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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

ROBERT J. PHILLIPS, et al.,

Plaintiffs and Appellants,

v.

CENTURY LLC, et al.

Defendants and Respondents.

2d Civil No. B264908
(Super. Ct. No. 56-2011-00398454-CU-PO-
SIM)
(Ventura County)

In this product liability case, Robert J. Phillips (Phillips) and his wife, Miga Phillips, appeal from the judgment entered in favor of Century LLC, respondent. The judgment was based on a jury's special verdict. The product is martial arts headgear designed and sold by respondent. Appellants contend that the trial court committed evidentiary errors, that respondent's counsel engaged in misconduct during opening

statement and closing argument, and that the jury made inconsistent findings in its special verdict.

Appellants also appeal from a postjudgment order denying their motion to strike and/or tax costs. We affirm both the judgment and the postjudgment order.¹

Factual and Procedural Background

One night in October 2010, Phillips was engaging in “light” and “friendly sparring” at a martial arts studio when his opponent, Renato Susim, punched him in the face. Susim threw “a light punch” but Phillips stepped into the punch, “[s]o it created a little bit heavier impact.” They were wearing “American-style boxing gloves.” Susim could not recall “how much [Phillips’s] head moved” in response to the punch.

Phillips, who was 44 years old, was wearing respondent’s “P2” protective headgear with a clear face mask or shield, hereafter referred to as the Century P2 headgear. Susim’s punch made contact with the “front area” of the shield. The shield hit the bridge of Phillips’s nose and cut it. Phillips cleaned the blood from his face and continued to spar with Susim and other persons at the martial arts studio. Susim testified: “We boxed again that night, and we also did Brazilian jiu-jitsu and that involves taking down -- take-downs.”

The next day Phillips saw Dr. Timothy Infuhr, a chiropractor, and said he had been hit in the nose. He complained of pain in the neck, middle back, and left shoulder.

¹ This is the second time that appellants have appeared before us in this case. The first time, in an unpublished opinion we affirmed a summary judgment in favor of respondent’s codefendants: American Hapkido, Inc., and Renato Susim. (*Robert and Miga Phillips v. American Hapkido Mixed Martial Arts Studio, et al.* (March 18, 2014) 2d Civil No. B249116.)

Dr. Infuhr diagnosed Phillips's problem as a muscle spasm affecting the neck's C3 vertebrae. He could see the "[t]ightness of the [neck] muscle." Dr. Infuhr "adjusted" Phillips's C3 vertebrae, but it did not have the desired effect. He therefore also adjusted the C1 and C2 vertebrae. The C1, C2, and C3 vertebrae are the first three vertebrae immediately below the skull. Dr. Infuhr understood that "[t]here can be a risk" that chiropractic manipulation of the neck will cause a dissection of the carotid artery. He opined that he had not done anything of "sufficient magnitude . . . to cause any damage to the carotid artery." He did not hyperextend Phillips's neck. He did not detect "any signs or symptoms of [a] possible stroke." Dr. Infuhr had been "trained to detect symptoms of strokes in patients."

The next morning at about 4:00 a.m., Phillips suffered a stroke caused by a dissection of the carotid artery. The stroke resulted in severe brain damage. According to Dr. Thomas Hedge, who specializes in physical medicine and rehabilitation, Phillips "needs a caregiver at all times."

Appellants filed a complaint alleging seven causes of action. Three theories of liability were presented to the jury: (1) respondent was strictly liable because the design of the Century P2 headgear was a substantial factor in causing harm to Phillips, and respondent failed to prove that the benefits of the design outweighed the risks inherent in the design;² (2) respondent

² "[A] product may be found defective in design, so as to subject a manufacturer to strict liability for resulting injuries, . . . if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design." (*Barker v. Lull Engineering Co.* (1978))

negligently designed the headgear and its negligence was a substantial factor in causing harm to Phillips; and (3) respondent intentionally failed to disclose facts about the headgear with the intent to deceive Phillips, and the concealment was a substantial factor in causing harm to Phillips. In their complaint appellants alleged that respondent had “concealed that the product substantially increased the risk of serious and severe injuries to users of the mask . . . and that the engineering and design of the product failed to consider safety issues and was in fact completely unsafely designed and engineered.”

Several expert witnesses testified at the trial. Dr. Harris Fisk, a neurologist called by appellants, opined that the dissection was due to the punch in the face. He explained that the punch caused Phillips’s head “to go back. We call that hyperextension.” At the same time his head rotated. “So we have hyperextension and rotation. That combination of factors is a major risk factor for causing the separation of the inner layer of [the carotid artery] blood vessel wall from the middle layer of that blood vessel wall. That’s the hyperextension injury, which . . . caused the dissection, which cause[d] the massive brain damage that resulted.”

Dr. Fisk further opined that the chiropractic manipulation did not have a significant impact on the dissection. There was no “persuasive medical evidence” that the manipulation “could . . . have taken a situation which is already in progress and made it worse.”

20 Cal.3d 413, 432.) This standard is referred to as the “risk-benefit” standard for design defect strict liability. (*Id.*, at p. 418.)

Dr. Barry Pressman, a neuroradiologist called by appellants, opined: “[T]he more likely cause [of the dissection], and the most probable so I’d say more than 50 percent likely, is the blow to the head.” Dr. Pressman testified: “[T]he carotid dissections we see are usually . . . spontaneous [in origin]. We see a number of those, particularly in young people, and traumatic [dissections].”

Dr. Fisk’s and Dr. Pressman’s testimony was disputed by respondent’s expert, Dr. Edwin Amos, a neurologist. He opined that although it is possible that the punch to Phillips’s face caused the dissection, “there’s an equally strong case to be made for the chiropractic manipulation.” “[I]t’s a known risk for carotid dissection to undergo a cervical or neck manipulation.” Such manipulation was probably the cause of about half of the carotid artery dissections in Dr. Amos’s patients. Dr. Amos was not aware of any report in the medical literature of a blow to the face causing a carotid dissection. The dissection also could have been “a spontaneous event” that had nothing to do with the punch or the chiropractic manipulation. A spontaneous dissection is “without a particular known cause or in[ci]ting event.” In “upwards of one half” of the dissections that Dr. Amos had seen, “no actual cause or force or injury has ever been documented.” Dr. Amos opined: “[I]t is not clear that any of these [three] factors [i.e., the punch to the face, the chiropractic manipulation, and the possibility of a spontaneous dissection] outweighs the others. So I’ve given them a one-third, one-third, one-third probability.”

Dr. David Dainty, respondent’s expert in the “biomechanics of injury,” opined that to cause a dissection of the carotid artery, a punch to the face would have to be of “such

force” that it would be “directed almost through the person” so that the neck would be bent “past the physiological range.” Dr. Dainty further opined that (1) Phillips’s carotid dissection “could not have been prevented by the use of any helmet,” and (2) “to a high degree of scientific probability . . . it’s not likely” that the Century P2 headgear “played a role in causing the . . . stroke suffered by [Phillips].”

Dr. Mariusz Ziejewski, appellants’ expert in biomechanics, testified that he had no “complain[t] about the lower part of the [Century P2] face mask at all.” The upper part of the mask, however, was defective because it had a “catching mechanism” so that a punch to the face could “catch” the mask and cause “rotational force.” The catching mechanism was an “opening at the eye level” of the mask. Dr. Ziejewski explained, “Essentially any glove of any size you punch it, you can catch. You can catch the upper edge [of the opening in the mask].” “[I]f you punch in the opening, you’re going to catch it and drag it.” But Susim, who threw the punch in question, testified that when his glove hit the mask, “[i]t didn’t catch at all.”

Freddie Rogers, respondent’s Vice-President of Operations, testified that respondent has sold about 105,000 units of the Century P2 headgear. Appellants’ claim “is the only claim of injury ever made.”

During closing argument, appellants’ counsel stated: “[I]t’s the plaintiff’s burden to prove that the headgear with face shield was a substantial factor in causing harm to [Phillips]. And . . . we proved that through Dr. Z [Ziejewski], who showed you the catching mechanism.”

The jury returned a special verdict. By a 10 to 2 vote, it answered “No” to the question, “Did the risk of the P2 Full Face

Headgear with Shield’s design outweigh the benefits of the design?” By an 11 to 1 vote, it answered “Yes” to the question, “Was [respondent] negligent in designing the P2 Full Face Headgear with Shield?” By a 9 to 3 vote, it found that the negligence was not a substantial factor in causing harm to Phillips. By a 12 to 0 vote, it found that respondent did not intentionally fail to disclose facts about the headgear.

Before the trial began, appellants did not accept respondent’s Code of Civil Procedure section 998 offer to compromise for \$1 million. After the jury’s verdict, respondent filed a memorandum of costs claiming \$151,607.93, including \$121,334.75 in expert witness fees. Appellants moved to strike and/or tax costs. The trial court denied the motion.

Evidentiary Rulings

“[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence” (*People v. Waidla* (2000) 22 Cal.4th 690, 725.) “[A] court abuses its discretion where no reasonable basis for the action is shown. [Citation.]” (*Coalition for a Sustainable Future in Yucaipa v. City of Yucaipa* (2015) 238 Cal.App.4th 513, 519.)

Appellants claim that the trial court made the following erroneous evidentiary rulings:

1. The court allowed Vice-President Rogers to testify, “over [appellants’] objection, about the absence of reported personal injury claims involving [the Century] P2 Headgear. . . . By permitting this testimony, [respondent] was able to introduce otherwise inadmissible evidence inferring that . . . Phillips’s injury was a singular event, and thus not caused by the design of the subject headgear.”

We look to our opinion in *Benson v. Honda Motor Co.* (1994) 26 Cal.App.4th 1337. There, we held “that trial courts may admit testimony regarding the absence of prior similar claims in cases concerning negligence or strict products liability. Whether a trial court ought to do so depends upon the purpose of such evidence and a showing of foundational requirements.” (*Id.*, at p. 1344.) We noted: “Evidence that there have been no prior claims tends to be more relevant in actions [such as the instant one] alleging negligence, because foreseeability of harm is a primary issue in such cases. [Citations.] Knowledge of prior similar incidents is also particularly important in actions [such as the instant one] alleging failure to warn of the alleged defect. [Citation.]” (*Id.*, at p. 1345.) “[A]t minimum, the proponent should proffer evidence through a witness who is familiar with product safety surveys or safety records concerning the product.” (*Id.*, at p. 1346.)

The trial court did not abuse its discretion. The absence of prior personal injury claims was relevant evidence. Rogers was “familiar with product safety surveys or safety records concerning the product.” (*Benson v. Honda Motor Co.*, *supra*, 26 Cal.App.4th at p. 1346.) From respondent’s insurance administrators, Rogers obtained records of all claims filed against respondent. He twice reviewed the records. When the claims were originally made, he had been involved in the investigation of all but two of them. Furthermore, Rogers testified, “[W]e went through every file in every department in the company looking for anything that might be relevant.”

2. Because Rogers was not an expert, he was “improperly permitted, over [appellants’] objection, to provide opinion testimony about the applicable ASTM [American Society

for Testing and Materials] standards governing the design of the [Century] P2 Headgear, and the P2 Headgear's compliance with the ASTM standards."

Appellants called Rogers as a witness during their case-in-chief. They elicited testimony from him about the ASTM standards. Appellants' counsel asked, "And you're aware that the [Century] P2 headgear without a face mask never met those ASTM standards [i.e., standards for martial arts headgear without a face mask]; true?" Rogers replied that it was "[n]ot true" because respondent had never tested the headgear to determine whether it complied with the ASTM standards. When appellants' counsel later asked if the headgear met the ASTM standards, Rogers responded that he did not know. Rogers explained, "The headgear might comply. You don't know that until you test."

During the presentation of its defense, respondent called Rogers as a witness and questioned him about the ASTM standards. Appellants twice objected on the ground that Rogers was not an expert. The first objection was to the question, "What requirements does a supplier of a headgear have to satisfy in order to say that they meet that standard [the ASTM standard]?" The second objection was to a question asking what was the highest energy impact that the helmet must be able to withstand under the ASTM standards.

In not sustaining appellants' objections, the trial court acted within its discretion. The questions did not call for an expert opinion because Rogers merely read from the ASTM standards. After the second objection, the court asked, "[A]re you just reading from the document?" Respondent's counsel replied, "Yeah." The court stated, "He [Rogers] can tell me what it says, I

guess.” Appellants’ counsel responded, “Sure,” thereby withdrawing the second objection.

In any event, Rogers’s testimony about the ASTM standards could not have resulted in a miscarriage of justice. (Evid. Code, § 353, subd. (b); *Cucinella v. Weston Biscuit Co.* (1954) 42 Cal.2d 71, 82-83 [“The burden is on the appellant in every case to show that the claimed error is prejudicial; i.e., that it has resulted in a miscarriage of justice”].) “A ‘miscarriage of justice’ occurs when it is “. . . reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” [Citation.]” (*Lundy v. Ford Motor Co.* (2001) 87 Cal.App.4th 472, 479.) Irrespective of Rogers’s testimony, the jury found that respondent had negligently designed the Century P2 headgear. If the trial court had excluded Rogers’s testimony, it is not reasonably probable that the jury would have found that respondent’s negligence was a substantial factor in causing harm to Phillips. Rogers’s testimony about the ASTM standards had nothing to do with the causation issue, which was fatal to appellants’ lawsuit.

3. Appellants cite seven instances when, over their objections, Rogers was permitted to testify to the out-of-court statements of other persons. Appellants claim that the admission of these statements violated the hearsay rule. “Hearsay evidence’ is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. Except as provided by law, hearsay evidence is inadmissible.” (Evid. Code, § 1200, subds. (a), (b).)

Appellants argue that the trial court erroneously reasoned that the out-of-court statements were not hearsay

because they were “not being offered for the truth of the matter asserted” and instead “were being offered to show [the] effect on the listener.” Appellants contend, “The . . . statements are undoubtedly hearsay, in that, in each instance, Rogers is repeating information that he garnered from the statements of others. [Citation.] As such, these statements are categorically inadmissible.” Appellants maintain that certain “details” of the statements were “offered for no purpose other than for [their] truth.”

In overruling appellants’ hearsay objections, the trial court said that the evidence is “coming in to show what this witness [Rogers] heard and what actions he . . . took later based upon that information.” The court explained, “[Y]ou’re suing them, in addition to other things, for punitive damage, which involves whether they acted with malice, oppression, or fraud, which includes conduct which is beyond unreasonable, but certainly unreasonable. And I don’t see how I can keep this out without allowing the jury to know what it is they heard and why they were or were not reasonable in relying upon that.” “[I]n order to know whether they acted reasonably, we got to know what they knew or thought they knew. And so they get to tell us what they knew or thought they knew based upon what they heard.” The complaint’s prayer included a request “[f]or punitive or exemplary damages according to proof.”

We need not consider appellants’ hearsay claim on its merits because the claim is not supported by meaningful legal and factual analysis with citations to the record. (See *Saltonstall v. City of Sacramento* (2015) 234 Cal.App.4th 549, 587-588; *In re S.C.* (2006) 138 Cal.App.4th 396, 408, 410.) Appellants do not explain why the trial court abused its discretion in ruling that,

because they were seeking punitive damages, the out-of-court statements were admissible for the nonhearsay purpose of showing that respondent was not “guilty of [the] oppression, fraud, or malice” required for an award of punitive damages. (Civ. Code, § 3294.) Thus, appellants have not overcome the presumption that the trial court correctly admitted the statements. (See *Boyle v. CertainTeed Corp.* (2006) 137 Cal.App.4th 645, 649-650 [“an appealed judgment is presumed correct, and appellant bears the burden of overcoming the presumption of correctness”].)

Furthermore, appellants fail to show that they were prejudiced by the admission of the out-of-court statements. They have therefore not carried their burden of establishing a miscarriage of justice. (Evid. Code, § 353, subd. (b).)

4. The trial court “erred in sustaining objections to multiple proper questions” that appellants posed to respondent’s expert witness, Dr. Amos. This claim is forfeited because appellants merely cite the objections without explaining why the grounds stated for the objections lacked merit. (See *In re S.C.*, *supra*, 138 Cal.App.4th at pp. 408, 410.)³ In addition, appellants fail to show that the trial court’s rulings prejudiced them. (Evid. Code, § 354.)

³ In their reply brief, appellants devote eight pages to analyzing why the trial court erroneously sustained the objections. “The additional argument on this point in [appellants’] reply brief comes too late. [Citation.]” (*Bell v. H.F. Cox, Inc.* (2012) 209 Cal.App.4th 62, 80, fn. 7; see also *Aviel v. Ng* (2008) 161 Cal.App.4th 809, 821 [“They attempt, in their reply brief, to develop the argument, but it is too late. We disregard issues not properly addressed in the appellant’s opening brief.”].)

5. The trial court erroneously admitted Phillips's responses to respondent's request for admissions concerning his physical condition on the day that he was punched in the face. The responses "were not relevant . . . because they all related symptoms that . . . had no established relevance to the injury he suffered [dissection of the carotid artery]." The responses showed that Phillips did not sustain facial fractures, did not vomit, did not have slurred speech, and did not have "any paralysis or loss of function of any . . . leg or arm."

The responses were relevant evidence. "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) That Phillips did not sustain facial fractures has a tendency in reason to show the forcefulness of the punch to the face. The lack of slurred speech is relevant because Dr. Infuhr testified that a stroke "[v]ery often . . . can affect the tongue," so that a stroke victim's "speech can be . . . different." That Phillips did not have "any paralysis or loss of function of any . . . leg or arm" is relevant because Dr. Amos testified that Phillips's carotid dissection would cause "right brain problems," and the right brain controls sensation and strength on the left side of the body. Finally, that Phillips did not vomit was relevant to impeach his wife's statements. On cross-examination of Dr. Amos, appellants' counsel noted that emergency room records showed that Phillips's wife reported that, since being punched in the face, Phillips had experienced "nausea and multiple episodes of vomiting." In any event, appellants have failed to show that the

admission of the responses resulted in a miscarriage of justice. (Evid. Code, § 353, subd. (b).)

Misconduct During Opening Statement

During opening statement, respondent's counsel declared that witnesses from the martial arts studio "will say that Mr. Phillips was known to be aggressive in the [sparring] sessions. Mr. Phillips told us in his deposition that that was his style. He liked to press on his opponent, be aggressive, take control, dominate." Appellants maintain that counsel's "comments came as a clear violation of the court's ruling on [appellants'] Motion in Limine No. 6, which prohibited [respondent] from asserting that participating in the sport of martial arts constituted negligence by [Phillips]." We disagree. Counsel did not claim that Phillips had been negligent by participating in the sparring session with Susim. He claimed that Phillips had an aggressive style of sparring.

Misconduct During Closing Argument

Appellants claim that during closing argument respondent's counsel "misstated legal standard[s] for the burden of . . . causation, asserting that [appellants] needed to 'prove beyond a probable degree of medical certainty the cause of the dissection.'" Appellants objected to the term "medical certainty." The trial court replied, "This is argument. Just follow my legal instructions on what the law is. I'll allow him to argue."

"In the context of products liability actions, the plaintiff must prove that the defective products supplied by the defendant were a substantial factor in bringing about his or her injury. [Citations.]" (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 968.) Before closing argument, the trial court correctly instructed the jury that appellants must prove that the

Century “P2 full-face headgear with shield’s design was a substantial factor in causing harm to Robert Phillips.” The court further instructed: “You must follow the law exactly as I give it to you If the attorneys have said or say anything different about what the law means, you must follow what I say.” “[W]e presume the jury followed the court’s instructions and not the argument of counsel. [Citations.]” (*People v. Valdez* (2004) 32 Cal.4th 73, 114, fn. 14.) Thus, appellants were not prejudiced by counsel’s alleged misstatement of the law of causation.

Appellants claim that respondent’s counsel “proceeded to weave throughout [his] closing argument numerous misstatements of evidence and to refer to supposed facts which were not justified by the record.” Appellants provide six examples of such misconduct:

1. Counsel’s mischaracterization of the deposition testimony of Jim Moran, Phillips’s friend. Counsel stated that Moran did not know that, the month before the stroke, Phillips had twice seen a chiropractor for treatment of injuries received at a martial arts studio.⁴ Appellants objected, but did not state any grounds for their objection. Thus, the issue is forfeited. (See *People v. Brown* (2003) 31 Cal.4th 518, 553 [to preserve a claim of misconduct for appeal, a defendant “must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury”]; *Sabella v. Southern Pacific Co.* (1969) 70 Cal.2d 311, 318 [“Generally a claim of misconduct is entitled to no consideration on appeal unless the record shows a

⁴ The stroke occurred in October 2010. Dr. Infuhr testified that Phillips had twice seen him in September 2010. The first time was for injuries sustained “[a]fter doing [a] karate flip.” The second time was for “neck pain again after karate.”

timely and proper objection and a request that the jury be admonished”]; *O’Neil v. Spillane* (1975) 45 Cal.App.3d 147, 157.)

In any event, appellants have not shown that “it is reasonably probable [appellants’] would have achieved a more favorable result in the absence of that portion of [counsel’s] closing argument now challenged.” (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 802.)

2. Counsel’s statement that, if Susim’s punch to the nose caused Phillips’s stroke, “there must be thousands and thousands of boxers and cage fighters with strokes.” This issue is forfeited because appellants did not state the grounds for their objection. In any event, the statement is a reasonable inference from the evidence. ““An attorney is permitted to argue all reasonable inferences from the evidence, . . .” [Citation.]” (*Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th at p. 795.)

3. Counsel’s statement that another helmet manufacturer, Macho, had “a double layer of foam” at the “occiput,” i.e., the back of the head. Appellants objected that the statement was unsupported by the evidence. The trial court replied that it could not remember what the testimony was on this matter. It asked the jury “to rely upon the testimony that you heard.”

Rogers testified that the Macho was a “double-layer headgear,” but respondent has not cited evidence in the record showing that it had a double layer of foam at the occiput. Assuming that counsel misstated the evidence, appellants do not show that it is reasonably probable a more favorable result would have been achieved in the absence of the misstatement. (*Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th at p. 802.)

4. Counsel's comment: "Martial artists above all else want to be able to see when they're sparring. They want to be able to see down where the kicks come from." Appellants objected that the comment was unsupported by the evidence. The trial court ruled that the comment was "a reasonable inference" from the evidence. We agree. Rogers testified: "One of the most important things for . . . martial artists is their vision so they can see a punch coming or prepare themselves for a punch by bracing."

5. Counsel's statement, "The industry norm . . . has become like the Macho and the [Century] P2 [headgear] with an eye cutout for visibility reasons." Appellants objected that the statement was unsupported by the evidence. But Rogers testified that "the predominant style in our industry" is to provide "an opening in the face shield to avoid . . . fogging and the other things that would interfere with vision."

6. Counsel's statement that, with the exception of the punch to Phillips's face and one other incident, "nobody's every complained of an injury wearing the [Century] P2 [headgear] with face shield. And they [respondent's employees] go out and ask actively in the martial arts community, how are we doing?" Appellants' counsel interjected, "I'm going to object. Misstates the evidence." The trial court responded, "Overruled."

The trial court could assume that the objection was to the statement immediately preceding the objection, i.e., counsel's statement that respondent's employees "go out and ask actively in the martial arts community, how are we doing?" The court properly overruled the objection. Rogers testified that each year respondent conducts a "Martial Arts Super Show" attended by approximately 2,000 people. The show is "a chance for us to get

to know our customers, . . . ask them questions about our products.” In addition, respondent’s employees “visit [martial arts] schools all the time” and discuss the company’s products with instructors and students.

Alleged Inconsistent Findings in Special Verdict

Appellants argue: “In the special verdict the jury . . . answered the first question ‘Did the risk of the [Century] P2 Full Face Headgear with Shield’s design outweigh the benefits of the design?’ by checking the box for ‘No.’ . . . However, in answer [to the] question . . . , ‘Was [respondent] negligent in designing the [Century] P2 Full Face Headgear with Shield?’ the Jury marked the box for ‘Yes.’ . . . These answers are plainly inconsistent.”

“A special verdict is inconsistent if there is no possibility of reconciling its findings with each other. [Citation.] . . . [¶] On appeal, we review a special verdict de novo to determine whether its findings are inconsistent. [Citation.] . . . ““Where the findings are contradictory on material issues, and the correct determination of such issues is necessary to sustain the judgment, the inconsistency is reversible error.” [Citations.] [Citation.]” (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 357-358.)

In their reply brief appellants claim that the jury’s findings are inconsistent pursuant to *Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, where “the Court was presented with an almost identical situation.” In *Lambert* the jury answered “No” to the question, “Was there a defect in the design of the 1985 Chevrolet Blazer?” (*Id.*, at p. 1182.) But it answered “Yes” to the question, “Was General Motors negligent in the design of the 1985 Blazer?” (*Ibid.*) The court concluded: “If the design of the Blazer was not defective, General Motors could not be deemed

negligent. The jury could not have concluded that General Motors negligently designed the Blazer and at the same time conclude that it was not defective. [Citation.] Therefore, the inconsistent verdicts are irreconcilable.” (*Id.*, at p. 1186.)

Lambert is distinguishable. Unlike the jury in *Lambert*, the jury here did not find that the Century P2 headgear was not defective. The jury answered “No” to the question, “Did the risk of the . . . Headgear . . . outweigh the benefits of the design?” This answer did not result in inconsistent findings. The jury could have reasonably concluded that, although the Century P2 headgear was negligently designed because of the catching mechanism described by Dr. Ziejewski, the risks inherent in the negligent design did not outweigh the benefits of the overall design of the headgear.

In any event, the correct determination of these issues by the jury is not “necessary to sustain the judgment,” so an inconsistency would not be reversible error. (*Singh v. Southland Stone, U.S.A., Inc., supra*, 186 Cal.App.4th at p. 358.) Irrespective of the allegedly inconsistent findings, the judgment is sustained by the jury’s finding of lack of causation.

Denial of Appellants’ Motion to Strike and/or Tax Costs

Appellants did not accept respondent’s Code of Civil Procedure section 998 offer to compromise for \$1 million. Therefore, the trial court had discretion to require appellants to pay the cost of respondent’s expert witnesses. (*Id.*, § 998, subd. (c)(1).) Appellants contend that the court erroneously “awarded the full amount of expert costs [i.e., \$121,334.75] requested by [respondent].”

“We review the trial court’s award of expert witness fees as a section 998 discretionary item of costs using an abuse of

discretion standard. [Citation.]” (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262.) “This means we must determine ‘whether the trial court exceeded the bounds of reason.’ [Citation.]” (*El Dorado Meat Co. v. Yosemite Meat & Locker Serv., Inc.* (2007) 150 Cal.App.4th 612, 617.)

Appellants claim that the trial court “abused its discretion [in] awarding [the] entirety of the expert witness costs requested by Respondent” because appellants were “able to prove that Respondent . . . was negligent in the design of the subject [Century] P2 headgear with face shield.” The claim is forfeited because it is not supported by meaningful legal analysis with citations to authority. “When a point is asserted without argument and authority for the proposition, “it is deemed to be without foundation and requires no discussion by the reviewing court.” [Citations.]’ [Citation.]” (*Saltonstall v. City of Sacramento, supra*, 234 Cal.App.4th at p. 588.)

In any event, the trial court did not abuse its discretion because appellants failed to prove that respondent’s negligence was a substantial factor in causing Phillips’s stroke. Without proof of causation, respondent was not liable for its negligence.

In their opening brief, appellants allege numerous additional grounds in support of their contention that the award of expert witness costs constituted an abuse of discretion. But in their motion to strike and/or tax costs, they alleged only one additional ground: “These expert witness fees demanded in [respondent’s] memorandum of costs are unreasonable as they contradict the amounts that the experts testified to under oath at trial. . . . [F]rom counsel’s best recollection, the amount that [respondent] is seeking now are [*sic*] substantially different than

the amount the defense experts testified under oath what they billed for this case.” Further grounds alleged in appellants’ opening brief are waived. (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1409 [“The law is clear that a motion to tax costs must state the grounds of the objection; any not stated are waived”; therefore, “[p]laintiffs’ failure to object in the trial court to the attorney fee request on the basis fees should have been apportioned constitutes a waiver of the issue”].)

Where, as here, cost “items on their face appear to be proper charges, the verified memorandum of costs is prima facie evidence of their propriety, and the burden is on the party seeking to tax costs to show they were not reasonable or necessary. ‘On the other hand, if items are properly objected to, they are put in issue and the burden of proof is on the party claiming them as costs.’ [Citation.]” (*Jones v. Dumrichob, supra*, 63 Cal.App.4th at p. 1266.)

In their motion to strike and/or tax costs, appellants did not show that the expert witness costs claimed by respondent were unreasonable or unnecessary. Nor did they properly object to these costs. They failed to give an example of a conflict between the costs claimed for an expert and that expert’s testimony as to the amount billed for his services.

The inadequacy of appellants’ motion to strike and/or tax costs was not remedied by their reply to respondent’s opposition to the motion. In their reply appellants erroneously argued that respondent’s “expert bills submitted with the memorandum of costs are hearsay.” (See *Jones v. Dumrichob, supra*, 63 Cal.App.4th at p. 1267 [“To the extent appellants claim the bills for Drs. Lunde and Singler provided at the hearing on the motion to tax costs constituted hearsay evidence, the bills fall

within a narrow but long-recognized exception to the hearsay rule”].) The heading on page 4 of the reply reads, “**THE TRANSCRIPTS ATTACHED DEMONSTRATE THAT THE CHARGES OF THE DEFENSE EXPERT ARE SUBSTANTIALLY DIFFERENT FROM THE CHARGES NOW CLAIMED.**” But no transcripts are attached to the reply in the record on appeal. Appellants’ discussion under the heading does not make a single reference to the transcripts.

The trial court ruled: “[Appellants] had the burden of demonstrating the costs were unreasonable or unnecessary. [Citation.] A party challenging the award of expert fees must do more than just claim that they are unreasonable. [Citation.] [Appellants] did not carry their burden.”

The trial court did not abuse its discretion. “In light of the fact that [respondent’s] verified memorandum of costs constitute[s] prima facie evidence that the listed expert witness fees were reasonable, [appellants] . . . failed to carry [their] burden of showing that the fees were improper and unnecessary.” (*Adams v. Ford Motor Co.* (2011) 199 Cal.App.4th 1475, 1487.)

Disposition

The judgment and postjudgment order denying appellants’ motion to strike and/or tax costs are affirmed. Respondent shall recover its costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Tari L. Cody, Judge

Superior Court County of Ventura

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