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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

GAREY L. ESTELLE, Plaintiff and Respondent, v. LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, Defendant and Appellant.	B268085 (Consolidated with B269626) (Los Angeles County Super. Ct. No. BC526217)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County, Charles F. Palmer, Judge. Judgment affirmed as modified, orders affirmed.

Peterson • Bradford • Burkwitz, Avi Burkwitz, Sherry M. Gregorio and Gil Burkwitz; Greines, Martin, Stein & Richland, Alison M. Turner and Feris M. Greenberger for Defendant and Appellant.

Pine Pine Freeman Tillett, Norman Pine, Stacy Freeman, and Scott Tillett; Aquino Law Firm and Rhonel T. Aquino; Hurwitz, Orihuela & Hayes and Cory H. Hurwitz for Plaintiff and Respondent.

INTRODUCTION

A jury found the Los Angeles County Metropolitan Transportation Authority (MTA) failed to accommodate the disability of one of its bus drivers, Garey Estelle, and failed to engage in the interactive process to discuss accommodating his disability. The jury awarded Estelle $625,000, consisting of $350,000 in past noneconomic damages and $275,000 in future noneconomic damages. The trial court denied the MTA's posttrial motions based on judicial estoppel and insufficiency of the evidence to support the damages award. In addition, the trial court, using a lodestar multiplier of 1.5, awarded Estelle $752,925.92 in statutory attorneys' fees.

We conclude that the trial court did not err in declining to apply judicial estoppel to vacate the jury's verdict and that substantial evidence supports the jury's award of noneconomic damages. We also conclude the trial court did not abuse its discretion in applying the lodestar multiplier and making an award of supplemental attorneys' fees for the time counsel for Estelle spent opposing the MTA's posttrial motions. Therefore, we modify the judgment to correct a clerical error and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Estelle Drives a Bus for the MTA for over 22 Years but Becomes Disabled by a Knee Injury*

Estelle drove a bus for the MTA for 22 years and eight months, until the MTA terminated his employment in June 2013. He worked in Division 3202, which was known as "Division 2," and drove 300 to 500 passengers each day. Estelle enjoyed his

work as a bus driver because it gave him an opportunity to be outside and interact with people, and he liked driving. He testified, "So it afforded me the opportunity to drive, and just seeing people, like children that used to ride my bus, now they are adults, and they have a family. So seeing the progress of them growing up to have their own family. And so that was one of the biggest perks of being a bus driver." Estelle had "a special kinship" with his elderly and disabled passengers because his grandmother had raised him when she was elderly and he had relatives who were disabled. He also had a "special bond" and "camaraderie" with his fellow bus drivers.

Estelle drove two kinds of MTA buses, the 5000 series bus and the larger 7000 series bus. When Estelle drove a 5000 series bus, the fare box bumped against his knee, and his left leg pressed against the side of the driver's compartment of the bus so that he could not extend his leg or move it freely.[1] The driver's compartment of the 7000 series bus had more room, and Estelle's left leg did not press against the interior of the compartment. The bus driver's seat in the 7000 series bus also moved much farther back than the seat in the 5000 series bus. Estelle drove the 7000 series bus on an hour or hour and a half route in the morning, called a "tripper," and drove the 5000 series bus on a seven or eight hour route in the afternoon.

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[1] Estelle was six feet tall and weighed approximately 285 pounds.

The driver's compartment in the 5000 series bus affected Estelle's ability to drive because he could not extend his leg and knee for extended periods of time, which caused Estelle significant discomfort. He was unable to move the seat of the 5000 series bus back to get more room. Several bus drivers brought these issues up at Division 2 safety meetings with Karla Aleman, the transportation operations manager, and Demetrius Jones, an assistant transportation operations manager. The managers said they would "check into it."

B. *The MTA Fails To Accommodate Estelle's Disability or Engage in the Interactive Process*

In early 2013 Estelle began experiencing daily stiffness, soreness, and throbbing pain in his knees. Estelle heard "a popping or grinding sound" in the mornings, and he experienced more intense pain at the end of the work day when his shift ended. The pain affected his day-to-day activities and his work, and made it hard for him to drive a 5000 series bus. Estelle testified, "Well, by me continuing to get the 5000 [series] buses, it made it difficult to really be focused on just driving the bus, doing my job to the best of my ability, and it was more so you're feeling the pain, but you are still trying to do your job." He explained, "Well, the position that my knee was in for an extended period of time. Being in sort of a bent or folded position. It caused a lot of discomfort. It took a lot of the focus away because you're constantly feeling the pain, and at no point was I able to extend my leg fully. And so I still had to work the turn signal. So it caused a considerable amount of discomfort."

Estelle spoke with Jones four to six times about the pain and the problems he was having with his knees, and he told Jones that driving the 5000 series buses was causing pain in his knees because he was not able to extend his leg. Estelle asked if the MTA could switch the buses he was driving in the morning and the afternoon, so that he could drive a 5000 series bus on the shorter, morning "tripper" and a 7000 series bus on the longer afternoon route. Estelle said the pain he experienced during his long afternoon shift in the 5000 series bus impeded his ability to operate the bus safely and put the public at risk. The MTA did not respond.

On February 23, 2013 Estelle submitted a report to the division manager. Estelle wrote, "Each day I receive a . . . 5000 series bus . . . . The configuration of the coaches causes extreme discomfort to my lower back, knees, and shoulder area. The main problem being the seats on these coaches do not go back far enough or not at all. I sign on at 9:30 a.m. and get off around 7:04 p.m. That's too long of a day to be in the position in a bus where there's no relief from my pain." After referencing that he had a disability, Estelle proposed the MTA let him drive the shorter morning tripper in a 5000 series bus and the longer afternoon shift in a 7000 series bus. He wrote: "[E]ach morning I receive a 7000 series bus to do a one-way tripper and pull in the yard. Why not switch the coaches? Let the morning operator take out a 7000 series, and I take a 5000 and do the tripper. That way, it ensures me a day of not suffering. Also, it meets the federal law. I hope this small but inconvenient problem can be solved. Thank you." The MTA did not respond or grant his request for an accommodation.

On February 28, 2013 Estelle submitted another report to Division 2 management.[2] Estelle again said the 5000 series bus was causing him pain and creating a public safety issue. Estelle again proposed a simple solution: switch the morning and afternoon buses he drove. The MTA still did not respond or grant his request for an accommodation.

Estelle submitted similar forms on March 1, 2013, March 4, 2013, March 11, 2013, March 14, 2013, March 18, 2013, April 17, 2013, and April 24, 2013. In the April 17, 2013 report, Estelle wrote that continuing to require him to drive 5000 series buses created an unsafe or hazardous working condition and put the public at risk because the buses were causing him such pain and discomfort. Estelle testified he wrote this because, as the pain and throbbing in his knee increased, it distracted him from focusing on driving and forced him to keep trying to position himself to relieve the stress on his left leg and knee. He again proposed switching buses for his long and short routes.

The MTA did not respond to any of Estelle's requests for accommodation. When asked how the MTA's failure to respond to his requests for accommodation made him feel, Estelle testified: "Angry, frustrated, ignored. To me, I thought it was just a simple request. I never had at no point said I wouldn't

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[2] Estelle used a form called a SAFE-7 form, which a supervisor had told him to use for this purpose. The same supervisor told Estelle other drivers in Division 2 were experiencing the same problems with the 5000 series buses. Several other bus drivers testified at trial about the problems they experienced with the driver's compartment in the 5000 series buses.

drive any bus. I was just asking to be accommodated or for some help to help my day be more easier, safer, and overall help me with what I have to do." In fact, after Estelle began submitting requests for accommodation in February 2013, the MTA, rather than responding to Estelle or accommodating his disability, actually increased Estelle's driving assignments on 5000 series buses so that he was driving the smaller bus more frequently on his longer afternoon shift. As a result, the pain in his Estelle's knees increased after he began requesting an accommodation.

Meanwhile, on March 8, 2013 Estelle completed his morning tripper but was unable to drive his afternoon shift because the pain in his left knee was more severe that day. He spoke with Aleman, who authorized him to see the "company doctor," which Estelle did. Estelle felt the company doctor was dismissive and belittled him. When Estelle told the doctor the 5000 series buses were causing his knee problems, the doctor told Estelle, who was 52 years old at the time, "You're like an old car. You have a lot of miles on you." Estelle saw the company doctor six to eight times, during which time the pain in Estelle's knee increased. The doctor eventually ordered an MRI, which showed Estelle had moderate or severe chondromalacia, a chronic disease of the knee.

C. *The MTA Terminates Estelle's Employment*

On April 26, 2013 Estelle was involved in an accident. Estelle was experiencing knee pain while driving a 5000 series bus. The tire of the bus Estelle was driving bumped into and rolled onto the curb, and a passenger on the bus fell, although Estelle did not see or hear him fall. Estelle did not report the incident.

On May 3, 2013 Aleman summoned Estelle to her office and told him he had been in an accident he had not reported. Estelle said he had no knowledge of an accident. Aleman said she had a video showing the incident, and she accused him of gross misconduct in failing to report that a man had fallen on the bus. The MTA ultimately terminated Estelle's employment in June 2013, four months before his pension fully vested. Estelle's knee pain continued after his termination and through trial, and limited his physical activities.

D. *Estelle Goes to Trial on Six Causes of Action, Wins Some, Loses Some*

Estelle filed this action on October 31, 2013 under the Fair Employment and Housing Act (FEHA). The operative first amended complaint included causes of action for disability discrimination, failure to make reasonable accommodations, failure to engage in the interactive process, harassment, and wrongful termination.[3] Estelle alleged he suffered from "two bulging [discs] on the left side of his neck that press[ed] on a nerve," which constituted a partial disability and for which he received a work restriction that permitted him to work without a dress tie. Estelle alleged Jones nevertheless gave him "a hard time about having a disability particularly because [Estelle] was not wearing a dress tie." Estelle also alleged he began having severe pain and stiffness because the MTA assigned him to drive the 5000 series buses, which "did not offer enough leg room space

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[3] Estelle subsequently dismissed his causes of action for disability harassment, violation of Labor Code section 203, and age discrimination, and all causes of action against Jones.

to operate the bus safely for bus operators who have [his] build." Specifically, Estelle alleged "his left leg was pressed up against the emergency brake" and was "very close to the steering wheel," and, "[b]ecause his left leg controlled the turn signals," he had to make "a lot of difficult and quick repetitive movements using his left leg within a very small confined area."

Estelle alleged these health and safety concerns caused him to submit safety forms and requests for accommodation, all of which the MTA ignored. Estelle also asked Jones to let him drive the larger 7000 series buses, which Jones refused. Estelle claimed the MTA failed to accommodate him and discriminated against him because of his neck and leg disabilities, and refused to engage in good faith in an interactive process to discuss accommodating his disabilities. Estelle also alleged the MTA discriminated against him based on his age (he was 52) and harassed him by falsely accusing him of failing to report an accident as an excuse to discipline him or terminate his employment.

After an 11-day jury trial in June 2015 on six of Estelle's causes of action (disability discrimination, failure to accommodate, failure to engage in the interactive process, and three retaliation claims), the jury found the MTA failed to reasonably accommodate his physical disability and failed to engage in the interactive process. Specifically, the jury found the MTA knew Estelle had a physical disability, Estelle was able to perform the essential job duties with reasonable accommodation, the MTA failed to provide a reasonable accommodation, Estelle's proposed accommodation would not have created an undue hardship in the operation of the MTA's business, and the MTA's failure to provide reasonable accommodation was a substantial

factor in causing harm to Estelle. The jury made similar findings on Estelle's cause of action for failure to engage in the interactive process, and found that, while Estelle was willing to participate in an interactive process, the MTA failed to do so. On Estelle's other causes of action, the jury found the MTA knew Estelle had a disability and Estelle opposed a discriminatory practice by the MTA, but neither Estelle's disability nor his opposition to the MTA's discriminatory practice was a substantial motivating reason for the MTA's decision to discharge him. The jury also found Estelle reported a bona fide safety or health issue to the MTA and had reasonable cause to believe the information he disclosed was a violation of law, but neither his reporting nor his disclosure was a contributing factor in the MTA's decision to terminate his employment. The jury awarded Estelle no past or future economic damages, but awarded him $350,000 in past noneconomic damages and $275,000 in future noneconomic damages.[4]

E. *The Trial Court Denies the MTA's Motions for JNOV and a New Trial*

On August 10, 2015 the MTA moved for judgment notwithstanding the verdict and a new trial. At some point counsel for the MTA learned Estelle had filed for bankruptcy several times, including a Chapter 7 filing in 2012 and a Chapter 13 filing in May 2014, the latter of which occurred during the

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[4] The judgment states the jury awarded $375,000, rather than $350,000, in past noneconomic damages and $250,000, rather than $275,000, in future noneconomic damages. The parties agree this was a mistake, which we will correct.

pendency of this action.[5] The MTA argued in its posttrial motions it did not learn about Estelle's May 2014 Chapter 13 bankruptcy until after the jury had returned its verdict and counsel for the MTA had done some research. MTA argued its attorney "did not know about the 2014 bankruptcy action prior to trial and, therefore, did not have the opportunity to ask Estelle any questions about it during deposition or written discovery," and, had he known about it, "there would have been some additional discovery requested as part of this defense."

The MTA argued Estelle's failure to list this action on his Chapter 13 bankruptcy schedules as an asset barred his causes of action under the doctrine of judicial estoppel. In its motion for a new trial, the MTA argued its attorneys' recent discovery Estelle had filed bankruptcy in 2014 constituted newly-discovered evidence entitling the MTA to a new trial under Code of Civil Procedure section 657, subdivision (4). The MTA argued it had been reasonably diligent in learning of the bankruptcy because Estelle never disclosed he had filed bankruptcy in 2014, even though the MTA had served numerous written discovery requests.

The MTA also argued substantial evidence did not support the jury's award of noneconomic damages. The MTA argued, "Throughout trial, the focus of Estelle's noneconomic/emotional distress damages was solely related to his termination from the MTA," and "there was no evidence that Estelle had suffered emotional distress damages relating to his claims for failure to accommodate or failure to engage in the interactive process."

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[5] Estelle also filed a Chapter 7 petition in 2003.

In his supporting declarations, counsel for the MTA stated: "During the 18 months of litigating this action, there was extensive discovery that included over 20 depositions, and multiple sets of written discovery, and production of documents. Of import, my office served various written discovery on Mr. Estelle requesting written statements and documents supporting or relating to his claims of economic and emotional distress. However, there was no time that Mr. Estelle, to my knowledge or recollection, ever indicated that he had filed for bankruptcy in 2014 even though he had claimed the discharge caused him financial stress, caused him to live day to day and caused his home to go into foreclosure. Mr. Estelle did not ever mention during his deposition, nor during any written discovery in response to interrogatories, that he had filed a bankruptcy petition during this case, even though he did complain[ ] on financial strain being placed on him as a result of his termination, and testified at great length about emotional distress related to discharge." Counsel for the MTA added that Estelle also made no mention of a bankruptcy filing to the doctor who conducted his defense medical examination.

With respect to the timing of raising the judicial estoppel issue for the first time in a posttrial motion, counsel for the MTA stated that, after Estelle testified at trial he had no "financial stressors in early 2013" but "a lot of financial stress" after the termination of his employment in June 2013, counsel for the MTA did some research. Counsel stated: "Following this testimony and in preparation for my cross exam, I sought to impeach Mr. Estelle's claim he had no financial stressors as of early 2013, and looked into the court docket of the timing for his 2012 Bankruptcy filing that I had recently been made aware of

by a private investigator." Counsel said he "looked further" after the adverse jury verdict and learned "Mr. Estelle had filed a Chapter 13 bankruptcy petition in May 2014" and had "never disclosed this case to the Bankruptcy court in any of the bankruptcy filings. Mr. Estelle also failed to disclose the existence of his bankruptcy filing in this action." Counsel for the MTA stated: "Had I known during discovery that Mr. Estelle failed to disclose this case to the Bankruptcy court, I would have done discovery on this subject and would have asked him questions about this topic in deposition. Also, I would have certainly filed a dispositive motion on this issue . . . . Had I know[n] about the failure to identify this case to the bankruptcy court, I would have raised the issue of judicial estoppel. During the discovery phase of this case I had no reason to suspect that Mr. Estelle had filed for bankruptcy in 2014 or that he would fail to identify this civil action to the Bankruptcy Court."

In opposition to the MTA's posttrial motions, Estelle argued the MTA could not show "it exercised 'reasonable diligence' in discovering [the bankruptcy] information because it was never specifically requested in discovery and was freely available on the federal court's PACER system,"[6] which, Estelle pointed out, was

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[6] "'PACER' is an acronym for Public Access to Court Electronic Records" and "is a service available for members of the public to examine documents filed in court proceedings." (*In re Vanamann* (Bankr. D.Nev. 2016) 561 B.R. 106, 117, fn. 23.) With the PACER system, "system users can view and print case filings, judicial opinions, and other docket information from the federal trial, bankruptcy, and appellate courts." (*In re Application for Exemption from Electronic Public Access Fees by Jennifer Gollan and Shane Shifflett* (9th Cir. 2013) 728 F.3d 1033, 1035.)

"the same system [the MTA] used to discover [Estelle's 2012] Chapter 7 filing and used to impeach him during cross-examination." Estelle also suggested that, because the MTA did "not even offer clear evidence that it was truly ignorant of the [2014] filing," the MTA "likely . . . did know of it but chose not to use it." Estelle also argued the MTA had failed "to show (or even argue) that the evidence was material to the case and likely [would] have brought a different verdict." (Emphasis omitted.) Estelle argued, "It is difficult to believe that the investigator, [counsel for the MTA], and the remaining members of [the MTA's] team were unaware of [Estelle's] Chapter 13 filing [in 2014] but were fully aware of his Chapter 7 filing" in 2012. As shown by a screenshot Estelle submitted of a page from PACER listing all three of Estelle's bankruptcy filings, Estelle explained that, had his "name been entered into the PACER system, the [2014] Chapter 13 filing would be prominently displayed." Finally, Estelle argued substantial evidence supported the noneconomic damages verdicts.

Relying on his supporting declaration, Estelle also argued his omission of this action from his bankruptcy schedules was a mistake. Estelle stated in his declaration, "I filed for Chapter 13 bankruptcy protection on or about May 16, 2014. I do not believe that I included my civil case in my bankruptcy paperwork. I was not aware that I needed to list the lawsuit. I am not an attorney and I am not familiar with the legal process. I completed the initial paperwork without the assistance of counsel. If I did not include the civil case in my bankruptcy paperwork, it was a mistake. I certainly never sought to mislead anyone." Estelle also stated counsel for the MTA never asked him in his deposition whether he had declared bankruptcy but that, had he

been asked, he "would have responded affirmatively." Estelle also said he "fully intend[ed] to correct" any mistake in not including this civil case in his "bankruptcy paperwork."[7]

The trial court denied the motion for judgment notwithstanding the verdict and the motion for a new trial. Citing case law holding that judicial estoppel is an extraordinary remedy to be used sparingly, the court ruled that the MTA had "failed to identify sufficient evidence" that Estelle's failure "to list this action in the pertinent bankruptcy filings was not the result of ignorance or mistake." The court also noted the MTA had not provided any evidence Estelle had told his attorney, or that his attorney had asked, about his claims against the MTA. The court also found, "With respect to MTA's assertion that its discovery of the bankruptcy filing constituted 'newly discovered evidence' for purposes of granting a new trial, it has made insufficient showings of materiality and due diligence."

The court also found there was sufficient evidence to support the jury's award of past and future noneconomic damages. Citing Estelle's testimony that the MTA's failure to respond to his requests for accommodation made him feel angry, frustrated, and ignored, the court stated: "The evidence was that there was no interactive process or any response at all (other than referring [Estelle] to the workers compensation doctor.) Moreover, while there was evidence that [Estelle] did not become

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[7] On September 11, 2015, one month after the MTA filed its posttrial motions raising the judicial estoppel issue, Estelle in fact filed an amended bankruptcy schedule listing the lawsuit and the judgment he had obtained in this action. Estelle's request for judicial notice of his amended bankruptcy schedule is granted.

clinically depressed prior to his termination, there was no evidence that following his termination he did not and does not continue to feel angry, frustrated, and ignored as a result of the MTA's failure to meet its statutory obligations to engage in the interactive process or reasonably accommodate disabilities."

F. *The Trial Court Grants Estelle's Motions for Attorneys' Fees*

The trial court awarded Estelle $752,925.93 in statutory attorneys' fees, which included a 25 percent reduction for time spent on Estelle's unsuccessful causes of action and a lodestar multiplier of 1.5. In a separate order, the court awarded an additional $15,000 in attorneys' fees for time spent opposing the MTA's posttrial motions. The MTA appealed from the judgment and the first order awarding Estelle attorneys' fees, and from the second order awarding supplemental attorneys' fees. This court consolidated the two appeals.

DISCUSSION

The MTA raises two challenges to the judgment and two to the attorneys' fees awards. The MTA argues that the trial court abused its discretion in denying its motions for new trial and JNOV based on judicial estoppel and that substantial evidence does not support the jury's awards of noneconomic damages. With respect to the awards of attorneys' fees, the MTA argues the trial court abused its discretion in applying a lodestar multiplier of 1.5 and had no authority to make a supplemental award.

A. *The Trial Court Did Not Abuse Its Discretion in Denying the MTA's Motion for New Trial Because the MTA Did Not Use Reasonable Diligence in Discovering Estelle's 2014 Bankruptcy*

1. *Applicable Law and Standard of Review*

Code of Civil Procedure section 657, subdivision (4), provides that a court may grant a new trial where there is "[n]ewly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial." The party moving for a new trial has the burden of proving it acted with reasonable diligence in discovering the allegedly new evidence. (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1192; see *Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 727-728 ["[t]he trial court may grant a new trial based on newly discovered evidence if the moving party shows the evidence is newly discovered, reasonable diligence was used to find it, and the new evidence is material to the moving party's case"]; *In re Marriage of Liu* (1987) 197 Cal.App.3d 143, 153-154 ["[i]n making a motion for new trial on this ground, the party seeking relief has the burden to prove that he exercised reasonable diligence to discover and produce the evidence at trial," and "must state the particular acts or circumstances which establish diligence"].) We review the trial court's order denying the MTA's motion for new trial under Code of Civil Procedure section 657, subdivision (4), for abuse of discretion. (*Shiffer v. CBS Corporation* (2015) 240 Cal.App.4th 246, 255; see *Maloof v. Maloof* (1917) 175 Cal. 571, 574 ["[a] motion for new trial on the ground of newly discovered evidence

is addressed to the discretion of the trial court, and the decision will not be disturbed unless an abuse of discretion is clearly shown"]; *Plancarte v. Guardsmark, LLC* (2004) 118 Cal.App.4th 640, 645 ["[a] trial court's broad discretion in ruling on a motion for new trial is accorded great deference on appeal"].)

2. *The MTA Did Not Exercise Reasonable Diligence*

The trial court denied the MTA's motion for new trial in part because the court found the MTA had not acted with sufficient diligence in discovering Estelle's 2014 bankruptcy filing and arguing Estelle's failure to list this action on his bankruptcy schedule barred his claims under the doctrine of judicial estoppel.[8] The trial court did not abuse its discretion in denying the MTA's motion for new trial on this ground.

The evidence showed not only that counsel for the MTA should have known through the exercise of reasonable diligence about Estelle's 2014 bankruptcy, but also that he may even have actually known about it. Counsel for the MTA admitted he knew about Estelle's 2012 bankruptcy at least during trial (after Estelle's direct "testimony and in preparation for [cross-examination]"), if not before (whenever it was he "had recently

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[8] The trial court also found the evidence the MTA claimed was newly discovered was not material. "In the context of a motion for a new trial, 'material' means likely to produce a different result." (*Wood v. Jamison* (2008) 167 Cal.App.4th 156, 161; see *Hill v. San Jose Family Housing Partners, LLC* (2011) 198 Cal.App.4th 764, 779 ["'[t]he newly discovered evidence must be material in the sense that it is likely to produce a different result'"].) The MTA does not directly challenge this finding.

been made aware of [it] by a private investigator"). As Estelle pointed out in opposition to the MTA's posttrial motions, from the facts that (1) counsel for MTA was "made aware" of Estelle's 2012 bankruptcy from a private investigator and (2) a PACER search of Garey Estelle reveals all three of his bankruptcies, it was a reasonable inference that attorneys for the MTA learned of Estelle's 2014 bankruptcy at the same time they learned of Estelle's 2012 bankruptcy. It would have been difficult for a private investigator or the federal court's computer system to find one but not the other. And, although counsel for the MTA never specifically stated in his declaration when he learned of the 2014 bankruptcy, his comments at trial suggested he knew about it during the trial. When counsel for the MTA sought to question Estelle about the 2012 bankruptcy, the court stated, "Well, it sounds like [counsel for the MTA] has done his homework." Counsel for the MTA responded, "I have."

At a minimum, the evidence showed counsel for the MTA should have discovered the 2014 bankruptcy through reasonable investigation after learning of the 2012 bankruptcy. (See *Fomco, Inc. v. Joe Maggio, Inc.* (1961) 55 Cal.2d 162, 165 ["[a] new trial on the ground of newly discovered evidence will be granted only where the affidavit in support thereof recites facts showing that the evidence could not, with reasonable diligence, have been discovered and produced at the trial"]; *Doe v. United Airlines, Inc.* (2008) 160 Cal.App.4th 1500, 1509 ["[g]enerally, when a party seeking a new trial knew, or should have known, about the pertinent evidence before trial but did not exercise due diligence in producing it, the grant of a new trial is error"]; see also *Lee v. West Kern Water District* (2016) 5 Cal.App.5th 606, 630 ["defendants forfeited a defense of judicial estoppel by failing to

raise it until after the jury returned its verdict"].) The accessibility and availability of Estelle's entire bankruptcy history, combined with the MTA's retention of a private investigator to investigate Estelle's "financial stress," supported the trial court's finding that the MTA did not exercise due diligence. (See *Fomco*, at p. 166 [no showing of reasonable diligence because the allegedly newly discovered "fact was a matter of public record open to defendants' discovery at any time upon inquiry or examination of the records"]; *Rubin v. De Lao* (1952) 110 Cal.App.2d 345, 348 [motion for new trial properly denied where it was "clearly inferable [the defendant] did not use due diligence or exert himself in the least to ascertain the existence of" a complaint filed by the plaintiff against a third party because "[s]earching court records is a popular method of acquainting a litigant with the true character or the evil practices of his adversary"].) As counsel for the MTA stated during trial, "If these are filings in court, it does not involve me doing anything other than looking online and getting documents." (See *American Civil Liberties Union v. U.S. Dept. of Justice* (D.C. Cir. 2011) 655 F.3d 1, 7 ["it would take little work for an interested person . . . to look up . . . case files in the public records of the courts, and therein find the information of interest," and, "[a]lthough this can be done manually, it can also be readily accomplished using [PACER]"]; *In re Bailey* (Bankr. E.D. Pa. 2005) 321 B.R. 169, 179 ["as a result of the advent of electronic documents, a few clicks of the mouse enable an attorney to discover that client's bankruptcy history," and "[w]here the client identifies a prior case . . . failure to further investigate the client's bankruptcy history, is inexcusable"].)

The MTA does not directly challenge the trial court's findings of lack of reasonable diligence and lack of materiality. The MTA argues only that it did not learn of Estelle's 2014 bankruptcy until after the trial, and that, "[o]nce the MTA did learn of the 2014 bankruptcy proceeding, including Estelle's failure to disclose the existence of this lawsuit to the bankruptcy court, it raised judicial estoppel in its post-trial motions." The MTA argues it only learned of Estelle's 2012 bankruptcy during Estelle's direct testimony at trial regarding his financial difficulties, during or after which (or perhaps before) counsel for the MTA apparently used a private investigator to retrieve documents from the bankruptcy court. The MTA argues repeatedly that Estelle did not disclose his bankruptcy filings at his deposition or in response to written discovery.

The MTA, however, did not submit any evidence that it asked Estelle whether he had ever filed for bankruptcy, and, if so, what assets he listed on his bankruptcy schedules. The MTA does not point to a single deposition question, document request, interrogatory, or request for admission asking Estelle whether he had ever declared bankruptcy. Counsel for the MTA's declaration in support of the motion for new trial attached "relevant portions" of written discovery served by the MTA on Estelle, but none of these discovery requests includes a question about bankruptcy.[9]

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[9] The closest the MTA may have come was serving interrogatories asking Estelle to state every physical or mental complaint proximately caused by the acts or omissions of the MTA and asking Estelle to state "any injuries, residuals, pain, suffering, anxiety, emotional distress, loss of consortium, inconvenience, any physical impairment or disfigurement . . . ." Estelle quite reasonably responded, "sleeplessness, mood swings,

B. *The Trial Court Did Not Abuse Its Discretion in Denying the MTA's Motions for New Trial and JNOV Based on Judicial Estoppel*

1. *Applicable Law and Standard of Review*

"The doctrine of judicial estoppel prevents a party from taking inconsistent positions during litigation." (*Santa Clarita Organization for Planning and the Environment v. Castaic Lake Water Agency* (2016) 1 Cal.App.5th 1084, 1100.) """"Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] . . ."' [Citation.] The doctrine [most appropriately] applies when: "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake."'" (*MW Erectors, Inc. v. Niederhauser Ornamental and Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 422 (*MW Erectors*); accord, *AP-Colton LLC v. Ohaeri* (2015) 240 Cal.App.4th 500, 507.) "These are mostly questions of fact [citation] requiring consideration of evidence." (*Lee v. West Kern Water District*, *supra*, 5 Cal.App.5th at p. 630.) The party

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depression, irritability, stress and constant worrying, among other things." Interpreting those interrogatories as asking for information about any bankruptcy filings as a cause of Estelle's emotional distress would be a stretch. The MTA also did not identify any discovery asking for a cause of Estelle's noneconomic damages other than the conduct of the MTA.

invoking judicial estoppel has the burden of showing the doctrine applies by proving all of the elements. (See *In re Marriage of Left* (2012) 208 Cal.App.4th 1137, 1149, fn. 8; *Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1467; *Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 735; *People ex rel. Sneddon v. Torch Energy Services, Inc.* (2002) 102 Cal.App.4th 181, 189.)

California courts will not apply judicial estoppel if the party to be estopped by taking inconsistent positions did so as a result of ignorance, fraud, or mistake. (*MW Erectors*, *supra*, 36 Cal.4th at p. 422.; see *Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 841 [""[t]he gravamen of judicial estoppel is . . . the intentional assertion of an inconsistent position that perverts the judicial machinery""]; *Safai v. Safai* (2008) 164 Cal.App.4th 233, 246 [judicial estoppel should be invoked "only in egregious cases . . . where a party misrepresents or conceals material facts"]; see also *Edwards v. Clinical Research Consultants, Inc.* (N.D.Ala., May 24, 2017, No. 2:15-CV-902-TMP) 2017 WL 2265834, at p. 6, fn. 7 ["[j]udicial estoppel is an equitable doctrine [citation] applicable only to prevent the perversion of judicial integrity," and it "is not designed to punish inadvertent or unknowing errors or to provide undeserved windfalls"].)[10] Whether a party took the

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[10] The court in *Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602 suggested that, in lender liability cases, the assertion of inconsistent positions need not be intentional, at least where the borrower fails to disclose, in earlier bankruptcy proceedings involving a creditor, claims the borrower brings in a subsequent civil action against the creditor. (*Id.* at pp. 1605, 1610, 1612.) The court reached this conclusion, however, without discussing the element of estoppel requiring the absence of ignorance, fraud, or mistake, and limited its analysis to distinguishing *Cloud v. Northrop Grumman Corp.* (1998) 67

first position as a result of ignorance, fraud, or mistake is a question of fact for the trial court. (*Lee v. West Kern Water District*, *supra*, 5 Cal.App.5th at p. 630; *Swahn Group, Inc. v. Segal*, *supra*, 183 Cal.App.4th at p. 843.) And "because judicial estoppel is an extraordinary and equitable remedy that can impinge on the truth-seeking function of the court and produce harsh consequences, it must be 'applied with caution and limited to egregious circumstances' . . . ." (*Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 449; accord, *Jogani v. Jogani* (2006) 141 Cal.App.4th 158, 170; see *Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 85-86 ["'[j]udicial estoppel is an extraordinary remedy that should be applied with caution'"].)

Some cases have described the standard of review of the trial court's factual findings in connection with a ruling on the applicability of judicial estoppel as substantial evidence. (See, e.g., *Regents of University of California v. Superior Court* (2013) 222 Cal.App.4th 383, 408; *Owens v. County of Los Angeles* (2013) 220 Cal.App.4th 107, 121.) The substantial evidence test, however, generally applies when, although the plaintiff met its burden of proof at trial, the defendant contends substantial evidence does not support the verdict. (See *Sonic Mfg. Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 465.) Where, however, the defendant failed to meet its burden at trial on an issue, here the defense of judicial estoppel, the issue on appeal is whether the evidence compels opposite findings as a matter of law. Where the trier of fact, here the trial

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Cal.App.4th 995, *Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, and other cases. (See *Hamilton*, at pp. 1610-1614.) In any event, this case is not a lender liability case.

court ruling on posttrial motions, "'expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment. . . . [¶] Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding."'" (*Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 838; accord, *Almanor Lakeside Villas Owners Assn. v. Carson* (2016) 246 Cal.App.4th 761, 769; *Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 395.)

2. *The Trial Court Did Not Err in Declining To Apply Judicial Estoppel*

The trial court found Estelle omitted this action from his 2014 bankruptcy schedules as a result of ignorance or mistake, and the evidence does not compel a contrary finding. Estelle stated in his posttrial declaration it was a mistake. He explained he was not familiar with bankruptcy law and procedures, he completed the bankruptcy petition and schedules without the assistance of counsel, he did not know he needed to list this action on his schedules, and had he known he was supposed to list this action as an asset in his bankruptcy petition he would have done so. (See *Kelsey v. Waste Management of Alameda County* (1999) 76 Cal.App.4th 590, 597 [doctrine of judicial

estoppel did not apply where the defendant failed "to adduce evidence that [the plaintiff] intentionally omitted his claim" from his Chapter 13 bankruptcy schedules]; *Cloud v. Northrop Grumman Corp*. (1998) 67 Cal.App.4th 995, 1019 ["nondisclosure in bankruptcy filings, standing alone, is insufficient to support the finding of bad faith intent necessary for the application of judicial estoppel"]; *Ah Quin v. County of Kauai Dept. of Transp.* (9th Cir. 2013) 733 F.3d 267, 276 ["[i]f Plaintiff's bankruptcy omission was mistaken, the application of judicial estoppel in this case would do nothing to protect the integrity of the courts, would enure to the benefit only of an alleged bad actor, and would eliminate any prospect that Plaintiff's unsecured creditors might have of recovering"].) Estelle stated he would take action to correct the mistake, and he did so almost immediately after receiving the MTA's posttrial motions by filing amended bankruptcy schedules that listed this action. (See *Ah Quin*, at p. 272 ["[a] key factor is that Plaintiff reopened her bankruptcy proceedings and filed amended bankruptcy schedules that properly listed this claim as an asset"].)

The MTA does not argue the evidence before the trial court in connection with the posttrial motions compels a finding Estelle did not act out of ignorance or mistake, or even that substantial evidence does not support the trial court's finding. Instead, the MTA reargues credibility. The MTA asserts the trial court's finding "strains credulity," "[n]o competent person" with Estelle's experience in the bankruptcy courts "can be ignorant or mistaken about the obligation to be honest and to disclose fully," and the willfulness of Estelle's nondisclosure is a "reasonable and inescapable inference" from the evidence. Factual inferences and credibility determinations in connection with judicial estoppel,

however, are for the trial court. (See *Blix Street Records, Inc. v. Cassidy* (2010) 191 Cal.App.4th 39, 49.) The trial court believed Estelle's declaration over the evidence the MTA submitted, and we defer to that determination. (See *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711, fn. 3 ["that the trial court's findings were based on declarations and other written evidence does not lessen the deference due those findings"]; *Ramos v. Homeward Residential, Inc.* (2014) 223 Cal.App.4th 1434, 1441 ["we defer to factual determinations made by the trial court when the evidence is in conflict, whether the evidence consists of oral testimony or declarations"]; *Poniktera v. Seiler* (2010) 181 Cal.App.4th 121, 130 ["we resolve all conflicts in favor of the judgment, even when (as here) the trial court's decision is based on evidence received by declaration rather than by oral testimony"]; *In re Marriage of Nurie* (2009) 176 Cal.App.4th 478, 492 ["we will defer to the trial court's assessment of the parties' credibility, even though the determination was made on declarations rather than live testimony"].)

Finally, even if the MTA had met its "almost impossible" burden of showing the evidence compelled findings contrary to those of the trial court (*Bookout v. State of California ex rel. Dept. of Transportation* (2010) 186 Cal.App.4th 1478, 1486), the trial court still had discretion not to apply judicial estoppel. "[J]udicial estoppel *is an equitable doctrine*, and its application, even where all necessary elements are present, is discretionary." (*MW Erectors*, *supra*, 36 Cal.4th at p. 422; accord, *Lee v. West Kern Water District*, *supra*, 5 Cal.App.5th at p. 630; *Jhaveri v. Teitelbaum* (2009) 176 Cal.App.4th 740, 751; *Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 127; see *Owens v. County of Los Angeles*, *supra*, 220 Cal.App.4th at p. 121 ["[e]ven if the necessary

elements of judicial estoppel are satisfied, the trial court still has discretion to not apply the doctrine"]; see also *New Hampshire v. Maine* (2001) 532 U.S. 742, 750 ["judicial estoppel 'is an equitable doctrine invoked by a court at its discretion'"].) Given that the MTA did not raise the issue of judicial estoppel until after the completion of a lengthy jury trial and that Estelle moved quickly to correct his mistake, declining to vacate the jury's verdict was well within the trial court's discretion.

C. *Substantial Evidence Supports the Jury's Awards of Noneconomic Damages*

1. *Applicable Law and Standard of Review*

"Noneconomic damages compensate an injured plaintiff for nonpecuniary injuries," which include "physical pain and various forms of mental anguish and emotional distress. [Citation.] Such injuries are subjective, and the determination of the amount of damages by the trier of fact is equally subjective." (*Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1332.) Noneconomic damages include more than emotional distress and pain and suffering. (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 300.) "[A] plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal." (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892-893.) "[M]ental suffering frequently constitutes the principal element of tort damages" (*id.* at p. 893) and "may include compensation for the plaintiff's loss of enjoyment of life." (*Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, 763.)

"There is no fixed standard to determine the amount of noneconomic damages. Instead, the determination is committed to the discretion of the trier of fact." (*Corenbaum v. Lampkin*, *supra*, 215 Cal.App.4th at p. 1332; see *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1213 [the amount of noneconomic damages "'is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial'"]; *Garfoot v. Avila* (1989) 213 Cal.App.3d 1205, 1210 [a jury has "relatively unfettered authority and responsibility to calculate damages for pain and suffering"].)

"We review the jury's damages award for substantial evidence, giving due deference to the jury's verdict and the trial court's denial of the new trial motion. [Citations.] 'In considering the contention that the damages are excessive the appellate court must determine every conflict in the evidence in respondent's favor, and must give him the benefit of every inference reasonably to be drawn from the record.'" (*Bigler-Engler v. Breg, Inc.*, *supra*, 7 Cal.App.5th at p. 300; see *Paulus v. Crane Co.* (2014) 224 Cal.App.4th 1357, 1363 [the """"appellate court must read the record in the light most advantageous to the plaintiff, resolve all conflicts in his favor, and give him the benefit of all reasonable inferences in support of the original verdict""""]; *Major v. Western Home Ins. Co.*, *supra*, 169 Cal.App.4th at p. 1208 ["[s]o long as there is 'substantial evidence' to support a jury award, the appellate court must affirm, even if the reviewing court would have ruled differently had it presided over the proceedings below, and even if other substantial evidence would have supported a different result"].) "The 'focus is on the quality, not the quantity, of the evidence.'" (*Jorge v. Culinary Institute of America* (2016)

3 Cal.App.5th 382, 396.) "'An appellate court can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury.'" (*Bigler-Engler v. Breg*, *supra*, 7 Cal.App.5th at p. 299.)

2. *Substantial Evidence Supports the Award of Past Noneconomic Damages*

The MTA argues substantial evidence does not support the jury's award of $350,000 in past noneconomic damages because "the evidence at trial focused on emotional distress attributable to Estelle's allegedly wrongful termination, as opposed to the only causes of action on which, in the end, Estelle prevailed—the MTA's failure to accommodate his knee disability or engage in a good faith interactive process." There was substantial evidence, however, to support the jury's award of past noneconomic damages.

Estelle testified the MTA's failure to respond to any of his requests for accommodation made him feel angry, frustrated, and ignored, particularly because he felt it was a simple request the MTA could easily accommodate. The trial court cited to this testimony in denying the MTA's posttrial motions. Estelle further testified the MTA's failure to respond to his request for the 7000 series bus accommodation caused him concern because he felt it was putting the public at risk. Estelle explained the pain he was experiencing distracted him while he was trying to drive and made him focus "on trying to situate" himself in the bus so he could take the stress off his left knee and leg. Estelle also stated he was upset by the fact the MTA not only ignored his

requests for an accommodation but also responded to his requests by increasing his time driving 5000 series buses.

In addition, Dr. Anthony Reading, a psychologist who examined Estelle, testified that in 2013, before the termination of his employment, Estelle was experiencing "adverse effects on his sleep," "was feeling picked upon somewhat," and felt "more on guard at work [and] some irritability." Dr. Reading stated that, although these symptoms did not indicate a "psychiatric illness at this time," they were "relevant" and "may undermine a person."[11] Dr. Reading also testified Estelle "was aggrieved or upset" not only because he felt "he was terminated unfairly just before he was eligible for retirement and . . . lifelong benefits," but also because "he was requesting accommodation owing to some problems he developed driving the 5000 series bus."[12]

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[11] The jury saw a slide presentation that accompanied Dr. Reading's trial testimony. One of the slides appears to have summarized Estelle's psychological condition while he was working at the MTA prior to June 2013. The slide presentation is not in the record.

[12] Citing *Lee v. Bank of America* (1990) 218 Cal.App.3d 914, 920, the MTA also asserts the evidence of past nonecomomic damages "falls short of the demonstration of severe, substantial, or enduring distress that the law requires." FEHA, however, does not require the plaintiff's emotional distress be severe, substantial, or enduring. As the court in *Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228 explained, the MTA "is confusing a cause of action . . . under the FEHA with a cause of action for the intentional infliction of emotional distress. The latter cause of action can be established only if the plaintiff suffered severe emotional distress. [Citation.] [¶] '[P]roof of the elements of the tort of intentional infliction of emotional distress

Finally, the MTA argues that, "even if the evidence were seen as adequate to support *some* past noneconomic damage award, the amount here—$350,000—is grossly excessive under the meager record."[13] At $350,000, however, the award for past noneconomic damages was relatively modest, and was at the far low end of the $100,000 to $5 million range counsel for Estelle suggested the jury should award. It does not, "at first blush," shock the conscience or suggest passion, prejudice, or corruption. (See *Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 507; *Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 738; *Bigler-Engler v. Breg*, *supra*, 7 Cal.App.5th at p. 299.)

3. *Substantial Evidence Supports the Award of Future Noneconomic Damages*

With respect to the award of future noneconomic damages, the MTA similarly argues "Estelle failed to prove that he would sustain any future emotional distress attributable to the MTA's failure to [accommodate/engage] in an interactive process," and the "only evidence of future emotional distress damages goes to the effects of the failed wrongful termination claim." The MTA contends "Estelle did not even try to establish specifically that he would continue to be afflicted by lingering frustration or other emotional distress over the MTA's failure to accommodate his disability," he "had no evidence to support the proposition that

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is not a prerequisite for the recovery of compensatory damages [under the FEHA] for mental anguish and humiliation.'" (*Id.* at pp. 1246-1247.)

[13] The MTA does not make this argument with respect to the $275,000 award for future noneconomic damages.

the MTA's failure to accommodate/engage in an interactive process *by itself* engendered future emotional distress damages," and "[o]nce the MTA had legitimately removed Estelle from the workplace, the basis for frustration or distress over the lack of accommodation evaporated entirely."

The court in *Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228 (*Taylor*) rejected the same argument and the attempt, like the MTA's attempt here, to segregate the effects of violations of different FEHA provisions into successful and unsuccessful causes of action. In *Taylor* the plaintiff sued his employer for hostile work environment sexual harassment, wrongful termination, and two other causes of action, but prevailed only on the sexual harassment cause of action, for which the jury awarded the plaintiff $150,000 in noneconomic damages. (*Id.* at p. 1235.) The defendant argued the noneconomic damages award of $150,000 "erroneously include[d] damages for emotional distress that [the plaintiff] suffered as a result of his discharge." (*Id.* at p. 1247.) The court held: "The record does not support this claim. The jury found that [the defendant] had not wrongfully discharged [the plaintiff]. Therefore, as a matter of law, [the defendant] was not liable for any emotional distress caused by [the plaintiff's] discharge. We will not assume that the jury nevertheless awarded damages for such emotional distress." (*Ibid.*) Here, the verdict form asked the jurors to answer the damages questions if they found liability for any of Estelle's causes of action, and the jurors found the MTA liable on two of Estelle's causes of action and awarded noneconomic damages. As in *Taylor*, we will not assume the jury

awarded noneconomic damages for the causes of action on which Estelle did not prevail.[14]

In terms of the testimony at trial, the evidentiary support for the jury's more modest award of $275,000 in future noneconomic damages was thinner than the evidentiary support for the award of $350,000 in past noneconomic damages. As the MTA points out, most of Estelle's testimony regarding his feelings about his employment with the MTA concerned the effects of his termination, not the effects of the MTA's failure to accommodate his disability or to engage in the interactive process. Most, but not all. For example, in describing how he feared he was letting down his teenage children, Estelle was answering a question from his attorney regarding whether "the termination *and everything that happened in 2013 with respect to the MTA* . . . had any impact on [his] relationship with [his] children." (Italics added.) Similarly, when asked how he felt about the termination of his employment from the MTA, Estelle answered he was "saddened," and "depressed," and "at a loss" about "the whole thing." This testimony was consistent with counsel for Estelle's closing argument, which asked the jury to compensate Estelle for "emotional harm . . . caused by the MTA," not just caused by the MTA's termination of his employment.

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[14] The MTA argues *Taylor* is distinguishable because the court, by using the phrase "[t]he record does not support [the defendant's] claim," meant "the record—the evidence—supported an emotional distress award on any proffered basis." That is not a fair reading of the *Taylor* opinion. Immediately after the court in *Taylor* stated "[t]he record does not support" the defendant's argument, the court referred to the jury's findings, not the evidence.

In addition, the jury reasonably could have inferred that the anger, frustration, and humiliation Estelle experienced during February through June 2013 did not immediately end when the MTA terminated his employment on June 15, 2013.[15] (*See In re Marriage of Bonds* (2000) 24 Cal.4th 1, 35 ["when asked to determine whether a factual determination is supported by substantial evidence, the reviewing court should draw all reasonable inferences in *favor* of the judgment"]; *Maaso v. Signer* (2012) 203 Cal.App.4th 362, 371 ["[s]ubstantial evidence includes reasonable inferences drawn from the evidence in favor of the judgment"]; *County of Kern v. Jadwin* (2011) 197 Cal.App.4th 65,

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[15] Estelle argues the award of noneconomic damages is supported by evidence of the physical pain he experienced in his knees, back, and shoulders. The trial court, however, instructed the jury: "You may not consider Garey Estelle's work-related injuries or the pain attributable to Garey Estelle's work-related physical injuries in determining damages in this case. However, you may consider any emotional distress which Garey Estelle suffered as a result of any unlawful discrimination, retaliation, failure to accommodate, or failure to engage in the interactive process." Estelle does not challenge this instruction. Although the written jury instructions are not in the record, it appears the parties agreed to this instruction after modifying it to list failure to engage in the interactive process as one of the causes of action for which Estelle could "recover emotional distress damages." The verdict form only asked the jurors to award damages for "noneconomic loss, including mental suffering, loss of enjoyment of life, inconvenience, grief, anxiety, humiliation, emotional distress." And trial counsel for Estelle told the court Estelle "will not be asking the jury for damages related to a work-related injury" and was "not going to ask the jury to award damages for Mr. Estelle specifically having physical knee pain related to his Workers' Compensation claim."

73 ["substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom"].) True, Estelle testified he suffered additional emotional trauma, including depression, loss of dignity, loss of self-worth, and insomnia, as a result of his termination. But that does not mean, as the MTA argues, that Estelle's feelings about the way the MTA treated him before his termination suddenly evaporated, although the jury's award of less in future noneconomic damages than past noneconomic damages reflects that Estelle's emotional distress was fading over time. And Estelle's theory, which the jury largely accepted,[16] was that the MTA's conduct in denying him a reasonable accommodation and refusing to engage in the interactive process was part of the MTA's efforts to find a reason to terminate his employment by accusing him of gross misconduct. As counsel for the MTA argued to the trial court during a discussion about the jury instructions, "It's like the whole entire case has been about Mr. Estelle has not gotten accommodation. He wanted a 7 series bus. He didn't get it.

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[16] The MTA asserts "Estelle's story was not successful with the jury." Hardly. As noted, the jury found for Estelle on his causes of action for failure to make reasonable accommodations for his disability and failure to engage in the interactive process, finding the MTA knew Estelle had a disability and failed to accommodate it or engage in the interactive process to discuss accommodating it. Even on his causes of action for disability discrimination and retaliation, on which Estelle did not prevail, the jury found Estelle was able to perform his essential job duties with a reasonable accommodation for his known disability, opposed a discriminatory practice, reported a bona fide work safety or health issue, and disclosed information regarding a violation or noncompliance with federal law.

What could you have done to accommodate him. The whole case has been about that."

D. *The Trial Court Did Not Abuse Its Discretion by Applying a Lodestar Multiplier of 1.5 in Awarding Reasonable Attorneys' Fees*

1. *Applicable Law and Standard of Review*

"The basic, underlying purpose of FEHA is to safeguard the right of Californians to seek, obtain, and hold employment without experiencing discrimination on account of race, religious creed, color, national origin, ancestry, physical disability, medical disability, medical condition, marital status, sex, age, or sexual orientation." (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 582-583; accord, *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 394; see *Husman v. Toyota Motor Credit Corporation* (2017) 12 Cal.App.5th 1168, 1180 ["[t]he express purposes of FEHA are 'to provide effective remedies that will both prevent and deter unlawful employment practices and redress the adverse effects of those practices on aggrieved persons'"].) To further this purpose, FEHA provides for an award of reasonable attorneys' fees to counsel who "obtain a favorable result for their client." (*Flannery v. Prentice*, *supra*, at p. 583.) Specifically, Government Code section 12965, subdivision (b), provides, "In civil actions brought under this section, the court, in its discretion, may award to the prevailing party . . . reasonable attorney's fees and costs . . . ." Fee awards should be "fully compensatory" and "'ordinarily include compensation for all hours reasonably spent.'" (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133, 1141 (*Ketchum*); see *Meister v.*

Regents of University of California (1998) 67 Cal.App.4th 437, 447 [“‘“unless special circumstances would render such an award unjust,”’ ‘parties who qualify for a fee should recover for all hours reasonably spent”’], quoting *Serrano v. Unruh* (1982) 32 Cal.3d 621, 633, 639.)

To calculate an appropriate award of reasonable attorneys’ fees, the trial court first determines the lodestar: the number of hours reasonably worked multiplied by a reasonable hourly rate. (*Taylor*, *supra*, 222 Cal.App.4th at p. 1249; see *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 (*PLCM Group*) [“the fee setting inquiry in California ordinarily begins with the ‘lodestar,’ i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate”].) The court then has discretion to increase or decrease the lodestar by applying an appropriate multiplier. (*Taylor*, at p. 1249.) The lodestar “may be adjusted by the court based on factors including . . . (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, [and] (4) the contingent nature of the fee award. [Citation.] The purpose of such adjustment is to fix a fee at the fair market value for the particular action.” (*Ketchum*, *supra*, 24 Cal.4th at p. 1132; see *Laffitte v. Robert Half Internat., Inc.* (2016) 1 Cal.5th 480, 489 (*Laffitte*) [“‘[o]nce the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative “multiplier” to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent

risk presented"'].)[17] "The adjustment to the lodestar figure, e.g., to provide a fee enhancement reflecting the risk that the attorney will not receive payment if the suit does not succeed, constitutes earned compensation; unlike a windfall, it is neither unexpected nor fortuitous. Rather, it is intended to approximate market-level compensation for such services, which typically includes a premium for the risk of nonpayment or delay in payment of attorney fees." (*Ketchum*, *supra*, 24 Cal.4th at p. 1138; see *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1171-1172 ["[t]he purpose of a fee enhancement is not to reward attorneys for litigating certain kinds of cases, but to fix a reasonable fee in a particular action," because "it is recognized that some form of fee enhancement may be appropriate and necessary to attract competent representation of cases meriting legal assistance"].)

Finally, "'[i]n reviewing a challenged award of attorney fees and costs, we presume that the trial court considered all appropriate factors in selecting a multiplier and applying it to the lodestar figure. [Citation.] This is in keeping with the overall review standard of abuse of discretion, which is found only where no reasonable basis for the court's action can be shown.'" (*Taylor*, *supra*, 222 Cal.App.4th at p. 1249; see *Cordero-Sacks v. Housing Authority of City of Los Angeles* (2011) 200 Cal.App.4th 1267, 1286 [""'what constitutes reasonable attorney fees is committed to

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[17] A multiplier that reduces the lodestar figure is not really a "negative multiplier," but a rational number between 0 and 1, usually (but not always)* expressed or expressible as a terminating decimal, such as 0.5 or 3/4. Use of the term a negative multiplier risks suggesting an award of attorneys' fees from, rather than to, the prevailing plaintiff.

* For example, the court might use a fraction, such as a multiplier of 1/3 or 2/3.

the discretion of the trial court'"']."] "'The "experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.'"' (*Laffitte*, *supra*, 1 Cal.5th at p. 488; see *Ketchum*, *supra*, 24 Cal.4th at p. 1132; *PLCM Group*, *supra*, 22 Cal.4th 1084 at p. 1095.)

2. *Relevant Proceedings*

Estelle filed a motion under Government Code section 12965, subdivision (b), seeking an award of $1,171,218.10 in attorneys' fees. Estelle asked for a lodestar of $669,267.50, plus a multiplier of 1.75. The trial court awarded Estelle $752,925.93, based on a lodestar of $501,950.62 (75 percent of the amount requested by Estelle) and a multiplier of 1.5. The court found the hourly rates of Estelle's attorneys were "reasonable and consistent with billing rates for similar services of similar quality." On the issue of allocating fees among the causes of action on which Estelle prevailed and those on which he did not, the court found Estelle "failed to prevail on claims unrelated to those upon which he prevailed insofar as they were based on different facts and legal theories. In particular, the court finds . . . that the underlying facts and events upon which [Estelle's] successful claims were based took place prior to the termination of his employment by the MTA. Further, the court finds that [Estelle's] successful claims relied on different legal theories than his unsuccessful claims. The court further finds that approximately 25% of the billed hours were incurred solely in pursuing [Estelle's] unsuccessful claims and, accordingly, were not reasonably expended on his successful claims."

On the issue of a lodestar multiplier, the court found "(1) the questions involved in the claims on which the plaintiff prevailed were not particularly novel or difficult; (2) little or no showing was made on the extent to which the nature of the action precluded other employment by the attorneys; (3) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award; (4) the result obtained was substantial; (5) [t]he quality of the legal representation was good; and (6) there is the potential for delay in receipt of payment. Taking these factors into account, the courts finds a multiplier of 1.5 is appropriate."

3. *The Trial Court Did Not Abuse Its Discretion in Applying a Lodestar Multiplier*

The MTA does not challenge the trial court's findings on counsel for Estelle's reasonable hourly rate, the reasonable number of hours they spent on the case, or the court's lodestar calculation. The MTA challenges only the trial court's decision to use a multiplier of 1.5. The MTA argues that, "[b]ecause the lodestar amount awarded far outstripped the limited extent to which Estelle recovered on his claims, the multiplier is unwarranted—in effect, there is a multiplier built into the lodestar award."

But there wasn't. The court's lodestar amount, which the MTA does not challenge, was based on the reasonable hourly rate times the reasonable number of hours worked; the court's lodestar calculations did not include a multiplier. The trial court properly analyzed, discussed, and made findings on the lodestar and the multiplier separately.

The MTA focuses on the use of the word "approximately" in the court's finding that "approximately 25% of the billed hours were incurred solely in pursuing [the] unsuccessful claims," which, the MTA asserts, means that "approximately" 75 percent of the billed hours were incurred on successful claims, which in turn means the "approximately" 75 percent of hours awarded must include "some time spent on unsuccessful claims." This proves, according to the MTA, that "at 75%, Estelle is already overcompensated," and the court's decision to "add a 1.5 multiplier" was "an abuse of discretion." Putting aside whether even under the MTA's theory the court rounded up or rounded down when it approximated the time spent on Estelle's successful causes of action, the court's use of "approximately" did not mean the court included more time in the lodestar calculation than appropriate. To the contrary, the court found "the hours reasonably incurred by [Estelle] are 75% of those claimed by him." There is no indication the court implicitly applied a hidden multiplier by including unreasonable hours in its lodestar calculation.

The MTA also argues that, in considering and weighing the multiplier factors, the court stated the quality of representation by counsel for Estelle was only "good," not very good or exceptional, which "leaves no sound basis for awarding a multiplier." Even assuming that, in today's climate of grade and legal performance inflation, "good" lawyering means the attorneys did not "display" much "skill" in "presenting" the "questions involved" in the litigation, the court's statement the "quality of the legal representation was good" did not automatically preclude a lodestar multiplier. The quality of the

plaintiff's legal representation was only one factor.[18] Among the other factors the court properly considered was the contingent nature of the action and eligibility for an award of attorneys' fees. "'An enhancement of the lodestar amount to reflect the contingency risk is "[o]ne of the most common fee enhancers."'" (*Center for Biological Diversity v. County of San Bernardino* (2010) 188 Cal.App.4th 603, 623; see *Taylor*, *supra*, 222 Cal.App.4th at p. 1252 ["'[i]n cases involving the enforcement of constitutional or statutory rights, "such fee enhancements may make such cases economically feasible to competent private attorneys"'"]; *Horsford v. Board of Trustees of California State University*, *supra*, 132 Cal.App.4th 359, 394-395 ["[i]t has long been recognized . . . the contingent and deferred nature of the fee award in a civil rights or other case with statutory attorney fees requires that the fee be adjusted in some manner to reflect the fact that the fair market value of legal services provided on that basis is greater than the equivalent noncontingent hourly rate"].) Some factors, like the lack of particularly novel or difficult questions, weighed against a lodestar multiplier. Other factors, like the contingent nature of the representation and the potential for (now an actual) delay in receiving payment, weighed in favor of a multiplier. The court properly considered and weighed the factors. (See *Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233,

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[18] The MTA also reads too much into the word "good." The court did not say that Estelle's legal representation was "only" or "merely" good, or, as the MTA asserts, that "the services provided were anything more than workmanlike." The court was considering the correct multiplier factors, one of which was the skill of the lawyers, and making appropriate findings.

1240 ["application of a lodestar multiplier . . . is based on the exercise of the court's discretion after consideration of the relevant factors in a particular case"].) The trial court did not abuse its discretion in using a lodestar multiplier of 1.5.

E. *The Trial Court Did Not Err in Awarding Estelle Supplemental Attorneys' Fees Incurred in Opposing the MTA's Posttrial Motions*

After the trial court had entered judgment, granted Estelle's motion for attorneys' fees, and denied the MTA's posttrial motions (in that order), Estelle filed a motion for supplemental attorneys' fees incurred in opposing the MTA's posttrial motions. Estelle sought an award of $75,640.50, consisting of a lodestar of $50,427 and a multiplier of 1.5. The MTA opposed the motion, arguing it was untimely and unauthorized. The trial court found the amount of attorneys' fees Estelle sought was "substantially excessive in light of the nature of the motion, what the court finds to be the reasonable hours of attorney time necessary in making the motion, and the amount of attorneys fees previously awarded. Accordingly, the court awards additional attorneys fees of $15,000.00 to [Estelle,] which amount the court finds appropriate in the circumstances."

The MTA argues the award of supplemental attorneys' fees was "statutorily unauthorized" because "Estelle had already taken his shot at obtaining attorney fees, and the trial court obliged," and Government Code section 12965, subdivision (b), "nowhere authorizes successive attorney fees motions or awards." The MTA also contends that Estelle was not entitled to recover additional attorneys' fees because "the original award is bloated

and the court should not have rewarded Estelle's rapacity by making a supplemental award."

Nothing in Government Code section 12965, subdivision (b), limits requests for prevailing party attorneys' fees to one "shot" or precludes "successive" motions for attorneys' fees. To the contrary, the law anticipates that a prevailing plaintiff entitled to statutory fees may need to file more than one postjudgment motion for such fees. For example, a successful FEHA plaintiff is entitled to recover attorneys' fees for the time spent on appeal defending the judgment and the award of attorneys' fees. (*Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 448; see *Frog Creek Partners, LLC v. Vance Brown, Inc.* (2012) 206 Cal.App.4th 515, 547 ["'[f]ees, if recoverable at all either by statute or the parties' agreement, are available for services at trial and on appeal'"]; *Imperial Bank v. Pim Electric, Inc.* (1995) 33 Cal.App.4th 540, 557 ["[s]tatutory authorization for the recovery of attorney fees incurred in trial court proceedings *necessarily* includes attorney fees incurred on appeal unless the statute specifically provides otherwise"].) Similarly, a prevailing plaintiff is entitled to recover attorneys' fees for time spent enforcing a judgment. (See *In re Conservatorship of McQueen* (2014) 59 Cal.4th 602, 614 ["when a fee-shifting statute provides the substantive authority for an award of attorney fees, any such fees incurred in enforcement of the judgment are within the scope of [Code of Civil Procedure] section 685.040" and therefore are recoverable]; *Rosen v. LegacyQuest* (2014) 225 Cal.App.4th 375, 382 ["[w]hen attorney fees are authorized by statute [they] may be recovered as costs if expended to enforce a judgment"]; *Berti v. Santa Barbara Beach Properties* (2006) 145 Cal.App.4th 70, 77 [fees authorized by

statute are recoverable under Code of Civil Procedure section 685.040, which authorizes a judgment creditor to certain fees and costs incurred in enforcing a judgment].) Where a prevailing plaintiff incurs statutorily recoverable attorneys' fees in enforcing and defending judgments on appeal, the court has the authority, and the obligation, to hear multiple motions to recover attorneys' fees incurred in these postjudgment proceedings. Estelle's motion for supplemental attorneys' fees incurred in defeating the MTA's posttrial motions was no different.

DISPOSITION

The judgment is modified to award Estelle $350,000 in past noneconomic damages and $275,000 in future noneconomic damages, for a total monetary judgment of $625,000. As modified, the judgment is affirmed. The orders granting Estelle's motions for attorneys' fees are affirmed. Estelle is to recover his costs on appeal and attorneys' fees in an amount to be determined by the trial court.

SEGAL, J.

We concur:

PERLUSS, P. J. BENSINGER, 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.