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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

BERTHA HERNANDEZ et al., Plaintiffs and Appellants, v. DARIUS SIRRON GARDNER et al., Defendants and Respondents.	B251309 (Los Angeles County Super. Ct. No. PC050060)

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

Law Office of Gerald P. Peters and Gerald P. Peters for Plaintiffs and Appellants.

Shaver, Korff & Castronovo , Edie L. Brookes, Tod M. Castronovo and Thomas W. Shaver for Defendants and Respondents.

Plaintiffs Bertha Hernandez, Albino Hernandez and Jose Hernandez appeal the judgment entered following a jury trial of their negligence claims against defendants Darius Gardner and Frank Gardner[1] as a result of an automobile accident. In this appeal, plaintiff[2] contends that the trial court erroneously excused a juror and improperly permitted a defense expert to testify to matters outside his area of expertise and to opinions not offered in his deposition. She also maintains that there was insufficient evidence to support the jury's verdict. We conclude that the excusal of the juror and the substance of the expert testimony were proper, and that the judgment is supported by substantial evidence. We therefore affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

On August 22, 2009, defendant Darius Gardner hit the right front portion of plaintiff's vehicle when he ran a red light as plaintiff was exiting a shopping center. Plaintiff's 16-year-old son Jose was sitting in the front passenger seat. As a result of the impact and her body position, plaintiff allegedly sustained injuries to her left shoulder and elbow, each of which eventually required surgery. Defendants admitted liability but contested damages. The defense maintained that while plaintiff sustained soft tissue injuries from the accident which caused her pain and discomfort for a period of time, those injuries and the resulting pain were resolved long before plaintiff underwent shoulder surgery in March 2011, and elbow surgery in May 2012.

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[1] Darius Gardner was the driver of the vehicle that hit plaintiff's car; Frank Gardner, Darius's father, was the vehicle's owner.

[2] Although all three plaintiffs appealed the judgment, the briefs on appeal name only Mrs. Hernandez and address her claims alone. We therefore deem abandoned the appeals of Albino and Jose Hernandez. (See e.g., *Boblitt v. Boblitt* (2010) 190 Cal.App.4th 603, 609 [""Contentions supported neither by argument nor by citation of authority are deemed to be without foundation, and to have been abandoned.""]; *Bonadiman-McCain, Inc. v. Snow* (1960) 183 Cal.App.2d 58, 65 ["Inasmuch as arguments in the briefs appear limited to that part of the judgment dealing with the final tract [], the appeal from other parts may be deemed abandoned"].)

A jury awarded plaintiff $5,774 for past economic damages, and failed to award her any non-economic or future economic damages.[3] The trial court denied plaintiff's motion for new trial on the condition that defendants agree to an additur of $3,500 for past non-economic damages. Defendants did so, bringing the total damage award to $9,274.

Plaintiff appeals the judgment. She cites as error the dismissal of a juror, the admission of defendant's expert testimony, and the denial of her motions for judgment notwithstanding the verdict and for a new trial. We recite the relevant facts and address each of these contentions below.

DISCUSSION

1. *Excused juror*

"If a juror upon good cause is found to be unable to perform his [or her] duty, then the court may order that the juror be discharged. (Code Civ. Proc., § 233[4].) Our Supreme Court has held that an appellate court should review a trial court's decision to dismiss a juror for an abuse of discretion. (*People v. Williams* (2001) 25 Cal.4th 441, 448.) Our high court has explained that a juror's inability to perform his duties "'must "appear in the record as a demonstrable reality." [Citation.]' [Citation.]" (*Mansur v. Ford Motor Co.* (2011) 197 Cal.App.4th 1365, 1383.) "'Under the demonstrable reality standard, . . . the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied. [¶] In reaching that conclusion, the reviewing panel will consider not just the evidence itself, but also the record of reasons the court provides.' ([*People v.*] *Barnwell* [(2007)] 41 Cal.4th [1038] at 1052–1053.)" (*People v. Fuiava* (2012) 53 Cal.4th 622, 712.)

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[3] The jury awarded no damages to plaintiff's son or husband. As noted above, plaintiff does not directly challenge this portion of the judgment.

[4] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

On the sixth day of trial, Juror No. 12 presented a typewritten letter to the courtroom attendant, in which she said that she had been injured some years earlier in a horse-riding accident and stated, "I feel I am not in the best position to deliberate and reach a verdict because I sympathize and tangentially justly favor the plaintiff." Juror No. 12 referenced a surgery similar to plaintiff's that had left her with $35,000 in medical bills. When the court questioned the juror in chambers, she stated that the scar from plaintiff's surgery reminded her of her own very similar scar and of the excruciating pain she went through after her own surgery. Although she knew that she shouldn't favor plaintiff and should continue to listen to the evidence, she still "tendentiously" favored plaintiff. The court then asked the juror if that meant that she leaned in that direction, or had already made up her mind. Juror No. 12 stated, "I sort of just made up my mind when I saw her crying about the surgery." The court then asked the juror if she could consider whether the accident was a substantial cause of plaintiff's injury or whether she had made up her mind; she responded, "I made up my mind only because – of course, that was my accident." Juror No. 12 stated that plaintiff's surgery was linked to the accident. She said that she had an open mind and was willing to listen, but when asked if she could follow the law stated, "That's the hard part."

Because her answers were equivocal, the trial court continued to question Juror No. 12 as follows:

> "The Court: So you feel that your sympathy is you really want to pay these bills for the plaintiff and that's even more important to you than keeping an open mind and making a decision on whether the accident caused these injuries?
>
> "Juror No. 12: It's really hard to make a decision when you put it that way, but yeah. My experience it's – yeah, I don't know. It's overwhelming. I don't know what to tell you.
>
> "The Court: That's what we are here for. Are you saying your personal experience is sort of overwhelming?

"Juror No. 12: It is, yes. Once I saw everything, like I told you, it's – I feel like I'm just going to favor her. I already favor her. And I think it's going to stay that way."

From the foregoing exchange the trial court concluded that Juror No. 12 was intelligent and that plaintiff's situation provoked a tremendous amount of emotion and sympathy in her. She had a strong desire that plaintiff's medical bills be paid regardless of whether they were caused by the automobile accident, and she could not set aside her personal feelings. The trial court excused Juror No. 12 and replaced her with an alternate. Plaintiff contends that this was error.

Our Supreme Court has held that "'when a court is put "on notice that improper or external influences were being brought to bear on a juror . . . 'it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and whether the impartiality of the other jurors has been affected.'" [Citation.] Such an inquiry is central to maintaining the integrity of the jury system. . . . [Citation.]' . . . '"The decision whether to investigate the possibility of juror bias, incompetence, or misconduct — like the ultimate decision to retain or discharge a juror — rests within the sound discretion of the trial court. [Citation.]"'" (*People v. Fuiava* (2012) 53 Cal.4th 622, 702.)

Here, the trial court's initial questioning of Juror No. 12 about her ability to be fair and impartial produced equivocal answers. Further questioning revealed that Juror No. 12 had formed a definite opinion about the case (although she had been admonished by the court at breaks and at the end of each day not to form any opinion until the case was submitted to the jury); wanted plaintiff's medical bills to be paid regardless of whether the accident was a substantial factor in causing the medical bills; and was unable or unwilling to set aside her emotions and sympathy for plaintiff. Based upon the record, we conclude that Juror No.12's inability to perform her duties was a "demonstrable reality." Accordingly, the trial court did not abuse its discretion in excusing this juror.

2. *Dr. Flinders's expert testimony*

Plaintiff challenges the testimony provided by the defendant's orthopedic expert, Dr. Boyd Flinders. Plaintiff first maintains that the trial court erred in permitting the expert to testify to his opinion based on a color photograph, taken during plaintiff's surgery of the interior of her shoulder, which opinion had not been offered during his deposition. She also contends that the doctor's opinion that plaintiff was motivated by "secondary gain" and "subliminally magnified" her symptoms were improperly admitted. Finally, plaintiff maintains that "[t]here is not substantial evidence to support the jury verdict since there is no factual basis for many of Dr. Flinders'[s] opinions." We summarize the relevant evidence in our discussion of these contentions below.

Defendant's car hit plaintiff's van on August 22, 2009, as plaintiff was waiting to make a left turn. Plaintiff was holding the steering wheel when she felt the impact, and moved forward, and then back. After the accident, plaintiff felt pain on her left side. An ambulance arrived at the scene and transported her to the emergency room of Lancaster Community Hospital.

The emergency room report stated that plaintiff had a non-tender neck with painless range of motion, meaning that she could move her neck freely without pain. No numbness or tingling was noted. Plaintiff's back was not tender, and her extremities had no evidence of trauma. An x-ray of plaintiff's left shoulder showed mild arthritis and mild lateral downsloping of the acromion, a bony prominence at the top of the shoulder blade; both conditions pre-dated the accident. Plaintiff was given pain medication and told to seek follow-up care from her own physician.

Plaintiff testified that, as a result of the accident, her left elbow was swollen. A month after the accident, she complained of pain radiating from her fourth and fifth fingers and intermittent numbness in those fingers. She also had pain in her spine, shoulder and thigh.

Plaintiff's attorney referred her to a chiropractor, Dr. Nikta Andalib, who placed plaintiff on disability leave as of September 3, 2009. Plaintiff returned to work 14 weeks later, in December of 2009.

When Dr. Andalib's associate, Dr. Cho, first saw plaintiff on September 3, 2009, she complained of neck, left shoulder and low back pain. Plaintiff's accident history form indicated she was going approximately five miles per hour at the time of the accident; she did not describe striking her left shoulder during the accident; there was no bruising. In his examination of plaintiff, Dr. Cho found no problem with the supraspinatus or infraspinatus; the rotator cuff, the subsacromial and subdeltoid bursa were all "okay." There was no concern with regard to plaintiff's left elbow, forearm or wrist. Dr. Cho completed a disability form 14 days after the accident based on painful and limited range of motion of the neck and low back; no other reason was noted. The treatment plan was hot packs, manipulation, massage and manual traction. When plaintiff saw Dr. Andalib almost three weeks after her treatment began, she reported decreased neck pain, and that the massages were very helpful. At night, her pain returned and radiated down the left arm to the fourth and fifth fingers. Dr. Andalib did not document any swelling of the left upper arm or the left elbow, nor did she contemplate cubital tunnel syndrome as a diagnosis. Dr. Andalib ordered a neck MRI, which was taken two days later, on September 23, 2009. She subsequently ordered a second MRI, of the shoulder.

Dr. Ronald Grusd, a board-certified radiologist, performed an MRI of plaintiff's cervical spine on September 23, 2009, and a second MRI, of her shoulder, on October 21, 2009. The report of the cervical spine MRI noted two-millimeter disc bulges but no nerve compression. At trial, Dr. Grusd testified that that MRI showed neither evidence of neurologic compromise to plaintiff's spinal cord, nor any evidence of trauma. The MRI of the shoulder showed arthrosis (a condition "very close to arthritis") of the acromialclavicular joint, and a type 3 acromion with an anterior hook. The former condition could not have developed between the accident in August 2009 and the MRI two months later; the latter condition, which plaintiff was born with, can cause impingement. Dr. Grusd also saw in the second MRI signs of tendinosis or partial tear of the subscapularis tendon, which can be caused by repetitive shoulder movement. Dr. Grusd did not diagnose the labral tear which plaintiff's surgeon later diagnosed and

repaired in surgery, but testified that he first noticed the tear one week before trial when he reviewed the MRI results at plaintiff's counsel's request. When asked to explain this discrepancy, Dr. Grusd speculated that he may have dictated "labral tear" and the transcriptionist omitted it. He also stated that at an earlier point in time he was not "sensitized" to the existence of labral tears. He could not recall his state of sensitivity to the issue in 2009 when he prepared the MRI report, and said "maybe I missed it."

Dr. Andalib referred plaintiff to Dr. Robere Missirian, an orthopedist, who examined plaintiff at the chiropractor's office on November 5, 2009. The results of Dr. Missirian's examination are in dispute, as he both reported that the left shoulder had "no clinical findings" and diagnosed a rotator cuff tear in the left shoulder. Dr. Missirian also diagnosed cubital tunnel syndrome (pressure on the ulnar nerve) in the left elbow, and injury to the cervical spine. Dr. Missirian prescribed a brace for the left elbow, followed by surgery to address the cubital tunnel syndrome if the brace did not resolve the issue within a month. With respect to the neck injury, Dr. Missirian recommended a series of three to four "cervical epidural steroid injections in order to adequately address her condition." The doctor noted that "[t]he estimated cost of 3-4 epidural injections, including hospital, anesthesia, surgeon fees, material used, and appropriate medication, is approximately 35,000 dollars."

On December 3, 2009, approximately two weeks after Dr. Missirian's examination, the chiropractors released plaintiff from their care. Plaintiff's only remaining complaint was of left shoulder pain. The discharge report by Dr. Cho states that plaintiff's "neck and low back symptoms have all resolved but confirms to have left shoulder pain." Plaintiff returned to work the second week of December 2009.

Plaintiff saw another orthopedist, Dr. Kayvanfar, in January 2010. Dr. Kayvanfar did not testify at trial.

Subsequent to seeing Dr. Kayvanfar in January 2010, plaintiff received no further medical care in connection with the injuries which purportedly resuled from the accident until November 12, 2010, when she sought care at Kaiser Permanente's Palmdale Medical Offices, complaining that her shoulder pain had worsened in the prior week;

plaintiff also reported a sore throat and a gynecological issue. The report of that visit stated that plaintiff "denies numbness and weakness." On November 30, 2010, plaintiff went to Dr. Bahman Omrani, an osteopathic physician, complaining of continuing shoulder pain and stiffness. Dr. Omrani gave plaintiff a subacromial injection in her left shoulder to provide pain relief, ordered a combined neck MRI and arthrogram, and referred her to Dr. Benjamin Broukhim, an orthopedic surgeon.

Before plaintiff first met with Dr. Broukhim in January 2011, Dr. Berkowitz performed the MRI/arthrogram recommended by Dr. Omrani, and did not report finding a labral tear. Also, in December 2010, Dr. Tabibian performed a nerve conduction study, the results of which were negative, as they did not show cervical radiculopathy or entrapment neuropathy. Thus, the nerve conduction study did not provide objective evidence of plaintiff's subjective symptoms of shoulder pain and limited range of motion. Dr. Omrani testified that there is sometimes a delay in the presentation of symptoms and their confirmation on a nerve conduction study. Dr. Broukhim called the test "nonsense" and did not order a repeat study.

Dr. Broukhim's findings from his initial examination of plaintiff on January 27, 2011, included tenderness in the neck, muscle spasms and decreased range of motion; tenderness in the AC joint of the left shoulder; tenderness to the subacromial bursa associated with the left rotator cuff; and diminished abduction, "means bringing the arm up," and internal rotation of the left shoulder. Plaintiff also had a positive impingement test, "which means whenever you rotate the arm like that, the rotator cuff goes under the acromion and they have extreme pain." In addition, plaintiff's elbow was swollen and she had a positive Tinel sign, that is, "shooting pain down the fourth and fifth digit," and numbness in these two fingers.

Dr. Broukhim determined that the conservative treatment which plaintiff had received to date had not relieved her symptoms. He therefore recommended surgical interventions. When questioned by plaintiff's counsel about his medical opinion of the necessity of surgery, Dr. Broukhim answered, "[T]he patient came to me with significant problems. She was almost crying that she cannot use her arm. She keep[s] dropping

objects. She cannot function. She cannot lift. She wanted something definite to be done. [¶] I decided to do surgery on her shoulder first because I thought that was more – more issues for her. So I did a left shoulder surgery on her, and she was so happy. And I believe that she even thanked me or even kissed my hand after the follow-up visits that I did for her shoulder surgery. [¶] Then I also – in one of my conclusion reports, I said, 'She's fine. She can go now.' And then don't even consider doing elbow surgery. But then she comes back and says, 'Doctor, you did such a great job on my shoulder that I am so much better now that I do a lot of my activities, including my job and things like that. So please fix my elbow also.' [¶] So I did surgery on her elbow, and again she had great results. So this, per se, shows that my recommendations were right and her treatment[s] were appropriate and she got better."

Dr. Broukhim acknowledged that neither of the radiologists' reports of plaintiff's shoulder MRIs noted a labral tear. He also stated that he did not review the MRI films themselves, but relied only on the reported findings of the radiologists. Dr. Broukhim explained, however, while performing surgery, he viewed on a monitor an image of the inside of plaintiff's left shoulder which was taken with a camera attached to a scope which he inserted through a small incision in the shoulder. Through this method, Dr. Broukhim observed that plaintiff's shoulder had a labral tear. He "fixed" the tear by "abrading" it. He also repaired a partial tear of the rotator cuff by "debriding" it with a "shaver." However, the defense introduced Dr. Broukhim's deposition, where he stated that during surgery, he did not see a "supraspinatus tendon tear."

In answer to plaintiff's counsel's question about whether the labral and rotator cuff tears could have resolved on their own, Dr. Broukhim answered, "No. [¶] Because if it wanted to resolve on its own, it would have to happen for two years, and I saw the tears that were there. And literature shows that it won't."

On September 4, 2012, three months after performing surgery on plaintiff's elbow, Dr. Broukhim first diagnosed plaintiff with a left trigger thumb, which he attributed to the accident three years earlier. Dr. Broukhim explained that the condition may have been caused by plaintiff tightening her grip on the steering wheel in anticipation of being hit

by defendant's car. This theory was inconsistent, however, with the testimony of both plaintiff and her accident reconstruction expert to the effect that she did not see defendant's vehicle before it hit her. The doctor acknowledged that there was no reference to left hand pain in the paramedic records, and no x-rays of the left hand or fingers were taken in the emergency room.

Although Dr. Broukhim noted that plaintiff did not have much complaint about her neck, and he had last examined plaintiff on October 30, 2012, he testified at trial that plaintiff would need three epidural injections costing $15,000 each, repeated again in two or three years. When questioned about this on cross-examination, Dr. Broukhim reconsidered, stating "I don't think she needs it at this stage."

None of her treating physicians questioned plaintiff about the physical requirements of her job or investigated whether the repetitive movements in which she engaged in performing her work duties caused or contributed to her symptoms. Dr. Broukhim confirmed that cubital tunnel syndrome could be caused by repetitive work.

Dr. Boyd Flinders, a board-certified orthopedic surgeon in private practice for the past 32 years, was defendant's retained medical expert. In addition to his private practice, he conducted "utilization reviews" which consist of reviewing records and bills to determine if treatment is necessary and bills are reasonable, as well as preauthorizations for surgery to ascertain whether a proposed surgery is reasonable based on a review of the medical records.

Dr. Flinders reviewed plaintiff's medical records, including the actual MRI films of plaintiff's shoulder and elbow. He testified that nothing in plaintiff's records supported the need for cervical epidural steroid injections as recommended by Dr. Missirian. The October 2009 MRI of plaintiff's shoulder showed no evidence of a rotator cuff tear but did reveal a downsloping acromion, which can rub and pinch the rotator cuff tendon causing it to become frayed and worn, as well as evidence of bursitis, which can be caused by repetitive activities. He saw no evidence of a labral tear on either of the MRI films taken in October 2009 and December 2010 or on the intraoperative

photographs taken by Dr. Broukhim during surgery. Dr. Flinders opined that plaintiff's MRI findings were more consistent and to a medical probability more related to repetitive activites as opposed to an injury or direct blow. He ruled out trauma as a cause because there was no soft tissue swelling, edema or bone bruising in the initial left shoulder films, and the records of the ambulance, emergency room, chiropractor and Dr. Missirian noted no bruising or swelling. This strongly suggested to Dr. Flinders that plaintiff's shoulder was not seriously injured, and did not suffer an impact in the accident with defendant.

Dr. Flinders concluded that the surgery Dr. Broukhim performed on plaintiff's left shoulder was not necessary because there was no significant anatomical abnormality on the MRI scan such as a torn rotator cuff or a labral tear that warranted surgery. Dr. Flinders opined that plaintiff sustained soft tissue strain to the left shoulder in the accident, which he would expect to last anywhere from several weeks to a few months. Thus, Dr. Flinders testified that plaintiff's shoulder surgery was both unnecessary and unrelated to the accident.

Dr. Flinders also testified that cubital tunnel syndrome, or inflammation of the ulnar nerve at the elbow, is most commonly caused by repetitive activities which cause constant irritation and frictional wear, or from constant pressure (such as leaning on the elbow) or from a fractured bone. A significant blow to the arm can irritate the nerve, but in order to do so, it would need to be of such force as to result in swelling or bruising. Dr. Flinders found no evidence of bruising or swelling in plaintiff's medical records. Dr. Flinders opined that the August 2009 accident was not a cause of the left elbow surgery. Moreover, he found no clinical indication that the elbow surgery was medically necessary.

a. *Color photograph*

During Dr. Flinders's deposition, plaintiff's counsel referred to Dr. Broukhim's deposition testimony to the effect he had "intraoperational" photographs of plaintiff's shoulder which showed a labral tear. Flinders acknowledged the testimony but stated, "Right. The copies are so poor that you can't see anything." Consequently, in his

deposition, Dr. Flinders offered no opinion concerning whether the photographs taken during plaintiff's shoulder surgery revealed a labral tear. He did not indicate that he would be unable to render an opinion regarding a labral tear based on a good quality photograph.

During direct examination by plaintiff's counsel, Dr. Broukhim authenticated and referred to three original photographs taken during plaintiff's shoulder surgery. He testified that the photographs showed a labral tear and a partial rotator cuff tear.

On the morning he testified in court, defense counsel showed Dr. Flinders the original color photographs which about which Dr. Broukhim had testified. Over plaintiff's objection, the trial court permitted Dr. Flinders to rebut Dr. Broukhim's testimony that the photographs revealed a labral tear. Thus, as plaintiff frames the issue, "At his deposition, Dr. Flinders had no opinions as to what the MRI[5] photograph revealed. At trial, he stated a new opinion as to what he saw in the photograph." Plaintiff claims this was error.

We review the evidentiary rulings of the trial court for abuse of discretion, and will not disturb those rulings in the absence of a showing of a manifest abuse of that discretion. (See e.g., *People v. Bolin* (1998) 18 Cal.4th 297, 321-322.)

Sections 2034.210 et seq. govern the designation and exchange of information concerning expert trial witnesses. "The purpose of [former] section 2034 is to permit parties to adequately prepare to meet the opposing expert opinions that will be offered at trial. '"'[T]he need for pretrial discovery is greater with respect to expert witnesses than it is for ordinary fact witnesses [because] . . . . [¶] . . . the other parties must prepare to cope with witnesses possessed of specialized knowledge in some scientific or technical field. They must gear up to cross-examine them effectively, and they must marshal the evidence to rebut their opinions." (1 Hogan & Weber, Cal. Civil Discovery (1997) Expert Witness Disclosure, § 10.1, 525.)' (*Bonds v. Roy* (1999) 20 Cal.4th 140, 147.) When an expert deponent testifies as to specific opinions and affirmatively states those

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[5] Contrary to plaintiff's description, the photograph in issue was not produced by an MRI but by a camera inserted into plaintiff's shoulder during surgery.

are the only opinions he intends to offer at trial, it would be grossly unfair and prejudicial to permit the expert to offer additional opinions at trial." (*Jones v. Moore* (2000) 80 Cal.App.4th 557, 565.)

In *Jones v. Moore, supra,* 80 Cal.App.4th 557, the plaintiff sued the attorney who had represented her in a marital dissolution action. One of the alleged acts of malpractice concerned the defendant's failure to use various assets of the plaintiff's former husband, including a pension plan, as security for his promissory note to her. The defendant's designated legal expert on the standard of care "was not asked during his deposition about the pension plan and was not asked to affirmatively state that his opinions at trial would be limited to those expressed during his deposition." (*Id.* at 566.) Over plaintiff's objection, the trial court permitted the expert to offer his opinion that the pension plan could not be used as security for the promissory note. The appellate court ruled that, "[u]nder these circumstances, the trial court did not abuse its discretion in permitting [the expert witness] to testify regarding the pension plan." (*Ibid.*)

As plaintiff asserts, "a party's expert may not offer testimony at trial that exceeds the scope of his deposition testimony *if* the opposing party has no notice or expectation that the expert will offer the new testimony. . . ." (*Easterby v. Clark* (2009) 171 Cal.App.4th 772, 780.) However, unlike the expert in *Jones v. Moore, supra,* 80 Cal.App.4th 557, Dr. Flinders did not state that the opinions he expressed at his deposition were his only opinions. Moreover, the color photographs were created by plaintiff's treating physician, and were introduced into evidence by plaintiff. If plaintiff wished to discover if Dr. Flinders had any expert opinions based on the color photographs, it was incumbent upon her to present those photographs to the doctor at his deposition. Finally, it is difficult to conceive that plaintiff's counsel would not expect that the defense medical expert would not be permitted to comment on evidence introduced by the plaintiff in order to rebut Dr. Broukhim's medical conclusions based on that evidence. Dr. Flinders made clear in his deposition that he did not believe that the MRIs of plaintiff's shoulder indicated a labral tear, although Dr. Broukhim had come to a

different conclusion. It was therefore hardly unexpected that Dr. Flinders would fail to find a labral tear on the intraoperational photographs.

In short, plaintiff was not blindsided by Dr. Flinders's opinion concerning the medical conclusions to be gleaned from the photographs which the doctor saw for the first time on the morning of his appearance in court, and the trial court did not abuse its discretion in permitting this testimony.

b. *Secondary gain and subliminal magnification of symptoms*

On direct examination, over plaintiff's objection, Dr. Flinders explained the concept of "secondary gain." He testified: "When we evaluate someone for surgery or for an illness that they have and the treatment they would like to have, we take into consideration many different factors, not only their functional ability and their anatomical changes, the findings that we have on examination and on x-rays and MRI scans, but also their state of mind. [¶] . . . [¶] In regards to secondary gain, there is overt secondary gain. You are out to get something. There's – we talked about – he mentioned subliminal. Big word. It means you are not consciously aware of it. It's something working in the background." Dr. Flinders gave examples of subliminal secondary gain: "Am I having the surgery because I don't want to do my job anymore? Do I need more attention from my husband? Would I like the kids to help me more around the house? These are not things that are necessarily working in the forefront of your mind. It could be in the background that [it]'s going on. And a physician who is aware of their patient and gets to know their patient should be cognizant and aware of what's going on in their life in that regard." On direct examination, Dr. Flinders opined that plaintiff was not "consciously lying" or overtly seeking secondary gain. On cross-examination, he opined that plaintiff exhibited "subliminal symptom magnification," likely for the non-financial secondary gain of the support and household help which her children provided in response to her injuries.

Plaintiff maintains that the trial court erred in permitting this testimony because it was beyond the scope of Dr. Flinders's expertise since he is not a psychologist, and

because his testimony was not based on objective findings from a medical examination and was therefore unfounded speculation.

As noted above, evidentiary rulings of the trial court are reviewed for an abuse of discretion. "With respect to a witness proffered as an expert, the issue of qualifications is left to the exercise of discretion by the trial court. If the witness is found to have disclosed 'sufficient knowledge of the subject to entitle his opinion to go before the jury', the court abuses its discretion by excluding the expert. (*Brown v. Colm* (1974) 11 Cal.3d 639, 646–647 [][exclusion of witness on standard of care erroneous when based on lack of personal experience at the time period in question].) 'Where a witness has disclosed sufficient knowledge, the question of the degree of knowledge goes more to the weight of the evidence than its admissibility. [Citation.]' (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18.)" (*In re Roberto C.* (2012) 209 Cal.App.4th 1241, 1249.)

Plaintiff first challenges Dr. Flinders's qualifications to opine on secondary gain by citing cases in which a psychologist or psychiatrist testified about the concept, including one published opinion, *People v. Hall* (2010) 187 Cal.App.4th 282, 289, and five unpublished federal cases. However, none of the cited cases is concerned with the qualifications of the expert to render an opinion on secondary gain. Here, plaintiff does not craft a legal argument but instead submits the results of a search of appellate opinions which contain the term "secondary gain."

Plaintiff next cites *Nichols v. American Nat. Ins. Co.* (8th Cir. 1998) 154 F.3d 875 to argue that Dr. Flinders's secondary gain testimony improperly invaded the province of the jury. In that case, a psychiatrist called by the defense opined that the plaintiff "was a malingerer motivated by financial gain" (*id.* at 883), essentially telling the jury that in her professional opinion, the plaintiff was not to be believed. In the words of the appellate court, the expert "did more than explain psychiatric terms and the situations in which they may arise. She provided her own opinion that [the plaintiff's] statements to [the expert] were influenced by recall bias, secondary gain, and malingering." (*Ibid*.) Thus, her testimony "went beyond the permissible areas." (*Id.* at 883-884.)

Unlike the expert in *Nichols v. American Nat. Ins. Co., supra,* 154 F.3d 875, in this case, Dr. Flinders briefly explained the term "secondary gain," but did not opine that plaintiff was untruthful in testifying about her subjective experience of pain. Dr. Flinders is a board-certified orthopedic surgeon with 32 years of experience. Throughout his career, he had conducted "utilization reviews" for the motion picture industry, consisting of the review of medical records, either before or after surgery, to assess the need for surgery or the efficacy of a performed surgery and the reasonableness of the medical bills. Dr. Flinders reviewed plaintiff's medical records and orthopedically examined her. Given these circumstances, we hold that the trial court did not abuse its discretion in concluding that Dr. Flinders was qualified to render opinions on the subject of plaintiff's injuries, factors orthopedic surgeons consider when deciding whether to operate, including the factor of secondary gain, and whether plaintiff was magnifying her symptoms.

The defense position throughout this trial was that while plaintiff suffered soft tissue damage as a result of the accident with defendant, those injuries were minor and resolved with treatment within, at most, several months of the accident. Defendants never suggested that plaintiff was malingering or was in any way misrepresenting her subjective experience of pain or discomfort. Rather, they presented evidence of alternative sources of plaintiff's shoulder and elbow complaints: A pre-existing shoulder condition (type 3 downsloping acromion and arthritis) and injuries resulting from plaintiff's repetitive assembly line work. They also sought to present evidence to the jury to explain why plaintiff would choose to undergo surgeries if her injuries were as described by Dr. Flinders. This evidence included the concept of subliminal symptom magnification and secondary gain, concepts which are acknowledged in the medical literature as factors to consider in patient treatment, as well as the substantial influence a medical professional can exert, wittingly or unwittingly, on a patient's decision to undergo elective surgery. The trial court's decision to allow Dr. Flinders to testify on a limited basis to these matters was not an abuse of discretion.

c. *Factual basis for opinion testimony*

Plaintiff asserts that the entirety of Dr. Flinders's testimony was conjecture and speculation, and thus does not provide substantial evidence for the verdict. She states there was no evidence in the record for any of Dr. Flinders's opinions, including (1) plaintiff suffered only minor, transitory injuries, (2) plaintiff's shoulder did not have a labral or rotator cuff tear, and (3) Dr. Broukhim did not repair a labral tear, but only "debrided" the labrum.

"As has been said many times and by many courts, when the 'findings of fact are challenged in a civil appeal, we are bound by the familiar principle that "the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below. [Citation.]' (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1100.) 'In applying this standard of review, we "view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. . . ." [Citation.]' (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1096.) '"Substantial evidence" is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value.' (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) We do not reweigh evidence or reassess the credibility of witnesses. (*Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 622.) We are 'not a second trier of fact. . . .' (*James B. v. Superior Court* (1995) 35 Cal.App.4th 1014, 1021.) A party 'raising a claim of insufficiency of the evidence assumes a "daunting burden." [Citation.]' (*Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 678.)" (*Pope v. Babick* (2014) 229 Cal.App.4th 1238, 1245-1246.)

Here, the jury found that the automobile accident did not cause plaintiff to need shoulder or elbow surgery. Substantial evidence supports this finding: Plaintiff did not recall that any part of her body struck the inside of her vehicle during the accident; she did not sustain any bruises or swelling at the time of the accident; x-rays taken in the emergency room were normal, revealing only pre-existing problems in the left shoulder

including arthritis and a downsloping acromium; plaintiff returned to work following the accident until, 12 days later, her attorney-referred chiropractor put her on disability leave for neck and back complaints (which were not consistent with the emergency room findings); and upon discharge from the chiropractor three months later, plaintiff had no complaints other than left shoulder pain. She continued to work capping bottles in an assembly line without doctor-ordered restrictions until March 2011, when she had surgery on the left shoulder.

In addition, the defense medical expert testified that the MRIs of plaintiff's shoulder did not reveal a torn rotator cuff or a labral tear, nor did the radiologists' reports of those tests note such injuries. Both plaintiff's treating surgeon and defendant's orthopedic expert agreed that plaintiff's downsloping acromion could cause her rotator cuff tendon to become frayed and worn, causing inflammation or bursitis, as can repetitive activities. Similarly, inflammation of the ulnar nerve in the elbow, which precipitated plaintiff's May 2012 elbow surgery, is commonly caused by repetitive activities. No bruising or swelling of the elbow was noted in plaintiff's medical records until after she was discharged from the chiropractor's care with no elbow complaints.

In sum, the jury's verdict was supported by substantial evidence.

3. *Denial of new trial motions*

Plaintiff moved for a new trial contending that the damage award was insufficient, and that there was insufficient evidence to justify the jury's verdict.[6] The trial court denied the motion. Plaintiff contends this was error.

Section 657 authorizes the grant of a new trial based on inadequate damages.

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[6] Plaintiff also argued that she was entitled to a new trial due to the trial court's errors in dismissing Juror No. 12 and in permitting Dr. Flinders to testify to matters not included in his deposition and about plaintiff's purported subliminal magnification of her symptoms and motivation to seek secondary gain. However, as we have ruled that the trial court did not err in these matters, plaintiff cannot rely on this evidence to argue that the court erred in denying her motion for new trial based on these matters.

(§ 657, subd. (5).) "A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, 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." (*Ibid.*) A trial court's decision to grant or deny a motion for a new trial rests within its sound discretion; its determination will not be disturbed on appeal unless a manifest abuse of discretion appears. (*Kauffman v. De Mutiis* (1948) 31 Cal.2d 429, 433-434; *Brignoli v. Seaboard Transportation Co.* (1947) 29 Cal.2d 782, 792; *Mazzotta v. Los Angeles Ry. Corp.* (1944) 25 Cal.2d 165, 169.) "It is the duty of the trial court in considering such a motion to weigh the evidence, to exercise its independent judgment and to grant a new trial if it clearly appears from the evidence believed by it that the damages were inadequate, and if the motion is granted, the only question presented on appeal from the order granting such motion is the question of whether the trial court abused its discretion in determining that the damages awarded were inadequate. [Citations.] Where, as here, there was a conflict in the evidence as to the extent and permanency of plaintiff's disability and the evidence would justify the award of increased general damages, we cannot say as a matter of law that the trial court abused its discretion in granting a new trial on the insufficiency of the evidence. [If] there is substantial evidence to support the conclusion of the trial court as to the inadequacy of damages awarded, its conclusion should not be disturbed by an appellate court. [Citation.]" (*Patterson v. Rowe* (1952) 113 Cal.App.2d 119, 122-123.)

In *Dodson v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931 (*Dodson*), our colleagues in Division Eight of this District Court of Appeal had occasion to consider the question presented on this appeal. There, the jury rendered a special verdict finding that the defendant J. Pacific's negligence was a cause of the plaintiff Dodson's injuries; that Dodson suffered $16,679 in economic damages but no noneconomic damages; and that Dodson's negligence caused 50 percent of his injuries. Dodson was therefore awarded $8,339.50. The trial court denied Dodson's motion for new trial based on inadequate damages, which ruling Dodson appealed.

The appellate court reviewed the case law regarding the failure to award noneconomic pain and suffering damages in cases of established negligence liability. It observed: "In some cases, courts have found jury awards which fail to compensate for pain and suffering inadequate as a matter of law. (E.g., *Haskins v. Holmes* (1967) 252 Cal.App.2d 580, 585-586 (*Haskins*) [award insufficient where plaintiff sustained severe head injuries necessarily requiring surgery, but the trial judge awarded only $88.63 in excess of the plaintiff's actual medical expenses, in effect 'allowing nothing for pain and suffering'; it was 'patently obvious' that 'substantial pain, suffering, shock and inconvenience' necessarily and inevitably accompanied the injuries].) The courts have also stated, however, that an award that does not account for pain and suffering is 'not necessarily inadequate as a matter of law' (*id*. at 586), and that '[e]very case depends upon the facts involved.' (*Miller v. San Diego Gas & Elec. Co.* (1963) 212 Cal.App.2d 555, 558 (*Miller*).)" (*Dodson , supra,* 154 Cal.App.4th at 936, fn. omitted.)

The *Dodson* court continued: "The controlling rule, we believe, was best stated in *Miller*, which affirmed a jury verdict that made no allowance for pain and suffering. *Miller* distilled this principle from the precedents it reviewed: Cases 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.' (*Miller, supra,* 212 Cal.App.2d at 558.) In such situations, *Miller* concluded, '[i]t is of course clear that . . . a judgment for no more than the actual medical expenses occasioned by the tort would be inadequate.' (*Ibid.*) On the other hand, a verdict may properly be rendered for an amount less than or equal to medical expenses in cases where, 'even though liability be established, a jury may conclude that medical expenses paid were not occasioned by the fault of the defendants.' (*Miller* at 559; see also *Haskins, supra,* 252 Cal.App.2d at 586 [an award 'for the exact amount of, or even less than, the medical expenses is not necessarily inadequate as a matter of law, because in the majority of cases there is conflict on a variety of factual issues – whether plaintiff received any substantial injury or suffered any substantial pain, or whether the medical treatment was actually given or given as a result

of the injuries, or reasonable or necessary'].)" (*Dodson, supra*, 154 Cal.App.4th at 936-937, fn. omitted.)

Here, as in *Miller, supra*, 212 Cal.App.2d 555 and *Haskins, supra*, 252 Cal.App.2d 580, there were conflicts in the evidence – for example, whether the medical treatment plaintiff received was reasonable and necessary, and whether the surgeries were caused by the accident – which explain the jury's failure to award noneconomic damages. And while plaintiff challenges the sufficiency of Dr. Flinders's testimony to support the defense theory that the surgeries were not causally related to the accident, the jury could have come to this conclusion in the absence of any expert testimony at all, based on the evidence that plaintiff did not recall striking her body against the inside of the vehicle; did not sustain any bruises or swelling as a result of the accident; x-rays taken at the emergency room were normal and revealed only pre-existing problems in the left shoulder, i.e., arthritis and downsloping acromium; plaintiff returned to work for 12 days following the accident until her attorney-referred chiropractor put her on disability for neck and back complaints; and after her disability leave ended, plaintiff returned to work her assembly line duties which required the repetitive movement of her elbows and shoulders.

In reviewing a claim of insufficient evidence to support the verdict, "[w]e do not review the evidence to see if there is substantial evidence to support the losing party's version of events, but only to see if substantial evidence exists to support the verdict in favor of the prevailing party. Thus, we *only* look at the evidence offered in [respondent's] favor and determine if it was sufficient." (*Pope v. Babick*, *supra*, 229 Cal.App.4th at 1245.) Here, substantial evidence supports the verdict.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GOODMAN, J.*

We concur:

TURNER, P.J.

KRIEGLER, J.

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