Filed 6/18/18 Sullivan v. Lotfimoghaddas CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SHAWN SULLIVAN, Plaintiff and Appellant, v. MANIJEH LOTFIMOGHADDAS, Defendant and Respondent.	B279175 (Los Angeles County Super. Ct. No. LC099466)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lee W. Tsao, Judge. Affirmed.

Cheong, Denove, Rowell & Bennett and John D. Rowell for Plaintiff and Appellant.

Richardson, Fair & Cohen and Kenneth A. Hagerman for Defendant and Respondent.

INTRODUCTION

Two cars collided on Van Nuys Boulevard. Each driver claimed, testified, and presented expert testimony the other driver was at fault. The jury believed the defendant and her expert, and found the defendant was not negligent. The plaintiff appeals, arguing the defendant committed discovery violations and her attorney made improper arguments to the jury. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *An Accident on the Boulevard*

This case arises out of a two-car accident involving Shawn Sullivan and Manijeh Lotfimoghaddas. Sullivan, who filed this action, testified he was driving north on Van Nuys Boulevard in the second lane from the center of the road after having made a wide left turn. He saw a truck in front of him move from the number two lane to the number one lane. Sullivan began to accelerate, and he saw "something on the left . . . coming." As he turned his head to see what it was, the collision occurred and he felt a "major impact" on the left side of his car, followed by a smaller impact. His car moved to the right, forcing him to adjust so that he did not hit any of the cars parked on the right. When he met Lotfimoghaddas, he said, "How can you be so fucking stupid?" Lotfimoghaddas said, "Nobody talks to me that way," and she got back into her car. Sullivan called the police.

Lotfimoghaddas said the accident happened differently. Lotfimoghaddas stated she was driving behind Sullivan on Van Nuys Boulevard when he changed lanes from the number one lane to the number two lane. Lotfimoghaddas continued

driving straight in the number one lane. She passed Sullivan and decided to change into the number two lane, in front of Sullivan. "All of a sudden" Sullivan's car hit Lotfimoghaddas's car as he attempted to pass her on the right from the parking lane, hitting the passenger side mirror of Lotfimoghaddas's car. Sullivan passed her on the right, kept driving, and stopped a block from where the accident occurred.

Each side retained an accident reconstructionist. The testimony of Sullivan's accident reconstructionist, Jon Landerville, supported Sullivan's version of how the collision occurred. Landerville testified the damage to Sullivan's car went "rear to front" because the photographic and documentary evidence (i.e., repair estimates) showed Lotfimoghaddas's car was "contacting the rear of [Sullivan's] car, moving along the side of it, and the impact's terminating up at the front." Landerville also opined Lotfimoghaddas's car was going faster than Sullivan's car, changed lanes from lane one to lane two, and hit Sullivan's car. The only photographs of Lotfimoghaddas's car Landerville reviewed in forming his opinion were "small black and white photographs which [he] was advised were the only ones available."

The testimony of Lotfimoghaddas's accident reconstructionist, Judson Welcher, supported Lotfimoghaddas's version of how the collision occurred. Welcher testified the two cars were traveling at approximately the same speed, and Sullivan made a lane change from the parking lane and hit Lotfimoghaddas's car. Welcher opined Landerville's reconstruction of the accident was invalid. In forming his opinion, Welcher reviewed 30 digital color photographs of Sullivan's car, 32 digital color photographs of Lotfimoghaddas's

car, 11 "additional photographs" of Lotfimoghaddas's car, two repair estimates for Sullivan's car, and three repair estimates for Lotfimoghaddas's car.

As noted, prior to testifying at trial Landerville had only seen what he called "poor black and white copies" of photographs of Lotfimoghaddas's car. Landerville had not seen the over 70 digital color photographs of the two cars, which are better for accident reconstuctionists, nor had he seen one of the repair estimates for Lotfimoghaddas's car.

B. *An Incomplete Disclosure in Discovery*

Sullivan had asked for all of these photographs and repair estimates in discovery. In connection with Lotfimoghaddas's deposition notice, Sullivan requested all photographs, slides,[1] videotapes, and cell phone pictures of "any person, place or thing that is involved in this subject automobile accident," including "the vehicles involved, damage to the vehicles (plaintiff and defendant), intersection/street pictures." Sullivan also asked for all repair estimates and bills, "including supplemental repairs" and other documents from Lotfimoghaddas's "insurance company and repair shop relating to the damage to your motor vehicle as a result of the incident which are the subject of this automobile accident." At her deposition, Lotfimoghaddas produced the poor quality black and white photographs, but did not produce the

---

[1] A "slide" is a "photographic transparency" recorded on celluloid. (*People v. Enskat* (1971) 20 Cal.App.3d Supp. 1, 3; see *Minnesota O & M Surgery, P.A. v. Charter Oak Fire Ins. Co.* (Minn. Ct.App., June 13, 2011, No. A10-2238) 2011 WL 2304164, at p. 3 ["[a] 'slide' is '[a]n image on a transparent base for projection on a screen'"].)

70-plus color photographs of Sullivan's car and Lotfimoghaddas's car or the second repair estimate for Sullivan's car.

Sullivan also served requests for production of documents. Among other things, Sullivan asked Lotfimoghaddas to produce all photographs, cell phone pictures, videotapes, or cell phone video depicting the accident scene and the two vehicles involved, repair and supplemental repair estimates, and documents identified in response to Sullivan's requests for admissions and special interrogatories (but not in response to Sullivan's form interrogatories). Lotfimoghaddas responded she did not "presently have in [her] possession, custody or control" any documents responsive to these requests. Lotfimoghaddas did not produce the additional photographs or estimates.

Sullivan also served form interrogatories. One of the interrogatories asked whether Lotfimoghaddas or anyone acting on her behalf knew of any photographs "depicting any place, object, or individual concerning the [accident] or plaintiff's injuries," and if so, to identify the number of photographs, what they depicted, who took them, and who possessed them. Lotfimoghaddas responded she had 13 photographs of the two cars involved in the accident and the accident scene, claims representatives of Lotfimoghaddas's insurer took the photographs, and Lotfimoghaddas's attorneys possessed them. Lotfimoghaddas did not identify in her interrogatory responses the additional color photographs or estimates.

Sullivan also took Welcher's deposition several months before trial. At his deposition, Welcher produced an electronic file on a DVD that, in several of its subdirectories, included three repair estimates of Lotfimoghaddas's car, one repair estimate of

Sullivan's car, and color photographs of the two cars, all of which Lotfimoghaddas had not previously produced.

C. *A Verdict for the Defendant*

The liability phase of the trial began on August 19, 2016.[2] The jury deliberated for three days. The jurors submitted two questions, one of which suggested they may have been deadlocked. The jury also requested readback of Sullivan's testimony about how the accident occurred. Ultimately, the jury found in favor of Lotfimoghaddas, answering the question in the verdict form whether she was negligent, "No."

D. *A Motion for New Trial*

Sullivan moved for a new trial. He argued Lotfimoghaddas willfully suppressed the color photographs of the two cars taken after the accident, served "false sworn discovery responses," and made improper arguments to the jury. Landerville submitted a declaration stating he had not been provided the 30 color photographs of Sullivan's car, the 44 color photographs of Lotfimoghaddas's car, or the damage assessment prepared for Lotfimoghaddas's insurer. Landerville stated the set of 44 color photographs of Lotfimoghaddas's car was "an extremely significant piece of evidence for purposes of doing an accident reconstruction and crash analysis." He also stated, "Had I been provided with these materials before my testimony I would certainly have incorporated them in my PowerPoint, explained

---

[2] On June 29, 2015 the court granted Lotfimoghaddas's motion for a separate trial on her statute of limitations defense. That phase of the trial occurred on May 10 and 11, 2016, and the jury returned a verdict in favor of Sullivan.

the significance of the contents and what was depicted in these photographs to the jury." Regarding the additional estimate, Landerville stated, "Had [it] been provided to me before I testified, I would have known that that exhibit was prepared by an adjuster for the insurance carrier for [Lotfimoghaddas], never provided to Mr. Sullivan, and not prepared for purposes of actually doing any repairs to the vehicle. In addition, there is material referred to in this estimate which shows, at least in part, that the accident was more severe than as represented by the defense accident reconstructionist." Landerville also explained that, after he testified at trial, he learned Welcher had testified about the additional photographs, but Landerville had been unable to return to the trial to testify about the new photographs because he had commitments out of state.

Counsel for Sullivan also submitted declarations in support of the motion for new trial. One of the attorneys for Sullivan stated that, "[t]he day before this case was assigned to [the trial court] for trial," he received trial exhibits from counsel for Lotfimoghaddas that included the photographs of Sullivan's car, color duplicates of the photographs of Lotfimoghaddas's car, and the repair estimate Landerville had not seen. He also admitted the missing color photographs and estimate were on the DVD produced by Welcher at his deposition on June 3, 2016, but explained they were buried in subdirectories (or, as Sullivan characterizes them on appeal, "sub-sub-directories") and he "had no means of reading the DVD at the deposition." Another attorney for Sullivan submitted a declaration attaching Lotfimoghaddas's verified discovery responses that failed to identify or disclose the existence of the color photographs and the

additional estimate and stating he would have given these items to Landerville had he known about them.

In opposition to the motion for new trial, Lotfimoghaddas, relying on the boilerplate "discovery is continuing" language in the discovery responses prepared by her attorneys, argued she and her attorneys did not suppress any evidence in discovery. Counsel for Lotfimoghaddas stated in his declaration that in May 2016, three months before the liability phase of the trial began, he and counsel for Sullivan prepared a joint exhibit list, which included as Lotfimoghaddas's trial exhibits the 30 photographs of Sullivan's car and 43 photographs of Lotfimoghaddas's car. On May 24, 2016 counsel for Lotfimoghaddas "hand-delivered by courier" five copies of Lotfimoghaddas's trial exhibits, which included color duplicates of the photographs of the two cars after the accident. The confirmation email from the delivery service indicated the courier delivered the exhibits at 1:37 p.m. on May 24, 2016. Lotfimoghaddas also argued that her attorney did not engage in any misconduct in closing argument and that any impropriety in the argument was harmless.

The trial court denied the motion. The trial court noted the photographs and estimates "were disclosed nearly, or almost three months prior to, trial, according to [counsel for Lotfimoghaddas's] declaration and the documents attached to his opposition." Addressing counsel for Sullivan, the court stated, "And although you may not personally have been aware of these photographs, for purposes of a new trial, aren't you deemed to have constructive notice of these photographs at the time that they were delivered? And isn't that dispositive of that argument?" The court stated to counsel for Sullivan, "The

problem that I'm having is, I don't see how your lack of knowledge of these photographs, when they were delivered to your firm, can be attributed to anything else other than an oversight on your firm's part." The court found that counsel for Sullivan was not "vigilant in this respect" and that "nothing has been presented to this court that those photographs should not have been reviewed in the ordinary course of business. If the defense firm delivers photographs to the plaintiff's firm, they're put on constructive notice of these photographs as far as the court is concerned." Regarding misconduct of counsel for Lotfimoghaddas at trial, the court ruled counsel's closing argument was not improper.

DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion in Denying Sullivan's Motion for New Trial Based on Discovery Violations*

Sullivan argues the trial court "saw a pattern of discovery violations but did not grant [Sullivan's] motion for a new trial." Sullivan contends that "hiding" the photographs "had the effect of depriving [him] of an equal opportunity to prepare and present his case" and "caused substantial prejudice," "warranting reversal and a new trial."

"Generally, rulings on new trial motions are reviewed for an abuse of discretion." (*Hall v. Goodwill Industries of Southern California* (2011) 193 Cal.App.4th 718, 730; see *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872 (*Decker*) ["a trial judge is accorded a wide discretion in ruling on a motion for new trial and that the exercise of this discretion is given great

deference on appeal"].) In reviewing an order "*denying* a new trial, as distinguished from an order *granting* a new trial, we must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial." (*Decker*, at p. 872; accord, *Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 46-47; see *Jenks v. DLA Piper Rudnick Gray Cary US LLP* (2015) 243 Cal.App.4th 1, 8 ["[a]n order denying a motion for new trial will not be set aside unless there was an abuse of discretion that resulted in prejudicial error"].)

The trial court found there was a discovery violation: "There's reason to believe these photos should have been disclosed earlier. They were in possession of and perhaps taken by the defendant's insurer, and they were not disclosed when [Sullivan] asked for them initially in [Lotfimoghaddas's] discovery responses." The court denied the motion for new trial, however, because the court found Lotfimoghaddas's discovery violation did not prejudice Sullivan because he and his attorneys had the undisclosed photographs and documents in plenty of time to prepare for trial.

The trial court's ruling was correct. As the court found, Lotfimoghaddas and her attorneys violated their discovery obligations by not producing responsive documents they should have produced and by falsely stating in their discovery responses they did not have responsive documents they actually had.

The accident occurred on January 12, 2011. On June 17, 2013 Lotfimoghaddas stated under penalty of perjury in response to Sullivan's form interrogatories that she had 13 photographs of her car (taken on January 13, 2011), Sullivan's car (taken on February 8, 2011), and the accident scene (taken on May 2, 2011).

This statement was false; Lotfimoghaddas, her insurer, and her attorneys had more than 13 photographs. On October 21, 2013 Lotfimoghaddas stated under penalty of perjury in response to document requests accompanying her deposition notice that she would comply with the requests and produce "[a]ny and all" pictures of the two cars involved in the accident and repair or supplemental repair estimates. She did not. She produced the black and white photographs, but did not produce the color photographs. And on January 4, 2015 Lotfimoghaddas stated under penalty of perjury in response to Sullivan's requests for production of documents that she did not have any pictures of the two cars involved in the accident, or any repair or supplemental repair estimates, other than those she produced at her deposition. Again, these statements were false; she had additional photographs taken by claims representatives of her insurer that she did not produce at her deposition.[3]

The discovery violations, however, were not prejudicial. On May 24, 2016 counsel for Lotfimoghaddas sent counsel for Sullivan by personal delivery five copies of Lotfimoghaddas's trial

---

[3] Lotfimoghaddas asserts that, "[a]t the time of [her] deposition, nearly three years before the trial of the liability and damages phase of this matter, she produced all evidence, responsive to the deposition notice, that was in her possession, custody and control at the time. This was also true at the time of her response to" Sullivan's requests for production of documents. The trial court was justified in rejecting this assertion. The parties repaired their cars after the accident in January 2011. The trial court could reasonably conclude the photographs were taken before Lotfimoghaddas's June 2013 responses to Sullivan's form interrogatories, her October 2013 deposition, and her January 2015 responses to Sullivan's document requests.

exhibits, including color duplicates of the photographs counsel for Sullivan argues he did not know about and Landerville stated he did not have prior to trial. Although counsel for Sullivan stated in his declaration he did not learn Lotfimoghaddas's exhibits included the over 70 photographs until Welcher testified at trial, there is no dispute the photographs were identified as trial exhibits and delivered to counsel's office in May 2016, three months before the liability phase of the trial began in August 2016. Counsel for Sullivan suggests he was misled about the contents of the exhibits he received because the description of the exhibits containing the color photographs "did not include any information about the number of photos and, other than stating the photos were of [the two cars], did not describe what was depicted in the photographs." The trial court, however, did not abuse its discretion in ruling that counsel for Sullivan could have and should have looked at the photographs and other trial exhibits counsel for Lotfimoghaddas delivered to his office and that his failure to review all of the exhibits before trial did not justify a new trial.

Counsel for Sullivan also had the "missing" color photographs and estimate on June 3, 2016, two months before the liability phase of the trial, when he took Welcher's deposition. At the deposition Welcher produced "an electronic copy of his file on a DVD," which counsel for Sullivan received and marked as an exhibit. Counsel for Sullivan conceded the DVD included the color photographs and the additional repair estimate, but stated he "had no means of reading the DVD at the deposition, taken at the witness' office." But counsel did not state that he had no means of accessing the documents on Welcher's DVD back at his office after the deposition or that he asked counsel for

Lotfimoghaddas, Welcher, or anyone else for assistance in accessing the documents and information on the DVD, and his request was denied.

Finally, when the issue arose at trial after Welcher's testimony, the court gave Sullivan the only relief he requested. Counsel for Sullivan made a motion for permission to recall Landerville and question him about the color photographs and the additional repair estimate. Over Lotfimoghaddas's objection, the trial court granted the motion, ruling Sullivan had "offered a plausible explanation as to why these photographs were not given to him previously" and Sullivan's request to recall Landerville sounded "pretty reasonable." Noting the trial could be over soon, counsel for Sullivan stated, "So I'm going to make every effort I can to get him here. This may be a tempest in the teapot if I can't get him here." Sullivan does not argue that he requested a continuance of the trial, permission to take witnesses out of order, or any other remedy should Landerville be unable to return to the trial, or that the trial court erred by denying him any remedy he asked for during the trial. Nor does Sullivan contend he asked for, and the trial court erred in denying, any other sanction for Lotfimoghaddas's discovery violations, such as monetary sanctions, evidentiary or issue sanctions, or giving CACI No. 204 or other appropriate jury instruction.[4]

---

[4] CACI No. 204 states: "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."

B. *Any Improper Argument by Counsel for Lotfimoghaddas Does Not Justify Reversal*

1. *Applicable Law and Standard of Review*

"Attorney misconduct is an irregularity in the proceedings and a ground for a new trial. [Citation.] Although it is common practice to urge that attorney misconduct is an error of law justifying the grant of a motion for a new trial, a party is not required to move for a new trial before raising attorney misconduct as an issue on appeal. [Citation.] However, to preserve for appeal an instance of misconduct of counsel in the presence of the jury, an objection must have been lodged at trial and the party must also have moved for a mistrial or sought a curative admonition unless the misconduct was so persistent that an admonition would have been inadequate to cure the resulting prejudice. [Citation.] This is so because '[o]ne of the primary purposes of admonition at the beginning of an improper course of argument is to avoid repetition of the remarks and thus obviate the necessity of a new trial.'" (*Garcia v. ConMed Corp.* (2012) 204 Cal.App.4th 144, 148.)

Moreover, "it is not enough for a party to show attorney misconduct. In order to justify a new trial, the party must demonstrate that the misconduct was prejudicial. [Citation.] As to this issue, a reviewing court makes 'an independent determination as to whether the error was prejudicial.' [Citation.] It 'must determine whether it is reasonably probable [that the appellant] would have achieved a more favorable result in the absence of that portion of [attorney conduct] now challenged.' [Citation.] It must examine 'the entire case, including the evidence adduced, the instructions delivered to the

jury, and the entirety of [counsel's] argument,' in determining whether misconduct occurred and whether it was sufficiently egregious to cause prejudice. [Citation.] 'Each case must ultimately rest upon a court's view of the overall record, taking into account such factors, inter alia, as the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge's control, of the trial, the likelihood of prejudicing the jury, and the efficacy of objection or admonition under all the circumstances.' [Citation.] '[I]t is only the record as a whole, and not specific phrases out of context, that can reveal the nature and effect of such tactics.'" (*Garcia v. ConMed Corp.*, *supra*, 204 Cal.App.4th at p. 149.)

"The Supreme Court has held that the appropriate standard of review for a trial court's denial of a motion for new trial based on attorney misconduct is de novo, at least on the issue of prejudice. [Citation.] Although a number of earlier cases emphasized that appellate courts must defer to the trial court's finding of no prejudice [citations], the Supreme Court's more recent decision in *Decker* is determinative . . . and has been followed by other Courts of Appeal in recent cases." (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 296, fn. 16.)

2. *Misconduct, Forfeiture, and Prejudice*

Sullivan argues counsel for Lotfimoghaddas engaged in four acts of misconduct during closing argument that were "viciously designed to inflame the jury against Mr. Sullivan and his counsel . . . ."[5] We conclude that, although counsel for

---

[5] Counsel for Lotfimoghaddas spent much of his argument calling Sullivan a liar: "the first word uttered by the plaintiff in this courtroom under oath was a lie"; "the bridge which plaintiff

Lotfimoghaddas's closing argument was not a model of professionalism, any misconduct does not justify reversing the judgment.

First, Sullivan contends counsel for Lotfimoghaddas improperly read a question and answer from Sullivan's deposition testimony that neither side had read at trial.[6] Counsel for Sullivan objected and, at a side bar conference, counsel for Lotfimoghaddas admitted he had read deposition testimony that had not been admitted at trial, but argued he could read such deposition testimony because during the trial he had "referred" to the subject matter of the testimony. The trial court correctly rejected this argument and admonished counsel for Lotfimoghaddas: "You are aware that you obviously cannot . . . refer to testimony . . . that was not elicited during this trial." After stating, "Nothing improper has, in my view, been argued yet," the court instructed the jury: "Ladies and gentlemen, I will just repeat a standard instruction that I have given you throughout the trial, that closing argument is just that,

---

has built and by which he attempts to establish liability is really constructed of a flimsy fabric woven of lies"; "plaintiff did lie when he testified"; "on something as basic as the geography of the street that he drives every day, he lied to you"; "under oath the plaintiff on several occasions told you things that were not true"; "plaintiff's relationship with the truth is rather tenuous." Sullivan does not argue these statements were improper.

[6] The deposition testimony counsel for Lotfimoghaddas read was Sullivan's statement, "I never told anyone I was going 25 [miles per hour]." Counsel for Lotfimoghaddas appears to have been trying to impeach Sullivan's trial testimony he was traveling 15 to 20 miles per hour.

it's argument. So, the argument by either side does not constitute evidence. You are only to [base] your verdict on the evidence at trial."

The trial court's actions were entirely proper. (See *Arave v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (2018) 19 Cal.App.5th 525, 536 ["'[i]t is well within [a trial court's] discretion to rebuke an attorney, sometimes harshly, when that attorney asks inappropriate questions'"].) The court essentially agreed with counsel for Sullivan that counsel for Lotfimoghaddas's argument was improper, admonished counsel for Lotfimoghaddas he could only read deposition testimony that had been read at trial, and sua sponte instructed the jury that counsel's argument was not evidence. Counsel for Sullivan did not ask the court for anything more, such as instructing the jury to disregard the question and answer counsel for Lotfimoghaddas improperly read. And any error in not striking this brief reference to the deposition testimony was harmless: The probability it had any effect on the result of the trial is statistically insignificant. (See *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 802-803 [no prejudice where "the offending argument was fleeting, comprising just two sentences in the reporter's transcript of a closing argument that covers more than 150 pages"];[7] *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1123 ["it is exceedingly unlikely that any prejudice resulted from the brief mention of insurance"]; see also *People v. Fuiava* (2012) 53 Cal.4th 622, 682 ["even assuming misconduct occurred because the [prosecutor's opening] statements constituted argument [citation], and referred to matters outside the evidence

---

[7] Counsel for Lotfimoghaddas's closing argument covers only 25 pages of the reporter's transcript.

to be presented at trial, defendant could not have been prejudiced by these brief and not particularly inflammatory comments"].)

Second, Sullivan contends counsel for Lotfimoghaddas improperly argued that Sullivan had failed to call as a witness Jennifer Schwartz, with whom Sullivan had a relationship for over 20 years and a son, Ryan Sullivan. On cross-examination, Sullivan testified he and Schwartz considered themselves, and held themselves out as, a married couple, and lived together for many years. Sullivan testified that Schwartz observed, and would be the best person to testify about, any pain or mobility difficulties Sullivan was experiencing. During closing argument, counsel for Lotfimoghaddas argued: "Jennifer Schwartz is the mother of Ryan Sullivan, she lived with the plaintiff for nearly 20 years, shared a bedroom with him, and the plaintiff even acknowledged there's no one on earth . . . that could better testify about his condition and how this fender-bender affected him. He still talks with her at least once a week. But when you talk about the ability to produce stronger evidence, we didn't see Jennifer Schwartz. You would think that if she really observed all this and really saw it as legitimate she would actually have some concern about the father for her child and she would be here. But she wasn't."

Sullivan forfeited the contention that this argument was improper by not objecting at trial. (See *Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th at p. 794 ["'generally, to preserve for appeal an instance of misconduct of counsel in the presence of the jury, an objection must have been lodged at trial'"]; *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 598 ["[t]o preserve a claim of attorney misconduct for appeal, a timely and proper objection must have been made at trial; otherwise, the claim is forfeited"].)

As noted, "[t]he purpose of the rule requiring the making of timely objections is remedial in nature, and seeks to give the court the opportunity to admonish the jury, instruct counsel and forestall the accumulation of prejudice by repeated improprieties, thus avoiding the necessity of a retrial." (*Horn v. Atchison, T. & S.F. Ry. Co.* (1964) 61 Cal.2d 602, 610; accord, *Janice H. v. 696 North Robertson, LLC* (2016) 1 Cal.App.5th 586, 604.) By failing to object, counsel for Sullivan deprived the trial court of the opportunity to cure with an appropriate instruction what little prejudice this brief argument to the jury may have created.[8]

Moreover, the argument was not improper in this case. Sullivan testified Schwartz was the most knowledgeable person about certain aspects of his injuries. The trial court instructed the jury pursuant to CACI No. 203, which Sullivan does not challenge, "You may consider the ability of each party to provide evidence. If a party provided weaker evidence when it could have provided stronger evidence, you may distrust the weaker evidence." Counsel for Lotfimoghaddas was entitled to argue that, by failing to call Schwartz, the person Sullivan stated was the best person to testify about his noneconomic damages, Sullivan provided weaker evidence of his damages, and the jury could distrust it. (See Evid. Code, § 412.) Although, as Sullivan correctly argues, the presumption does not apply to nonparty witnesses who are equally available to both sides (see *Smith v. Covell* (1980) 100 Cal.App.3d 947, 956-957; *Provencio v. Merrick* (1970) 5 Cal.App.3d 39, 42), it was not improper for counsel for

---

[8] Sullivan does not argue that objecting to counsel for Lotfimoghaddas's argument and requesting an admonition would have been futile. (See *Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1412.)

Lotfimoghaddas to argue, based on the long-term relationship between Sullivan and Schwartz, that Schwartz was more available to Sullivan than to Lotfimoghaddas. And nothing prevented counsel for Sullivan from arguing to the jury that, because Schwartz was equally available to both sides, CACI No. 203 did not apply. (See *Johnson v. City of San Leandro* (1960) 179 Cal.App.2d 794, 799 ["[t]he statutory language [of the predecessor to Evidence Code section 412] serves only to emphasize the point that whatever mistrust may arise out of the weaknesses of plaintiff's case is exclusively a matter of jury determination and application"].)

Third, Sullivan argues counsel for Lotfimoghaddas improperly argued that the two phases of Sullivan's trial "were necessitated by plaintiff, that they were a waste of our community's resources and time and that 'we' need to do something about it." Counsel for Lotfimoghaddas argued: "And, so, what we have is two weeks, a busy courtroom consuming their time, a busy judge court, support staff, sheriff's deputy maintain[s] order[ ], court reporters, jurors who come out and do their civic duty, alternates who have to sit here as well, all based upon lies. And that waste of resources and that misuse of our community's time is bad enough. But remember, two trials, two different courts, all these—two juries, four alternates, and through it all, Mrs. Lotfimoghaddas has had the anxiety and stress of the whole thing: lawyers, lawyers, and an attack on her personal financial security. That's wrong. That is wrong. And I think if as a community we allow that type of misuse of scarce resources and good people's time, that maybe Shakespeare was right: First thing, let's kill all the lawyers."

This argument, which appealed to the jurors' self-interest, is much more troubling. Arguing the jury should rule in his client's favor because of the public expense of the trial and the effect on her "financial security," and suggesting Sullivan's lawyers should be killed for bringing the case, was improper. (See *Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th at p. 796 ["[a]n attorney's appeal in closing argument to the jurors' self-interest is improper and thus is misconduct because such arguments tend to undermine the jury's impartiality"]; *Martinez v. Department of Transportation* (2015) 238 Cal.App.4th 559, 566 ["attorneys cannot make appeals based on irrelevant financial aspects of the case such as the hardship that would be visited on a defendant from a plaintiff's verdict" and "appealing to the jurors' self-interest as taxpayers"]; *Du Jardin v. City of Oxnard* (1995) 38 Cal.App.4th 174, 177, 179 [counsel for defendant's argument that "public services . . . will disappear" if the jury found against the public entity defendant was improper].)

Counsel for Lotfimoghaddas's argument was improper for another reason: There was no evidence at trial to support it. (See *Decker*, *supra*, 18 Cal.3d at p. 870 ["misconduct has often taken the form of improper argument to the jury, such as by urging facts not justified by the record or suggesting that the jury may resort to speculation"]; *Malkasian v. Irwin* (1964) 61 Cal.2d 738, 747 ["to argue facts not justified by the record, and to suggest that the jury could speculate, was misconduct"]; *Garcia v. ConMed Corp.*, *supra*, 204 Cal.App.4th at p. 148 [""[w]hile a counsel in summing up may indulge in all fair arguments in favor of his client's case, he may not assume facts not in evidence or invite the jury to speculate as to unsupported inferences""].) And counsel for Sullivan could not, without arguing facts outside the

record of the trial, point out it was Lotfimoghaddas who (1) alleged the affirmative defense that Sullivan's complaint against Lotfimoghaddas was barred by the statute of limitations because Sullivan's amendment to add Lotfimoghaddas as a doe defendant was untimely, (2) unsuccessfully moved for summary judgment on this ground, and (3) requested a bifurcated trial on the issue. Counsel for Sullivan could have argued Lotfimoghaddas and her attorneys were responsible for wasting taxpayer money, but counsel for Sullivan played by the rules.

Sullivan, however, did not object to this argument at trial. Therefore, he forfeited his contention counsel for Lotfimoghaddas's misconduct justifies reversal of the judgment. (See *Regalado v. Callaghan*, *supra*, 3 Cal.App.5th at p. 599 ["although in our view the remarks from [the plaintiff's] counsel telling the jury that its verdict had an impact on the community . . . were improper," the court "need not reach the issue because [the defendant] failed to timely object to the remarks and failed to request a curative admonition"].)

Finally, Sullivan argues counsel for Lotfimoghaddas committed misconduct in making derogatory comments about Sullivan and his teenage son Ryan, who testified at trial. Counsel for Lotfimoghaddas argued: "I don't know if you noticed but . . . after Ryan Sullivan stepped down off the witness stand he sat right here by the jury box and he observed his father testify. Because Ryan was here in the courtroom, we can infer that Dad didn't say, 'Hey, here's ten bucks, go to subway and get a sandwich, I will see you later. . . .' Instead, the plaintiff chose to allow his son to sit in this courtroom while he was cross-examined and shown to have lied at a public forum by his own testimony. He allowed his son to observe him in an attempt to

misuse and manipulate this process for financial gain. That's wrong. That's really wrong. And killing all the lawyers won't fix that."

Again, this was questionable advocacy. A jury argument that attacks a litigant's personal integrity, impugns his parenting decisions, and gratuitously suggests the exercise of his constitutional right to petition the courts is worse than murdering attorneys, falls below the level of acceptable advocacy and civility that courts and bar associations are striving to restore in our profession. (See *Martinez v. State*, *supra*, 238 Cal.App.4th at p. 566 ["a defense attorney commits misconduct in attempting to besmirch a plaintiff's character," and "[a]ttorneys are not to mount a personal attack on the opposing party even by insinuation"]; *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1246 ["[p]ersonal attacks on opposing parties and their attorneys, whether outright or by insinuation, constitute misconduct," and "[s]uch behavior only serves to inflame the passion and prejudice of the jury, distracting them from fulfilling their solemn oath to render a verdict based solely on the evidence admitted at trial"].) Even when advocating zealously, counsel must recognize there are lines that are not to be, and need not be, crossed. "Zeal and vigor in the representation of clients are commendable. So are civility, courtesy, and cooperation. They are not mutually exclusive." (*In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1537; see Super. Ct. L.A. County, Local Rules, Guidelines for Civility in Litigation, Appen. 3.A., guideline (*l*)(2) ["[c]ounsel should always deal with parties, counsel, witnesses, jurors or prospective jurors, court personnel and the judge with courtesy and civility"]; Assn. of Business Trial Lawyers, Ethics, Professionalism, and Civility

Guidelines, guideline 1 <http://www.abtl.org/pdfs/civilityguidelines.pdf> ["[z]ealous representation of the client's interests should be carried out in a professional manner"].) But again, Sullivan did not object and request a curative instruction, thus forfeiting the issue.

DISPOSITION

The judgment is affirmed. Each party is to bear his or her costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.*

---

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