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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

BETTY LIBMAN, Plaintiff and Appellant, v. SOUTHERN WINE & SPIRITS OF AMERICA, INC., et al., Defendants and Respondents.	B287345 and B288805 (Los Angeles County Super. Ct. No. BC566717)

APPEALS from a judgment and postjudgment orders of the Superior Court of Los Angeles County, Graciela Freixes, Judge. Affirmed.

Law Offices of Michael J. Libman and Michael J. Libman fir Plaintiff and Appellant Betty Libman.

Kuluva, Armijo & Garcia and Christina Y. Morovati for Defendants and Respondents Southern Wine & Spirits of America, Inc. and Peter Basmajian.

Schumann | Rosenberg, Kim Schumann, Jeffrey P. Cunningham and Marlys K. Braun for Defendant and Respondent Ralphs Grocery Store.

Betty Libman appeals from a judgment awarding her $10,000 for injuries sustained in a fall after Peter Basmajian, an employee of Southern Wine and Spirits of Southern California, Inc. (SWS), collided with her in a Ralphs supermarket while he was completing a liquor display in the store. Libman contends the trial court improperly denied as untimely her peremptory challenge pursuant to Code of Civil Procedure section 170.6;[1] abused its discretion in denying a 48-hour stay of the trial to permit her to seek extraordinary writ relief from that ruling; erred in granting the motion for nonsuit filed by Ralphs Grocery Company; and committed prejudicial error by excluding evidence that Ralphs had destroyed a videotaped recording of the incident, limiting the testimony of Libman's medical expert concerning the reasonable cost of future surgery to Medicare rates and failing to include in the special verdict form a statement that Basmajian's negligence in failing to look before he backed into Libman was conceded. Libman also appeals from postjudgment orders awarding post-section 998 settlement offer costs of $54,365.81 to Ralphs and $101,580.68 to SWS and pre-settlement offer costs of only $803 to Libman. We affirm the judgment and the postjudgment orders.

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[1] Statutory references are to this code unless otherwise stated.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Incident at Ralphs and Libman's Complaint*

Betty Libman, then 68 years old, went shopping at Ralphs near her home in Encino on Monday morning, December 31, 2012. While she was slowly walking toward a check stand, Basmajian backed into her as he was photographing an in-store liquor display he had just built. Libman was knocked to the ground. A glass pickle jar she was holding broke, cutting her right hand.

Libman was helped to a chair; and an incident report was completed by the store safety coordinator, Darlene Crystal. Libman's son Michael J. Libman, whose law office was near the store, was called. He came to the store, helped his mother to his car and took her home. Later that day Libman's husband drove her to an urgent care facility.

On December 14, 2014 Libman, represented by her son, filed a complaint for premises liability against Ralphs and SWS; negligence against Ralphs, SWS and Basmajian; negligent hiring, supervision and retention against SWS; and negligence under a theory of respondeat superior against Ralphs and SWS. Libman alleged she had been seriously injured by the fall. All parties answered the complaint. On March 7, 2017 the case was assigned for trial to Judge Graciela Freixes.

2. *Motions in Limine: Spoliation of Evidence and Future Medical Expenses*

At the time of Libman's fall Ralphs had surveillance cameras throughout its Encino store. The incident was recorded by one of the cameras. Two copies of the recording were made: One was sent to Ralphs's risk management department; the second was kept at the store. However, according to Ralphs, the

DVR from which the DVDs were made had malfunctioned; and an incorrect time period was captured. When the DVR was repaired or replaced, the original images were lost. As a result, although Libman's son had immediately requested that Ralphs preserve all video/audio-surveillance and still photographs depicting the incident, no security footage was available at the time of trial.

On March 10, 2017 Judge Freixes heard argument on a variety of motions in limine. Ralphs's motion in limine no. 1 asked the court to preclude Libman from referring to the surveillance cameras at the Encino store or arguing Ralphs had willfully suppressed the recording of the incident, justifying use of CACI No. 204, which permits an inference the evidence would have been unfavorable to Ralphs.[2] Ralphs argued all defendants had stipulated Basmajian was negligent in backing into Libman without looking over his shoulder and no evidence would be presented that Libman did not fall in the way she would describe (that is, there would be no defense expert witness regarding the mechanics of her fall). "The only thing we disagree with is causation of medical damages," Ralphs's counsel argued. Reversing its tentative ruling, the court rejected Libman's argument the recording, had it been preserved, would have assisted the jury in its evaluation of the issue of causation and granted the motion in limine pursuant to Evidence Code section 352, finding evidence of the loss of the recording would be unduly prejudicial.

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[2] CACI No. 204 provides, "You may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party."

During the hearing on March 10, 2017 the court also considered SWS and Ralphs's motion in limine to limit testimony on the cost of future medical treatment that Libman may need to rates that would be paid on her behalf by Medicare. Libman filed no written opposition to the motion. The court granted the motion, basing its ruling on the decision by Division One of this court in *Markow v. Rosner* (2016) 3 Cal.App.5th 1027 (*Markow*), which, citing *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 556 (*Howell*), held, "Our Supreme Court has endorsed a market or exchange value as the proper way to think about the reasonable value of medical services. [Citation.] This applies to the calculation of future medical expenses. [Citation.] For insured plaintiffs, the reasonable market value or exchange value of medical services will not be the amount *billed* by a medical provider or hospital, but the 'amount *paid* pursuant to the reduced rate negotiated by the plaintiff's insurance company.'" (*Markow*, at pp. 1050-1051.)

3. *Mistrial and the Section 170.6 Challenge*

Prospective jurors were sworn, and jury selection began on March 14, 2017. That afternoon counsel for SWS and Basmajian advised the court she had a family emergency and requested a continuance of the trial. The court declared a mistrial and scheduled a new trial setting conference for March 28, 2017 in the parties' original courtroom (Department 91).

On March 28, 2017 the trial date was continued to May 15, 2017. That date was thereafter continued several more times, ultimately to May 31, 2017 when all parties answered they were ready for trial. On that date Department One again assigned the case to Judge Freixes. Libman, through her counsel, filed a

section 170.6 challenge;[3] defense counsel immediately objected the challenge was untimely. The parties were ordered to file briefs on the issue.

On Monday, June 5, 2017 Judge Debre Weintraub in Department One denied the section 170.6 challenge, ruling, "A retrial after a mistrial in this case is a continuation of the first trial. As such, the 170.6 is not timely." The court also denied Libman's request for a 48-hour stay of the trial to allow her to seek extraordinary writ relief in this court, finding that "[s]taying the case will have an adverse impact on the workings of the LASC, given the limited judicial resources of the LASC, by keeping a trial courtroom open during this period of time." The court directed the parties to appear before Judge Freixes at 1:30 p.m.

Counsel met with Judge Freixes that afternoon to discuss the case and motions in limine. The following day a panel of prospective jurors were sworn in and voir dire began. On June 7, 2017 Libman's counsel informed the court he was having physical and vision difficulties as the result of a head injury he had suffered three weeks earlier, and trial was recessed to June 8, 2017. On June 8, 2017 Libman's counsel brought a letter from his doctor stating counsel needed to avoid physical or mental distress for the next seven days. The court released the jury and continued the trial to Monday, June 12, 2017.

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[3] "Section 170.6 permits a party to obtain the disqualification of a judge for prejudice, based solely upon a sworn statement, without being required to establish prejudice as a matter of fact to the satisfaction of the court." (*The Home Ins. Co. v. Superior Court* (2005) 34 Cal.4th 1025, 1032.)

On June 12, 2017 Libman's counsel advised the court he was ready to proceed with trial. A new panel of prospective jurors was sworn; voir dire began; and a jury was selected.

4. *Trial and Verdict*

a. *Libman's case-in-chief*

The jury trial took place between June 13 and June 20, 2017. Libman, who was born in Ukraine, testified that, as she was slowly walking to find an open cashier, "Somebody hit me so strong that I fall. I flew. Not I fall. I flew. And my purse was on one side and my glasses was on the other side and the jar was broken, food on the floor. And I just got some bleeding." Libman explained she remained on the floor for approximately one minute feeling terrible pain on her right side. Crystal, the Encino store's safety coordinator, helped her up; cleaned her hand; and filled out an incident report. Libman's son came to the store and drove her home.

Libman explained that at the time of the incident she was self-employed as an aesthetician, providing clients facials, makeup, lashes, eyebrows and waxing in a space she rented. She made $2,000 to $3,000 per month. She continued seeing clients after the fall, although it was painful for her to stand while working. Because of the pain, Libman reduced her work schedule to half-time in 2014 and retired completely in 2015. She estimated she lost approximately $22,000 in income because of this decrease in working hours.

On direct examination Libman described an early 2010 fall in front of her condominium, which resulted in a broken hip and required a surgical repair. She also described a 2007 automobile accident that caused a soft tissue (whiplash) injury. On cross-examination Libman admitted that six months before her fall at

Ralphs she had complained of low back pain to her primary care physician and had begun physical therapy. In addition, she acknowledged that in the four-years-plus since the incident, she had not undergone the back and knee surgeries her retained experts recommended and that prior to trial she had expressed no desire to undergo those surgeries.

Basmajian, testifying during Libman's case-in-chief pursuant to Evidence Code section 776, explained SWS had not provided him with any training on how to safely build displays in stores and no one from Ralphs had instructed him how Ralphs wanted displays built. Ralphs did not give him tape to cordon off the area or warning signs to place near the display. Basmajian also conceded he did not look before stepping back and colliding with Libman. Eric Scantland, the manager of the Ralphs Encino store, and Crystal, also testifying pursuant to Evidence Code section 776, admitted that Basmajian was not supervised on the date of the incident and that Ralphs provides vendors with no written instructions concerning their conduct while on the store's premises.

Brad Avrit, an accident reconstruction expert and president of a construction management and safety engineering consulting firm, found fault with Basmajian on two grounds. First, he should have been more attentive to his surroundings when he was in the main aisle of the supermarket. Second, he failed to build the display in accordance with good industry practices, which dictate that a large display should be set up when the store is closed or during hours with minimal customer traffic, or at least should be done within an area cordoned off from the store's customers.

With respect to Ralphs, Avrit opined its failure to provide any instructions to vendors that come into its stores regarding stocking activities was "unusual in the industry. Typically you have rules." Avrit continued, "I'm critical of Ralphs for being lax about that. They should be strict with all their vendors, that their vendors have to comply with the standards that their own employees have to comply with for the safety of their customers because, ultimately, again, they know customers are walking around the stores looking at displays and it's their responsibility to make sure that the displays and the customer aisles are clear and safe. And they didn't seem to make any effort in this case to make sure that that was the case in their store." In response to the question whether it is "typically the grocery store's responsibility to oversee and make sure that their vendors don't endanger the grocer's customers," Avrit responded, "Yes. And they do that by imposing rules and then observing activities periodically and disciplining anybody that is breaking the rules."

Dr. Serge Obukhoff, a neurological surgeon, testified the fall at Ralphs was a substantial factor in Libman's persistent pain syndrome. In his opinion Libman needed lumbar decompression and lumbar fusion surgery to alleviate her pain. In accordance with the court's in limine ruling, Dr. Obukhoff, who does not accept Medicare, did not testify to the costs of that future treatment.

Dr. Jacob Tauber, an orthopedic surgeon, testified Libman's fall was a substantial factor in aggravating her preexisting arthritis, creating the need for bilateral knee replacement surgeries. He also believed the fall aggravated the arthritis in her hips but was unable to say with medical certainty she would need hip replacement surgery. Dr. Tauber said the cost for a

total knee replacement would be approximately $25,000 per knee, plus $3,000 to $5,000 of postoperative rehabilitation per knee.[4] The cost of hip replacement surgery would be approximately the same.

b. *The nonsuit motion*

At the close of Libman's case-in-chief Ralphs moved for a nonsuit. As to the cause of action for premises liability, Ralphs argued there was no evidence a dangerous condition existed at the store. As to direct negligence, Ralphs argued Libman had failed to present evidence it had a duty to supervise Basmajian, that Basmajian's carelessness was foreseeable or that Ralphs's conduct was a substantial factor in causing Libman's injury. As to negligence on a theory of respondeat superior, Ralphs argued the evidence established Basmajian was not an employee or agent of Ralphs and was not performing work at its direction or under its control. The court agreed, rejecting Libman's argument based on Avrit's testimony that the failure of Ralphs to establish and enforce safety regulations on its vendors created a dangerous condition at the store or constituted a breach of Ralphs's duty of care to its customers. The court also concluded, "There is no connection that the absence of rules and regulations and instructions to vendors was a substantial factor in causing any harm to Mrs. Libman."

c. *SWS's defense expert*

Dr. Geoffrey Miller, an orthopedic surgeon, examined Libman and reviewed her medical records. In his opinion Libman did not need knee or back surgery; and the fall at Ralphs,

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[4] Dr. Tauber's testimony concerning costs was based on Medicare rates, although that fact was not disclosed to the jury.

while causing some bruising, did not aggravate her arthritic condition. He believed Dr. Tauber and Dr. Obukhoff, Libman's retained experts, failed to fully acknowledge Libman's preexisting conditions because they did not have her complete medical records. He noted that none of Libman's treating physicians considered her a candidate for surgery.

d. *Closing argument*

In closing Libman stressed Basmajian had admitted, and SWS stipulated, Basmajian was negligent in failing to look before stepping back to photograph the display. Libman argued SWS was also negligent in failing to properly train Basmajian how to safely build its product displays. She asked the jury to award her a total of $822,000: $22,000 in past economic loss/lost earnings; $50,000 in future medical expenses; $250,000 in past pain and suffering; and $500,000 for future pain and suffering.[5]

Emphasizing Libman's various preexisting conditions, SWS's counsel responded the accident at Ralphs had nothing to do with Basmajian's training and Libman's fall had caused only very limited, short-term injury (a trip to urgent care and several doctors' visits), not the catastrophic harm described by her counsel. He asked the jury to find SWS not negligent and to award no damages against Basmajian.

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[5] Libman claimed only her alleged lost earnings as past economic loss; she did not request any damages based on medical expenses she had incurred. Her alleged future economic loss, in contrast, was based solely on her claimed future medical expenses.

e. *The special verdict*

The jury was given a special verdict form with four questions:

"1. Was SOUTHERN WINE & SPIRITS OF SOUTHERN CALIFORNIA negligent?

"2. Was PETER BASMAJIAN'S negligence a substantial factor in causing harm to BETTY LIBMAN?

"3. Was SOUTHERN WINE & SPIRITS OF SOUTHERN CALIFORNIA'S negligence a substantial factor in causing harm to BETTY LIBMAN?

"4. What are BETTY LIBMAN'S damages?

"a. Past economic Loss/Lost Earnings

"b. Future economic loss/ Medical Expenses

"c. Past noneconomic loss/Pain/Mental Suffering

"d. Future noneconomic loss/Pain/Mental Suffering."

Libman had proposed a special verdict form that included the question, "Was Peter Basmajian negligent?" and pre-marked the answer to that question, "Yes." The court rejected that proposal and used the form presented by SWS, which assumed Basmajian was negligent, as had been stipulated, and asked the jury to decide causation and damages as to him.

The jury deliberated for approximately 90 minutes before reaching its verdict.[6] It answered question 1, "Yes"; question 2,

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[6] During its brief deliberations the jury asked the court if it voted "no" on question 1 (SWS's negligence), could it vote "yes" on question 3, "or do both of these need to be 'yes' or 'no.'" The court responded in writing, "If the jury's answer to question #1 is 'no,' the answer to question #3 must also be 'no.' If the jury's answer to question #1 is "yes,' the answer to question #3 can be 'yes' or 'no.'"

"No"; and question 3, "Yes" (all by votes of 11-1); and awarded Libman $5,000 for past noneconomic loss, $5,000 for future noneconomic loss, and nothing for past and future economic losses.

Judgment on the special verdict in favor of Libman and against SWS was entered on October 24, 2017.[7] Judgment on Ralphs's motion for nonsuit, dismissing it from the action, was also entered on October 24, 2017. After the court denied her motion for a new trial, Libman filed a timely notice of appeal from the judgments (B287345).

5. *The Postjudgment Order Regarding Costs*

On November 23, 2016 Ralphs, SWS and Basmajian served on Libman, pursuant to section 998, a joint offer to compromise of $35,000, with each party to bear his, her or its costs and attorney fees. Libman did not accept the offer.[8]

Following entry of judgment Ralphs submitted a memorandum of costs totaling $54,615.81, which included $14,535.39 for expert fees. Libman moved to strike or tax costs, arguing, in part, Ralphs was not entitled to expert costs because Libman had obtained a more favorable judgment than the joint section 998 offer made by the defendants. Libman explained she had incurred at least $26,753 in recoverable preoffer costs as

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[7] The judgment on special verdict does not direct entry of judgment in favor of Basmajian or otherwise mention him. None of the parties on appeal mentions this anomaly.

[8] Libman made her own section 998 settlement offer of $749,000 in February 2016 and a further offer of $599,000 in November 2016. Neither offer was accepted.

reflected in her memorandum of costs; her judgment of $10,000 plus those preoffer costs exceeded the section 998 offer by $1,753.

SWS and Basmajian submitted a memorandum of costs, and thereafter a revised memorandum of costs, totaling $102,080.68, including $27,170.81 for expert fees. Libman moved to strike or tax costs, again asserting she should be considered to have obtained a more favorable judgment than the joint section 998 offer because the amount of the judgment and her recoverable preoffer costs exceeded $35,000.

Libman submitted a memorandum of costs totaling $85,933.98, including $21,390 for expert witness fees. SWS and Basmajian moved to tax costs, asserting some of the costs requested were not recoverable under section 998 and others were duplicative. Allowable costs, they argued, should be $3,697.41. Ralphs joined the motion.

On January 19, 2018, following additional briefing and oral argument, the court granted defendants' motions to tax costs as to all but $803 in Libman's memorandum of costs. After noting that SWS and Basmajian had withdrawn costs of $500 and Ralphs had withdrawn costs of $250, the court denied Libman's motion to strike or tax. Accordingly, SWS and Basmajian were awarded costs of $101,580.68; Ralphs was awarded costs of $54,365.81. Explaining its reasoning at the hearing on the three motions, the court observed that more than 95 percent of Libman's preoffer costs were for services by Network Deposition Services, reflected on a November 15, 2016 invoice, including 126 hours for PowerPoint presentations, 38 hours for audiovisual and 18 hours for exhibit database creation. Ralphs, SWS and Basmajian objected to this invoice as unreasonable and unnecessary in light of the status of the case in mid-November

2016: No depositions had been taken at that point. In addition, no extensive or intricate PowerPoint presentation was made to the jury; a different company actually provided Libman's audiovisual services at trial. The court found Libman had failed to respond directly to those objections or to otherwise justify the invoice. Because the other preoffer costs totaled only $803, Libman failed to obtain a more favorable judgment than the joint section 998 offer and was not entitled to recover any postoffer costs.

Libman filed a timely notice of appeal from the postjudgment order (B288805).[9]

DISCUSSION

1. *The Order Denying Libman's Section 170.6 Challenge to Judge Freixes Is Not Reviewable on Appeal*

Although Libman devotes a substantial portion of her appellate briefs to arguing the court improperly denied her section 170.6 challenge to Judge Freixes following the March 14, 2017 mistrial, she concedes writ relief is the only authorized method of appellate review for such a disqualification motion. (§ 170.3, subd. (d) ["[t]he determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding"]; see *People*

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[9] On January 9, 2019 this court denied Libman's motion to consolidate the two appeals. In our order, however, we stated the court may consider the two appeals concurrently for purposes of oral argument and decision, as we have done, and granted the parties permission to incorporate by reference into briefs in B288805 the statements of facts and/or arguments from the briefs filed in B287345.

v. Panah (2005) 35 Cal.4th 395, 444 ["the statute means what it says: Code of Civil Procedure section 170.3, subdivision (d) provides the exclusive means for seeking review of a ruling on a challenge to a judge, whether the challenge is for cause or peremptory"]; *Frisk v. Superior Court* (2011) 200 Cal.App.4th 402, 413 ["peremptory challenges are reviewable by writ, not appeal"].) Nothing more need be said on this point.

2. *The Court Did Not Abuse Its Discretion in Denying Libman's Request for a 48-hour Stay of Trial*

As discussed, when Judge Weintraub denied Libman's section 170.6 motion, she also denied her request for a 48-hour continuance of the start of trial to permit Libman to file a petition for writ relief in this court. Libman now contends the court abused its discretion in denying that request and, ratcheting up the rhetoric but not the accompanying legal analysis in her reply brief, claims Judge Weintraub violated Libman's right to due process and engaged in unethical behavior by improperly inducing Libman to waive her right to seek appellate review of the denial of her peremptory challenge to Judge Freixes.[10]

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[10] Libman's charge of unethical behavior is based solely on California Code of Judicial Ethics, canon 6D(4), which provides, "After a temporary judge who has determined himself or herself to be disqualified from serving under Canon 6D(3)(a)-(d) [providing grounds for disqualification that generally track those for active judges set forth in Code of Civil Procedure section 170.1] has disclosed the basis for his or her disqualification on the record, the parties and their lawyers may agree to waive the disqualification and the temporary judge may accept the waiver. *The temporary judge shall not seek to induce a waiver . . . .*" (Italics added.) The same language appears in California Rules of Court, rule 2.818, which, like canon 6D(4), applies only to the

California Rules of Court, rule 3.1332 (rule 3.1332), which Libman fails to cite in either her opening or reply brief, governs motions for continuance of a trial and cautions, "To ensure the prompt disposition of civil cases, the dates assigned for a trial are firm. All parties and their counsel must regard the date set for trial as certain." (Rule 3.1332(a).) Trial continuances are "disfavored," and "[t]he court may grant a continuance only on an affirmative showing of good cause requiring the continuance." (Rule 3.1332(c).) Factors to be considered in determining whether good cause exists include "[t]he proximity of the trial date" (rule 3.1332(d)(1)); "[t]he availability of alternative means to address the problem that gave rise to the motion or application for a continuance" (rule 3.1332(d)(4)); and "[t]he court's calendar and the impact of granting a continuance on other pending trials" (rule 3.1332(d)(7)). We review the denial of a motion to continue the trial date for abuse of discretion. (*Link v. Cater* (1998) 60 Cal.App.4th 1315, 1321 [a motion for a continuance of trial is addressed to the sound discretion of the trial court]; *Foster v. Civil Service Com.* (1983) 142 Cal.App.3d 444, 448 ["[t]he granting or denying of a continuance is a matter within the court's discretion, which cannot be disturbed 'on appeal except upon a clear showing of an abuse of discretion'"].)

Consistent with the provisions of rule 3.1332(d)(7), Judge Weintraub properly considered the adverse impact of Libman's requested continuance on the availability of trial courtrooms for personal injury cases other than Libman's. Balanced against that consideration, it was by no means clear

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conduct of court-appointed temporary judges and has no bearing on the propriety of the court's denial of Libman's motion to continue the trial.

that the requested two-day continuance (from June 5 to June 7, 2017) would have any meaningful effect on Libman's ability to seek writ review. Prior to her ruling on June 5, 2017 that Libman's section 170.6 challenge was untimely, Judge Weintraub had given Libman time to file a brief in support of her position, which she did on June 1. Thus, a significant portion of the work necessary to prepare a writ petition should already have been completed before June 5. Although Libman's counsel had to be concerned about his final trial preparation, he had once before started trial in this case (in March 2017). Only finishing touches, not ground-up construction, should have been required, permitting time to draft a petition and seek a stay of the trial in this court. In fact, because of further pretrial discussions and jury voir dire after returning to Judge Freixes's courtroom, Libman's counsel did not question his first witness until June 13, 2017, more than a full week after the court's ruling on the section 170.6 motion. Under these circumstances the denial of the request for a continuance was not beyond the bounds of reason (see, e.g., *People v. Kopatz* (2015) 61 Cal.4th 62, 85), or so arbitrary or irrational that no reasonable person could agree with it (see, e.g., *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773).

Other than properly exercising its discretion to deny Libman's request for a trial continuance, the court did nothing to "induce" Libman not to seek writ review of the ruling denying her section 170.6 challenge to Judge Freixes. The decision not to do so appears to have been a tactical one that, with hindsight, Libman now regrets. The claims that the court's ruling somehow violated Libman's due process rights and that it engaged in unethical behavior are as frivolous as they are scurrilous.

3. *Libman Has Forfeited Any Claim the Court Erred in Granting the Motion in Limine Regarding Spoliation of Evidence*

In the introduction to her opening brief Libman lists nine issues purportedly presented by her appeal, including whether the trial court committed prejudicial error by granting Ralphs's motion in limine to exclude evidence of its suppression of the surveillance tapes of Libman's fall. However, the argument section of her brief fails to even mention this issue, let alone support her claim of error by legal argument and citation to authority. (See Cal. Rules of Court, rule 8.204(a)(1)(B) [each brief must "[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority"].) As such, the issue has been forfeited. (*Hernandez v. First Student, Inc.* (2019) 37 Cal.App.5th 270, 277 ["'[t]o demonstrate error, an appellant must supply the reviewing court with some cogent argument supported by legal analysis and citation to the record'"]; *Public Employment Relations Bd. v. Bellflower Unified School Dist.* (2018) 29 Cal.App.5th 927, 939 [""[w]e are not bound to develop appellants' argument for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived""]; *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 ["[w]hen legal argument with citation to authority is not furnished on a particular point, we may treat the point as forfeited and pass it without consideration"].)

Moreover, any error in granting Ralphs's motion in limine was unquestionably harmless in light of the court's subsequent ruling granting Ralphs's motion for nonsuit based on lack of causation. (See Cal. Const., art. VI, § 13 ["[n]o judgment shall be set aside . . . on the ground of misdirection of the jury, or of the

improper admission or rejection of evidence, . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice"]; *Vaughn v. Jonas* (1948) 31 Cal.2d 586, 601 ["[t]he burden is on the appellant in every case affirmatively to show error and to show further that the error is prejudicial"]; see also *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 801 ["errors in civil trials require that we examine 'each individual case to determine whether prejudice actually occurred in light of the entire record'"].) To be sure, even though the parties had stipulated to Basmajian's negligence, the trial court appeared not to recognize the continued relevance of a video recording of the incident. If available, the recording could have confirmed Libman's description of her impact with Basmajian as having been significantly more forceful than a mere "bump," which in turn might have influenced the jury's assessment of the credibility of her claims of injuries greater than a bruise. But any adverse inference permitted by CACI No. 204 based on Ralphs's willful destruction of evidence would have applied only to Ralphs, not SWS or Basmajian. And as discussed in section 5, below, the nonsuit in favor of Ralphs was based on the lack of any evidence the company's failure to provide safety instructions to vendors such as SWS was a substantial factor in causing the collision between Basmajian and Libman. It had nothing to do with the nature of the accident itself.

4. *Any Error in Limiting the Testimony of Dr. Obukhoff to Medicare Rates Was Harmless*

Libman contends the trial court committed prejudicial error in granting the motion in limine restricting evidence of the cost of her future medical treatment to Medicare reimbursement

rates. As discussed, because Dr. Obukhoff did not accept Medicare and was not otherwise familiar with Medicare rates, he did not testify about the cost of the lumbar procedures he opined Libman needed. Libman did not call any other witness to provide that information.

Whether the trial court's ruling was correct is by no means clear. (See *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 315 [whether plaintiff is entitled to a particular measure of damages is a question of law subject to de novo review]; *Markow*, *supra*, 3 Cal.App.5th at p. 1050.) Damages for past medical expenses are limited to the lesser of (1) the amount paid or incurred for past medical expenses and (2) the reasonable value of the services. (*Howell*, *supra*, 52 Cal.4th at p. 566.) Thus, an injured plaintiff with health insurance may not recover as damages for past medical services an amount that exceeds the amount actually paid by the insurer for the services provided: "[W]hen a medical care provider has, by agreement with the plaintiff's private health insurer, accepted as full payment for the plaintiff's care an amount less than the provider's full bill, evidence of that amount is relevant to prove the plaintiff's damages for past medical expenses and, assuming it satisfies other rules of evidence, is admissible at trial. . . . Where the provider has, by prior agreement, accepted less than a billed amount as full payment, evidence of the full billed amount is not itself relevant on the issue of past medical expenses." (*Id.* at p. 567.) The *Howell* rule applies whether those past medical expenses were

paid by a private insurer or Medicare. (*Luttrell v. Island Pacific Supermarkets, Inc.* (2013) 215 Cal.App.4th 196, 198.)[11]

The Supreme Court in *Howell* expressed no view as to the relevance or admissibility of evidence of the full amount billed by a medical provider on the issue of future economic damages for anticipated medical procedures. (*Howell*, *supra*, 52 Cal.4th at p. 567.) However, as the trial court noted in granting SWS and Ralphs's motion in limine, the court of appeal in *Markow*, *supra*, 3 Cal.App.5th 1027, held *Howell*'s market or exchange value approach to determining the reasonable value of medical services applies to the calculation of future medical expenses and concluded the reasonable value of future medical expenses for an insured plaintiff is the amount that would be paid pursuant to the reduced rate negotiated by the plaintiff's insurer. (*Markow*, at pp. 1050-1051; see *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1331 [evidence of the full amount billed for past medical services cannot support an expert opinion on the reasonable value of future medical expenses]; see also *Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163, 182; *Ochoa v. Dorado* (2014) 228 Cal.App.4th 120, 135-136.) By a parity of reasoning, the reasonable value of future medical expenses for a plaintiff covered by Medicare would be the Medicare rate for the services and procedures to be provided.

Subsequent to the trial in this case, however, our colleagues in Division Six came to a somewhat different

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[11] Accordingly, the trial court properly granted a separate motion in limine to limit evidence of Libman's past medical expenses to the amounts paid by Medicare or her supplemental insurance carrier. Libman, who presented no evidence at trial concerning past medical expenses, does not challenge that ruling.

conclusion in *Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266, 1269 (*Pebley*). As *Pebley* explained, under the *Howell* rationale that damages are limited to the amount paid or incurred or the reasonable value of the services, whichever is less, the measure of damages for past medical services for an uninsured plaintiff generally turns on the reasonable value of the services provided, rather than the "standard charges" for those services that may be reflected in an unpaid bill. (*Pebley*, at p. 1269; *Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1330-1331; see also *State Farm Mutual Automobile Ins. Co. v. Huff* (2013) 216 Cal.App.4th 1463, 1471 ["'the full amount billed by medical providers is not an accurate measure of the value of medical services' [citation] because 'many patients . . . pay discounted rates,' and standard rates 'for a given service can vary tremendously, sometimes by a factor of five or more, from hospital to hospital in California'"].) But evidence of medical bills, at least when coupled with testimony by medical experts that the bills represent reasonable and customary costs for the services in the relevant community and by the treating physicians that they expect to be paid those amounts in full, is admissible as relevant to proving reasonable costs. (*Pebley*, at p. 1269.) The defendant, in turn, should be allowed to present expert testimony that the reasonable and customary value of the services is less than the amounts actually billed. (*Ibid*.)

Applying these principles, *Pebley* held an insured plaintiff who has chosen to treat with doctors and medical facility providers outside his insurance plan should be considered uninsured, as opposed to insured, for the purpose of determining economic damages. (*Pebley*, *supra*, 22 Cal.App.5th at p. 1269.) "A tortfeasor cannot force a plaintiff to use his or her insurance to

obtain medical treatment for injuries caused by the tortfeasor. That choice belongs to the plaintiff. If the plaintiff elects to be treated through an insurance carrier, the plaintiff's recovery typically will be limited to the amounts paid by the carrier for the services provided. [Citation.] But where, as here, the plaintiff chooses to be treated outside the available insurance plan, the plaintiff is in the same position as an uninsured plaintiff and should be classified as such under the law." (*Id.* at p. 1277.)[12] Like the uninsured plaintiff, the court continued, the plaintiff treating outside his or her plan bears the burden of establishing through expert testimony the reasonable value of the services rendered; evidence of the billed charges alone is insufficient. (*Id.* at p. 1278; accord, *Bermudez v. Ciolek*, *supra*, 237 Cal.App.4th at p. 1335 ["initial medical bills are generally insufficient on their own as a basis for determining the reasonable value of medical services"].)[13] Significantly, the *Pebley* court applied its analysis

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[12] The *Pebley* court explained there are many reasons why an injured plaintiff might elect to treat outside his or her insurance plan, including the desire to be treated by a particular specialist who does not accept the plaintiff's insurance or any other type of insurance. (*Pebley*, *supra*, 22 Cal.App.5th at p. 1277.) "In addition, health care providers that bill through insurance, rather than on a lien basis, may be less willing to participate in the litigation process." (*Ibid.*)

[13] The court rejected the defendants' argument Pebley had failed to mitigate his medical expenses by opting for a more expensive method to pay for his treatment by going outside his insurance plan. (*Pebley*, *supra*, 22 Cal.App.5th at p. 1276.) However, the court recognized the defendants' right to present opposing expert testimony regarding the reasonable value of the medical services he had received. (*Id.* at p. 1280.)

to the plaintiff's recovery of both past economic damages for reasonably necessary medical care that he had received and future economic damages for medical care he was expected to receive in the future. (*Pebley*, at p. 1279.) Under *Pebley*, therefore, if Libman elected to be treated by Dr. Obukhoff, who did not accept Medicare, she should have been treated as uninsured and permitted to introduce expert testimony as to the reasonable cost (or reasonable value) of the medical care he would provide.

As intriguing as the issue is, we need not decide in this case whether *Markow* or *Pebley* is correct. The jury plainly did not believe Libman suffered any significant injury as a result of her collision with Basmajian. It awarded her nothing for past economic damages, rejecting her claim she was forced to reduce her work hours and thereby lost income because of ongoing pain attributable to the fall. And it awarded only $5,000, rather than the $250,000 requested by her counsel, for her alleged pain and suffering during the four and one-half year period between her fall at Ralphs and the date of trial. In addition, after hearing Libman concede that prior to trial she had not expressed any desire to undergo the back and knee surgeries her retained experts recommended, the jury rejected her request for $50,000 for bilateral knee replacement procedures and awarded only $5,000, rather than the requested $500,000, for future pain and suffering. Given the jury's overwhelmingly negative evaluation of Libman's claims, it is not reasonably probable that testimony concerning the non-Medicare cost for lumbar decompression and lumbar fusion surgery, rather than evidence of the Medicare reimbursement rates, would have led to a more favorable trial outcome. (*Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th at p. 800;

see *D.Z. v. Los Angeles Unified School Dist*. (2019) 35 Cal.App.5th 210, 231 ["a "'miscarriage of justice"' warranting reversal "'should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error"'"]; *Christ v. Schwartz* (2016) 2 Cal.App.5th 440, 455 [same].)

Faced with this record, Libman's discussion of any prejudice that may have resulted from the trial court's ruling granting the motion in limine is wholly inadequate. As the appellant, it was Libman's burden to demonstrate any error was not harmless. (*Vaughn v. Jonas*, *supra*, 31 Cal.2d at p. 601.) Yet her opening brief contains only a single, eight-word sentence on the topic: "This was clearly a prejudicial and reversible error." That conclusory assertion cannot support reversal of the judgment. (See *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 287 ["we may disregard conclusory arguments that are not supported by pertinent legal authority or fail to disclose the reasoning by which the appellant reached the conclusions he wants us to adopt"].)

The reply brief is hardly better, stating simply, "[B]ecause the jury may have discounted Dr. Tauber's testimony as to costs of surgeries that he testified would be needed, it does not necessarily mean that the jury decided that Dr. Obukhoff's opinions as to costs of future surgeries were also discounted. The jury was simply prejudicially denied that evidence and did not have it to consider." But "it does not necessarily mean" is not the governing standard. Because Libman did not carry her burden of establishing prejudice, any error in the ruling limiting the

evidence of future medical expenses does not warrant reversal of the judgment. (See *Donohue v. AMN Services, LLC* (2018) 29 Cal.App.5th 1068, 1104; *Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1352.)

5. *The Trial Court Properly Granted Ralphs's Motion for Nonsuit*

A trial court may not grant a defendant's motion for nonsuit if the plaintiff's evidence would support a jury verdict in the plaintiff's favor. (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1214; *Crouch v. Trinity Christian Center of Santa Ana, Inc.* (2019) 39 Cal.App.5th 995, 1013.) We review an order granting or denying a motion for nonsuit de novo, using the same standard as the trial court. (*Crouch*, at p. 1013; see *Castaneda*, at p. 1214 ["[o]n review of a judgment of nonsuit, as here, we must view the facts in the light most favorable to the plaintiff"]; *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 286 [same].)

As discussed, in granting Ralphs's nonsuit motion, the trial court found Libman's evidence in her case-in-chief did not establish that Ralphs's failure to develop and implement safety policies for its vendors or to supervise the vendors' employees while they were stocking items at its stores created a dangerous or defective condition at the Encino store or that the absence of such policies and procedures breached a duty Ralphs owed to its customers or was a substantial factor in causing Libman's injuries. On appeal Libman argues Avrit's expert testimony that Ralphs's conduct had been "lax" and its failure to provide any instructions to its vendors was "unusual in the industry," liberally construed in her favor, was sufficient to show that Ralphs was negligent (that is, it breached its duty to exercise due

care so as not to create an unreasonable risk of injury to others).[14] And although she omitted any discussion of causation in her opening brief, in her reply brief Libman insists Drs. Obukhoff and Tauber provided expert testimony that the fall caused Libman's persistent pain syndrome and aggravated her preexisting arthritis.[15] The trial court's focus on Avrit's testimony with respect to causation, rather than the doctors', Libman contends, was prejudicial error.

We might agree with Libman that the evidence was minimally sufficient to go to the jury on the issue of Ralphs's breach of duty. But, "assuming the defendant owed and breached a duty of care to the plaintiff, she nonetheless cannot prevail unless she shows the breach bore a causal connection to her injury." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 773; accord, *Coyle v. Historic Mission Inn Corp.* (2018) 24 Cal.App.5th 627, 645 ["[t]he element of causation requires there be a connection between the defendant's breach and the plaintiff's injury"].) Here, as the trial court ruled, there simply was no evidence that would have permitted the jury to find

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[14] On appeal Libman does not contest the trial court's nonsuit ruling to the extent it rejected both her premises liability theory and her claim that Ralphs was vicariously liable for the negligence of Basmajian, who was SWS's employee, not Ralphs's.

[15] Generally, when an issue is not addressed until the appellant's reply brief, we consider it forfeited. (See *Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 352 [appellant forfeits an argument by failing to raise it until his or her reply brief]; *Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 452 ["point not raised in opening brief will not be considered"].)

Ralphs's failure to establish safety protocols for its vendors was a substantial factor in causing Libman to fall. Any purported relationship between Ralphs's alleged negligence and Basmajian's collision with Libman was not addressed in Avrit's testimony, let alone in the testimony of Libman's medical experts. The motion for nonsuit was properly granted.

6. *The Court Did Not Abuse Its Discretion in Rejecting Libman's Proposed Special Verdict Form*

Basmajian and SWS stipulated to Basmajian's negligence before trial. Following the close of evidence the court instructed the jury, "Defendants stipulate that Mr. Peter Basmajian backed up negligently without looking over his shoulder causing a collision with Mrs. Libman." The court further instructed that, to find against Basmajian, Libman needed to establish that Basmajian's negligence was a substantial factor in causing her harm.

Notwithstanding the stipulation and instructions regarding Basmajian's negligence, Libman objected to the omission from the special verdict form of a question asking whether Basmajian had been negligent, pre-marked with the answer, "yes." The court ruled such a pre-marked question was not only unnecessary but also improper and, as to Basmajian's liability, included in the special verdict form only the question, "Was Peter Basmajian's negligence a substantial factor in causing harm to Betty Libman?"

The court's decision to exclude Libman's proposed pre-marked question was well within its discretion: "A special verdict is 'fatally defective' if it does not allow the jury to resolve every controverted issue." (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 329; accord, *Trejo v. Johnson & Johnson*

(2017) 13 Cal.App.5th 110, 136; *Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1240.) Here, the special verdict form presented to the jury every disputed issue regarding Basmajian's liability for his admitted negligence. Nothing more was required. In addition, in light of the court's instructions informing the jury SWS and Basmajian had stipulated to Basmajian's negligence, Libman cannot establish she was prejudiced by the refusal to include her pre-marked question on the special verdict form. (See *Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 872 ["the adequacy of the special verdict form is reviewed for prejudicial error"].)

7. *The Evidence at Trial Did Not Require a Finding That Basmajian's Negligence Was a Substantial Factor in Causing Harm to Libman*

Citing Basmajian's trial testimony in which he admitted Libman had injured her neck, hip and knees as a result of the collision and fall at Ralphs, Libman argues the special verdict finding Basmajian's negligence was not a substantial factor in causing harm to Libman "was entirely inconsistent with the evidence." But the jury was free to disregard Basmajian's lay concessions and the opinions of Libman's expert witnesses and to rely instead on the opinion of Dr. Miller, the defense medical expert, who testified, based on Libman's medical records, that, other than a bruise over Libman's hip, he did not believe the fall had caused her any injury. Any future surgeries, Dr. Miller opined, if needed at all, were not due to the fall. Because it was Libman's burden to prove Basmajian's negligence was a substantial factor in causing her harm and the evidence on this point was in conflict, we cannot reverse the jury's finding. (See *Wells Fargo Bank, N.A. v. 6354 Figarden General Partnership*

(2015) 238 Cal.App.4th 370, 390 ["[w]here an issue subject to appellate review turns on a failure of proof at trial, the question for a reviewing court is whether the evidence compels a finding in favor of the appellant as a matter of law"]; see also *In re R.V.* (2015) 61 Cal.4th 181, 201 [where party fails to meet its burden on an issue in the trial court, "the inquiry on appeal is whether the weight and character of the evidence . . . was such that the [trial] court could not reasonably reject it"]; *Bookout v. State of California ex rel. Dept. of Transportation* (2010) 186 Cal.App.4th 1478, 1486 ["[w]here, as here, the judgment is against the party who has the burden of proof, it is almost impossible for him to prevail on appeal by arguing the evidence compels a judgment in his favor"].)

8. *The Court Did Not Abuse Its Discretion in Striking Libman's Costs and Awarding Costs to Ralphs, SWS and Basmajian*

Because the jury returned a verdict in her favor, albeit for far less than she had requested, Libman was the prevailing party, entitled to recover her reasonable costs pursuant to sections 1032, subdivision (b), and 1033.5. (See *Seever v. Copley Press*, *Inc.* (2006) 141 Cal.App.4th 1550, 1556-1558.) However, if, as the trial court found, Libman's total recovery, including her reasonable preoffer costs,[16] was less than Ralphs, SWS and

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[16] Section 998, subdivision (c)(2), expressly directs, in determining whether a plaintiff has obtained a judgment more favorable than a defendant's settlement offer under section 998, "the court . . . shall exclude the postoffer costs." (§ 998, subd. (c)(2)(A).) "'The rationale for this rule is that allowing the addition of postoffer costs would defeat the purpose of [section 998, subdivision (c)] . . . and enable the plaintiff to

Basmajian's joint section 998 settlement offer of $35,000, Libman was entitled only to those preoffer costs; and Ralphs, SWS and Basmajian were entitled to recover from Libman all costs they had incurred from the time of their offer. (§ 998, subd. (c)(1) ["[i]f an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer"].) In addition, if a plaintiff's recovery is less than the defendant's offer, the court in its discretion "may require the plaintiff to pay a reasonable sum to cover postoffer costs of the services of expert witnesses, . . . actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant." (§ 998, subd. (c)(1); see *Sviridov v. City of San Diego* (2017) 14 Cal.App.5th 514, 520 ["[s]ection 998

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increase the amount of the "judgment" simply by driving up postoffer costs.'" (*Duale v. Mercedes-Benz USA, LLC* (2007) 148 Cal.App.4th 718, 725, fn. 3.) However, preoffer costs, including reasonable attorney fees if authorized by contract or statute, are properly added to the award of damages to determine whether a plaintiff has obtained a more favorable judgment if, as here, the settlement offer would require the plaintiff to bear its own costs and fees: "When the defendant's offer includes costs, it is to be compared with the plaintiff's judgment plus preoffer costs including attorney's fees." (*Heritage Engineering Construction, Inc. v. City of Industry* (1998) 65 Cal.App.4th 1435, 1441; accord, *Mesa Forest Products, Inc. v. St. Paul Mercury Ins. Co.* (1999) 73 Cal.App.4th 324, 330 ["[i]t is well established that where, as here, the section 998 offer includes costs, the plaintiff's *preoffer* costs are included in deciding whether the 'judgment' is more favorable than the offer; *postoffer* costs are excluded"]; *Duale*, at p. 725, fn. 3 [same].)

is itself an exception to section 1032's provision that only a prevailing party is entitled to costs. [Citation.] It makes an award of ordinary costs mandatory against a plaintiff who did not accept a statutory offer to compromise and failed to obtain a more favorable judgment. It also gives the court discretion to award reasonable expert witness costs"].)

Libman claimed she had incurred total costs for the litigation of $85,933.98, of which at least $26,753 were preoffer costs. As such, she argued, the jury verdict of $10,000 plus her preoffer costs exceeded the $35,000 settlement offer by at least $1,753. Ralphs, SWS and Basmajian objected to the largest item of preoffer costs, an invoice from Network Deposition Services for $25,950, as both unreasonable and unnecessary, arguing that as of November 2016 the case had not progressed to a point where the work reflected in the invoice was warranted. They pointed out that no depositions had been taken by either side as of that time and that Network Deposition Services did not participate at trial other than providing court reporting services (that is, it did not provide audiovisual services). The trial court agreed and granted the defendants' motions to tax costs, ruling only $803 in preoffer costs were recoverable.[17] As such, Libman's recovery did not exceed the section 998 settlement offer.

In her opening brief Libman argues "it should be self-evident to this court" that the trial court's decision on costs was "clearly wrong" and done "as a punitive measure . . . for no apparent reason." No additional argument was proffered.

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[17] The trial court permitted recovery of a filing fee of $435, service of process fees of $218 and jury fees of $150.

Even if we were to liberally construe this unsupported attack on the trial court as an argument the court abused its discretion in deciding the motion to tax costs (see *LAOSD Asbestos Cases* (2018) 25 Cal.App.5th 1116, 1121 ["[g]enerally, we review a trial court's order taxing costs for an abuse of discretion"]; *Adams v. Ford Motor Co.* (2011) 199 Cal.App.4th 1475, 1484 [same]), Libman failed to offer any argument, legal analysis or citation to the record that would justify a conclusion the trial court had abused its discretion in ruling the costs invoiced by Network Deposition Services were not reasonably incurred as of November 2016. As such, the issue has been forfeited. (See *Hernandez v. First Student, Inc.*, *supra*, 37 Cal.App.5th at p. 277; *Public Employment Relations Bd. v. Bellflower Unified School Dist.*, *supra*, 29 Cal.App.5th at p. 939; *Allen v. City of Sacramento*, *supra*, 234 Cal.App.4th at p. 52.)

In her reply brief Libman makes a minimal effort to revive this issue by asserting the trial court's ruling constituted second-guessing of her counsel's trial preparation methodology without considering the evidence before it. But Libman still fails to provide any record citations, let alone legal argument, that would demonstrate the trial court's evaluation of the Network Deposition Services invoice was arbitrary or exceeded the bounds of reason under all the circumstances. (See *Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 349 [the abuse-of-discretion standard of review "looks to see 'whether the trial court exceeded the bounds of reason'"]; *Rey v. Madera Unified School Dist.* (2012) 203 Cal.App.4th 1223, 1240 ["the trial court's exercise of discretion will be reversed only if its decision 'exceeded the bounds of reason,' i.e., it was arbitrary, capricious, or patently absurd"].)

Libman also belatedly contends the joint section 998 offer should be deemed a "token" or bad faith offer and, therefore, not a valid basis for awarding postoffer costs to a nonprevailing party. (See *LAOSD Asbestos Cases*, *supra*, 25 Cal.App.5th at p. 1126 [section 998 authorizes recovery of costs if the statutory conditions are met and the offer to compromise was reasonable and made in good faith; "[g]ood faith requires the offer be 'realistically reasonable under the circumstances of the particular case,' and carry with it a reasonable prospect of acceptance"]; *Wear v. Calderon* (1981) 121 Cal.App.3d 818, 821-822 [reversing an award of costs following a verdict in favor of defendant based on $1 pretrial settlement offer; "[a] plaintiff may not reasonably be expected to accept a token or nominal offer from any defendant exposed to [a substantial] liability unless it is absolutely clear that no reasonable possibility exists that the defendant will be held liable"].)

Even if this claim were not forfeited because it was not presented to the trial court and not raised until her reply brief, Libman's argument lacks merit. She asserts it is inconceivable Ralphs and SWS reasonably believed she would accept a $35,000 settlement offer in November 2016 when she had "suffered years of pain, epidural shots and medical care and treatment and is a surgical candidate." But Ralphs and SWS consistently maintained that whatever medical issues Libman had were not the result of her fall at Ralphs on December 31, 2012. The jury essentially agreed with them, confirming their assessment of Libman's lawsuit was not only reasonable but also accurate. And notwithstanding her counsel's exorbitant valuation of Libman's case—one perhaps distorted by filial affection—an offer of

$35,000 for bruises and a trip to urgent care is a far cry from the $1 offer found unreasonable in the case cited by Libman.

DISPOSITION

The judgment and postjudgment orders are affirmed. Ralphs, SWS and Basmajian are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

FEUER, J.