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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

GARY KLINE, Plaintiff and Appellant, v. ZIMMER, INC., Defendant and Appellant.	B269317 (Los Angeles County Super. Ct. No. BC444834)

APPEAL from orders of the Superior Court of Los Angeles County, Amy D. Hogue, Judge. Affirm in part; reversed in part and remanded.

Waters Kraus & Paul and Michael B. Gurien for Plaintiff and Appellant.

Reed Smith, Paul D. Fogel, Lisa M. Baird, David J. de Jesus; Faegre Baker Daniels, Tarifa B. Laddon, J. Stephen Bennett and J. Joseph Tanner for Defendant and Appellant.

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This appeal and cross-appeal arise out of Gary Kline's two hip surgeries. The hip is a ball and socket joint; a total hip replacement involves replacing both with components that mimic the ball and socket. In May 2007, plaintiff Kline underwent a total hip replacement, which included implantation of the Durom Acetabular Component (Durom Cup), a component manufactured by defendant Zimmer, Inc. (Zimmer). The Durom Cup, a metal component, was implanted around another metal component and was fixated in Kline's body without screws. The Durom Cup replaced the acetabulum, i.e., the socket portion of the hip joint. Kline claims that the Durom Cup was defective.

Kline's second operation, in September 2008, involved the removal and replacement of the Durom Cup. At trial, Kline claimed that the Durom Cup was defective; Zimmer failed to adequately test it prior to selling it in the United States; and Zimmer failed to provide adequate warnings. The 17-day trial was interspersed with numerous objections and motions for mistrial. Ultimately, after deliberating for three hours, jurors found in Kline's favor awarding him $153,317 in economic damages and $9 million in noneconomic damages, substantially more than Kline's counsel had requested during closing argument.

Following the jury verdict, the trial court denied Zimmer's motion for a judgment notwithstanding the verdict, finding sufficient evidence to support the verdict. The trial court granted Zimmer's motion for a new trial on two grounds—irregularity in the proceedings caused by Kline's counsel's misconduct and excessive damages. With respect to the misconduct, the court concluded that Kline's counsel improperly suggested to jurors that they "should award large damages for any finding of

liability." (Italics, underscoring and capitalization omitted.) The court ordered a new trial unless Kline accepted a reduced amount of damages, an alternative Kline rejected.

We affirm in part and reverse in part. We affirm the order granting Zimmer's motion for new trial on damages. The trial court acted well within its discretion in concluding that the damages were excessive. However, we find no support for Zimmer's argument that the case warranted another trial on liability. Although the trial court found that Kline's counsel committed misconduct amounting to irregularities in the proceedings, the misconduct was almost entirely directed at the amount of damages. With limited exceptions, it had no bearing on liability. Review of the lengthy trial record shows that no improper evidence was admitted with respect to liability, and no improper argument was made concerning liability. Because Zimmer suffered no prejudice with respect to liability, the new trial should be limited to damages.

We further reject Zimmer's challenge to the sufficiency of the evidence to demonstrate a design defect, which the trial court considered in the context of Zimmer's motion for a judgment notwithstanding the verdict on both the design defect and failure to warn claims. Compelling evidence supported Kline's theory that the coating on the Durom Cup was defective. The coating did not have sufficient porosity for bone ingrowth or ongrowth necessary for fixation without screws. With respect to Kline's failure to warn theory, we conclude Kline failed to present any evidence of causation. We remand the case to the trial court for a new trial on damages related to the design defect of the Durom Cup.

FACTS

1. Hip Replacement Surgery and the Durom Cup

A total hip replacement involves removing a small layer of bone in a person's hip socket, impacting a shell into the socket, wedging a prosthesis into the bone, and placing the ball into the shell. The Durom Cup is a shell used to surround the ball. The version of the Durom Cup sold in the United States had a smoother coating than the Durom Cup sold in Europe.

Bone growth was necessary to permanently stabilize the Durom Cup, and without such stability a patient would experience pain. A rough surface is required to achieve bone ingrowth or ongrowth. It was undisputed that the version of the Durom Cup sold in the United States was smoother than the European version, which preceded the American one.

Dr. Roy Bloebaum, a research professor in bioengineering and biology, concluded that the coating on the Durom Cup sold in the United States was defective because it did not allow for bone ingrowth or ongrowth. Bloebaum explained the coating is "defective in the context that it didn't achieve the goals for ingrowth and attachment, the appropriate material presentation to the bone so you could achieve attachment. It didn't have the proper open porosity for the bone to grow into it."

Dr. Bloebaum further explained that the American Durom Cup had a different coating than the European one. According to Bloebaum, tests of the European coating do not show that the coating in the United States could achieve skeletal attachment. Bloebaum expressed concern that Zimmer did not conduct an animal study to test the new coating. He testified: "[I]t's a basic scientific principle that when you make a change, you need to

test that change." Prior to this case, Zimmer repeatedly hired Bloebaum and credited him as a reliable researcher.

Dr. Paul Roberts, along with others, developed the European version of the Durom Cup. The European coating was tested on animals. The test was designed to determine the quality of bone ingrowth. Roberts was involved in discussions about the development of a new coating for the American Durom Cup because the "European-type coating didn't meet the FDA[1] requirements." Roberts expressed concern that that pore size, porosity, surface roughness, and adhesive strength were not independent. One could not be altered without affecting the others. Roberts testified that the proposed change to the American coating "may adversely affect the biological fixation of the cup in the long term." Roberts recommended Zimmer conduct the same testing on the American coating that had been conducted on the European coating. This included an animal study. Roberts testified "that testing should be carried out before marketing to at least show that it was as good in an animal model and that over time in vivo studies . . . should go ahead."

Zimmer did not clinically test the coating on the American Durom Cup prior to selling it. Zimmer conducted no tests to "establish[] scientifically that its coating would be effective at achieving skeletal attachment." The FDA did not require animal testing, and Zimmer did not conduct any.

After Zimmer started selling the Durom Cup in the United States, it asked Dr. William Thomas Long, an orthopedic surgeon specializing in hip and knee replacement, to investigate the Durom Cup. Long observed that the coating on the Durom Cup

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1 United States Food and Drug Administration.

was not rough. Long discussed with Zimmer representatives his concerns "about the cup's ability to achieve bony fixation." Prior to Kline's surgery, Long warned Zimmer that the Durom Cup had a significant failure rate. Zimmer took no action as a result of Long's warnings. When Long removed the Durom Cup from patients, who (like Kline) required revision surgeries, he found no bone ingrowth.

Zimmer's business plan reflected an effort to conceal the difference between the European and American coatings. Porolock was the name of the coating on the European version of the Durom Cup. Zimmer's business plan provided: "To avoid unpleasant rumors on the markets and attacks from competitors, we have to keep quiet the development of the new coating. Therefore we will use the trademark Porolock as well for the new coating so there will be only little changes in the existing brochures and the cups will not be exposed to strong critics."

2. Kline's Condition and His Hip Surgeries

Before he developed osteoarthritis in his right hip, Kline enjoyed using the gym, playing golf, hiking, bike riding, motorcycle riding, and hunting. As a result of osteoarthritis, Kline suffered severe pain daily. He had difficulty walking and climbing stairs. Putting on his shoes and socks was painful, and Kline used narcotic and anti-inflammatory medication to control his pain. As a result of his hip pain, Kline visited orthopedic surgeon Dr. Stephen Mikulak in 2007. At the time he visited Mikulak, Kline had suffered from hip pain for two years.

Kline decided to have hip replacement surgery, and at the age of 51, underwent the procedure. As part of Kline's first hip surgery, Dr. Mikulak implanted a Durom Cup. When using the

Durom Cup, Mikulak generally "ream[s] line to line, which is the exact size of the cup." Brian Huscher, a representative of Zimmer was present in the operating room during Kline's initial surgery.[2]

Initially, Kline progressed well after his hip replacement surgery. Then, just over a year after the surgery, Kline began experiencing regular "jolts" in his hip, causing him excruciating pain. When his hip "froze," and he suffered "severe pain," he visited Dr. Mikulak again. Mikulak informed Kline that the Durom Cup may be loose and that he may need another surgery. Until he underwent the revision surgery, Kline experienced severe pain, rendering him immobile. Such pain was unusual following hip replacement surgery. Mikulak testified that about 95 to 98 percent of his patients fully recovered after a total hip replacement.

Following the revision surgery, Kline's pain improved. But his recovery was complicated by the need for two major surgeries (the hip replacement and the revision surgery) in a 15-month period. The multiple surgical procedures may have caused Kline to suffer damage to his right leg.

A "couple years" after his revision surgery, Kline developed stiffness and discomfort in his right hip. Beginning in September 2010, Kline visited a rheumatologist for this pain. In addition to hip pain, Kline also suffered from hand pain, back pain, muscle aches, and knee pain. Kline had osteoarthritis near his tail bone

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[2] Dr. Mikulak did not read Zimmer's brochure describing the surgical technique to implant the Durom Cup because, according to him, he had performed numerous surgeries and did not "need a person in a suit to tell me how to do surgery . . . ." However, Mikulak testified that he expected that Zimmer's representative would have informed him of any necessary special technique, and Huscher did not inform him of any such special technique.

and in his low back. His rheumatologist concluded that he had damage to muscles, nerves and tissues in his right leg because of his multiple hip surgeries.

The rheumatologist prescribed prednisone (an anti-inflammatory), Skelaxin (a muscle relaxant), and meloxicam (an anti-inflammatory). In 2012, when Kline stopped taking prednisone, he felt pain. As a result, Kline continued to take prednisone, which eventually could cause osteoporosis, diabetes, elevated blood pressure, adrenal insufficiency, and weight gain. Kline's discomfort in his right hip would return each time he stopped taking prednisone.

Kline stopped playing golf, hiking and biking because of pain in his right hip. Kline sometimes walked with a cane. As a witness for Zimmer acknowledged, Kline's recovery may have been hampered by having two surgeries instead of one. Additional surgeries increase the chance of infection as well as scar tissue.

All of Kline's witnesses testified that Dr. Mikulak properly performed both the initial and the revision surgery. Mikulak testified that nothing he did or failed to do in the operating room caused the Durom Cup to fail. Dr. Ryan Nunley, an orthopedic surgeon, testified that he had no criticism of Mikulak's surgery. According to Nunley, "[i]t was done well and very standard." He also believed Mikulak properly performed the revision surgery.

In addition to testifying that Dr. Mikulak properly performed the surgeries, Dr. Nunley testified that successive operations may cumulatively affect a patient. He testified that Kline's Durom Cup was not permanently secured and that a loose cup can cause severe pain. According to him, nothing "would have prevented a full recovery after implantation with a non-

defective component." Nunley estimated that absent implantation with the defective Durom Cup, Kline would have been able to perform 95 percent of the activities he previously enjoyed. According to Nunley, following a revision surgery, patients recover about 75 to 85 percent of their prior ability to perform activities.

3. Dr. Mikulak's Experience with the Durom Cup Including Kline's Durom Cup

As noted, Dr. Mikulak performed both Kline's initial hip replacement surgery and the revision surgery in which Kline's Durom Cup was replaced. The revision surgery confirmed Mikulak's suspicion that the Durom Cup was loose. Mikulak observed that "[t]here was no bone anchoring the cup." According to Mikulak, the Durom Cup did not work as intended because bone did not grow onto it to permanently stabilize it.

Dr. Mikulak had not been informed that the coating on the American Durom Cup differed from the European one. Zimmer's sales representative responsible for working with Mikulak was not aware that there were differences in the coating between the European Durom Cup and the American version (both of which bore the same name).

Dr. Mikulak testified that he performed about 30 operations to remove Durom Cups, and none had bone ingrowth or ongrowth. According to Mikulak, the surface of the Durom Cup when it was removed looked the same as when it had been implanted. Mikulak testified that the failure rate of the Durom Cup was significantly higher than with other cups except the "Inter-Op Cup." Absent infection, the acceptable failure rate of an implant in the first two years was 0 percent. Other witnesses

also concluded that the failure rate of the Durom Cup was unacceptably high, and the elevated revision rate demonstrated a defect in the Durom Cup.

4. FDA Review of the Durom Cup

Other than the coating, the European and American versions of the Durom Cup were the same. The texture of the American version was modified to comply with FDA regulations.

The FDA reviews new medical devices more extensively from those categorized as equivalent to existing devices. New devices require premarket approval, a process by which the FDA determines if the device is safe and effective. Other devices are analyzed under the FDA's premarket notification (510(k) process), which is less rigorous. As one court has explained: "The 510(k) process allows some medical devices to avoid the strict safety testing requirements imposed by the Medical Device Amendments ('MDA') to the Federal Food, Drug, and Cosmetic Act, so long as the device is 'substantially equivalent' to a pre-1976 device already in use at that time. [Citation.] Thus, devices approved under the 510(k) process 'may be marketed without premarket approval' as would be required by the MDA, although they 'are subject to "special controls . . . that are necessary to provide adequate assurance of safety and effectiveness." ' [Citation.] In this respect, although the process is certainly not a rubber stamp program for device approval, it does operate to exempt devices from rigorous safety review procedures." (*In re C.R. Bard, Inc.* (4th Cir. 2016) 810 F.3d 913, 920.) " 'Thus, even though the FDA may well examine 510(k) applications . . . with a concern for the safety and effectiveness of the device,' the agency's clearance rests only on whether the device is

'substantially equivalent to one that existed before 1976' before allowing it 'to be marketed without running the gauntlet of the [MDA premarket approval] process.' " (*Id.* at pp. 920-921.)

Zimmer applied for and received clearance for the Durom Cup under the FDA's 510(k) process. George Samaras, a biomedical engineer and former employee of the FDA, testified that the 510(k) process considers whether other similar products are already on the market and compares the product under review to the similar products. It does not determine whether a product is safe and effective. The FDA sent Zimmer a letter indicating that it could sell the Durom Cup in the United States. Samaras testified that the coating in the United States had "not been tested for its intended use with intended users." As noted, the FDA did not require animal testing.

5. Zimmer's Evidence

Zimmer disputed the evidence that Kline's Durom Cup did not work as intended and presented expert opinion that it was *not* loose. There were scratches on Kline's Durom Cup, and Zimmer's witnesses concluded that the scratches showed the cup was difficult to remove, which in turn showed that bone had grown onto or into it.

Zimmer disputed the conclusion that the Durom Cup's coating was defective and that its testing was insufficient. Kevin Ong, a mechanical engineer who evaluated medical devices, testified that the Durom Cup was not defective. He testified specifically that the coating was not defective and expressly disagreed with Dr. Bloebaum's conclusions. Ong testified that animal studies were a "last resort" because they required sacrificing the participant animals. Ong was not concerned with

the Durom Cup's revision rate because the Durom Cup was a metal on metal component and that type of component "tend[ed] to be placed into a younger patient population." Younger patients tend to be more active and put more pressure on their implants. However, Ong admitted that the revision rate was higher in the Durom Cup than other cups.

Zimmer disputed the inference that it gave the American coating the same name as the European coating in an effort to mislead consumers. A Zimmer representative testified that Zimmer used the same name to forestall concern from European doctors that their product was lesser. (Dr. Roberts also expressed concern over how European physicians would perceive a change in the Durom Cup's coating.)

It was undisputed that Zimmer complied with all FDA administrative requirements and received clearance to sell the Durom Cup. It also was undisputed that Dr. Mikulak properly implanted the Durom Cup. Like Kline's witnesses, all of Zimmer's witnesses uniformly testified that Mikulak properly implanted the Durom Cup. In other words, *no* witness testified that Mikulak improperly implanted the Durom Cup. *No* witness testified that an improper implantation technique injured Kline.

With respect to damages, Dr. James Pritchett, an orthopedic surgeon, testified that hip replacement surgery was not a panacea and could not reasonably be expected to relieve all pain. He further testified that after Kline's Durom Cup had been removed, Kline could not continue to suffer pain as a result of it.

6. Closing Arguments

During closing argument, Kline's counsel emphasized warnings Zimmer received about the coating on the American

Durom Cup from Dr. Roberts, Dr. Long, and Dr. Bloebaum. Counsel emphasized the high failure rate of the Durom Cup. Counsel criticized Zimmer for ignoring the warnings, refusing to test the new coating, and referring to the coating in the United States as the same as the European coating. Counsel reminded jurors of Dr. Mikulak's testimony that no bone had grown onto or into Kline's Durom Cup in the 15 months it was implanted.

Kline's counsel summarized the evidence of Kline's damages and argued that jurors should award Kline $153,317 for his medical bills, $2 million for the pain he had suffered and $4 million for the pain he would suffer. (Counsel's argument ignored a joint stipulation that "Kline's past medical expenses in relation to his failed Durom Cup" were $73,153.)

Defense counsel argued the Durom Cup was thoroughly tested; Kline's cup was not loose; and the Durom Cup did not cause Kline's injuries. Counsel argued that, at the time Kline had his initial surgery, Zimmer was not aware of evidence that revisions in the Durom Cup were necessary. Counsel argued that the American coating was not new, and the Durom Cup was not a new device but an evolution. Counsel further argued that scratches on Kline's cup indicated that Dr. Mikulak had to remove bone when he removed the Durom Cup. With respect to damages, Zimmer's counsel argued that Kline's condition had improved since his initial hip surgery and that any pain caused by the Durom Cup would have stopped once the cup was removed.

PROCEDURE

1. Complaint

Kline and others filed a complaint in September 2010. Kline's case was tried first. Kline's theories remaining at trial were failure to warn and design defect.

2. Order Granting Zimmer's Motion in Limine Concerning Subsequent Remedial Measures

Prior to trial, in a motion in limine, Zimmer sought the exclusion of the following six items of evidence: "(1) Zimmer's 7/22/08 urgent device correction letter to surgeons announcing the results of its investigation and plan to temporarily suspend sales of the Durom Cup; [¶] (2) Zimmer's 7/22/08 communication to the FDA concerning the results of its investigation; [¶] (3) Zimmer's 8/16/08 revisions to its Durom Cup surgical brochure and [i]nstructions for use; [¶] (4) Changes and additions Zimmer made to the training offered to surgeons who performed or intended to perform Durom Cup implants (8/16/08); [¶] (5) Zimmer's voluntary suspension of sales of the Durom Cup from July 22–August 16, 2008; [¶] (6) Zimmer's 8/18/08 letter to patients regarding potential problems."

The trial court's April 13, 2015, order, which is relevant to Zimmer's claims that Kline's counsel committed misconduct, provided: "The Court finds that admitting the subsequent conduct would be unfairly prejudicial to Defendant under [Evidence Code] Section 352. In this case, the actions that Zimmer undertook to advise physicians and strengthen its warnings occurred a year after Plaintiff's surgery, long after it devised its initial warnings. Without evidence tying this subsequent conduct to what Zimmer knew before it issued its

initial warnings, evidence of the subsequent conduct provides, at best, a tangential relevant inference that the earlier warnings were inadequate when made. The probative value of the improved warnings is therefore quite weak. [¶] On the other hand, evidence of what appears to be an admission that the original instructions were inadequate is highly prejudicial. The prejudice is compounded because Zimmer has little means of effectively rebutting the inference of an admission. If the subsequent warnings were admitted, Zimmer would want [to] present evidence of good reasons why it decided to strengthen the warning or take other remedial measures. Assuming that Zimmer strengthened its warning in response to reports of complaints or surgical failures, Zimmer faces a Hobson's choice. To demonstrate that the strengthened warnings were a responsible response to prevent failures, Zimmer would have to introduce the highly prejudicial evidence of reported failures. That evidence, which tends to prove that the product was defectively manufactured or designed would not otherwise come into this case because, for policy reasons, Plaintiffs are not permitted to sue Zimmer under a theory of strict products liability based on defective design. The prejudicial nature of this evidence leaves Zimmer with no viable basis to rebut the inference that the improved warnings were an admission that the earlier warnings were inadequate."

The court therefore concluded that "Zimmer's subsequent conduct is not admissible under [Evidence Code] Section 1151 and that the prejudicial value of Zimmer's subsequent conduct outweighs its probative effect. [T]he Court finds that testimony and documents relating to the six items identified in Zimmer's Motion in Limine at trial are inadmissible."

3. Pretrial Stipulations

The parties stipulated that Kline's medical expenses totaled $73,153 and that Kline was not required to provide evidence of each separate medical bill.

The parties also stipulated that they would not admit evidence "regarding recalls or complaints about Zimmer products other than either the US version of the Durom Cup or the EU version of the Durom Cup." They also agreed not to admit: "Any evidence, testimony, documents, or arguments relating to the total amount paid to expert witnesses. The parties further agree[d] that they may ask experts whether they are being paid as an expert to testify, how much they are being paid per hour, and what percentage of their time is spent in litigation and litigation related matters."

4. Special Verdict

In a special verdict, jurors concluded all of the following: Zimmer manufactured the Durom Cup implanted in Kline. Zimmer was negligent in designing the Durom Cup. Zimmer's negligent design was a substantial factor in causing harm to Kline. Zimmer failed to adequately warn of potential risks, which would not have been apparent to an ordinary consumer. The lack of sufficient instructions or warnings was a substantial factor in causing harm to Kline. Jurors awarded Kline $153,317 in past medical expenses (more than double the stipulated amount). Jurors awarded Kline $2.4 million for past noneconomic loss and $6.6 million for future noneconomic loss.

5. New Trial

The trial court denied Zimmer's motion for a judgment notwithstanding the verdict and granted Zimmer's motion for a new trial. In its written order granting a new trial, the court expressed concern over the jury's "extraordinarily short deliberation," of only three hours. The trial court explained: "After weighing the evidence in the entire record and considering all reasonable inferences, the Court is convinced . . . *that the resulting damage award was excessive, and that the jury clearly should have reached a verdict awarding less damages*." (Italics added.) Ultimately, the court granted a retrial unless Kline accepted a reduced award. Kline did not accept the reduced award. Kline's appeal and Zimmer's cross-appeal followed. Both the order granting a new trial and the order denying the motion for judgment notwithstanding the verdict are appealable. (Code Civ. Proc. § 904.1, subd. (a)(4).)

DISCUSSION

We first discuss Zimmer's argument that the trial court should have granted its motion for a judgment notwithstanding the verdict. Finding the design defect cause of action viable, we then turn to Kline's argument that the trial court erred in granting a new trial.

1. Judgment Notwithstanding the Verdict

Products liability may be based on design defect or failure to warn. (*Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1231.) Kline claimed both. Zimmer argues that neither theory was supported by substantial evidence and

that the trial court should have granted its motion for a judgment notwithstanding the verdict.

In evaluating a motion for a judgment notwithstanding the verdict, any conflict in the evidence must be resolved in favor of Kline. (*Cooper v. Takeda Pharmaceuticals America, Inc.* (2015) 239 Cal.App.4th 555, 572-573.) As we shall explain, we conclude ample evidence supported the verdict on the design defect claim, but the causation element of the failure to warn claim was not supported by substantial evidence.

a. Design Defect

"A design defect exists when the product is built in accordance with its intended specifications, but the design itself is inherently defective." (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1303.) According to Kline, his theory of design defect "was premised on a defect in the Durom Cup's . . . coating." Specifically, according to Kline, the coating failed to permit skeletal attachment. As we shall explain, compelling evidence supported the jurors' finding that the Durom Cup's design was defective.

Viewed in the light most favorable to the judgment, the evidence showed the coating on the Durom Cup did not allow the bone growth necessary to permanently stabilize the cup. When Dr. Mikulak removed Kline's Durom Cup, he observed *no* bone ingrowth or ongrowth. Mikulak conducted 30 revision surgeries on patients with implanted Durom Cups and discovered none had bone ingrowth or ongrowth.

Dr. Bloebaum testified that Zimmer failed to conduct studies on its American coating to ensure that the coating would facilitate bone growth. As explained by Bloebaum, a roughened surface is essential for bone ingrowth or ongrowth. The coating

on the American version of the Durom Cup was smoother than on the European version. Dr. Long noticed the smooth surface. Samaras testified that the coating used on the Durom Cup sold in the United States had not been tested for its intended use. Nevertheless, internal Zimmer documents indicated that the company concluded it had "to keep quiet the development of the new coating." Therefore it used the same name for the coating in the United States as in Europe even though the coatings were different. Based on this evidence, a reasonable trier of fact could conclude that Zimmer failed to adequately test the American coating and that it misled consumers to believe the coatings were the same.

Zimmer is incorrect that Kline failed to present evidence of the standard of care. The following evidence was sufficient. Animal studies were commonly used to test the efficacy of coatings. Dr. Bloebaum testified that a new coating must be tested and that Zimmer failed to perform the necessary tests. Bloebaum expressly opined that the coating on the Durom Cup was defective. He explained: "[I]t's defective in . . . that it didn't achieve the goals for ingrowth and attachment, the appropriate material presentation to the bone so you could achieve attachment. It didn't have the proper open porosity for the bone to grow into it. And then its surface was contaminated." Bloebaum was especially credible as Zimmer regularly hired him to test medical devices.

Other witnesses also testified that an animal study was necessary to evaluate the new coating. Dr. Roberts suggested an animal study was important to determine the efficacy of the American coating. Zimmer considered conducting animal tests but ultimately chose not to conduct any tests. Even when

Dr. Long informed a Zimmer representative that the coating may not be effective, Zimmer did not implement a test to evaluate whether it encouraged bone growth.

Based on the foregoing evidence, reasonable jurors could have concluded that a medical device manufacturer should test the coating on a proposed implant and that Zimmer failed to perform the tests. The evidence also strongly supported the inference that tests would have shown the deficiency in the coating as animal tests successfully were used to determine the efficacy of the European coating.

Finally, Zimmer's argument that clearance by the FDA of the Durom Cup shows that it complied with the standard of care and was dispositive of Kline's design defect claim lacks merit.[3] That argument is inconsistent with the evidence at trial as well as with general legal principles. The evidence at trial showed that although Zimmer received FDA clearance to sell the Durom Cup, the coating in the United States "had not been tested for its intended use with intended users."

Additionally, the United States Supreme Court has held that the FDA 510(k) process—the only process employed by the FDA in this case—does not preempt state court tort actions. (*Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 493-494.) The high court explained: "The § 510(k) notification process is by no means comparable to the PMA [(premarket approval)] process; in contrast to the 1,200 hours necessary to complete a PMA review, the § 510(k) review is completed in an average of only 20 hours." (*Id*. at pp. 478-479.)

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[3] We assume for purposes of this appeal that Zimmer preserved this argument.

The high court later reiterated that 510(k) review "is ' "focused on *equivalence*, not safety," ' " and devices entering the market through this review are not evaluated for " 'safety or efficacy.' " (*Riegel v. Medtronic, Inc.* (2008) 552 U.S. 312, 323; see *Buckman Co. v. Plaintiffs' Legal Committee* (2001) 531 U.S. 341, 348 [510(k) process "requires only a showing of substantial equivalence to a predicate device," not an evaluation of the "risks and efficacy of each device"].) *Riegel* held that the preemption clause in title 21 of United States Code section 360k barred state common law claims concerning the safety and effectiveness of a medical device. (*Riegel, supra*, at pp. 322-324.) But it was critical to the court's decision that the device had "received premarket approval from the FDA." (*Id*. at p. 320; see *Robinson v. Endovascular Technologies, Inc.* (2010) 190 Cal.App.4th 1490, 1496-1497 [discussing federal preemption].)

Premarket approval may result in preemption of any conflicting state tort requirements. (*Blanco v. Baxter Healthcare Corp.* (2008) 158 Cal.App.4th 1039, 1053.) That is because when a device is evaluated for safety and efficacy, a state cannot impose additional requirements relating to safety and efficacy. (*Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, 1486-1487.) But here Zimmer did not subject the Durom Cup to the premarket approval process and therefore cannot rely on laws applicable to devices that have successfully completed that process. (See, e.g., *Lewis v. Johnson & Johnson* (S.D.W.Va. 2014) 991 F.Supp.2d 748, 752 ["Because of the differences in these processes, tort claims regarding medical devices cleared through the 510(k) process are not preempted by federal law, while tort claims regarding medical devices approved through the premarket approval process generally are preempted."].) In

short, the FDA clearance of the Durom Cup does not shield Zimmer from Kline's design defect claim.

b. Failure to Warn

A failure to warn defect cause of action is based on a theory "that the product is dangerous because it lacks adequate warnings or instructions." (*Chavez v. Glock, Inc., supra*, 207 Cal.App.4th at p. 1304.) For both negligent and strict liability failure to warn, Kline was required to show that Zimmer's failure to warn was a substantial factor in causing his injuries. (*Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 125.) The requirement to show causation is undisputed. For reasons we shall explain, we conclude that Kline failed to present evidence supporting the inference that Zimmer's failure to warn caused him any injury. Therefore a judgment notwithstanding the verdict on this cause of action was warranted.

According to Kline, his theory of failure to warn was that "[t]he Durom Cup required a special implantation technique to achieve optimal contact with the bone in the hip socket. This was known by Defendant Zimmer, but it failed to adequately warn or instruct surgeons on this technique. As a result, Dr. Mikulak did not use this technique when he implanted Mr. Kline's Durom Cup."

Although Dr. Roberts testified that the Durom Cup required a specific implantation technique, no witness testified that Dr. Mikulak used the wrong technique.[4] Kline asks us to

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[4] According to Dr. Roberts, in the United States surgeons ream the socket to the size of the cup; there is no press-fit. For press-fit, a surgeon must "under-ream[]" the socket and put in a cup that is "bigger than the socket." Roberts testified that if a

reach that conclusion based on Mikulak's testimony that he "ream[ed] line to line, which is the exact size of the cup." Significantly, *no* witness testified that Mikulak used the wrong technique when he reamed line to line, and thus Kline's conclusion lacks evidentiary support.

Even assuming Dr. Roberts's testimony was sufficient to demonstrate that Dr. Mikulak used the wrong technique when he implanted Kline's Durom Cup, there was no evidence that Mikulak's technique harmed Kline. *All* of the evidence showed just the opposite. Mikulak testified that in his opinion nothing he did or failed to do "in operating on Mr. Kline led to the failure of his Durom Cup." He testified that "everything went well in that initial implant surgery . . . ." Dr. Nunley, another orthopedic surgeon, testified that he had "[n]o criticism" of Mikulak's surgery. It was "done well and very standard." He further testified that nothing occurred that would have prevented Kline's full recovery with a nondefective component.

Dr. Pritchett, another orthopedic surgeon, testified that there was no indication Dr. Mikulak had difficulty with the surgery implanting the Durom Cup. He testified: "I think the care that Dr. Mikulak provided was caring, attentive, in every way proper in all ways. I don't have any concerns whatsoever about the primary surgery, the revision surgery, the post-operative care, or anything else." Ong also testified that there was no evidence Mikulak failed to properly place the Durom Cup. Even Kline's counsel described Mikulak as "well-trained" and suggested that Mikulak knew "exactly what [he was] doing." To reiterate, no witness testified Mikulak failed to properly implant

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surgeon reamed the socket to the size of the cup the Durom Cup would "fail immediately."

the Durom Cup in Kline or that Mikulak's surgical technique in any way caused Kline harm.[5] Because Kline failed to present evidence of causation, a judgment notwithstanding the verdict on his failure to warn claim was warranted.

2. New Trial

As noted the trial court granted Zimmer's motion for a new trial on the grounds of irregularity in the proceedings and excessive damages. We now turn to Kline's argument that the trial court erred in granting a new trial. In the alternative, Kline argues that if a new trial is warranted, it should be limited to damages. As we explain, only the latter argument has merit.

Kline argues that the trial court erred in concluding that "the awards for past and future noneconomic losses [we]re excessive." He emphasizes his testimony that after both the initial and revision surgeries, he suffered pain and was required to curtail his activities, testimony corroborated by his wife and daughter.[6] Kline also emphasized Dr. Nunley's testimony that

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[5] Kline cites Dr. Nunley's testimony that "an inability to get that cup into the hole as intended" would be a defect in the design. That testimony does not support the inference that Kline was injured because of Zimmer's failure to warn Dr. Mikulak of the proper surgical technique regarding the size of the hole for the Durom Cup. Nunley testified that Mikulak properly performed the surgery. He did not testify that anything related to Mikulak's surgical technique caused Kline harm. Moreover, the cited evidence was unrelated to Kline's surgery.

[6] Kline's statement that the trial court relied only on other cases and failed to consider the evidence in this case is contrary to the record. In its order, the court summarized the evidence related to plaintiff's ability to participate in activities prior to any

absent the revision surgery he would likely have recovered to 95 percent of his active lifestyle and his rheumatologist's testimony that Kline's right leg was damaged as a result of multiple surgical procedures. Kline continued to require medication to relieve his pain, and each time he attempted to stop taking prednisone, the pain in his right hip returned.

"The standards for reviewing an order granting a new trial are well settled. After authorizing trial courts to grant a new trial on the grounds of '[e]xcessive . . . damages' or '[i]nsufficiency of the evidence,' [Code of Civil Procedure] section 657 provides: '[O]n appeal from an order granting a new trial upon the ground of the insufficiency of the evidence . . . or upon the ground of excessive or inadequate damages, . . . *such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons*.' (Italics added.) Thus, we have held that an order granting a new trial under section 657 'must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on [the trial court's] theory.' " (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 411-412 (*Lane*).) In deciding whether to grant a new trial, "[t]he only relevant limitation on [the trial court's] discretion is that the trial court must state its reasons for

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surgery, following the initial surgery and following the revision surgery. The court summarized the evidence presented by Kline as well as that presented by Zimmer. After the court summarized the evidence, it concluded the evidence did not warrant the amount of damages awarded. The court did not simply rely on awards in other cases as found improper in *Bigboy v. County of San Diego* (1984) 154 Cal.App.3d 397, 406. The fact that the court must base its conclusion on evidence in the case under review does not render decisions in other cases irrelevant.

granting the new trial and there must be substantial evidence in the record to support those reasons." (*Id.* at p. 412.)

" '[T]he trial court's factual determinations, reflected in its decision to grant the new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations.' " (*Baker v. American Horticulture Supply, Inc.* (2010) 186 Cal.App.4th 1059, 1068.) As one court explained: " 'The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. They see and hear the witnesses and frequently . . . see the injury and the impairment that has resulted therefrom.' " (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 299 (*Bigler-Engler*).)

a. Excessive Damages

At the outset, it is undisputed that although during closing argument Kline's counsel requested $153,317 in economic damages, he had stipulated that his expenses were $73,153. It is further undisputed that the trial court properly reduced the award of economic damages to the stipulated amount. The crux of the parties' dispute is whether the noneconomic compensatory damages—$9 million—were excessive. As we shall explain, Kline fails to demonstrate that the trial court abused its discretion in concluding that the damages were excessive. In coming to this conclusion, we defer to the findings of the trial court as required when reviewing an order granting a new trial. (*Lane, supra*, 22 Cal.4th at pp. 411-412.)

i. The Court Adequately Specified Its Reasons for Finding Excessive Damages

Kline is correct to the extent he argues the trial court was required to specify its reasons for granting a new trial. (Code

Civ. Proc., § 657 ["When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason for granting the new trial upon each ground stated."].) "A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." (Code Civ. Proc., § 657.) A statement of reasons assists in "promot[ing] judicial deliberation before judicial action" and in making "the right to appeal from the order more meaningful." (*Mercer v. Perez* (1968) 68 Cal.2d 104, 113.)

The trial court complied with the requirement that it state its reasons.[7] In its lengthy new trial order, the court summarized both Kline's evidence and Zimmer's evidence regarding the extent of Kline's damages. The court stated: "While it is true, of course, that the jury has broad discretion to decide the amount of damages to award for pain and suffering and that the reasonableness of its award depends on the facts and circumstances of the case, the 125 multiple in this case is not proportionate to the medicals, the testimony about damages, or to the circumstances of a hip replacement and revision surgery for a patient with pre-existing conditions." The court then cited numerous cases to support its conclusion. The court's explanation that a less sizeable verdict was required because the

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[7] Even if the court failed to supply adequate reasons, its order would be defective, not void. (*Cassady v. Morgan, Lewis & Bockius LLP* (2006) 145 Cal.App.4th 220, 229.)

evidence did not support the verdict is a sufficient reason in light of the court's summary of the evidence. The reasons were adequate to explain why the trial court deemed the amount excessive. (*Kolar v. County of Los Angeles* (1976) 54 Cal.App.3d 873, 879 ["The reasons make it clear to us that, in exercising its discretion with respect to the credibility of witnesses and the burden of proof, the trial court simply concluded plaintiffs had failed to establish that they were damaged in the sum of $25,000."].)

The court's conclusion was supported by the following evidence, which the court had summarized: Prior to Kline's Durom Cup implant he suffered severe pain, which improved after his first surgery. After his revision surgery, Kline improved and no longer was under Dr. Mikulak's care. He enjoyed many activities even though his lifestyle was not as active as it had been two years before his initial surgery. Based in large part on this evidence, the trial court exercised its discretion to conclude that Kline's noneconomic damages for past and future pain and suffering did not amount to $9 million. "Under well-established rules of law the trial judge was vested, not only with the power, but also with the duty to grant a new trial upon the issue of damages if he was of the considered opinion that the damages as assessed by the jury were too high." (*Los Angeles v. Bitter* (1951) 103 Cal.App.2d 385, 387.)

ii. The Trial Court Acted Well Within Its Discretion in Concluding the Damages Were Excessive

The recent case *Bigler-Engler, supra*, 7 Cal.App.5th 276 shows the trial court did not abuse its discretion in ordering a new trial based on excessive damages. In *Bigler-Engler*, the trial court denied a motion for new trial and the appellate court was

required to indulge all presumptions in favor of the trial court's decision and could order a new trial only if " 'the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury.' " (*Id.* at p. 299.) The *Bigler-Engler* court concluded damages were excessive under this exacting standard. Applying that holding here, the significantly higher damage award also was excessive.

In *Bigler-Engler*, a high-school student (Engler) sued her doctor and others after she suffered injuries by using a device called the PolarCare 500, which had been recommended by her doctor. (*Bigler-Engler, supra*, 7 Cal.App.5th at p. 284.) The PolarCare device delivered "cold therapy" to a surgical site similar to an icepack. (*Id*. at p. 286.) As a result of using the device, Engler was required to undergo an additional knee surgery followed by a week of convalescence in the hospital. (*Id*. at p. 289.) That surgery "left a large open wound, which took nine additional procedures . . . to clean and close." (*Id*. at p. 289.) Each surgical procedure was painful. (*Ibid*.) After the 10 surgical procedures, Engler had a large scar and underwent two additional scar reduction procedures. (*Ibid*.) Engler's knee was painful to touch, and she felt numbness and itching. (*Ibid*.) Engler had difficulty with certain activities including kneeling, riding horses competitively, dancing, and riding a bike while holding a leash. Jurors awarded $68,270 in economic damages and $5,127,950 in noneconomic damages. (*Id*. at p. 284.) Despite the trial court's rejection of a motion for a new trial on excessive damages, the appellate court concluded that the award of noneconomic damages was excessive. (*Id*. at pp. 285, 298-299.)

The appellate court first noted that Engler suffered a serious injury and was required to undergo multiple, painful

surgical procedures. (*Bigler-Engler, supra*, 7 Cal.App.5th at p. 302.) The circumstances caused emotional distress, anxiety, and embarrassment in addition to physical pain. (*Ibid*.) But, her condition improved and jurors appeared to have compensated her the same amount after her condition improved as when she was in extreme pain. (*Ibid*.) With respect to future damages, although additional surgeries may be necessary, "[t]here was no suggestion of the prospect of suffering a significant future disability, shortened life expectancy, inability to succeed professionally, or a distrust of doctors or other fiduciary advisors." (*Ibid*.) Ultimately, the appellate court ordered a new trial unless Bigler-Engler (Engler's representative) agreed to a reduction of the noneconomic damages to $1.3 million. (*Id*. at pp. 332-333.)

Whereas Engler was forced to undergo 10 additional surgeries from the use of the PolarCare, Kline was forced to undergo only one from the implantation of the defective acetabular component. Although strong evidence linked Kline's pain in the period between the initial and revision surgeries to the defective Durom Cup, evidence linking his ongoing pain after the revision surgery to the Durom Cup was less plentiful. Neither loss of income nor loss of earning potential was claimed. There was no evidence of a shortened life expectancy. Even if Kline's expectation of returning to his physical state two years before his initial surgery was reasonable (as implied by Dr. Nunley), the trial court did not abuse its discretion in concluding that Kline's reduction in physical ability did not support a $9 million noneconomic award, almost $4 million more than that found excessive in *Bigler-Engler* and $7.7 million more than what the appellate court in *Bigler-Engler* found to be

reasonable after reduction. (See *Collins v. Union Pacific Railroad Co.* (2012) 207 Cal.App.4th 867, 884 [finding no abuse of discretion in conditionally granting new trial on excessive damages where conflicting evidence on amount of future damages existed and there were irregularities during closing argument]; *Thompson v. John Strona & Sons* (1970) 5 Cal.App.3d 705, 712 [affirming order granting new trial based on excessive damages].)

b. Irregularity in the Proceedings

In addition to concluding jurors awarded excessive damages, the trial court concluded there were irregularities in the proceedings because of Kline's counsel's misconduct. With respect to the irregularity in the proceedings, the court explained: "In this case, the Court finds that a series of mistakes and misjudgments on the part of Plaintiff's counsel caused the jury to arbitrarily inflate its award of damages rather than decide on an amount of damages supported by evidence. Defendant suffered prejudice when counsel (1) twice stated that Zimmer is in a multi-billion dollar industry; (2) introduced evidence, in violation of a stipulation and order, that Zimmer's expert witness received $79,000 in compensation; and (3) misrepresented the amount of paid medical expenses and (4) falsely represented, in closing argument, that Zimmer paid to have its witnesses testify while Plaintiff's expert trial witnesses testified without compensation. The Court finds that Zimmer suffered additional prejudice when, in violation of the Court's written *in limine* order, Plaintiff introduced prejudicial evidence of subsequent remedial measures, implying that after Plaintiff's implant surgery, Zimmer either recalled or removed the Durom Cup from the market." The prejudice identified by the court is that "a series of mistakes and misjudgments on the part of Plaintiff's counsel *caused the jury to*

arbitrarily inflate its award of damages rather than decide on an amount of damages supported by evidence." (Italics added.) The trial court identified no prejudice bearing on the jury's determination of liability.

As already explained, the trial court did not abuse its discretion in concluding that jurors awarded Kline excessive damages. Moreover, in addition to the factors set forth above, the record supported the trial court's conclusion that Kline's counsel's misconduct contributed to the elevated damage award. In challenging this conclusion, Kline ignores the cumulative prejudice created by his counsel's decision to (1) ignore the trial court's order limiting reference to the value of the medical device industry; (2) ignore the parties' stipulations regarding the introduction of evidence of payment to experts; (3) falsely represent such payments during closing argument; and (4) ignore the parties' stipulation as to the amount of Kline's medical bills, which was less than half of what counsel represented to jurors. Taken together, these incidents support the conclusion that the jury award was " ' "so high as to suggest passion or prejudice," ' " and jurors may have been influenced by " 'improper considerations.' " (*Bigler-Engler, supra*, 7 Cal.App.5th at p. 299.) While Kline argues that his counsel's statements were all relevant and that errors were unintentional, the court was not required to condone the repeated violation of its orders and the parties' agreements. (*Id.* at p. 295 ["[R]epeated violations of pretrial in limine rulings, despite sustained objections, is misconduct."].) Further, Kline's postverdict acceptance of the corrected amount of his economic damages does not correct the prejudice caused by the misrepresentation of the amount made during closing argument.

We now turn to the misconduct related to the purported mention of a recall of the Durom Cup, which Zimmer argues supported a new trial on liability (in addition to the new trial on damages). As we shall explain, we conclude the retrial should be limited to damages. The only prejudice identified by the trial court was an inflated damage award, and Zimmer fails to show that a new trial on liability was warranted. We begin with additional background on the two incidents of misconduct unrelated to the amount of damages and then consider prejudice.

i. Recall of Inter-Op Cup

The trial court expressed concern that Kline's counsel, when questioning Dr. Mikulak (Kline's surgeon) referred to a recall of the Inter-Op Cup (not the Durom Cup). The relevant colloquy was as follows:

"Q. Have you ever seen a device with widespread failure of bony ingrowth like the Durom Cup?

"A. The Inter-Op Cup.

"Q. And that was manufactured and effected a recall of that product—"

Defense counsel then objected and the court ruled (in front of jurors): "[T]here is nothing in this case about a recall . . . . And I am concerned that you're trying to get something into the case that the jury is not going to have to think about or consider. So I think, as I will make it clear, anything about a recall of some other product just isn't in this case."

ii. Purported Removal of Durom Cup from the Market

The second claim of misconduct concerns evidence that the Durom Cup was no longer sold—evidence which was stricken

from the record. The relevant colloquy between Kline's counsel and Dr. Mikulak was as follows:

"Q. Okay. Now, you're not an expert in titanium plasma coatings, are you?

"A. No.

"Q. And you've not had any reason to conduct a study on the nature and properties of the Durom coating, correct?

"A. Correct.

"Q. There's no reason to do one on a cup that isn't sold anymore, right?"

"[DEFENSE COUNSEL]: Your Honor, I'm going to object.

"THE WITNESS [Dr. Mikulak]: Correct.

"THE COURT: Sustained, and that will be stricken.

"[DEFENSE COUNSEL]: May I ask two questions, [Y]our Honor, just a very brief follow-up?"

The court found that the stricken evidence violated its prior order, which the court characterized as prohibiting Kline from suggesting that Zimmer had taken or failed to take subsequent remedial measures. For purposes of this appeal in which we must defer to the trial court's finding of misconduct, we conclude Kline's counsel violated the court's order on Zimmer's motion in limine.[8] The remaining issue is whether Zimmer suffered prejudice.

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[8] We have quoted the trial court's April 13, 2015, order. The order appears to reference six specific remedial measures, not encompassed in Kline's counsel's question. Neither Zimmer's motion nor the trial court's order references the fact that the Durom Cup was no longer sold, which could occur for a variety of reasons. Nevertheless, we assume for purposes of this appeal that taking the Durom Cup was off the market was a remedial

iii. Prejudice

Even in the context of the grant of a new trial motion, legal issues are subject to independent review. (*Twedt v. Franklin* (2003) 109 Cal.App.4th 413, 417.) Following the denial of motion for a new trial, the appellate court independently reviews the prejudice suffered from attorney misconduct. (*Bigler-Engler*, *supra*, 7 Cal.App.5th at p. 296; *Garcia v. ConMed Corp*. (2012) 204 Cal.App.4th 144, 149.) Regardless whether we independently review prejudice or defer to the trial court, the result in this case is the same because the trial court found no prejudice with respect to liability.

" 'In order to justify a new trial, the party must demonstrate that the misconduct was prejudicial.' " (*Bigler-Engler*, *supra*, 7 Cal.App.5th at p. 296; see *Martinez v. State* (2015) 238 Cal.App.4th 559, 568.) Prejudice asks whether it is reasonably probable Zimmer would have " 'achieved a more favorable result in the absence of that portion of [attorney conduct] now challenged.' " (*Garcia v. ConMed Corp., supra*, 204 Cal.App.4th at p. 149.) " ' "[T]he trial court is bound by the rule of California Constitution, article VI, section 13, that prejudicial error is the basis for a new trial, and there is no discretion to grant a new trial for harmless error. [Citation.] . . . The grant of a new trial for harmless error violates the constitutional provision and wastes judicial time and resources to no purpose. [¶] Accordingly, the order granting a new trial is valid only if prejudicial error occurred at the trial." ' " (*Garcia v. Rehrig Int'l, Inc.* (2002) 99 Cal.App.4th 869, 875.)

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measure, and that Kline's counsel's question violated the trial court's order under a broad interpretation.

Here, Zimmer identifies *no* prejudice related to liability, and we find none. Therefore, to the extent the court ordered a new trial on liability, such order was unwarranted. As previously quoted, the *only* prejudice identified by the trial court was that counsel's "mistakes and misjudgments on the part of Plaintiff's counsel caused the jury to arbitrarily inflate its award of damages rather than decide on an amount of damages supported by evidence." Because prejudice concerned only damages, the retrial should be limited to damages.

The reference to the fact that an Inter-Op Cup was recalled does not support the inference that the Durom Cup also was recalled. Kline's case concerned only the Durom Cup, and the brief reference to a different device was irrelevant. Moreover, the evidence arguably was in Zimmer's favor as it showed that the Durom Cup was not the only device with a high revision rate. To the extent Zimmer was concerned with the simple mention of the word "recall" that was not encompassed in its motion in limine, and in any event, the trial court told jurors that no recall was at issue in this case. The irrelevant evidence of the Inter-Op Cup recall could not have affected the jury's determination of liability.

The other question referred expressly to the Durom Cup and therefore was relevant. However, the single, isolated, fleeting reference to the fact that the Durom Cup was no longer sold—which was stricken from the record—in the context of a lengthy trial did not prejudice Zimmer. The brief reference to evidence which was stricken from the record does not show a reasonable probability that Zimmer would have achieved a more favorable result on liability.

The parties presented sharply contradictory evidence of the efficacy of the Durom Cup's coating and the adequacy of the

testing of the coating. The parties also presented contrasting evidence of whether bone grew onto Kline's Durom Cup. During closing argument, counsel emphasized the conflicting evidence and neither counsel referred to a recall or to any suggestion that the Durom Cup was no longer sold. Thus, jurors were guided to consider liability based on the merits of the parties' competing evidence, not based on improper considerations.

The court's instructions further supported the conclusion that jurors limited their consideration to the evidence in the case. The court instructed jurors: "You must consider all the evidence and decide what you think happened. You must decide the facts based *only* on the evidence admitted in this trial." (Italics added.) The court further instructed jurors "[w]hat the attorneys say during the trial is not evidence." "Likewise, the attorneys' questions are not evidence. Only the witnesses' answers are evidence. Don't think that something is true just because an attorney's question suggested it was true." "If I sustained an objection to a question, you have to ignore the question and don't guess why I sustained the objection. If the witness did not answer, don't guess what he or she might have said. If the witness already answered, you have to ignore the answer if I sustained the objection." "If I struck testimony, then you must disregard it altogether as if it didn't exist." There was no suggestion that jurors were unable or unwilling to follow the trial court's instructions.

The trial court's own oral analysis rejecting Zimmer's motion for a mistrial supported the conclusion that the new trial should be limited to damages. The court stated: "[I]t's very clear from the instructions and the special verdict form that the case has nothing to do with the recall. I've told them that it has

nothing to do with the recall. [¶] The instructions that I just read clearly ask them to determine liability based on the date of Mr. Kline's surgery. So the jury would effectively be disobeying my instructions if they were to think about [a] recall. [¶] So I trust them not to do that. That's why I do not think it's such irreparable harm." The court did not revise its analysis in its written new trial order.

In short, the fleeting reference to evidence stricken from the record did not prejudice Zimmer. Kline's counsel's misconduct was not "so pervasive nor so egregious, that it prevented the jury from rationally considering the evidence admitted at trial." (*Bigler-Engler, supra*, 7 Cal.App.5th at p. 297.) Zimmer makes *no* showing that the liability verdict was tainted by Kline's counsel's misconduct.

Finally, Zimmer correctly points out that if a limited retrial is prejudicial or would result in an injustice, the court should grant a new trial on all issues. (*Ryan v. Crown Castle NG Networks, Inc.* (2016) 6 Cal.App.5th 775, 790.) But, Zimmer demonstrates no such prejudice or injustice. "Even if an excessive damage award is the product of passion and prejudice, it does not necessarily follow that the verdict as to liability was similarly influenced." (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 981, fn. 8; see *Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588-589 [finding damages excessive but no new trial on liability warranted].) "Society has a manifest interest in avoiding needless retrials: they cause hardship to the litigants, delay the administration of justice, and result in social and economic waste." (*Mercer v. Perez, supra*, 68 Cal.2d at p. 113.)

DISPOSITION

The order denying the judgment notwithstanding the verdict on failure to warn is reversed. The order denying the judgment notwithstanding the verdict on design defect is affirmed. The order granting a new trial on damages is affirmed. To the extent the trial court ordered a new trial on liability, that order is reversed. The case is remanded to the trial court for a retrial on Kline's damages caused by the design defect of the Durom Cup. The parties shall bear their own costs on appeal.

HALL, J.*

I CONCUR:

RUBIN, J.

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

Rubin, J. – Concurring:

I join in the majority opinion which I have signed. I write separately because in my view the trial court did not in fact grant a new trial on the issue of liability but only on damages. As I see it, the court's disposition might be more accurately stated, in part, as an affirmance of the order granting a new trial on the issue of damages only. The majority accomplishes the same result through a slightly different approach. Either way the retrial will be limited to damages on the failure to warn theory. In limited respect, I differ with Justice Bigelow's concurring and dissenting opinion which concludes the trial court ordered a retrial on liability and damages, and that such an order should be affirmed.

I agree with much of Justice Bigelow's opinion. Although the trial court's order was thoughtful and complete, words taken here and there might suggest the court was intending to grant a new trial on liability as well. But I am guided by the appellate maxim not to parse a trial court's order too finely or seize on a word or phrase, whether here or there. "The true measure of an order . . . is not an isolated phrase appearing therein, but its effect when considered as a whole. [Citations.] In construing orders they must always be considered in their entirety, and the same rules of interpretation will apply in ascertaining the meaning of a court's order as in

ascertaining the meaning of any other writing." (*In re Ins. Installment Fee Cases* (2012) 211 Cal.App.4th 1395, 1429.)[1]

My assessment that the trial court only ordered a new trial on damages could almost start and end with the order's caption and its conclusion. The caption expressly states that the order is a *conditional* order granting a new trial.[2] A conditional order granting a new trial is provided for in Code of Civil Procedure section 662.5, subdivision (a)(2): "If the ground for granting a new trial is excessive damages, [the court may in its discretion] issue a conditional order granting the new trial unless the party in whose favor the verdict has been rendered consents to the reduction of so much thereof as the court in its independent judgment determines from the evidence to be fair and reasonable."

The conditional order for new trial is statutorily limited to excessive (and inadequate) damages. The other statutory grounds for granting a new trial, including "irregularit[ies] in the proceedings" (Code of Civ. Proc., § 657, subd. (1)), do not authorize the court to conditionally order a new trial, nor do the grounds even lend themselves to that type of order. For example,

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[1] For example I agree with Justice Bigelow that the phrase "In the alternative" might suggest that the procedural irregularities discussion that precedes the phrase applied to a new trial on liability and what followed "in the alternative" was limited to damages. As I explain in the text, however, I cannot square that with the overall import of the order which is to grant only a conditional order for new trial on damages.

[2] The order's caption is: "Order Conditionally Granting Defendant Zimmer Inc.'s Motion for a New Trial."

how would a judge fashion a conditional order for a new trial due to misconduct of the jury under section 657, subdivision (2)?

That the trial court here granted only a conditional new trial on damages is supported by language throughout the order, and reaches its dénouement in the order's last paragraph. Under "Conclusion," the court states: " 'In a civil action where after trial by jury an order granting a new trial limited to the issue of damages would be proper, the trial court may in its discretion . . . issue a conditional order granting the new trial unless the party in whose favor the verdict has been rendered consents to the reduction of so much thereof as the court in its independent judgment determines from the evidence to be fair and reasonable.' (Code Civ. Proc., § 662.5(a)(2).) Because the Court finds that there were prejudicial procedural irregularities and that the damage award was excessive, the Court conditionally GRANTS Defendant's motion for a new trial. The Court will proceed with trial readiness conference on December 18, 2015 at 9:00 a.m. and commence a retrial on January 12, 2015, at 9:00 a.m., unless, on or about December 16, 2015, Plaintiff consents to reduce his award to $823,153 ($73,153 for past economic damages, $250,000 for past noneconomic damages, and $500,000 for future noneconomic damages)."

This language unmistakably informs counsel that there will be a new trial unless plaintiff "consents to reduce his award." The corollary to that statement is that if plaintiff does consent to reduce his award, there will be no new trial. Imagine for a moment what would have happened if plaintiff had filed with the court a written notice that he accepted the conditional reduction in damages. Based on the quoted language above, the court

would have entered judgment in the amount of $823,153 – no new trial, no further trial court proceedings.

It is not necessarily easy to square my conclusion that the trial court limited the new trial to damages with the court's lengthy discussion of irregularity in the proceedings. In one sense, the discussion is somewhat superfluous to a finding of excessive damages. Hence my partial agreement with Justice Bigelow's concurrence.

But I am loathe to ignore a significant part of a trial court's order. I reconcile this dilemma by treating the trial court's discussion suggesting that procedural irregularities were a partial *cause* of the excessive damages and nothing else. In other words, a conditional new trial is ordered because (1) plaintiff counsel's repeated violations of orders and stipulations constituted significant procedural irregularities resulting in an award excessive damages; and (2) even without those irregularities, the jury verdict was on its own excessive. My conclusion is supported by language the trial court used at the end of its introduction to the order. On page 2, the court writes: "After weighing the evidence in the entire record and considering all reasonable inferences, the Court is convinced that counsel's mistakes were procedurally irregular, that the resulting damage award was excessive, and that *the jury clearly should have reached a verdict awarding less damages."* (Italics added.) Not that in the trial court's view, sitting as the 13th juror, the jury should have reached a verdict for the defense, but that the jury "should have reached a verdict awarding less damages." Based on its view that damages were excessive, the trial court conditionally granted a new trial. It even went so far as setting a

date for the new trial "unless, on or before December 16, 2015, plaintiff accepts a remitted award of $828,153 . . . ."[3]

For all these reasons, I conclude the trial court properly granted a conditional new trial based on excessive damages and when plaintiff refused to accept the remitted award, the order directed a new trial on damages only. As that is the result reached by the majority, I concur.

RUBIN, J.

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[3] That the court found procedural irregularities were a cause of excessive damages is borne out by the subheadings in the trial court's order. Under part "II. Analysis: Motion for New Trial," subheading "B" states: "Plaintiff's Counsel's Mistakes Gave the Jury a False Impression that It Should Award Large Damages for Any Finding of Liability." This heading plainly draws the connection between counsel's misconduct and the jury's award of excessive damages.

BIGELOW, P.J., Concurring and Dissenting:

I concur in the majority's reversal of the order denying the judgment notwithstanding the verdict on failure to warn. However, I disagree with the majority's conclusion that the order granting a new trial should be reversed on the issue of liability.

"A reviewing court should not modify an order granting a new trial on all issues to one granting a limited new trial 'unless such an order should have been made as a matter of law.' " (*Schelbauer v. Butler Manufacturing Co.* (1984) 35 Cal.3d 442, 456 (*Schelbauer*).) I do not believe the majority is adhering to this principle. Here, the trial court found a new trial was warranted based on both "prejudicial procedural irregularities *and* that the damage award was excessive." (Italics added.) Given the trial court's own language, I would not find that an order limiting the new trial to damages should have been made as a matter of law. As a result, I would order the case be remanded for a complete retrial on the design defect of the Durom Cup and damages.

There is no dispute there were irregularities in the underlying proceedings because of Kline's counsel's misconduct. As the majority points out, the trial court found Zimmer suffered prejudice when Kline's counsel, "(1) twice stated that Zimmer is in a multi-billion dollar industry; (2) introduced evidence, in violation of a stipulation and order, that Zimmer's expert witness received $79,000 in compensation; (3) misrepresented the amount of paid medical expenses and (4) falsely represented, in closing argument, that Zimmer paid to have its witnesses testify while

[Kline's] expert trial witnesses testified without compensation." Kline's counsel also introduced prejudicial evidence of subsequent remedial measures in direct violation of the trial court's written *in limine* order.

The order granting a new trial made clear that Kline's counsel's misconduct was so pervasive it also prejudiced the jury's verdict on liability. The reason its new trial order emphasized Kline's counsel's breach of the order prohibiting any evidence of subsequent remedial measures, and the false theme of Kline's counsel's closing argument improperly attacking the credibility of Zimmer's expert witnesses was to highlight the prejudicial effect of the misconduct on the jury's verdict on liability. It was also apparent to the trial court that the jury could not have considered liability based solely on the merits of the parties' admissible competing evidence. As pointed out in its written ruling, the jury's hasty verdict was "far too short for the number of witnesses, the volume of written evidence, and the often technical testimony presented to the jury." The trial court further explained, "The jury's rapid decision on the verdict before consulting the late-delivered instructions and exhibits [was] evidence that the irregularity was prejudicial." I would not substitute my judgment for that of the trial judge, who witnessed the entire trial first hand.

Finally, I also disagree with the concurring opinion, which asserts that the trial court's issuance of a remittitur in this case means the order granting a new trial was limited to damages. Only after the trial court pointed out the impact of the misconduct on liability did the text of its order focus on excessive damages, stating, "*In the alternative*, the Court orders a new trial on the grounds of excessive damages." (Italics added.) I would

find that because the trial court's order was not limited to the issue of excessive damages, it was an abuse of discretion to have issued a remittitur. An invalid conditional remittitur does not invalidate a trial court's order. (*Schelbauer*, *supra*, at p. 455.) " '[A] void condition can have no effect on an otherwise valid order. The condition is simply disregarded and the order stands.' " (*Ibid*.) The mistaken disposition here does not define the trial court's definitive order. The concurrence finds otherwise, believing in the flawed idea that the tail wags the dog.

BIGELOW, P. J.