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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

GLORIA JEAN MALABED-VERONA, Plaintiff and Appellant, v. CRAIG HOLLAWAY, Defendant and Respondent.	B278154 (Los Angeles County Super. Ct. No. BC542893)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elaine Mandel, Judge. Affirmed.

Gappy & Verbick and Dena M. Gappy for Plaintiff and Appellant.

Law Offices of Cleidin Z. Atanous and Cleidin Z. Atanous for Defendant and Respondent.

INTRODUCTION

Appellant Gloria Jean Malabed-Verona filed this action for injuries arising out of a car accident. Respondent Craig Hollaway conceded liability. After trial on the issues of causation and damages, the jury returned a $10,000 verdict in favor of appellant. However, following an award of costs for respondent under Code of Civil Procedure section 998, the trial court entered judgment for $9,179.83 in favor of respondent.[1]

On appeal, appellant challenges some of the trial court's discovery-related rulings and argues that misconduct by respondent's counsel and bias by the court deprived her of a fair trial. Appellant also claims that the court's award of costs under section 998 was improper. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Accident*

At the time of the accident, appellant worked as a primary-care physician, owning her own solo practice. In April 2012, she was driving with her husband, daughter and five other passengers in the family's minivan when respondent's car struck the rear end of their vehicle. None of the passengers required medical assistance at the time. Appellant and her family then drove to a nearby car-rental agency and rented a car so they could continue their trip while their vehicle was being repaired.

In the months following the accident, appellant saw a family practitioner and a chiropractor with complaints about pain in her neck, shoulder and back. She subsequently began

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

receiving massage therapy, and being a physician herself, she also engaged in "self-treatment," which included stretching and exercises.

B. *The Complaint and Trial*

In April 2014, appellant, her husband, and her daughter filed suit against respondent, claiming damages for pain and suffering, loss of earnings, medical expenses, and property damage, among other claimed damages. Appellant's husband and daughter settled their claims against respondent shortly thereafter. In June 2014, appellant met with Dr. Michael Weinstein, an orthopedist, for a "medical-legal evaluation." In a report Weinstein prepared, he noted that appellant had had "minimum treatment" and had had "no treatment for about two years."

Following discovery and prior to trial, respondent conceded liability. The matter therefore proceeded to trial solely on the issues of causation and damages. At trial, appellant testified about the accident, her claimed injuries, and her treatment. She also called Weinstein and Thomas Gaebe, her accountant, to testify. After appellant rested her case, respondent called two medical experts, who opined that appellant suffered from degenerative changes in her spine and that her complaints were not attributable to the accident. Respondent also called Jennie McNulty, a forensic economist, who opined that appellant had suffered no loss of income due to the accident. After trial, the jury returned a verdict for appellant, awarding her $10,000 in past noneconomic damages and denying her damages for rental-car expenses, past or future lost earnings, and future noneconomic damages.

C. *Appellant's Motion for a New Trial*

After the jury returned its verdict, appellant moved for a new trial, challenging the court's rulings on certain discovery-related matters and arguing that both respondent's counsel and the court engaged in misconduct during trial. Respondent's attempt to file a late opposition was denied. Following a hearing, the trial court denied the motion, and subsequently entered a judgment of $10,000 in appellant's favor, reserving the issue of costs for future determination.

D. *Costs*

Prior to trial, respondent served appellant with an offer to settle for $30,000 under section 998. The terms of respondent's offer required appellant to execute "a general release of any and all claims arising out of the accident of APRIL 12, 2012." Appellant allowed the offer to lapse.[2] After the court entered judgment of $10,000 for appellant, respondent sought an award of costs under section 998. Appellant filed a motion to strike costs, contending she should not be required to pay costs under section 998 because respondent's offer was unreasonable and insufficiently certain to be valid. The trial court denied her motion and awarded respondent $20,620.53 in postoffer costs, ultimately resulting in a $9,179.83 amended judgment in favor of respondent. This appeal followed.

DISCUSSION

On appeal, appellant again challenges the trial court's rulings on discovery-related matters, and contends that the court

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[2] An offer under section 998 that is not accepted within 30 days is deemed withdrawn. (§ 998, subd. (b)(2).)

was biased against her and that respondent's counsel engaged in misconduct during trial. She also contends that the court erred in awarding respondent costs under section 998.

A. *Discovery-Related Challenges*

1. *Gaebe's Deposition*

i. *Background*

Appellant claims the trial court abused its discretion in ordering, sua sponte, that she make Gaebe, her accountant, available for deposition after the discovery cut-off date. During discovery, respondent made multiple demands for production of any documentation tending to support appellant's claim for loss of earnings. In her responses, appellant objected to these demands but nevertheless agreed to provide responsive documents. Appellant then provided a single sheet containing a summary of her earnings in 2011 and 2012.

Appellant subsequently designated Gaebe as a nonretained expert witness. Respondent noticed Gaebe's deposition to take place after the discovery cut-off date, apparently unmindful of that fact. After appellant moved to quash the notice of deposition, respondent announced that he would "not be going forward with [the] deposition."

Thereafter, respondent moved to exclude Gaebe's testimony, claiming that despite multiple demands for production, appellant had failed to provide meaningful documentation of her loss-of-earnings claim. At a hearing on the motion, the trial court expressed concern that appellant had not been forthcoming in responding to the demands for production and was "hiding the ball." Nevertheless, noting that respondent had not filed a motion to compel additional production, the court denied the motion to exclude Gaebe's testimony. Instead, the

court ordered appellant to make Gaebe available for a deposition. Appellant did not object, and respondent was later able to depose him prior to his testimony.

ii. *Analysis*

Appellant argues that absent a motion by respondent, who had previously decided to forgo Gaebe's deposition, the court's ruling was arbitrary and therefore an abuse of discretion. We review the trial court's discovery rulings for abuse of discretion. (*Union Bank of California v. Superior Court* (2005) 130 Cal.App.4th 378, 388.) "An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice. [Citations.]" (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1422.) A miscarriage of justice results only if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Appellant failed to object to the court's ruling below. On appeal, she cites no authority and provides no meaningful argument to support her contention that the court was outside its authority in permitting Gaebe's deposition. She has therefore forfeited any challenge in this regard. (See *People v. Mejia* (2012) 211 Cal.App.4th 586, 634, fn. 8 [failure to object below constitutes forfeiture]; *Sviridov v. City of San Diego* (2017) 14 Cal.App.5th 514, 521 [contentions unsupported by reasoned argument and citation to authority are forfeited].)

Moreover, appellant's claim that the court's ruling was arbitrary would also fail on the merits. During discovery, appellant provided no meaningful documentation in support of

her claim for loss of earnings, despite respondent's multiple requests for any such documents.[3] Although the trial court was concerned that appellant had not been forthcoming and was "hiding the ball," it denied respondent's subsequent motion to exclude Gaebe's testimony about appellant's loss of earnings. Instead, to protect respondent from unfair surprise at trial, the court chose to allow respondent to depose Gaebe. (See *Emerson Electric Co. v. Superior Court* (1997) 16 Cal.4th 1101, 1107 ["One of the principal purposes of discovery was to do away 'with the sporting theory of litigation -- namely, surprise at trial'"].) The court's ruling reasonably balanced the equities, allowing appellant to present testimony in support of her claim without unduly prejudicing respondent.

Finally, even had we concluded the trial court abused its discretion in allowing respondent to depose Gaebe after the discovery cut-off date, appellant could not establish that the court's ruling prejudiced her case. She argues only that owing to the late deposition, respondent was "better positioned in trial with the deposition testimony and documents from [her] accountant." This assertion does no more than recognize that the purpose of discovery, viz., to allow one party to prepare for the other's evidence, was served. It does not show prejudice. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836; *County of Los Angeles v. Nobel Ins. Co.* (2000) 84 Cal.App.4th 939, 945 ["'appellant bears the duty of spelling out in his brief exactly how the error caused a miscarriage of justice'"].)

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[3] While appellant objected to respondent's demand for production, she represented that she was producing the responsive documents notwithstanding her objection.

2. *McNulty's Testimony*

i. *Background*

Appellant next contends that the trial court abused its discretion in denying her motion to exclude the testimony of McNulty, respondent's expert economist, as she claims that respondent failed to make McNulty available for a deposition. A few days prior to McNulty's scheduled deposition, respondent advised appellant that due to a scheduling conflict, the deposition could not take place as planned. Respondent later offered several alternative dates for McNulty's deposition. Although the discovery cut-off date had passed, respondent also offered to agree to an extension so appellant could depose McNulty. However, appellant rejected one suggested date and failed to respond to other proposed dates.

Appellant then moved to exclude McNulty's testimony on the ground that respondent had not made the expert available for a deposition. During the next three months, before the court's hearing on her motion, appellant did not seek to reschedule McNulty's deposition. At the hearing, the court denied the motion to exclude the expert's testimony but permitted appellant to take the expert's deposition before she testified.

ii. *Analysis*

Appellant argues that respondent failed to make McNulty available for a deposition, and thus section 2034.300 required the court to exclude her testimony. We disagree.

Section 2034.300 requires courts to exclude an expert opinion from evidence if the proponent of the opinion has "unreasonably failed" to make the expert available for a deposition. (§ 2034.300, subd. (d).) Whether a party's conduct during discovery has been unreasonable is generally left to the

discretion of the trial court. (*Cottini v. Enloe Medical Center* (2014) 226 Cal.App.4th 401, 422.) "The operative inquiry is whether the conduct being evaluated will compromise these evident purposes of the discovery statutes: '"to assist the parties and the trier of fact in ascertaining the truth; to encourage settlement by educating the parties as to the strengths of their claims and defenses; to expedite and facilitate preparation and trial; to prevent delay; and to safeguard against surprise."' [Citation.]" (*Staub v. Kiley* (2014) 226 Cal.App.4th 1437, 1447.)

Courts generally have not excluded expert witnesses from testifying unless the conduct of the proponent amounted to an attempt to impede the opposing party's discovery. (Compare *Staub v. Kiley, supra,* 226 Cal.App.4th at p. 1447 [exclusion of expert was abuse of discretion where proponent's deficiencies did not reflect "'an attempt to thwart'" opposing party's discovery] with *Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1117 [exclusion was proper where noncompliant party produced expert witness information that was late and incomplete, and refused to make her experts available for deposition, in a "comprehensive attempt to thwart the opposition from legitimate and necessary discovery"].)

Respondent had advised appellant that McNulty's deposition could not take place as planned due to a scheduling conflict and later offered several alternative dates for the deposition. Additionally, respondent offered to extend the discovery cut-off date to allow McNulty's deposition. Appellant did not avail herself of the opportunities respondent provided and did not seek to reschedule McNulty's deposition at any time prior to the court's hearing on her motion. Respondent did not "attempt to thwart" appellant's discovery and therefore did not

"unreasonably fail" to make his expert available for a deposition. (See *Staub v. Kiley*, *supra*, 226 Cal.App.4th at p. 1447.) Accordingly, the trial court did not abuse its discretion in denying appellant's motion to exclude McNulty's testimony. (See *ibid*.)

B. *Allegations of Attorney Misconduct*

Appellant contends that respondent's counsel engaged in misconduct in two ways. First, she claims that defense counsel elicited false testimony and made false factual assertions in closing argument about appellant's failure to produce an invoice for her rental car expenses. Second, appellant maintains that counsel improperly commented in closing about her failure to call her treating physicians to testify.

"Attorney misconduct is an irregularity in the proceedings and a ground for a new trial." (*Garcia v. ConMed Corp.* (2012) 204 Cal.App.4th 144, 148.) Attorney misconduct involves "'a dishonest act or an attempt [by an attorney] to persuade the court or jury, by use of deceptive or reprehensible methods.'" (*People v. Chojnacky* (1973) 8 Cal.3d 759, 766.) Misconduct often takes the form of improper argument to the jury, "such as by urging facts not justified by the record or suggesting that the jury may resort to speculation." (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 870.)

"[T]o preserve for appeal an instance of misconduct of counsel in the presence of the jury, an objection must have been lodged at trial and the party must also have moved for a mistrial or sought a curative admonition unless the misconduct was so persistent that an admonition would have been inadequate to cure the resulting prejudice." (*Garcia v. ConMed Corp.*, *supra*, 204 Cal.App.4th at p. 148.) "Attorney misconduct is incurable only in extreme cases." (*Rayii v. Gatica* (2013) 218 Cal.App.4th

1402, 1412.) We discuss each of appellant's allegations of misconduct in turn.

1. *Testimony and Argument About a Rental-Car Invoice*

i. *Background*

During discovery, appellant produced an invoice in support of her claim for rental-car expenses. At trial, appellant testified that she had paid $856.41 for her rental car after the accident and had not been reimbursed for that expense. Appellant did not introduce the rental-car invoice into evidence, however. During respondent's testimony, his counsel recounted appellant's assertion that she had not been compensated for her rental expenses, and proceeded to ask respondent if he had received an invoice for rental expenses from appellant. Respondent replied that he had not.

In closing argument, respondent's counsel stated: "There's a lot of information that [appellant] did not provide to you that she could have. She didn't provide a rental invoice. My client testified that he never received a rental invoice." Appellant did not object to this argument. Instead, during her rebuttal, appellant attempted to tell the jury that she had delivered an invoice to respondent's counsel in the course of discovery. Respondent objected that the invoice was not in evidence, and the court disallowed the argument that appellant had provided the invoice.

ii. *Analysis*

Appellant asserts that defense counsel's examination of respondent and her argument in closing constituted misconduct, entitling appellant to a new trial. She claims that, because she had provided a rental invoice during discovery, respondent's

testimony that he had not received an invoice and counsel's statement to the jury that appellant had not provided one were false.

However, appellant did not object to the alleged misconduct before the jury rendered its verdict. Though she insists she "brought the issue to the trial court's attention," appellant refers to her attempt to argue in her rebuttal that she had produced an invoice during discovery. At no point before her motion for a new trial did appellant object to defense counsel's closing argument as improper or seek an admonition. Nor has appellant shown that counsel's challenged conduct was so persistent and extreme that an objection and request for admonition would have been futile. Appellant has therefore forfeited her claims in this regard. (See *Garcia v. ConMed Corp.*, *supra*, 204 Cal.App.4th at p. 148; *Rayii v. Gatica*, *supra*, 218 Cal.App.4th at p. 1412.)

Furthermore, we see nothing improper in defense counsel's challenged conduct. Counsel's examination sought to respond to appellant's earlier testimony that she had not been reimbursed for her rental expenses. It allowed respondent to counter the potential implication that he had unreasonably refused to compensate appellant for a proven harm by clarifying that he had received no proof of the alleged harm following the accident. That appellant provided an invoice to respondent's counsel during discovery was both immaterial and outside the scope of counsel's question.

Counsel's closing argument was also permissible. It was appellant's burden to prove her damages at trial, and counsel was entitled to point out any failure of proof. The assertion that appellant had failed to provide the jury with documentary evidence of her rental expenses was wholly accurate. Counsel

was also within her rights to argue that the jury should distrust appellant's testimony about her rental expenses given her failure to introduce a rental invoice into evidence. (See Evid. Code, § 412 ["If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."].)

Relatedly, appellant argues that the trial court abused its discretion in denying her motion for a new trial as it related to defense counsel's conduct. A trial court's ruling on a motion for a new trial will not be disturbed absent a """"manifest and unmistakable abuse of discretion."""" (*Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 623.) In light of our conclusions that appellant forfeited any challenge to counsel's conduct and that, in any event, counsel's conduct was not improper, the trial court did not abuse its discretion in denying appellant's motion for a new trial.[4]

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[4] Citing cases concerning allegations of juror misconduct, appellant argues that the trial court should have deemed her allegations of misconduct "admitted" due to respondent's failure to file a timely opposition to her motion for a new trial. The cases she cites, however, stand only for the proposition that absent affidavits or declarations to counter evidence of juror misconduct proffered on a new trial motion, the facts alleged will be deemed established. (See *Lankster v. Alpha Beta Co.* (1993) 15 Cal.App.4th 678, 681, fn. 1, 682; [deeming acts alleged admitted but independently reviewing whether they constituted misconduct]; *Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 740-741 [deeming facts alleged admitted but concluding that no misconduct occurred].) Those

2. *Appellant's Failure to Call Her Treating Physicians*

Appellant testified at trial, without objection, that two of her treating physicians had concluded that her injuries resulted from the accident. In closing argument, respondent's counsel stated that despite testifying to seeing multiple doctors, appellant "didn't provide testimony from any of those doctors."

Appellant maintains that defense counsel's argument raised an improper inference from her failure to call her treating physicians to testify and therefore constituted misconduct. As with her allegation that defense counsel made false factual assertions, appellant did not object before the verdict to the argument she seeks to contest on appeal. She has therefore forfeited any challenge in this respect. (See *Garcia v. ConMed Corp.*, *supra*, 204 Cal.App.4th at p. 148.)

Had appellant preserved this claim, we would reject it on the merits. First, as noted above, respondent's counsel was entitled to argue to the jury that "[i]f weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." (Evid. Code, § 412.)

Additionally, "[t]he failure of a [party] to call an available witness whom he could be expected to call if that witness['s] testimony would be favorable is itself relevant evidence. The omission traditionally has been considered an admission by conduct -- an admission that the witness's testimony would not be favorable. [Citations.]" (*People v. Ford* (1988) 45 Cal.3d 431, 448

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cases have no application here because the facts surrounding appellant's allegations of misconduct are undisputed.

(*Ford*); see also *People v. Gonzales* (2012) 54 Cal.4th 1234, 1275 ["it is neither unusual nor improper to comment on the failure to call logical witnesses"].) For example, in *Ford*, the Supreme Court held that a prosecutor's comment on the defendant's failure to call "logical witnesses to corroborate defendant's alibi" was permissible. (*Ford*, *supra*, at p. 452.) Similarly, in *People v. Cornwell* (2005) 37 Cal.4th 50, the court held that a criminal defendant's failure to call witnesses who could explain the presence of his vehicle near the crime scene was "a fair subject for comment by the prosecutor." (*Id.* at p. 91, disapproved of on another ground by *People v. Doolin* (2009) 45 Cal.4th 390.)

Application of these two principles instructs that defense counsel's argument about appellant's failure to call her treating physicians to testify was permissible. The causation of appellant's injuries was a major point of contention at trial. But rather than call any of her treating physicians to testify, appellant testified herself that two of them had concluded that her injuries resulted from the accident. Defense counsel was entitled to argue that these circumstances supported the inference that the testimony of appellant's physicians would not have been favorable, as the jury could logically have expected her to call them to testify about the causation of her injuries and corroborate her own testimony. (See, e.g., *Ford*, *supra*, 45 Cal.3d at p. 448.)

Citing *Smith v. Covell* (1980) 100 Cal.App.3d 947, appellant argues that defense counsel's argument was improper because her treating physicians were "'equally available to subpoena by [respondent].'" (Italics omitted.) In *Smith*, the plaintiff filed an action for personal injuries she claimed were caused by a car accident. (*Id.* at p. 951.) At trial, two of the plaintiff's treating

physicians opined that her injuries indeed resulted from the accident. (*Ibid.*) In closing argument, the defendant's counsel commented on the plaintiff's failure to call three other doctors from a pain clinic she had visited following the accident. (See *id.* at pp. 956, 957-958.) Counsel's implication was that those doctors would have testified adversely to the plaintiff's case. (*Id.* at p. 956.) On appeal, the court agreed with the plaintiff that the inferences counsel raised were improper because "[t]hese doctors were equally available to subpoena by defendant had she chosen to call them." (*Ibid.*) Although *Smith* seemingly relies on the witnesses' equal availability to both parties as the rationale for its decision, we read it to imply that there was no reason that the plaintiff (and not the defendant) would be expected to call them. Unlike appellant, the plaintiff in *Smith* did not rely on her own testimony about her treating physicians' conclusions; instead, she called two of them to testify. (*Smith v. Covell*, *supra*, at p. 951.) Considering that the plaintiff's treating physicians testified about the causation of her injuries, she would not logically have been expected to call the additional pain-clinic doctors to testify about that same issue. This reading of *Smith* is more consistent with the principles discussed above. (See *Ford*, *supra*, 45 Cal.3d at p. 448-449 [adverse inference reasonably drawn from defendant's failure to call logical witnesses subject to subpoena by either party]; see also McCormick, Evidence (7th ed.) § 264 [courts often inaccurately state that no inference arises from the failure to call a witness who is "equally available" to both parties. "What is meant instead is that when the witness would be as likely to be favorable to one party as the other, no inference is proper"].) Defense counsel engaged in no misconduct.

C. *Allegations of Judicial Bias*

1. *Background*

Appellant complains that the trial court demonstrated bias against her during her closing argument by failing to rule on certain objections by respondent and by making improper comments on the evidence. Respondent raised several objections to appellant's counsel's argument. Though the trial court overruled most of respondent's objections, in a few instances, the court did not expressly state that the objection was "overruled." Instead, in rejecting the objections, the court responded that counsel's argument was merely argument and that the jury would consider it as such.

During her argument, appellant's counsel made certain calculations and offered them to the jury as a measure of appellant's damages. Respondent raised multiple objections to counsel's argument, arguing that it assumed facts not in evidence. After one such objection, the trial court stated, "There's been no testimony to this, counsel. . . . This is not what Mr. Gaebe testified to." Appellant's counsel responded that the court was correct and proceeded to argue that appellant's and McNulty's testimony provided the numbers she used in her calculations. After another objection by respondent, the court stated that there was no expert testimony about appellant's counsel's calculations. Appellant's counsel then argued at a sidebar that her argument permissibly urged the jury to make reasonable inferences from the evidence. The court agreed and allowed her to proceed with her argument.

2. *Analysis*

Appellant contends the court demonstrated bias by improperly failing to rule on respondent's objections and by

making incorrect statements about the evidence. Her claim of judicial bias is both forfeited and meritless.

Initially, "adverse or erroneous rulings, especially those that are subject to review, do not establish a charge of judicial bias." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1112, disapproved on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) Thus, even assuming the trial court erred as appellant maintains, this would not establish bias against her. Further, appellant never complained of judicial bias during trial. Her "willingness to let the entire trial pass without [a] charge of bias against the judge not only forfeits [her] claims on appeal but also strongly suggests they are without merit." (*Ibid.*)

Finally, we perceive nothing improper in the judicial conduct appellant now challenges. As she acknowledges, the record shows that even in the few instances in which the court did not utter the word "overruled" in response to respondent's relevant objections, it nevertheless overruled the objections and permitted appellant's argument. Appellant cites no authority suggesting that trial courts must use a particular formulation in overruling objections.

As to its comments on the evidence, the court noted, accurately, that the witnesses did not testify to the calculations appellant offered to the jury. However, upon appellant's insistence that she was entitled to argue based on reasonable inferences from the evidence, the court agreed and allowed her to proceed as she pleased. Appellant has not shown that the court's comments were improper, let alone the product of bias. (See, e.g., *People v. Sturm* (2006) 37 Cal.4th 1218, 1232 [trial courts may comment on the evidence as long as such comments are

"'accurate, temperate, nonargumentative, and scrupulously fair'"].)

D. *Challenges to the Section 998 Award*

Prior to trial, respondent served on appellant a section 998 offer to compromise, offering $30,000 in settlement of her claims. Appellant did not accept the offer. Following trial, and based on its conclusion that appellant had failed to obtain a judgment more favorable than respondent's compromise offer, the trial court awarded respondent over $20,000 in postoffer costs.

"The effect of a valid section 998 offer that is not accepted is to establish a fee-shifting procedure, shifting some postoffer costs upon a party's refusal to settle. If the party who prevailed at trial obtained a judgment less favorable than a pretrial settlement offer submitted by the other party, then the prevailing party may not recover its own postoffer costs and, more, must pay its opponent's postoffer costs, including potentially expert witness costs. (§ 998, subd. (c)(1).)"[5] (*Sanford v. Rasnick* (2016) 246 Cal.App.4th 1121, 1129, fn. omitted (*Sanford*).)

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[5] Section 998, subdivision (c)(1) provides: "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover postoffer costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant."

To be valid, an offer under section 998 must meet several requirements, two of which are relevant here. First, "[a]ny nonmonetary terms or conditions must be sufficiently certain and capable of valuation to allow the court to determine whether the judgment is more favorable than the offer. [Citations.]" (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 764-765.) Second, the offer must be made in "good faith." (*Najah v. Scottsdale Ins. Co.* (2014) 230 Cal.App.4th 125, 143 (*Najah*).) Appellant argues that respondent's section 998 offer failed to meet either requirement. For the reasons discussed below, we disagree.

1. *Sufficiently Certain and Capable of Valuation*

Appellant maintains that respondent's section 998 offer was insufficiently certain and thus incapable of valuation. We independently review whether a section 998 settlement offer was sufficiently certain. (See *Chen v. Interinsurance Exchange of the Automobile Club* (2008) 164 Cal.App.4th 117, 122.) Because the offeror bears the burden of drafting the offer with sufficient precision, a section 998 offer is "construed strictly in favor of the party sought to be subjected to its operation. [Citations.]" (*Berg v. Darden* (2004) 120 Cal.App.4th 721, 727.)

Among the terms of respondent's section 998 offer was a requirement that appellant execute "a general release of any and all claims arising out of the accident of APRIL 12, 2012." Appellant argues that because respondent did not attach the proposed release to his offer, "there is no way to know what the terms would include." She cites *Sanford*, *supra*, 246 Cal.App.4th 1121, for the proposition that an offer that requires a release without attaching the proposed release is invalid.

The section 998 offer in *Sanford* required the offeree to execute "a written settlement agreement and general release." (*Id.* at p. 1125.) Reversing the trial court's determination that the offer was valid, the court of appeal stated: "The case law does allow for releases. [Citations.] [¶] But a release is not a settlement agreement, and the [offerors] have cited no case, and we have found none, holding that a valid section 998 offer can include a settlement agreement, let alone one undescribed and unexplained." (*Id.* at p. 1130.) The court therefore held that the offerors' "'placement of a "settlement agreement" requirement in their section 998 offer invalidated the offer.'" (*Id.* at p. 1132.) Because respondent's section 998 offer required only a general release and made no mention of a "settlement agreement," *Sanford* does not support appellant's contention. (See *id.* at p. 1130.)

Appellant's argument about the potential breadth of the release in respondent's offer also overlooks that it was limited to "claims arising out of the accident of APRIL 12, 2012." "[A] release of unknown claims arising only from the claim underlying the litigation itself does not invalidate the offer. [Citation.]" (*Ignacio v. Caracciolo* (2016) 2 Cal.App.5th 81, 89.)

In her brief, appellant notes that in settling the claims of her husband and daughter, respondent required the two to release claims against respondent, his insurance company, and all "agents, principals, servants, successors, heirs, executors, administrators, insurer, [and] insurer's agents." However, appellant makes no reasoned legal argument relating to this fact and does not otherwise explain its significance. Nor does she present a reasoned argument that respondent's offer might have required her to release claims against other parties. Appellant

has therefore forfeited any argument in this regard. (See, e.g., *Sviridov v. City of San Diego*, *supra*, 14 Cal.App.5th at p. 521.) Accordingly, we find no error in the trial court's determination that respondent's section 998 offer was sufficiently certain and capable of valuation.

2. *Good Faith*

For a section 998 offer to be made in good faith, it must be "'realistically reasonable under the circumstances of the particular case'" (*Adams v. Ford Motor Co.* (2011) 199 Cal.App.4th 1475, 1483) and "carry with it some reasonable prospect of acceptance" (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 698). The reasonableness of a defendant's offer generally depends on whether, based on information that both the defendant and the plaintiff knew or reasonably should have known, "the offer represents a reasonable prediction of the amount of money, if any, defendant would have to pay plaintiff following a trial, discounted by an appropriate factor for receipt of money by plaintiff before trial." (*Id.* at p. 699, fn. omitted.)

"Whether a section 998 offer was reasonable and made in good faith is left to the sound discretion of the trial court." (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 134.) "In reviewing an award of costs and fees under Code of Civil Procedure section 998, the appellate court will examine the circumstances of the case to determine if the trial court abused its discretion in evaluating the reasonableness of the offer or its refusal. [Citations.]" (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 152.)

"Where . . . the offeror obtains a judgment more favorable than its offer, the judgment constitutes prima facie evidence

showing the offer was reasonable and the offeror is eligible for costs as specified in section 998." (*Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, 117.) Here, the jury's $10,000 verdict for appellant constituted prima facie evidence that respondent's $30,000 offer was reasonable. (See *ibid*.)

In seeking to show that the offer was nevertheless unreasonable, appellant notes that before making his offer, respondent had conducted only limited discovery, consisting of written discovery and appellant's deposition. Citing *Najera v. Huerta* (2011) 191 Cal.App.4th 872 (*Najera*), she suggests respondent had therefore not given her sufficient time to evaluate his offer. We disagree.

In *Najera*, a plaintiff served a section 998 offer concurrently with the summons and complaint, about six months after the accident that gave rise to his lawsuit. (*Najera*, *supra*, 191 Cal.App.4th at pp. 875-876.) After the plaintiff obtained a more favorable judgment at trial, the trial court denied him costs under section 998, concluding that he had not given the defendant adequate time for a reasonable investigation to evaluate the offer. (*Id.* at p. 876.) The court of appeal upheld that determination, reasoning that the plaintiff had served the offer at an "early (and time-critical) juncture in the case" and thus that, absent special circumstances, the defendant's counsel had not had access to information or a reasonable opportunity to evaluate the offer within the allotted time. (*Id.* at p. 879.)

Here, unlike in *Najera*, respondent's section 998 offer came more than three years after the accident that prompted appellant's suit and almost a year and a half after appellant filed her complaint. Moreover, unlike the defendant in *Najera*, who

depended on the plaintiff to provide information about his claims, appellant was well-positioned to investigate her own injuries. In short, appellant had a reasonable opportunity to evaluate respondent's offer.

Next, appellant notes that discovery at the time of respondent's offer showed she "was claiming past lost earnings estimated at $100,000, in addition to ongoing treatment, which [she] was told might include surgery." She argues that in light of her claims, respondent's offer of only $30,000 was unreasonable. She is mistaken.

The extent of potential damages alone is insufficient to show that a considerably lower offer was unreasonable. (See *Culbertson v. R. D. Werner Co., Inc.* (1987) 190 Cal.App.3d 704, 710, fn. omitted ["the amount of demand by plaintiff . . . is only one of the many factors to be taken into consideration by the trial judge in making his decision"].) We find *Najah* instructive. There, the plaintiffs did not accept the defendant's section 998 offer to settle for $30,000. (*Najah*, *supra*, 230 Cal.App.4th at p. 133.) After trial, judgment was entered in the defendant's favor, and the trial court awarded postoffer costs to the defendant. (*Ibid.*) On appeal, the plaintiffs argued that the offer to compromise was unreasonable given the evidence, which at the time of the offer indicated damages of $500,000. (*Id.* at p. 144.) This court affirmed, concluding that "although potential damages were extensive, given the reasonable possibility that liability did not exist, the trial court did not abuse its discretion in determining that [the defendant's] offer was reasonable." (*Id.* at p. 145.)

The same analysis applies here. Despite ample opportunity to investigate her claims before receiving respondent's offer,

appellant had not been able to produce meaningful documentary support for her claim of loss of income. As to the extent of her physical injuries, the evidence gathered through discovery before respondent's offer showed: (1) appellant had been in a minor traffic accident, after which she continued her journey without seeking medical treatment; (2) in the months following the accident, appellant received minimal treatment; and (3) appellant sought no additional treatment until after she had filed her complaint, approximately two years after the accident.

Based on the state of the evidence at the time, there was a reasonable possibility that following a trial, a jury would conclude that appellant's injuries were minor, and that she had not suffered a loss of income. Accordingly, the trial court did not abuse its discretion in determining that respondent's offer was reasonable and made in good faith. (See *Najah*, *supra*, 230 Cal.App.4th at p. 145.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, P. J.

We concur:

WILLHITE, J. COLLINS, J.