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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

NATHAN BARKER, Plaintiff and Appellant, v. ROXANNA AMINIRAD, Defendant and Appellant.	B258944 (Los Angeles County Super. Ct. No. BC495535)

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, C. Edward Simpson, Judge. Affirmed.

Manning & Kass, Ellrod, Ramirez, Trester, Dennis B. Kass and Scott Wm. Davenport for Defendant and Appellant.

Walton Law Group and John R. Walton for Plaintiff and Appellant.

This action stems from a car accident between defendant and appellant Roxanna Aminirad and plaintiff and respondent Nathan Barker, who was injured. Aminirad admitted liability, and the matter was tried to a jury on causation and damages. The jury awarded damages to Barker. Aminirad appeals, and Barker cross-appeals. In her appeal, Aminirad contends that the trial court improperly excluded expert testimony about causation, that she was deprived of a fair trial because insurance was mentioned, and that an award of future medical damages was improper. In his cross-appeal, Barker contends that the trial court improperly taxed costs. We affirm.

BACKGROUND

In 2010, Barker, an Australian national, was vacationing in the United States. On December 16, 2010, he was the front passenger in a car that was rear-ended by a car Aminirad was driving. Barker's back was injured in the accident. In 2012, Barker sued Aminirad and her father, Mohsen Aminirad,[1] for personal injury damages. Mohsen owned the car Aminirad was driving. After the accident, Barker returned to Australia, but, by the time of trial, he was living in California.

Aminirad admitted liability, and the matter was tried to a jury in 2014 on causation and damages. Mohsen was dismissed before trial for a waiver of costs.

At trial, Dr. Fardad Mobin, Barker's treating physician and expert witness, testified that Barker had a "disc rupture herniation at the L5-S1 level." Within a reasonable degree of medical probability, the car accident was the sole cause of

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[1] To avoid confusion, we refer to Mohsen Aminirad by his first name.

Barker's back injury. Dr. Mobin recommended that Barker have lumbar fusion surgery, which was scheduled for December 2014, after trial. That surgery would cost $160,000 to $180,000, and a second procedure to remove screws would cost about $50,000 to $60,000. In the future, Barker will require another fusion and procedure to remove screws, and they will cost in the same range.

Aminirad's medical expert, Dr. Gerald Alexander, agreed that defendant had a herniated disc. He thought, however, that the injury resulted from a combination of a prior back injury from 2001 and from the 2010 car accident, which added stress to Barker's disc and worsened that area. Dr. Alexander apportioned 50 percent of Barker's back problems to the car accident and 50 percent to the prior injury. The spinal fusion surgery that Dr. Mobin recommended was "somewhat aggressive at this stage of [Barker's] life," so Dr. Alexander recommended less invasive treatment.

Barker's accident reconstruction expert Patrick Scott Moore testified that the Delta-V or change in velocity for Barker's car was in the 10 to 12 miles per hour range, meaning that the car went from a dead stop to moving at 10 to 12 miles per hour in milliseconds. Isaac Ikram, Aminirad's biomechanics expert, testified to the contrary, that the change in velocity on impact between the cars was within the range of impact between bumper cars. The compressive force generated in the lumbar spine during such a collision was comparable to or less than what occurs during the "activities of daily living." Ikram did not, however, testify that the accident caused Barker's injury, because the trial court precluded him from testifying about causation.

A jury rendered a special verdict on May 15, 2014 and found that Aminirad's negligence was a substantial factor in

causing harm to Barker. The jury awarded Barker $19,008 in past economic loss (medical expenses); $129,400 in future economic loss (medical expenses); $47,583 in past noneconomic loss; and $37,668 in future noneconomic loss.

Aminirad moved for a new trial and for judgment notwithstanding the verdict. The motions raised the same contentions at issue in this appeal; namely, that Ikram's testimony about causation was improperly excluded, insurance was improperly mentioned, and future medical expenses should not have been awarded. The trial court denied the motions.

Aminirad also moved to tax costs on the ground that Barker's pretrial offer to compromise under Code of Civil Procedure section 998 (section 998) failed to apportion the offer between the two defendants, Aminirad and Mohsen. The trial court granted that motion and taxed, among other things, expert witness costs.

This appeal followed.

DISCUSSION

I. Expert witness testimony about causation

Aminirad contends that the trial court violated her due process rights by precluding Ikram from testifying about causation. We reject that contention.

1. *Additional background and the Evidence Code section 402 hearing (402 hearing)*

The parties exchanged expert witness designations, with Barker designating Dr. Mobin and Moore. Aminirad then supplementally designated Ikram to testify "concerning the biomechanics and dynamics of how the incident occurred, reconstruction of said incident, the forces and factors involved leading up to, at the time of, and after the collision occurred, the

extent to which such forces are likely to have caused the injuries by plaintiff, and as to opinions testified to by plaintiff's expert[.]" Barker moved in limine to preclude Ikram from testifying about whether the impact would have caused injury.[2] At a 402 hearing to determine the admissibility of Ikram's testimony, Ikram testified that he was an accident reconstructionist and biomechanical engineer, although his degree was in only mechanical engineering. A biomechanical engineer uses the "same principals of applied mechanics regarding applied forces, kinematics, dynamics, stresses and strains and how those particular characteristics would relate to failure of human tissue." In college, he took a physiology class. While pursuing his master's degree in 2003-2004, he worked with his school's dental department to develop a sensor-based system for measuring head and jaw movements in rear-end collisions. Ikram agreed he was not qualified to express a medical opinion or to make a medical diagnosis.

In 2007, Ikram attended a two- or three-day seminar put on by the National Transportation Safety Board. During that seminar, he took classes about the biomechanics of high impact injuries; biomedical issues in accident investigation; biomechanics of head injuries; cervical spine injury; use of

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[2] Barker also argued that Aminirad's supplemental designation of Ikram violated Code of Civil Procedure section 2034.280, which limits a supplemental designation to a subject to be covered by an expert designated by an adverse party to the exchange. It does not appear that the trial court addressed the propriety of the supplemental designation. We also do not address that issue because we find that, in any event, the court did not abuse its discretion by excluding Ikram's testimony.

analytical techniques; AIS scaling and mechanism of injury; thoraco-abdominal anatomy; biomechanical and injury causation; thoracolumbar spinal impact biomechanics; biomechanics of the extremities; biomechanics of vulnerable road users; "blast and bullets, high-rate [biomechanics]"; restraint systems minimizing whole-body injury risks; and aviation injury causation analysis.

In 2008, Ikram attended a one-day seminar at the Association for the Advancement of Automotive Medicine. The seminar topics were biomechanics of injury to the abdomen and pelvis; epidemiology; anatomy; injury mechanics and case studies; injuries of the extremities; biomechanics of head injury; crash test dummies; crashes and cervical spine injuries; biomechanics of pediatric automotive injury; "plainer" vehicle motor collisions related to epidemiology, occupant kinematics, injury mechanism, injury risk and case studies; and thoracic and restraint analysis.

At the conclusion of the 402 hearing, the trial court indicated that Ikram had "extensive background, education, training in the area of [biomechanical] research, in mechanical engineering." But, relying on *People v. Roehler* (1985) 167 Cal.App.3d 353,[3] the court noted there was a distinction between

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[3] The defendant in *Roehler* was accused of murdering his wife and stepson, both of whom died, the defendant claimed, in a boating accident. Prosecution experts conducted experiments using a dummy and a dory to show that the child's head injuries could not be caused by a collision between his head and the dory. An engineering expert was allowed to testify about the potential force applied to the head of the dummy and the dory, but only appropriately qualified medical experts could testify concerning the injuries to human heads. (*People v. Roehler*, *supra*, 167 Cal.App.3d at pp. 388-389.)

an engineering expert's testimony concerning engineering principles and those a qualified medical expert may make about injuries to humans. The court then added, "I think that this witness does not have the background, experience, or qualifications to express an opinion as to whether the force of [the] impact would have caused injury" to Barker. "That is a medical opinion." The court, however, said that Ikram could testify about the "relative forces that would have been applied to the body" and the movement or lack of movement of the body in an impact of this nature. "But I do believe there is a bright line drawn between that testimony and an opinion as to whether . . . that movement in that impact would have caused a physical injury."

2. *The trial court did not abuse its discretion by limiting Ikram's testimony*

Rulings on evidentiary objections and motions in limine generally are committed to the trial court's discretion. (*Condon–Johnson & Associates, Inc. v. Sacramento Municipal Utility Dist.* (2007) 149 Cal.App.4th 1384, 1392; *People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 639-640.) Although the application of the abuse of discretion standard of review to evidentiary rulings is well-established, Aminirad argues that we should review the admissibility of Ikram's testimony de novo because her due process rights were violated. She cites *Edwards v. Centrex Real Estate Corp.* (1997) 53 Cal.App.4th 15 to support that argument. In *Edwards*, the motion in limine objected to "any and all evidence" on the grounds that the pleadings were fatally defective and failed to state a cause of action; hence, the motion was the functional equivalent of a demurrer, the sustaining of which is reviewed de

novo. (*Id.* at p. 27.) In contrast, Barker's motion in limine sought to exclude a specific expert from testifying about a specific issue, causation. In no way did that motion, or the trial court's order granting it, either preclude Aminirad from presenting evidence through another witness that the accident did not cause Barker's injury or direct a verdict in Barker's favor. *Edwards*, therefore, is distinguishable, and the usual abuse of discretion standard of review applies.

Under that standard, we discern no abuse of discretion. We will assume that a biomechanics expert is not necessarily precluded from rendering an opinion on causation; that is, that an accident caused a certain injury. (See *People v. Catlin* (2001) 26 Cal.4th 81, 131 (*Catlin*) [clinical toxicologist with Ph.D. in physiology and pharmacology permitted to testify regarding cause of victim's death (paraquat poisoning)], overruled on another ground in *People v. Nelson* (2008) 43 Cal.4th 1242, 1253-1256; *Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 675 ["medical evidence does not necessarily have to be provided by a medical doctor"]; but see *People v. Dellinger* (1984) 163 Cal.App.3d 284, 291-296 [biomechanics engineer's expert opinion not admissible under *People v. Kelly* (1976) 17 Cal.3d 24; but not per se inadmissible]; *Smelser v. Norfolk Southern Ry. Co.* (6th Cir. 1997) 105 F.3d 299, 305 [biomechanics expert cannot render medical opinion].)

Even if we make that assumption, it is "for the trial court to determine, in the exercise of a sound discretion, the competency and qualification of an expert witness to give his opinion in evidence [citation], and its ruling will not be disturbed upon appeal unless a manifest abuse of that discretion is shown." (*Huffman v. Lindquist* (1951) 37 Cal.2d 465, 476.) "A person is

qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) Although the trial court here, in ruling on the motion in limine, indicated that case law limits causation testimony to a medical expert, the court also stated that Ikram lacked the background, experience and qualifications to render a medical opinion about causation. The court, in connection with denying post-trial motions, confirmed that Ikram's lack of expertise was its core reason for limiting his testimony: "I probably had an opinion as to whether or not this impact would or would not have caused injury. But [he] didn't have any training [or] experience in that area. It was just simply an opinion. [¶] That was somewhat my sense of Mr. I[k]ram. He did have extensive training and experience in his mechanical field, in his biomechanical engineering field. He testified that some of that involved collisions with dummies, some of them involved collisions with human beings. But what I found to be lacking was any human anatomy classes, any extensive experience in reading MRI's of individuals that have been involved in automobile accidents. That's kind of where I came down on that issue."

The record supports the trial court's finding that Ikram lacked the requisite expertise to testify that the accident caused Ikram's injury. Ikram did not, for example, have a degree in biomechanics. His college coursework on human tissue appeared to be limited to a physiology class. Ikram had attended biomechanics seminars, but they amounted to approximately just three or four days of classes. His research also appeared to be

limited to graduate research involving head and jaw movements during a collision.

Ikram's expertise thus was more limited than the expert's qualifications in *Catlin*. That expert had advanced training in occupational medicine, physiology and pharmacology; had worked in the area of agricultural poison toxicology for 18 years; had specialized experience in paraquat toxicology; had consulted and advised physicians in cases of paraquat poisoning; had participated in many research projects and biannual conferences on paraquat toxicology; and had provided laboratory services to analyze human tissue samples connected with incidents of paraquat poisoning. Hence, the trial court in *Catlin* did not abuse its discretion in finding that the expert was qualified to testify that paraquat poisoning caused the victim's death and the effect hypertension and age would have on kidney function. (*Catlin*, *supra*, 26 Cal.4th at pp. 131-132.) Nor can we find that the trial court here abused its discretion in finding that Ikram lacked the requisite qualifications to testify about causation.

But even if we agreed that the trial court abused its discretion, we would find the error to be harmless. Where, as here, a claim of error is based on the erroneous exclusion of evidence, an appellant must demonstrate that the error resulted in a "miscarriage of justice." (Evid. Code, § 354; Cal. Const., art. VI, § 13.) A miscarriage of justice should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.) Aminirad's own medical expert, Dr. Alexander, *agreed* that the accident caused

Barker's injury. (Cf. *DePalma v. Rodriguez* (2007) 151 Cal.App.4th 159, 166 [where plaintiff's own expert said that accident resulted in only incremental increase in plaintiff's symptoms and loss of function, no miscarriage of justice occurred in permitting biomechanics expert to testify about lack of causation].) But the doctor said that the accident contributed to only 50 percent of Barker's injuries, while the other 50 percent resulted from Barker's pre-existing back injury from 2001. Given that Ikram admitted he was not qualified to make a medical diagnosis, he would not have been able to offer any opinion on whether Barker's prior back injury contributed to the injury for which he was claiming damages. Moreover, Ikram *did* testify about causation-related issues. He said that the change in velocity during the collision was similar to that between bumper cars and that the compressive force generated in a spine during such a collision is comparable to that which occurs during the daily activities of life. A reasonable inference from this was that the collision between Aminirad's and Barker's cars was not a significant factor in causing Barker's injury. (See, e.g., *id*. at p. 161 [biomechanics expert "opined at trial that one would not expect the accident to result in the specific knee and shoulder injuries complained of because the 'forces are very comparable' to what would be experienced during normal 'routine activities' "]; *Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150, 1153 [biomechanics expert calculated the forces in a motor vehicle accident and compared them to " 'hopping off a six-inch curb' " or " 'plopping into an office chair' "].) No miscarriage of justice occurred.

II. Collateral source evidence

Next, Aminirad contends that a brief mention of insurance in front of the jury deprived her of a fair trial. We disagree.

During direct examination of Barker's accident reconstructionist, Moore, he was asked what "major documents and stuff" he relied on to form his opinion. Moore answered, "The primary documents – I'm going to start off with – in the police report vehicle number 1 is a – I believe it's a 2002 Mercedes C Class C230 [Aminirad's car], I believe. In that particular vehicle I received a number of photographs of the damage to the vehicle. *I also received a Geico insurance estimate* that was dated February 8th of 2011." (Italics added.) The following exchange then occurred:

"[Defense counsel]: Your honor, may I?

"The court: Let's just move along.

"Q. (By [plaintiff's counsel]) We don't need to mention where any of these –

"The court: Just move along.

"[Plaintiff's counsel]: Thank you.

"The court: We'll talk to Mr. Moore when we take our recess." Plaintiff's counsel moved on, asking whether Moore looked at property damage estimates for the cars involved in the accident. Later, out of the jury's presence, defense counsel argued that Moore "clearly" referred to "the fact that Geico insurance is associated and involved in the case," and the witness knew that area was "off limits." It "clearly got a [response] from everyone here." Counsel therefore asked for a mistrial. Plaintiff's counsel disagreed it got a reaction from "everyone here." He argued that no implication arose from Moore's reference to the repair estimate. The trial court denied the

mistrial motion. First, the court found the slip "inadvertent." The court noted that Moore had testified in court only 11 times and his "overall demeanor" did not "impress me" as someone who had "an interest in the outcome of this case." The court alluded to a second reason for denying the motion, but did not state it. Aminirad now argues that the court should have granted her motion for a mistrial, a contention we review for an abuse of discretion. (See *Blumenthal v. Superior Court* (2006) 137 Cal.App.4th 672, 679.)

Evidence that a person was insured against liability for another's injury is inadmissible to prove negligence or other wrongdoing. (Evid. Code, § 1155; *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1122 (*Bell*).) The related collateral source rule provides that "if an injured party receives some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor." (*Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 6.) The collateral source rule "operates both as a substantive rule of damages and as a rule of evidence." (*Arambula v. Wells* (1999) 72 Cal.App.4th 1006, 1015.) "As a rule of evidence, it precludes the introduction of evidence of the plaintiff being compensated by a collateral source unless there is a 'persuasive showing' that such evidence is of 'substantial probative value' for purposes other than reducing damages." (*Ibid.*) Nevertheless, " 'the existence of insurance may properly be referred to in a case if the evidence is otherwise admissible.' [Citation.] The trial court must then determine, pursuant to Evidence Code section 352, whether the probative value of the other evidence outweighs the prejudicial

effect of the mention of insurance. [Citations.]" (*Blake v. E. Thompson Petroleum Repair Co.* (1985) 170 Cal.App.3d 823, 831.)

We do not agree that Moore's reference to the Geico insurance estimate violated Evidence Code section 1155 or the collateral source rule. Moore merely said he looked at the estimate to form his opinion about how the accident occurred. He did not say that plaintiff was being compensated for his medical injuries from an insurance source.

But even if that was the implication or if Moore suggested that a party had car insurance, it was not prejudicial. This Division, in *Bell*, observed it is commonly known that most drivers in California have car insurance, and most jurors assume the existence of such insurance even if it is not explicitly mentioned at trial. (*Bell*, *supra*, 181 Cal.App.4th at p. 1123.) *Bell* thus found that "[a]bsent aggravating circumstances" a brief reference to insurance was, in that case, "very unlikely to cause the jury to conclude either that the plaintiff will be fully compensated for his injuries by insurance or that the defendant should be relieved of liability for any reason." (*Ibid.*)

No such aggravating circumstances exist here. The trial court expressly found that Moore's disclosure was inadvertent. The mention of insurance was brief, and the court immediately told counsel to move on. Moreover, the jury was instructed not to consider "whether any . . . parties in this case has insurance. The presence or absence of insurance is totally irrelevant. You must decide this case based only on the law and the evidence." (CACI No. 105.) We presume the jury followed that instruction absent some indication to the contrary. (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1415.) Also, plaintiff's counsel reminded the jury in his closing statement that it was "not to consider the

presence of insurance, the absence of insurance or anything like that." "So back there, somebody may say, you know what, listen, just give Mr. Barker X. An insurance company will take care of it. Can't do it. It's against the law. Or somebody may say, don't give him anything because then insurance rates will rise. Can't do it." Given the limited nature of the reference to insurance and that the jury was instructed not to consider insurance, we conclude that the record reveals no prejudicial error.

III. Future medical expenses

Aminirad argues that the jury's award of future medical expenses must be reversed because (1) Barker failed to carry his burden of showing he is entitled to medical care in the United States; (2) Barker failed to comply with *Howell v. Hamilton Meats and Provisions, Inc.* (2011) 52 Cal.4th 541 (*Howell*); and (3) Barker presented only speculative evidence of future medical expenses.

1. *Mitigation of damages*

Aminirad contends that Barker has an "obligation to mitigate his damages" by returning to Australia, which has, Aminirad asserts, "universal government-provided health care." This contention is forfeited. It was not raised in the trial court until post-trial, and Aminirad cites no authority on appeal to support such a notion. (See generally *Cruz v. Sun World Internat., LLC* (2015) 243 Cal.App.4th 367, 380 [issues not raised in the trial court are waived]; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 [contentions waived when there is failure to support them with reasoned argument and citations to authority]; *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700 [points perfunctorily raised on appeal, without adequate analysis and authority, may be treated as

abandoned].) Also, Aminirad raised mitigation of damages as an affirmative defense. It was Aminirad's burden to produce evidence of that defense. (Evid. Code, § 500 [party has burden of proof as to each fact essential to claim for relief or defense the party is asserting]; *Cordero-Sacks v. Housing Authority of City of Los Angeles* (2011) 200 Cal.App.4th 1267, 1284.) No evidence, however, was produced. Indeed, defense counsel did not cross-examine Barker on any topic, including his nationality, or produce evidence about Australia's health care system. The issue is therefore forfeited for that reason as well.

2. *Howell*

Aminirad also contends it was improper to award future medical damages to Barker because he failed to present evidence of the amounts medical providers would accept as payment in full, under *Howell*, *supra*, 52 Cal.4th 541. We reject this contention, because, as we explain, Aminirad failed to address any *Howell* issues adequately in the trial court.

Howell considered what medical damages a tortiously injured person may receive: the amount billed or the amount the care provider accepted as full payment. (*Howell*, *supra*, 52 Cal.4th at p. 548.) *Howell* held that such a plaintiff may recover "as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial." (*Id.* at p. 566.) Stated otherwise, an insured plaintiff who incurs "only the fee amount negotiated by their insurer, not the initial billed amount," may recover only their "actual loss, i.e., the amount incurred and paid to settle their medical bills." (*Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1329 (*Bermudez*).) As to an uninsured plaintiff who has not paid his or her medical bill, *Howell* suggested that the measure of

medical damages "will usually turn on a wide-ranging inquiry into the reasonable value of medical services provided" (*Bermudez*, at pp. 1330-1331), that is, the market value of the service or the amount for which it could usually be exchanged (*id.* at p. 1329). In addition to establishing a measure of damages for past medical expenses, *Howell* had evidentiary implications; for example, where a medical provider accepts less than the full billed amount, "evidence of the full billed amount is not itself relevant on the issue of past medical expenses." (*Howell*, at p. 567; see also *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1328 [billed amount not relevant to past or future medical expenses].) *Howell*, however, concerned past, not future, medical expenses. Furthermore, *Howell* expressed no opinion as to the relevance or admissibility of billed amounts on other issues, such as non-economic damages or future medical expenses. (*Howell*, at p. 567.)

This case presents no occasion to delve into issues left open by *Howell*. Aminirad failed to raise any *Howell* issue in a timely manner before trial.[4] (See generally *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564 [general rule is issues not litigated in trial court are forfeited].) Indeed, *Howell* was not addressed pretrial at all, even though the trial court asked at a pretrial conference whether there were any medical damages issues. Barker's counsel responded that Dr. Mobin had testified at deposition that all charges were reasonable and necessary, but that the defense expert, Dr. Alexander, did not testify "one way or

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[4] Aminirad raised *Howell* in her post-trial motions for a new trial and for judgment notwithstanding the verdict.

the other" on the issue of bills. The court then asked, "What about future medicals?" Barker's counsel confirmed that plaintiff was seeking future medicals and that Dr. Mobin would testify about the cost of a spinal fusion. Aminirad's counsel failed to object to testimony about future medical expenses by a motion in limine or otherwise.

In that respect, this case is similar to *Bermudez*. The uninsured *Bermudez* plaintiff was injured in a traffic accident. (*Bermudez*, *supra*, 237 Cal.App.4th at p. 1324.) Doctors (including Dr. Mobin) testified about the plaintiff's past and future medical expenses.[5] (*Id.* at pp. 1325-1326.) As to the plaintiff's past medical expenses, doctors testified that the charges were, for the most part, reasonable. (*Id.* at pp. 1324-1326.) As to future medical expenses, Dr. Mobin, for example, opined about the cost of the back surgery and related procedures the plaintiff would require; but that testimony was not linked to existing medical bills. (*Id.* at pp. 1325-1326.) The jury awarded past and future medical expenses. On appeal, the defendant challenged the experts' testimony on the ground it did not establish that the experts' method of forming an opinion about the reasonable cost of the medical procedures was linked to a market or exchange value of medical services.[6] (*Id.* at pp. 1339-1340.) The court rejected that challenge because the defendant failed to object by a motion in limine or otherwise in the trial court. In the absence of such objection, "[f]or all we know, [the

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[5] An economist also testified about the present value of the future medical expenses.

[6] It is unclear whether the defendant's challenge on this ground was to past *and* future medical expenses.

plaintiff's] experts could have provided compelling testimony supporting their chosen method of determining the reasonableness of [the plaintiff's] medical expenses for the market in which he was served. We leave the question of how courts should fulfill their gatekeeper role in a case like the instant one for an appeal in which the parties have actually litigated the issue at trial." (*Id.* at p. 1340.)

Similar to the defendant's complaint in *Bermudez* that there was no evidence of the market or exchange value of the medical services, Aminirad complains that Barker failed to establish prevailing rates or to produce evidence of "insurance-based write-downs, workers' compensation write-downs, or any other amount which would be accepted as full and final payment." But Aminirad neither litigated nor developed these issues below. The defense did not ask Barker about medical insurance or worker's compensation. Indeed, defendant did not cross-examine Barker at all. It is not even clear that "insurance-based write-downs" were relevant, because it appears that Barker was uninsured. It is similarly unclear how workers' compensation benefits were relevant because the accident occurred while Barker was on vacation. Nor did defendant cross-examine Dr. Mobin about the charges for the back surgery.[7] Moreover Barker's surgery had yet to occur at the time of trial, and therefore he had not incurred medical expenses or been billed for them. Therefore, it does not appear that *Howell* – to the extent it has evidentiary implications about medical bills – applied at all.

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[7] Defense counsel merely asked how much of the global cost would Dr. Mobin get as the surgeon, to which Dr. Mobin answered, "about [$]45,000."

Based on this record and on defendant's failure to develop the issues, we decline to conclude that Dr. Mobin's testimony was insufficient to establish Barker's future medical expenses. We instead conclude that it was sufficient evidence of Barker's future medical expenses. Dr. Mobin testified about the reasonable and customary cost of the spinal fusion surgery and related procedures Barker required. Dr. Mobin, a neurosurgeon who had his own business, said he was familiar with the charges for services related to the surgery. The "global cost" for the procedure ranged from $160,000 to $180,000. Included in that global cost was "the cost for the authorization, the hardware material that we need to insert in the lower back, including the screws, rods and the cage, the surgeon's fee, assistant surgeon's fee, anesthesiologist's fee, and internal medicine, the physician involved with clearance of the patient for the surgeon[.]" The global cost for a second procedure to remove the screws ranged from $50,000 to $60,000. Because Barker was susceptible to a higher rate of disc degeneration, there was a "very high chance" he would need another fusion in 33 years. The cost of this procedure would also range from $160,000 to $180,000.[8] Under the applicable standard of review, which requires us to resolve all conflicts in favor of the prevailing party and indulge all legitimate and reasonable inferences to uphold the verdict if possible, this evidence was sufficient to support the jury's award

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[8] When Aminirad's counsel tried to ask her expert, Dr. Alexander about the reasonable cost of a spinal fusion surgery, plaintiff's counsel objected, because the doctor had not offered any testimony in deposition on that issue. The court sustained the objection. The propriety of that ruling is not at issue on appeal.

of future medical expenses.[9] (*Ortega Pajaro Valley Unified School Dist*. (1998) 64 Cal.App.4th 1023, 1043.)

3. *The speculative nature of Barker's future medical expenses*

Aminirad contends that Barker produced only "speculative" evidence of his future medical expenses. She argues that despite the passage of four years since the accident, Barker had received only "de minimis" treatment (epidurals and physical therapy) and testified that his limitations were minimal. She also finds suspicious the timing of Barker's decision to have surgery "a few weeks before trial and after he had returned to the United States." Aminirad's suspicions notwithstanding, her argument amounts to nothing more than an improper request we reweigh the evidence and evaluate the credibility of witnesses. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766.) Barker testified about his back pain and physical limitations. Dr. Mobin testified that spinal surgery was medically indicated and reasonable. This evidence was sufficient to establish that Barker would require future medical treatment.

IV. Barker's cross-appeal regarding the section 998 offer

Before trial, Barker served Aminirad and her father, Mohsen, a single offer to compromise for $74,999 under section 998. Barker did not apportion the offer between them. They rejected it. After Barker prevailed at trial, he served a memorandum of costs that asked for expert witness fees. Aminirad objected on the ground that the section 998 offer was

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[9] We also note that the jury awarded $129,400 in future medical expenses, much less than the approximate $480,000 (at the high end) that Dr. Mobin said Barker's future surgeries would cost.

invalid because it was not apportioned between her and her father, who was still a party at the time the section 998 offer was served. Finding that the unapportioned offer was invalid, the court taxed expert witness fees. As we explain, the court was correct that the section 998 offer was invalid.

Section 998, subdivision (d), provides in relevant part: "If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment . . . , the court . . . , in its discretion, may require the defendant to pay a reasonable sum to cover postoffer costs of the services of expert witnesses . . . ." "The purpose of section 998 is to encourage the settlement of lawsuits before trial by penalizing a party who fails to accept a reasonable offer from the other party." (*Taing v. Johnson Scaffolding Co.* (1992) 9 Cal.App.4th 579, 583 (*Taing*).)

A section 998 offer made to multiple parties is valid only if it is expressly apportioned among them and not conditioned on acceptance by all of them. (*Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, 112; *Taing*, *supra*, 9 Cal.App.4th at p. 586; *Burch v. Children's Hospital of Orange County Thrift Stores, Inc.* (2003) 109 Cal.App.4th 537, 548-551 (*Burch*).) This rule of apportionment exists because an unapportioned offer to multiple defendants "requires any defendant who wants to accept [the offer] to obtain the concurrence of his or her codefendants," "plac[ing] a reasonable defendant at the mercy of codefendants whose refusal to settle may be unreasonable." (*Taing*, at p. 584.) Also, if defendants are served with an unapportioned section 998 offer, " 'there is no way to determine whether a subsequent judgment against a particular nonsettling defendant is "more favorable" than the offer.' [Citation.]" (*Burch*, at p. 547.)

Here, Barker served an unapportioned offer to multiple defendants (Aminirad and Mohsen). Nothwithstanding the general rule that offers must be apportioned, Barker points out that the rule does not apply when the defendants' potential liability is joint and several. (See generally *Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc.* (1996) 50 Cal.App.4th 1542, 1550 (*Steinfeld*); *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1001.) He thus argues that Aminirad's and Mohsen's liability was joint and several, because, for example, they were jointly represented by the same counsel provided by the same insurance carrier controlling defense of the case. (See, e.g., *Steinfeld*, at p. 1549 [complaint alleged single cause of action against defendants].) Barker also relies on Vehicle Code section 17151, subdivision (a), which capped the liability of Mohsen, as mere owner of the car, at $15,000. (See generally *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1852-1853 [where the operator of a vehicle settles claim of injured third party for a sum equal to, or in excess of the amount of the owner's statutory liability, the owner's obligation is discharged]; *Flores v. Enterprise Rent-A-Car Co.* (2010) 188 Cal.App.4th 1055, 1072.) Barker thus argues that Aminirad's and Mohsen's liability was "joint and several" up to $15,000; otherwise, Aminirad was wholly liable for any judgment.

We are unpersuaded. Aminirad and Mohsen were not jointly and severally liable on the entire section 998 offer. Notwithstanding the statutory cap, the offer was not clear that, by accepting, Mohsen would only be liable for $15,000 as opposed to the entire $74,999. This lack of clarity contravenes the rationale underlying the rule favoring apportionment, which is to protect a reasonable defendant from an unreasonable

codefendant who refuses to settle, and to ensure that both defendants are able to assess the offer against the plaintiff's recovery at trial. (*Taing*, *supra*, 9 Cal.App.4th at p. 584; *Burch*, *supra*, 109 Cal.App.4th at p. 545; *Steinfeld*, *supra*, 50 Cal.App.4th at p. 1548.) Mohsen was unable to assess the section 998 offer.

We acknowledge that Barker's argument *might* work in the limited circumstances before us involving a father and daughter represented by the same insurance company, but it is not workable as a general rule of law, even in other cases that might involve Vehicle Code section 17151. We can envision a scenario involving a vehicle owner and its operator where their interests are not aligned. Therefore, as the trial court observed, to effectuate what Barker apparently intended, he should have served a section 998 offer in the amount of $15,000 to Mohsen and served a separate section 998 offer to Aminirad for the balance.[10] Having failed to so apportion the offer, it was invalid.

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[10] Indeed, the judicial council form Barker used cautions that it was "designed to be used only in civil actions involving a single plaintiff and a single defendant[.]"

DISPOSITION

The judgment and order are affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BACHNER, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.