called as a witnesses her daughter Colleen Toumayan and granddaughter Meagan Toumayan, who testified that Kniffin's ability to function deteriorated after the January 2013 accident.

on an intensity scale running from 0 to 10 -- was 10. Charbonnet immediately lowered her daily dosage of morphine to 90 milligrams, and in April 2013, reduced it to 60 milligrams. From April 2013 to October 2014, Kniffin reported pain levels ranging from 5 to 9. In October 2014, when Kniffin complained of pain in her lower back and knee, he increased her daily dosage to 90 milligrams.

On cross-examination, Dr. Charbonnet acknowledged that his records showed that prior to the January 2013 accident, Kniffin received eight epidural injections, and her reported pain and dosage of pain medication varied. In December 2008, Kniffin reported a pain level of 7. In 2009, her pain levels usually ranged from 8 to 10, although on one occasion she reported a level of 5, and on another, a level of 7. In 2010 and the initial months of 2011, her pain levels ranged from 8 to 10, with the exception of three periods immediately following epidural injections, when she sometimes reported levels as low as 3.

In mid-2011, shortly before Dr. Salem recommended that Kniffin undergo back surgery, she reported pain levels of 10. Dr. Charbonnet ordered an epidural injection and prescribed daily doses of morphine of 90 milligrams (excluding break-through morphine). Thereafter, during the period prior to the January 2013 accident, Kniffin received two more epidural injections. In early 2012, Charbonnet reduced her daily dosage of morphine to 60 milligrams (excluding break-through morphine) for several months.

After August 2012, her daily dosage of morphine varied between 30 and 45 milligrams.

From the date of the mid-2011 epidural injection to the January 2013 accident, Kniffin's pain levels ranged from 4 to 8, although she once reported a level of 1 immediately after an injection. In December 2012, at Kniffin's last visit with Charbonnet prior to the January 2013 accident, she reported a pain level of 6, and was prescribed 30 milligrams of morphine per day (excluding break-through morphine).

Dr. Charbonnet's records also reflected that Kniffin's pain levels varied after the January 2013 accident. In mid-2013, at Kniffin's second and third visits following the accident, she reported pain levels of 5. Later in 2013, her pain levels ranged from 6 to 8, and Charbonnet ordered an epidural injection. In 2014, following that injection, her pain levels ranged from 4 to 9, although on one occasion she reported a level of 2. In October 2014, Kniffin described pain in her lower back and knee, and reported her pain level as 9.

iii. *Dr. Acosta*

Dr. Frank Acosta, a neurosurgeon, testified that in December 2013, he recommended that Kniffin undergo back surgery to restore the curvature of her spine, which he believed to be her last option for improving the quality of her life. According to Acosta, the surgery he recommended differed from that proposed by Dr. Salem in 2011. At trial, Acosta opined that the January 2013 accident exacerbated her back pain.

On cross-examination, Acosta stated that his December 2013 surgery recommendation did not rely on any "film" (that is, an MRI, CT scan, or "plain film") created before October 2013, and that his opinion regarding Kniffin's pain was based entirely on her remarks to him. He further acknowledged that the diagnostic images of Kniffin's spine he reviewed showed age-related osteoporosis and a degenerative condition known as diffuse spondylosis, but no traumatically induced injury.

iv. *Dr. Caton*

Dr. William Caton, a neurosurgeon, opined that the January 2013 accident caused Kniffin's lower back problems to worsen. Prior to the accident, she suffered from several conditions, including pinched nerves in her spinal column, stenosis (narrowing of the spinal canal), and scoliosis (curvature of the spine). According to Caton, following the accident, Kniffin's pain increased, and she displayed neurological deficits -- that is, shortcomings and weaknesses in her reflexes -- potentially affecting her ability to walk. Additionally, she became more susceptible to pseudarthrosis, that is, a failure of bones fused in prior back surgeries to "knit solidly." On cross-examination, Caton acknowledged that the films of Kniffin's back (that is, MRIs and CT scans) created before and after the January 2013 accident showed no objective differences.

v. *Dr. Chien*

On direct examination, geriatrics specialist Dr. Norman Chien opined that the January 2013 accident materially changed Kniffin's experience of pain. According to Chien, Kniffin's pain following the accident was "different" because it involved a loss of balance and other functions. Chien further opined that surgery constituted Kniffin's sole remaining avenue of pain control, as medication-related treatments had been ineffective and other alternatives were unavailable to her. Chien acknowledged that his opinions were based on a partial review of Kniffin's medical records.

On cross-examination, Dr. Chien stated that he once met Kniffin for ten minutes, but never examined her. He further testified that he was unaware that prior to the January 2013 accident, she had fallen several times. An excerpt from the reporter's transcript of Chien's deposition was admitted to show that at the time of the deposition, Chien believed that Kniffin was not using morphine prior to the accident.

vi. *Other Evidence Regarding Damages*

Darryl Zengler, a forensic economist, estimated that the costs of Kniffin's "future life care needs" -- which encompassed the back surgery proposed by Dr. Acosta and

related care -- totaled approximately $3.99 million (adjusted to present value).[5]

2. *Braganza's Evidence*

i. *Dr. Salem*

Dr. Ayman Salem testified that from 2009 to 2011, he was Kniffin's primary consulting neurosurgeon. At that time, he determined that she suffered from an "accelerated degenerative lumbar condition," and recommended a limited lumbar fusion in an effort to relieve her severe lower back pain. According to Salem, "in a perfect world," he would have recommended the different surgical procedure later proposed by Dr. Acosta in 2013, but did not do so because he believed that Kniffin was not sufficiently healthy to undergo that procedure.

ii. *Dr. Armirnovin*

Dr. Ramin Amirnovin, a neurosurgeon, opined that the January 2013 accident did not "worsen . . . permanently" Kniffin's medical condition, stating: "She has a long-standing spine problem[, a]nd that problem may need surgery, but it needed surgery before [the] accident." According to Amirnovin, the films of Kniffin's back (MRIs, CTs, and "plain films") showed no changes after the January

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[5] Zengler based his estimate on a plan prepared by Jan Roughan, a life care planner who also testified at trial.

2013 accident. He believed that the accident resulted only in a muscular injury or "tendon pains" that lasted no more than three months.

Amirnovin further opined that notwithstanding the "roller coaster" pattern of Kniffin's reported pain levels, her pain in 2014 was at the baseline established prior to the accident. He noted that prior to the accident, her daily dosage of MS Contin often exceeded or equaled the 60 milligram dosage that Dr. Charbonnet began prescribing for her in March 2013, following the accident. Kniffin's records reflected that from December 2009 to April 2010 and from January 2011 to August 2011, Kniffin's daily dosage was 90 milligrams, and that from February 2012 to May 2012, her daily dosage was 60 milligrams.

C. *Special Verdicts, Judgment, and Motion for a New Trial*

Over Kniffin's objection, the trial court instructed the jury regarding comparative negligence. In addition, the jury was instructed that Kniffin sought economic damages for future medical expenses, and noneconomic damages for past and future pain and suffering. During closing arguments, Kniffin's counsel requested an award of $3.99 million in economic damages for Kniffin's future medical needs, but expressly declined to seek past medical expenses. Kniffin's counsel also requested an award of $15 million in noneconomic damages for pain and suffering, including $5 million for past pain and suffering.

The special verdict form asked the jury to render findings on several issues, including the existence of comparative negligence. The first question asked whether Braganza was negligent, and the second asked whether his negligence was a substantial factor in causing harm to Kniffin; if the jury answered "No" to either question, it was directed to make no further findings. The jury returned a "Yes" answer to the first question, a "No" answer to the second question, and rendered no other special verdicts.

On March 2015, the trial court entered judgment in Braganza's favor and against Kniffin in accordance with the jury's special verdicts. In May 2015, the trial court denied Kniffin's motions for judgment notwithstanding the verdict and a new trial. This appeal followed.

DISCUSSION

Kniffin challenges the judgment and the denial of her motions for judgment notwithstanding the verdict and a new trial, arguing that she is entitled to a new trial limited to causation and damages. She contends (1) that the special verdicts are inconsistent and unsupported by substantial evidence, (2) that the trial court erred in instructing the jury regarding comparative fault, and (3) that Braganza's counsel engaged in misconduct. For the reasons discussed below, we conclude that she has shown no reversible error.[6]

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[6] To the extent Kniffin's challenges rely on her motions for judgment notwithstanding the verdict and a new trial,
(Fn. continued on next page.)

we apply the appropriate standard of review. As motions for judgment notwithstanding the verdict potentially conclude litigation on a complaint or claim, the rules governing them are "strict" (*Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 750 (*Fountain Valley*)), and "[t]he trial court's discretion in granting a motion for judgment notwithstanding the verdict is severely limited" (*Teitel v. First Los Angeles Bank* (1991) 231 Cal.App.3d 1593, 1603). Generally, ""'[i]f the evidence is conflicting or if several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied. [Citations.] 'A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied.' [Citation.]'"" (*Id.* at p. 1603, quoting *Clemmer v. Hartford Co.* (1978) 22 Cal.3d 865, 877-878.) In reviewing the trial court's ruling, we also examine the record for substantial evidence to support the verdict. (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 845 (*OCM Principal Opportunities Fund*).)

In contrast, new trial motions permit parties to challenge judgments on a variety of statutorily defined grounds (Code Civ. Proc., § 657). (*Fomco, Inc. v. Joe Maggio, Inc.* (1961) 55 Cal.2d 162, 166.) Provided the party seeking a new trial complies with the statutorily-mandated procedures (see *Mercer v. Perez* (1968) 68 Cal.2d 104, 118), the trial

(Fn. continued on next page.)

A. *Special Verdicts*

Appellant asserts intertwined contentions regarding the special verdicts, arguing that they are inconsistent, and that the record unequivocally shows that Braganza's negligence was a substantial factor in causing cognizable harm to Kniffin. As explained below, we reject her challenges to the special verdicts.

1. *Inconsistency*

We begin with Kniffin's contention regarding the consistency of the special verdicts. Generally, "'[a] special verdict is inconsistent if there is no possibility of reconciling its findings with each other. [Citation.]' [Citation.] 'On appeal, we review a special verdict de novo to determine whether its findings are inconsistent. [Citation.] . . . '"'Where the findings are contradictory on material issues, and the correct determination of such issues is necessary to

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court "has much wider latitude in deciding the motion [citation], which is reflected in an abuse of discretion standard when the ruling is reviewed by the appellate court" (*Fountain Valley*, *supra*, 67 Cal.App.4th at p. 751). Nonetheless, to the extent the record establishes an error during the trial, we "review[] the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial." (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 872.)

sustain the judgment, the inconsistency is reversible error.'" [Citations.]" [Citation.] . . . The proper remedy for an inconsistent special verdict is a new trial. [Citation.]' [Citation.]" (*David v. Hernandez* (2014) 226 Cal.App.4th 578, 585 (*David*).)

An instructive application of these principles is found in *David*. There, the plaintiffs' vehicle collided with the defendant's truck as it entered the highway on which the plaintiffs were travelling. (*David*, *supra*, 226 Cal.App.4th at pp. 581-582.) At trial, after receiving instructions regarding ordinary negligence and negligence per se, the jury found that the defendant was negligent but that his negligence was not a substantial factor in causing harm to the plaintiffs. (*Id*. at p. 585.) On appeal, the plaintiffs contended the special verdicts were "fatally inconsistent." (*Ibid*.) The appellate court rejected that contention, concluding that under the instructions, the jury was presented with multiple theories of negligence, several of which it could have accepted without finding causation. (*Id*. at pp. 585-588.) The court explained: "'Where, as here, there is no special finding on what negligence is found by the jury, the jury's finding is tantamount to a general verdict. As long as a single theory of negligence is lawfully rebutted on a lack of causation theory, it matters not that another theory of negligence is not so rebutted. [Citation.]' [Citation.]" (*Id*. at p. 586, quoting *Jonkey v. Carignan Construction Co.* (2006) 139 Cal.App.4th 20, 26.)

Here, appellant's contention fails, as the instructions set forth at least one theory of negligence that the jury could reasonably have accepted without necessarily finding that Braganza's negligence was a substantial factor in causing harm. At trial, the jury was offered theories of negligence and negligence per se. The jury was instructed, inter alia, with CACI No. 700, which sets forth "the basic standard of care for driving a vehicle." (*Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1318.) That instruction states in pertinent part: "A person must use reasonable care in driving a vehicle. Drivers must keep a lookout for pedestrians, obstacles and other vehicles. . . . [¶] [F]ailure to use reasonable care in driving a vehicle is negligence." The record otherwise discloses evidence that Braganza failed to notice Kniffin before she stepped into the unmarked crosswalk, but -- as discussed further below (see pt. A.2. of the Discussion, post) -- it does not mandate the inference that his conduct caused harm to her. Accordingly, under the theory of negligence set forth in CACI No. 700, the jury could reasonably have found negligence without necessarily finding the existence of causation.

2. *Causation of Harm*

We turn to Kniffin's contention that the record conclusively establishes that Braganza's negligence caused injury to her. As explained below, we reject her contention, as the jury could reasonably have found that Kniffin suffered no injury for which it was required to award damages.

a. *Governing Principles*

When a jury finds the defendant to be the sole negligent party in a traffic accident, it may nonetheless conclude that the negligence caused no harm to the plaintiff because the plaintiff failed to show compensable injury attributable to the accident. (*Chaparkas v. Webb* (1960) 178 Cal.App.2d 257, 259-262 (*Chaparkas*); see *Hunt v. Burgess* (1962) 210 Cal.App.2d 855, 862-863 (*Hunt*); *Morseman v. Mangum* (1960) 177 Cal.App.2d 218, 223-224 (*Morseman*).) Here, the jury was expressly permitted to return a special verdict that Braganza's negligence was not a substantial factor in causing harm to Kniffin upon finding no injury attributable to the accident, as the jury instructions stated that "[c]onduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct." Any such finding is reviewed for the existence of substantial evidence.[7] (*Hunt, supra,* 210 Cal.App.2d at pp. 862-863;

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[7] On review for substantial evidence, "the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination [of the trier of fact], and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the [trier of fact]." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, italics omitted.)

To the extent Kniffin's challenge is directed at the trial court's denial of her new trial motion, we apply established

(Fn. continued on next page.)

Morseman, supra, 177 Cal.App.2d at pp. 223-224; see *Chaparkas*, *supra*, 178 Cal.App.2d at p. 262.)

Our focus is thus on the showings required to establish Kniffin's claimed items of damages. Kniffin's request for economic damages was limited to her "future life care needs" relating to the back surgery proposed by Dr. Acosta. Generally, "[a]n injured plaintiff is entitled to recover the reasonable value of medical services that are reasonably certain to be necessary in the future." (*Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1330 (*Corenbaum*).) Nonetheless, the jury may not award damages for medical expenses absent an adequate showing that the services are attributable to the accident, that they are necessary, and that the charges for such services are reasonable. (*Dimmick v. Alvarez* (1961) 196 Cal.App.2d 211, 216; *Morris v. McCauley's Quality Transmission Service* (1976) 60 Cal.App.3d 964, 971 ["If . . . the jury found that the many

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principles. "The appellate court has not seen or heard the witnesses, and has no power to pass upon their credibility. Normally, the appellate court has no power to interfere except when the facts before it suggest passion, prejudice or corruption upon the part of the jury, or where the uncontradicted evidence demonstrates that the award is insufficient as a matter of law. In determining whether there has been an abuse of discretion, the facts on the issue of damage most favorable to the respondent must be considered." (*Gersick v. Shilling* (1950) 97 Cal.App.2d 641, 645.)

problems that [the plaintiff] developed over the two years following the accident were not attributable to the accident, then the jury was not justified in charging defendant for the medical expenses incurred because of those symptoms"].)

Kniffin also requested awards for past and future pain and suffering. As an item of damages, injured plaintiffs may seek a recovery for noneconomic injuries, including pain and suffering. (*Corenbaum*, *supra*, 215 Cal.App.4th at p. 1332.) "Pain and suffering is a unitary concept that encompasses physical pain and various forms of mental anguish and emotional distress. [Citation.] Such injuries are subjective, and the determination of the amount of damages by the trier of fact is equally subjective. [Citation.] There is no fixed standard to determine the amount of noneconomic damages. Instead, the determination is committed to the discretion of the trier of fact. [Citations.]" (*Ibid.,* fn. omitted.)

Jury awards that do not compensate for pain and suffering are sometimes inadequate as a matter of law, although "'[e]very case depends upon the facts involved . . . .'" (*Dodson v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931, 936, quoting *Miller v. San Diego Gas & Elec. Co.* (1963) 212 Cal.App.2d 555, 558.) Generally, "[c]ases finding an award inadequate for failure to account for pain and suffering 'involve[ ] situations where the right to recover was established and . . . there was also proof that the medical expenses were incurred because of defendant's negligent act.'" (*Dodson, supra,* at p. 937, quoting *Miller*, *supra,* at p. 558.) However, an award for an amount equal to, or less

than, the claimed medical expenses is not necessarily inadequate when the jury is presented with conflicting evidence on key factual issues, including "whether [the] plaintiff received any substantial injury or suffered any substantial pain, or whether the medical treatment was . . . given as a result of the injuries . . . ." (*Haskins v. Holmes* (1967) 252 Cal.App.2d 580, 586 (*Haskins*); see *Miller*, *supra*, at p. 560.)

In suitable circumstances, the jury may determine that the defendant's negligence cause no damages, even though the plaintiff testifies that he or she suffered pain as the result of the defendant's negligence. In *Morseman*, the plaintiff asserted a claim for personal injuries allegedly due to a collision between a truck in which he was a passenger and the defendant's car. (*Morseman*, *supra*, 177 Cal.App.2d at p. 219.) At trial, the plaintiff testified that following the accident, he experienced neck pain and incurred medical expenses exceeding $200. (*Id.* at p. 221.) His treating physician testified that after the accident, an X-ray showed a "bony displacement," but "'no actual pathology.'" (*Ibid.*) He opined that the plaintiff suffered from an unresolved and painful whiplash injury. (*Ibid.*) The defendant's medical expert testified that he discerned no injury to the plaintiff. (*Ibid.*) The jury found in the plaintiff's favor on the issue of negligence, but awarded no damages. (*Id.* at p. 219.) Affirming the judgment and the trial court's denial of a new trial motion, the appellate court stated: "It is apparent from the . . . verdict that the jury found that [the] defendant . . .

was negligent and liable for the damage, if any, resulting to [the plaintiff], but the jury found further that he suffered no damage. Whether or not the collision caused injury to [the plaintiff] was a question of fact for the jury. The evidence was sufficient to support the verdict." (*Id.* at p. 224.)

In *Hunt*, the plaintiff alleged that she suffered personal injuries when the defendant's vehicle collided with a car in which she was a passenger. (*Hunt*, *supra*, 210 Cal.App.2d at pp. 856-857.) At trial, the plaintiff testified that following the accident, she had no physical cuts or fractures, but experienced soreness and stiffness in her neck, and incurred more than $1,000 in medical expenses in order to resolve those conditions. (*Id.* at p. 858.) Although the jury found that the defendant was negligent, it also found that the plaintiff "was not damaged." (*Id.* at p. 862.) On appeal, the plaintiff contended the jury was required to award damages because the evidence regarding her injuries and medical expenses was uncontradicted. (*Ibid.*) The appellate court disagreed, concluding that other evidence regarding the accident supported the reasonable inference that the plaintiff suffered no damages due to the accident. (*Id.* at pp. 861-863.)

In *Chaparkas,* a married couple alleged that they suffered injuries when the defendants' vehicle collided with their car. (*Chaparkas*, *supra*, 178 Cal.App.2d at pp. 258-259.) At trial, the husband testified that after the accident, he experienced swelling and pain in his neck and back, and consulted a doctor, who attributed the pain to arthritis. (*Id.*

at p. 260.) The husband denied suffering any noticeable arthritis pain before the accident. (*Ibid*.) The pertinent doctor (who testified primarily on the wife's behalf) stated that he had treated the husband before the accident, but offered no evidence regarding his post-accident condition and medical expenses. (*Id*. at pp. 260-261.) A defense medical expert testified that 15 months after the accident, the husband's health was normal, with the exception of high blood pressure. (*Id*. at p. 261.) The jury found that the defendants were the sole negligent party regarding the accident and awarded damages to the wife, but none to the husband. (*Id*. at 259.) Affirming the judgment against the husband, the appellate court stated that the jury was permitted to reject his testimony -- even if uncontradicted -- on any rational basis, including his demeanor while testifying. (*Id*. at p. 262.) The court concluded: "Even should we assume that the foregoing evidence would have justified an award of at least nominal damages[,] the judgment . . . should not be reversed simply to permit such a recovery. [Citations.]" (*Ibid*.)

b. *Analysis*

We conclude that substantial evidence supports the jury's special verdict regarding causation. Viewed in the light most favorable to the judgment, the trial evidence establishes that Kniffin was not harmed by the January 2013 accident. As explained below, the jury could reasonably have concluded that the accident caused no long

term change in the physical state of Kniffin's back and her pain levels, and that its sole possible effect was a short term increase in pain not requiring an award of damages.

The evidence showed that prior to the January 2013 accident, Kniffin suffered from serious back disorders and high (albeit fluctuating) levels of pain. Before 2004, Kniffin underwent several back surgeries. In 2008, her pain motivated her to seek help from Dr. Charbonnet, and in 2009, Dr. Salem recommended another surgery. Despite Charbonnet's care, from 2009 to early 2011, Kniffin's pain levels usually ranged from 8 to 10. In 2011, Salem again recommended back surgery, and Charbonnet ordered the first of a series of epidural injections that Kniffin received prior to the accident. From early 2011 to the accident, Kniffin's pain levels generally ranged from 4 to 8. Her last reported pain level before the accident was 6.

The evidence further showed that the accident involved a low speed and modest impact. According to Braganza's testimony, the accident occurred when he stopped his car at the intersection and then eased forward at two to three miles per hour. The evidence otherwise established that his car contacted Kniffin just as she stepped into the unmarked crosswalk, causing her to fall.

Although Kniffin's post-accident condition was contested at trial, the record discloses considerable evidence that the accident caused no physical change to her back. The parties' medical experts agreed that the "films" of her back (MRIs, CTs, and "plain films") created before and after

the accident showed no objective differences. In late 2013, following the accident, Dr. Acosta recommended that Kniffin undergo back surgery. However, according to Dr. Salem, he would have recommended the *same* surgery in 2009 and 2011 had he believed that Kniffin was then sufficiently healthy to undergo it. It was undisputed that she suffered from a degenerative spine condition, and although Kniffin began using a wheelchair in 2014, that change followed the onset of knee problems that Dr. Amirnovin regarded as unrelated to the accident.

The record also reflects considerable evidence that the accident caused no material change to Kniffin's long term experience of pain. Although she complained of pain following the accident and reported a pain level of 10 in her first post-accident visit with Dr. Charbonnet, she reported pain levels of 5 in her next two visits, and her pain levels ranged from 6 to 8 during the remainder of 2013. Charbonnet increased her daily dosage of morphine, but only to amounts he had often prescribed before the accident. Later, upon developing a knee problem, she sometimes reported a pain level of 9. Accordingly, after Kniffin's first post-accident visit, her pain levels prior to the knee problem were similar to those she reported from early 2011 until the accident.

In light of this evidence, the jury could reasonably conclude that Kniffin established no damages attributable to the accident. Because the evidence showed that Kniffin suffered no continuing physical injuries attributable to the

accident, the jury was entitled to reject her requested economic damages for "future health care needs," which were predicated primarily on the surgery proposed by Dr. Acosta. Furthermore, because the evidence showed that the accident caused no change in Kniffin's long term experience of pain, the jury was permitted to reject her request for past and future damages for pain and suffering, insofar as that request relied on any such change. To the extent Kniffin sought a recovery for any temporary increase in her pain following the accident, the jury could reasonably have found that it was not "substantial pain" requiring an award of damages, in view of the brevity of the alleged increase, her relatively high historical baseline of pain, and her use of additional morphine to mitigate pain. (See *Haskins*, *supra*, 252 Cal.App.2d at p. 586.)

Kniffin contends that at trial, Braganza's counsel conceded that Braganza's negligence caused injury to her. She places special emphasis on defense counsel's opening statement, in which he asserted that "the evidence will show nothing more than a short term exacerbation of pre-existing medical problems." As explained below, we reject her contention.

The record discloses no concession that Braganza's negligence caused injury to Kniffin for which she was entitled to compensation. Defense counsel's remark regarding the "short term exacerbation of pre-existing medical problems" appears to refer to Dr. Amirnovin's testimony that the accident was likely to have resulted only

in a muscular injury or "tendon pains" that lasted no more than three months. That testimony, however, did not establish the existence of compensable injury. Kniffin sought no damages for any medical services potentially related to that short term condition, including the additional morphine she used to mitigate the purported pain. Furthermore, as explained above, the jury could properly decline to award damages for the alleged temporary increase in pain.

Kniffin contends the jury was obliged to find that Braganza's negligence caused injury to her, arguing that at trial, the medical experts agreed that she was more susceptible to injury due to her age and pre-existing back condition. That contention fails, however, because Kniffin did not show that Braganza's conduct caused her claimed injuries, for purposes of an award of damages.

Generally, "a tortfeasor may be held liable in an action for damages where the effect of his negligence is to aggravate a pre-existing condition or disease. [The p]laintiff may recover to the full extent that his condition has worsened as a result of [the] defendant's tortious act. [Citations.] That a plaintiff without such a condition would probably have suffered less injury or no injury does not exonerate a defendant from liability. [Citation.]" (*Ng v. Hudson* (1977) 75 Cal.App.3d 250, 255, overruled on another ground in *Soule v. General Motors* (1994) 8 Cal.4th 548, 574, 580 (*Soule*).) Nonetheless, the plaintiff must establish that the injuries for which compensation is sought were due to

the defendant's aggravation of the pre-existing condition. (*Murray v. San Leandro Rock Co.* (1952) 111 Cal.App.2d 641, 644-646.) For the reasons discussed above, the jury reasonably concluded that Kniffin failed to make that showing.

Kniffin also contends that the weight of the evidence at trial established Braganza's liability for her claimed injuries. In so arguing, however, she "'misapprehends our role as an appellate court. Review for substantial evidence is not trial de novo. [Citation]' [Citation.] When there is substantial evidence to support the jury's actual conclusion, 'it is of no consequence that the [jury,] believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.' [Citation.]" (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1301.) As explained above, there is sufficient evidence to support the jury's determination that Kniffin suffered no injury warranting an award of damages. In sum, Kniffin has failed to show any deficiency in the special verdicts.[8]

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[8] In view of our conclusions, we also see no error in the trial court's denial of Kniffin's motions for judgment notwithstanding the verdict and a new trial, insofar as they challenged the jury's special verdicts. To the extent Kniffin's new trial motion relied on insufficiency of the evidence and inadequacy of the damages, the trial court was obliged to weigh the evidence and render an independent judgment regarding the propriety of the verdict. (*Dominguez v.*

(Fn. continued on next page.)

B. *Comparative Fault Instruction*

Kniffin contends the trial court erred in instructing the jury regarding comparative fault. Generally, "[a] party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." (*Soule*, *supra*, 8 Cal.4th at p. 572.) Kniffin argues that there was "zero evidence" of her comparative fault. We disagree.

The comparative fault doctrine "is designed to permit the trier of fact to consider all relevant criteria in apportioning liability. The doctrine 'is a flexible,

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Pantalone (1989) 212 Cal.App.3d 201, 215 [insufficiency of the evidence]; *Jehl v. Southern Pac. Co.* (1967) 66 Cal.2d 821, 832 [inadequacy of damages].) In making this assessment, "[t]he court does not disregard the verdict, or decide what result it should have reached if the case had been tried without a jury, but instead '. . . should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict.' [Citation.] [¶] Some courts state the rule to be that a new trial cannot be granted ". . . unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision.'" [Citation.]" (*Dominguez*, *supra*, at pp. 215-216, italics omitted.) Nothing before us suggests that the trial court, in denying the new trial motion, abused its discretion regarding the application of these standards.

commonsense concept, under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury (whether their responsibility for the injury rests on negligence, strict liability, or other theories of responsibility), in order to arrive at an "equitable apportionment or allocation of loss.'" [Citation.]" (*Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225, 1233, quoting *Knight v. Jewett* (1992) 3 Cal.4th 296, 314.) A defendant has the burden of showing that some nonzero percentage of fault is properly attributed to the plaintiff or an individual other than the defendant. (See *Sparks v. Owens-Illinois, Inc.* (1995) 32 Cal.App.4th 461, 476.)

Drivers and pedestrians are subject to common law and statutory duties governing their interactions at crosswalks. Under the common law, "the driver of a motor vehicle is bound to use reasonable care to anticipate the presence on the streets of other persons having equal rights with himself to be there." (*Zarzana v. Neve Drug Co.* (1919) 180 Cal. 32, 37.) Similarly, under the common law, "the duty remains upon a pedestrian in a street . . . to use reasonable care for his own safety." (*Eveleth v. Goodchap* (1935) 5 Cal.App.2d 735, 737.) Statutory duties relating to crosswalks are set forth in section 21950 of the Vehicle Code, subdivisions (a) and (b), which require drivers to yield the right of way to pedestrians "crossing the roadway . . . within any unmarked crosswalk" and exercise due care with respect to them, and also prohibits pedestrians from "suddenly leav[ing] a curb . . . and walk[ing] . . . into the path of a vehicle that is so

close as to constitute an immediate hazard."[9] Generally, whether a driver or pedestrian has complied with these duties presents a question of fact unless "reasonable minds cannot differ on the question . . . ." (*Kostouros v. O'Connell* (1940) 39 Cal.App.2d 618, 622.)

Here, the jury was instructed regarding the duties described above, as well the principles of comparative fault. The record adequately supports those instructions, as it discloses substantial evidence that Kniffin "suddenly le[ft] a curb . . . into the path of a vehicle that [was] so close as to constitute an immediate hazard" (Veh. Code, § 21950, subd.

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[9] Vehicle Code section 21950 provides in pertinent part: "(a) The driver of a vehicle shall yield the right-of-way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, except as otherwise provided in this chapter. [¶] (b) This section does not relieve a pedestrian from the duty of using due care for his or her safety. No pedestrian may suddenly leave a curb or other place of safety and walk or run into the path of a vehicle that is so close as to constitute an immediate hazard. . . . . [¶] (c) The driver of a vehicle approaching a pedestrian within any marked or unmarked crosswalk shall exercise all due care and shall reduce the speed of the vehicle or take any other action relating to the operation of the vehicle as necessary to safeguard the safety of the pedestrian. [¶] (d) Subdivision (b) does not relieve a driver of a vehicle from the duty of exercising due care for the safety of any pedestrian within any marked crosswalk or within any unmarked crosswalk at an intersection."

(b)). At trial, Braganza testified that he stopped his car approximately six feet from the stop sign, activated his right turn signal, and eased forward at approximately two miles per hour. After moving four or five feet, his car contacted "something." Because that contact occurred as Kniffin stepped into the crosswalk, on Braganza's version of the accident, his car was moving toward Kniffin well before she left the curb. As the trial court observed in denying the new trial motion, Braganza's testimony showed that Kniffin "had an opportunity to see [him] proceed slowly through almost the entire intersection before she stepped off . . . in front of the advancing car."[10]

Even were we to conclude the comparative fault instructions were erroneous, however, we would find no prejudice. The jury, in rendering its special verdicts, answered "No" to the second question regarding whether Braganza's negligence was a substantial factor in causing harm to Kniffin, and pursuant to the directions on the special verdict form, returned no answers to the subsequent

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[10] Although Kniffin's briefs suggest that the trial court improperly overruled her motion in limine to exclude Braganza's testimony, that contention has been forfeited for want of argument with citation to supporting legal authority. (*Okasaki v. City of Elk Grove* (2012) 203 Cal.App.4th 1043, 1045, fn. 1; *OCM Principal Opportunities Fund, L.P., supra*, 157 Cal.App.4th at p. 844, fn.3; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 701, pp. 769-771.)

questions relating to comparative negligence. The record thus establishes that the jury resolved Kniffin's claim against Braganza without reaching the issue of comparative negligence. In sum, Kniffin has failed to demonstrate instructional error.[11]

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[11] In an effort to show prejudice from the comparative fault instruction, Kniffin supported her new trial motion with a declaration from a juror. The juror explained his reason for voting for a "No" answer to the second question on the special verdict form as follows: "I felt that the accident was not a substantial factor in the current status of . . . Kniffin['s] medical situation." When asked to describe "comments made by [his] fellow jurors during deliberations," the juror stated: "Even though . . . Braganza was negligent[,] . . . Kniffin was more negligent because she saw that he did not see her and she still stepped off the curb. [¶] During the last decade . . . Kniffin was on a downward spiral health wise."

As the trial court correctly observed in denying the new trial motion, the juror declaration was inadmissible to show how the jury reached its special verdicts. (*Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1125 ["[J]uror declarations are inadmissible to the extent that they purport to describe the jurors' understanding of the instructions or how they arrived at their verdict"]). Furthermore, had the declaration been admissible, it would not demonstrate that any juror improperly considered comparative fault in deliberating regarding the second question.

C. *Attorney Misconduct*

Kniffin contends that defense counsel engaged in numerous instances of misconduct throughout the trial. It is well established that attorneys may not try to influence the jury by improper methods. (See 7 Witkin, Cal. Procedure (5th ed. 2008) Trial, §§ 214-225, pp. 257-276; cf. *People ex rel. Dept. Pub. Wks. v. Hunt* (1969) 2 Cal.App.3d 158, 166-168 [discussing grounds for new trial].) As explained below, we reject Kniffin's contention, as she has forfeited her contention by failing to raise timely objections and request admonitions.

"'Generally, to preserve for appeal an instance of misconduct of counsel in the presence of the jury, an objection must have been lodged at trial.' [Citation.] In addition to objecting, a litigant faced with opposing counsel's misconduct must also 'move for a mistrial or seek a curative admonition' [citation] unless the misconduct is so persistent that an admonition would be inadequate to cure the resulting prejudice [citation]. This is so because '[o]ne of the primary purposes of admonition at the beginning of an improper course of argument is to avoid repetition of the remarks and thus obviate the necessity of a new trial.' [Citation.] . . . However, 'the absence of a request for a curative admonition does not forfeit the issue for appeal if "the court immediately overrules an objection to alleged . . . misconduct [and as a consequence] the [party] has no opportunity to make such a request."' [Citation.]" (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 794-795.)

Kniffin contends that the opening statement of respondent's counsel, along with his cross-examination of Kniffin, use of Dr. Charbonnet's and Dr. Salem's testimony, and closing argument, constituted an improper effort to misrepresent Kniffin's health and character. Regarding these contentions, the record discloses that after attorney Nancy Doumanian presented Kniffin's opening statement, Braganza's counsel, Paul Bigley, began his opening statement by remarking, "This is a simple case with the medical records telling the entire and true story . . . ." Bigley further stated, "It came as no surprise that Ms. Doumanian's focus was largely on the post[-]accident care and treatment and condition of Ms. Kniffin. She ignored the realities contained in the thousands of pages of medical care and treatment."

Doumanian objected to that statement, asserting "[i]mproper precondition [sic] and argumentive." The trial court responded: "I've cautioned the jury that this is not evidence. . . . Counsel is gesturing towards some things that might be evidence, and I think . . . [the jury] can handle that. If it goes too far, we'll revisit, but I think they can handle a little argument. But do focus on what you expect the evidence to show."

Following the initial objection, Doumanian asserted no further objections to Bigley's opening statement. In the remaining portion of that statement, Bigley summarized Kniffin's medical records, noting that prior to the accident, Kniffin had taken morphine for several years, that a blood

test before the accident disclosed a high level of morphine, and that she had experienced many falls. Additionally, Bigley stated that the evidence would show that on the date of the accident, Kniffin stepped off the curb "under a high level of morphine," and without due attention to Braganza's car.

Later, in cross-examining Kniffin, Bigley questioned her regarding complaints and remarks she made to various doctors, as reflected in her medical records. Doumanian asserted numerous evidentiary objections and objections challenging the form of Bigley's questions (including lack of foundation, hearsay, speculation, assumption of facts not in evidence, and leading question), but never objected that Bigley was engaging in misconduct. The trial court overruled most of Doumanian's objections.

During the trial, the jury was presented with video recordings of Dr. Charbonnet's depositions. The record reflects that prior to the trial, Doumanian waived all objections to the presentation of the depositions. When deposed, Charbonnet stated that two weeks before the January 2013 accident, a blood test disclosed high levels of morphine in Kniffin's blood.

During the closing arguments, Bigley maintained that the accident was due solely to Kniffin's negligence, which was probably enhanced by her use of morphine. He further asserted that Braganza's negligence (if any) was not a substantial factor in Kniffin's harm because her claimed injuries were due to her pre-accident condition. Bigley

argued that her pre-accident medical records -- which he characterized as "the 6,000 pound gorilla in the room" -- established her morphine use and undermined any claim that the accident materially affected her. He also argued that Dr. Salem contemplated "the same surgery" as Dr. Acosta, but proposed a "lesser intrusive" surgery only because he thought that "the other one would be too much." Doumanian asserted no objections of misconduct during Bigley's closing argument.

In view of this record, Kniffin has forfeited her contention regarding attorney misconduct. Doumanian's sole objection reasonably understood as relating to misconduct occurred during Bigley's opening statement. Because Doumanian neither moved to strike the offending remarks nor requested an admonition, that objection has not been preserved for appeal, as the remarks were not so inherently inflammatory that we may disregard those requirements. (*Houser v. Bozwell* (1947) 80 Cal.App.2d 702, 705-707 [attorney misconduct during closing argument was not reversible error due to lack of motion to strike].) Furthermore, as the trial court stated that it was prepared to revisit the issue of misconduct, it did not preclude Doumanian from satisfying those requirements or voicing objections to other portions of Bigley's opening statement.

Kniffin also forfeited her contention with respect to the remaining instances of purported misconduct identified in her briefs, which Doumanian never challenged as misconduct before the trial court. (*Grimshaw v. Ford Motor*

Co. (1981) 119 Cal.App.3d 757, 796 [objections to form of questions during cross-examination failed to preserve contention of attorney misconduct].) That conduct was neither egregious nor inflammatory. Under suitable circumstances, defense counsel may properly cross-examine the plaintiff regarding pre-trial statements potentially inconsistent with the plaintiff's trial testimony. (See *Fredrics v. Paige* (1994) 29 Cal.App.4th 1642, 1649; Evid. Code, §§ 770, 1235.) On appeal, Kniffin has identified no errors in the trial court's rulings regarding Doumanian's objections to Bigley's cross-examination. Furthermore, in closing argument, Bigley was entitled to argue his case vigorously on the basis of the evidence, including Dr. Salem's and Dr. Charbonnet's testimony. (*Grimshaw*, *supra*, at pp. 789-799.) Kniffin has thus demonstrated no action by Bigley cognizable as misconduct on appeal.

DISPOSITION

The judgment is affirmed. Braganza is awarded his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.