Filed 3/6/18 Warner v. Wright Medical Technology, Inc. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ALAN WARNER et al., Plaintiffs and Appellants, v. WRIGHT MEDICAL TECHNOLOGY, INC., Defendant and Appellant.	B267907 Los Angeles County Super. Ct. No. BC475958

APPEALS from a judgment and order of the Superior Court of Los Angeles County, Michael B. Harwin, Judge. Order reversed in part; judgment reinstated and affirmed.

Vartazarian Law Firm, Steven R. Vartazarian; Ehrlich Law Firm and Jeffrey I. Ehrlich for Plaintiffs and Appellants.

Wilson Sonsini Goodrich & Rosati, Boris Feldman; Howard & Howard Attorneys and David C. Van Dyke for Defendant and Appellant.

INTRODUCTION

Plaintiff Alan Warner and his wife, Patricia Warner,[1] sued Wright Medical Technology, Inc. (Wright Medical), for strict products liability and negligence after a section (the stem) of plaintiff's hip prosthesis fractured. Plaintiff has since undergone a series of additional surgeries to revise the hip replacement and to address persistent infections in his hip joint, conditions which have substantially and negatively impacted plaintiffs' quality of life. A jury found plaintiff's stem suffered from a manufacturing defect and awarded plaintiff $2 million for past pain and suffering and $2 million for future pain and suffering; Mrs. Warner received $500,000 for loss of consortium. After plaintiffs rejected a proposed remittitur, the court ordered a new trial on damages only. Both sides appeal.

Wright Medical contends principally there is no substantial evidence of a manufacturing defect in the stem. We disagree because plaintiffs' engineering experts examined the fractured stem and concluded Wright Medical applied orientation marks to the stem with a laser in an inadequately controlled and irregular manner, resulting in a reduction in the fatigue strength of the titanium alloy in the area immediately surrounding the laser marks. It was undisputed at trial that the fracture of the stem originated at one of the laser orientation marks.

In addition, Wright Medical claims it was extremely prejudiced by plaintiffs' counsel's repeated insinuations that it withheld documents and other information during discovery. But

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[1] We refer to Mr. and Mrs. Warner collectively as "plaintiffs" and to Mr. Warner individually as "plaintiff." When necessary to discuss facts particular to Mrs. Warner, we refer to her as Mrs. Warner.

the trial court advised the jury on several occasions to disregard counsel's comments and even went so far as to instruct the jury that the court had not found any misconduct by Wright Medical. The court's advisements to the jury were timely, responsive, and clear and we presume the jury heeded the court's instructions.

Wright Medical also objects to the admission of certain testimony by one of plaintiffs' experts, and the exclusion of certain testimony by one of its experts. As to plaintiffs' expert, we conclude Wright Medical forfeited the issue on appeal because its counsel failed to timely object or move to strike the majority of testimony at issue. As to Wright Medical's expert, the testimony it proposed to offer through its biomechanical engineer would have been largely duplicative of testimony already offered by its expert orthopedic surgeon. Accordingly, any error in excluding the testimony was not prejudicial.

In their appeal, plaintiffs argue the trial court erred in ordering a new trial on damages. When granting a new trial, the court must provide a statement of grounds and reasons sufficient to permit appellate review. Because the court's ruling in this case falls well short of the mark, we reverse the new trial order, reinstate the judgment, and affirm.

FACTS AND PROCEDURAL BACKGROUND[2]

1. Plaintiff's Medical History

In July 2006, plaintiff Alan Warner (then age 62) underwent hip replacement surgery after he slipped and fell in his home. After the first surgery, plaintiff generally recovered

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[2] We limit our discussion to those aspects of the case related to plaintiffs' manufacturing defect theory.

well but he ultimately needed additional hip replacement surgery (a revision)[3] due to a discrepancy in the length of his legs caused by the prosthesis. A second doctor performed a revision surgery in January 2007. Plaintiff's initial recovery was promising but within several months he began experiencing severe pain, grinding and swelling in his left hip.

In late 2007, plaintiff visited Dr. Brad Penenberg, a noted orthopedic surgeon who recommended a revision hip replacement surgery. Dr. Penenberg opted to use the Wright Medical Profemur R system which was designed for use on patients who have had prior hip replacement and/or revision surgeries and may have odd or misshapen bones or bone loss as a result. Due to his prior surgeries, plaintiff suffered from osteopenia, a weakening of the bone, in the femur. Such bone loss is graded on a scale of 1 to 4 with 4 being the greatest loss; Dr. Penenberg concluded plaintiff's was a grade 2. The Profemur R system is marketed by Wright Medical for use in situations involving grade 2, 3 or 4 bone loss.

Dr. Penenberg performed the surgery in November 2007 and implanted, as relevant here, a Profemur R bowed stem.[4] Plaintiff recovered well and within six months told Dr. Penenberg " 'there is nothing I can't do.' " In fact, within six months of the surgery, the Warners took a trip to England and plaintiff was walking without assistive devices and without a limp. In June

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[3] A revision is an operation performed on a patient who has had a previous hip replacement surgery.

[4] The Profemur R system is comprised of several components. The stem is the cylindrical piece that is placed inside the patient's femur.

2009, an x-ray showed the bone around the stem seemed to be attaching to the stem.

The stem fractured in October 2010 and Dr. Penenberg performed another revision surgery. He found the portion of the stem below the fracture was well fixed to the femur, making it extremely difficult to remove. Indeed, the stem was so firmly attached to the femur, Dr. Penenberg had to cut the bone in two places before he could separate the implant from the bone.

Dr. Penenberg sent the fractured device to Wright Medical for analysis. Sometime later, Wright Medical advised him "[t]here was likely a weakness in the metal at the site of these etched lines. They're designed to allow understanding of the rotation of the body portion in relation to the stem, and the etching process actually cuts into the surface of the metal and potentially weakens it."

Plaintiff's left hip dislocated in February 2011. Dr. Peneberg's associate reset it but the hip dislocated again the next day and required another revision. In January 2012, it was discovered plaintiff had developed a serious infection in his left hip, requiring emergency surgery. Plaintiff had a fifth hip replacement surgery in 2013.

2. Lawsuit and Trial

Plaintiffs filed a lawsuit against Wright Medical stating four causes of action: strict products liability (design defect, manufacturing defect, failure to warn), negligence, and breach of warranty by plaintiff, and loss of consortium by Mrs. Warner.[5] The cause was tried to a jury in mid-2015.

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[5] The complaint also stated a claim for medical malpractice against Dr. Penenberg. Plaintiffs later withdrew that claim.

2.1. General Background

The Profemur R system manufactured by Wright Medical is a modular system consisting of three components (proximal body, neck, stem) available in multiple sizes, which can be configured by the surgeon to provide the best position and function in the body and fixation within the bone structure.

Between 2002 and 2015, Wright Medical sold 9,343 Profemur R bowed stems worldwide, of which 5,552 (including plaintiff's) were manufactured in France. All had laser orientation marks on the upper (proximal) portion of the stem. Seven bowed stems, including plaintiff's, fractured but only two were returned to Wright Medical for examination.

As to plaintiff's stem, Wright Medical's internal investigation concluded the fracture initiated at one of the laser marks ("laser mark 6").[6] As to the other fractured device, the company's internal investigation concluded the fracture also initiated at a laser mark but at a different position on the stem, near laser marks used to identify the device. As to the remaining five stems, Wright Medical was unable to determine whether laser marks played a role in the device's failure because they could not examine those devices.

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[6] We use the numbering scheme used by Dr. Ayers, who numbered the seven laser marks in a clockwise direction.

2.2. Plaintiffs' Case[7]

To establish the fractured stem suffered from a manufacturing defect, plaintiffs relied principally on the testimony of two experts: Dr. Reed Ayers and Mari Truman.

Dr. Ayers, an engineer who has significant experience working with titanium alloys, testified that the stem fracture initiated at laser mark 6 because the application of the laser was too intense and caused significant degradation in the fatigue and fracture resistance properties of the alloy at that site. He also observed that the areas affected by the heat of the laser varied significantly as between the seven orientation marks, ranging from 28.34 microns at laser mark 2 to 125 microns at laser mark 7. He concluded the stem fractured at laser mark 6 because the heat-affected area there—105 microns—was more than four times greater than the recommended maximum depth of 25 microns. He also concluded, based on the inconsistency of the heat-affected areas, the laser marking process itself was not well controlled and constituted a manufacturing defect.

Mari Truman, a mechanical engineer and orthopedic prosthesis designer, also testified for plaintiffs. Like Dr. Ayers and Wright Medical's investigative team, Truman concluded the fracture originated at laser mark 6. She testified it is standard in the industry to carefully place laser marks in areas of low stress and to apply the marks in a consistent and controlled manner to minimize the heat-affected area. She concluded the irregular application of the laser marks on the stem and the excessive

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[7] Because we discuss plaintiffs' expert testimony in detail *post*, we provide only a brief summary of that testimony here.

depth of the heat-affected area around laser mark 6 were manufacturing defects that caused plaintiff's stem to break.

2.3. Wright Medical's Case

Wright Medical posited that plaintiff's stem broke because his femur provided inadequate support for the implant, thereby subjecting the stem to unexpected stresses it was unable to withstand.

Dr. Russell Windsor, Wright Medical's expert orthopedic surgeon, reviewed x-rays of plaintiff's left hip taken before and after the fracture and stated the x-rays showed radiolucency (a loss of bone stock) on both sides of the implant which, in his view, can indicate the implant is loose, or not well fixed to the surrounding bone. In plaintiff's case, Dr. Windsor found the lack of proximal support for the implant significant. He opined the stem fractured due to the lack of proximal bone support which put the entire load on the implant.

Wright Medical also offered testimony by Dr. Brad James, a metallurgical engineer specializing in failure analysis of orthopedic devices, including fatigue and fracture. He stated, contrary to plaintiffs' expert, that nothing in the technical literature correlates the depth of the heat-affected zone around a laser mark with a reduction in fatigue strength of a titanium alloy. He also noted there was no evidence the entire heat-affected zone around laser mark 6 cracked all at once, as would be expected if the alloy turned into a brittle ceramic, as suggested by Dr. Ayers.

Dr. James also emphasized plaintiff's device actually had two fatigue cracks: one at the orientation marks and one in the

trunnion[8]. The presence of two fatigue cracks suggested the implant was subjected to very high stresses. And in his opinion, the device would have fractured with or without the laser marks. Nonetheless, he conceded the crack initiated at laser mark 6 and acknowledged the laser mark contributed to the formation of the crack which ultimately fractured. He also agreed with Dr. Ayers that laser marking can cause titanium to melt and that it solidifies with a different microstructure.

Finally, as pertinent here, Wright Medical presented testimony by Dr. Jorge Ochoa, a biomechanical engineer. He opined that Wright Medical had a controlled process for laser marking, consistent with industry standards. In his view, standard elements of stress (movement, body weight) and subpar bone quality caused plaintiff's stem to fracture. He testified the stem did not suffer from a manufacturing defect. The stem fractured due to very high bending stresses which resulted mainly from the poor bone quality and support around the proximal portion of the implant.

3. The Verdict

The jury found in favor of Wright Medical on plaintiffs' design defect theory, but found plaintiff's stem had a manufacturing defect. The jury made no award of damages for past or future medical expenses,[9] but awarded plaintiff $2 million for past pain and suffering and an additional $2 million for future

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[8] The trunnion is the upper portion of the stem which is placed inside the proximal body to connect the two components.

[9] Plaintiff did not present evidence regarding past or anticipated future medical expenses.

pain and suffering. The jury also awarded Mrs. Warner $500,000 for loss of consortium.

4. Posttrial Motions and Appeals

Wright Medical timely filed motions for judgment notwithstanding the verdict (JNOV) and new trial. The court denied the motions based in part on its finding "as a matter of fact that the evidence presented by plaintiffs' witnesses was more credible than that presented by defendant's experts and other witnesses as to the issue of manufacturing defect."

Wright Medical apparently asserted additional arguments in support of its new trial motion and argued it was prejudiced by plaintiffs' counsel's repeated insinuations to the jury that it withheld documents and other information during discovery.[10] The court rejected that argument, explaining the curative admonitions made immediately after the defense objections "were sufficient to counter any improper actions by plaintiffs' counsel."

With respect to damages, however, the court found the jury's award was unsupported by the evidence. The court granted the motion for new trial as to damages only, unless plaintiffs agreed to a significant remittitur. The court subsequently set the remitted amounts at $500,000 (from $2 million) for plaintiff's past pain and suffering, $375,000 (from $2 million) for plaintiff's future pain and suffering, and $150,000 (from $500,000) for Mrs. Warner's loss of consortium. Plaintiffs rejected the remittitur.

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[10] The appellant's appendix does not contain copies of the memoranda of points and authorities supporting Wright Medical's posttrial motions.

Wright Medical timely appeals from the judgment. Plaintiffs timely appeal the court's order granting a new trial on damages.

CONTENTIONS

Wright Medical contends the jury's verdict is unsupported by the evidence and therefore the trial court erred in denying its motion for judgment notwithstanding the verdict and in denying its motion for new trial as to liability for manufacturing defect. Wright Medical also asserts it was prejudiced by plaintiffs' counsel's suggestions that it withheld evidence, the court improperly admitted certain evidence by plaintiffs' expert which had not previously been disclosed, the court improperly excluded evidence by its biomechanical engineering expert, and the cumulative effect of the court's errors deprived it of a fair trial.

Plaintiffs contend the court erred in finding the jury's damages award excessive and granting a new trial on that issue.

STANDARD OF REVIEW

"A party is entitled to judgment notwithstanding the verdict only if there is 'no substantial evidence [to] support' that verdict. (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68 (*Sweatman*); see Code Civ. Proc., § 629.) In reviewing a trial court's denial of a motion for judgment notwithstanding the verdict, we ask: Does the record, viewed in the light most favorable to the jury's verdict, contain evidence that is reasonable, credible and of solid value sufficient to support the jury's verdict? [Citations.] If we must resolve any legal issues in answering this question, our review of such issues is de novo. [Citation.]" (*Licudine v. Cedars-Sinai Medical Center* (2016) 3 Cal.App.5th 881, 890.)

"A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict ... or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the ... jury clearly should have reached a different verdict...." (Code Civ. Proc., § 657.) "[W]e review an order denying a new trial motion under the abuse of discretion standard. However, in doing so, we must review the entire record to determine independently whether there were grounds for granting the motion. [Citation.]" (*Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 733 (*Santillan*).)

DISCUSSION

1. Substantial evidence supports the jury's finding that plaintiff's fractured stem contained a manufacturing defect.

1.1. Additional Facts

Plaintiffs' manufacturing defect theory, presented through the testimony of Dr. Reed Ayers and Mari Truman, was that the improperly controlled and irregular application of laser marks on the stem caused structural changes to the titanium alloy at the site of the marks, which resulted in the alloy becoming weaker and more brittle than the surrounding, unaltered portion of the stem, ultimately causing the stem to fracture.

Dr. Ayers, an aerospace engineer by training, has extensive experience working with titanium alloys and has studied how titanium alloys change after being placed in the human body. He explained that the stem was made from an alloy of 90 percent titanium, 6 percent aluminum, and 4 percent vanadium by weight, a strong, corrosion-resistant alloy commonly used for

orthopedic implants. Dr. Ayers examined plaintiff's fractured stem using images taken by high powered microscopes, including a scanning electron microscope and energy dispersive spectroscopy, which allowed him to estimate the chemical composition of the materials on the stem. Because the stem fracture originated at one of the laser marks on the stem, Dr. Ayers examined each of the seven marks closely and found, in each case, the area surrounding the laser mark had been affected (or melted) by the heat of the laser. The melted areas, or heat-affected zone, had a different structure than the normal titanium alloy. In his opinion, the heat-affected zone suffered from a "significant degradation in the fatigue properties and fracture of this device," likely a 75 percent degradation at laser mark 6.

Dr. Ayers also observed the heat-affected areas around the laser markings varied considerably in depth, ranging from 28.34 microns at laser mark 2 to 125 microns at laser mark 7. A heat-affected area deeper than 25 microns would affect the structural integrity of a titanium medical device. And the acceptable variation between the heat-affected areas is 5 microns. In the case of plaintiff's stem, the inconsistency in depth of the heat-affected areas—a difference of about 400 percent between the smallest and largest—suggested the laser itself was not well controlled which constituted a manufacturing defect.[11] Dr. Ayers

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[11] It was unclear what sort of instructions or specifications Wright Medical had for the application of the laser marks. Truman reviewed fully detailed design drawings that called for laser marks but had no specifications regarding their application. She concluded the absence of drawings or specifications providing for the orientation of the laser marks was a design defect. Wright Medical's witness, Irina Timmerman, discussed a laser marking procedure but admitted she

concluded the stem would not have fractured but for the laser mark and, additionally, would not have fractured if the heat-affected area around each of the laser marks had been 28.34 microns, as at laser mark 2.

Dr. Ayers also reviewed electron microscope studies performed by Wright Medical as part of its internal investigation of plaintiff's stem fracture. He observed patterns on the fracture face which indicated the fracture initiated at laser mark 6. And he agreed with the assessment made by Wright Medical's scientists: " '[t]he fracture initiated at a laser mark and propagated through the stem cross-section.' " The studies indicated the presence of aluminum oxide, a substance not generally found in the alloy used by Wright Medical. Their investigative report said, for example, " '[e]mbedded aluminum oxide was evident on the outside diameter of the stem, including the laser mark.' " Dr. Ayers explained that aluminum oxide is a brittle ceramic with significantly less fracture toughness than the titanium alloy.

Mari Truman, a mechanical engineer and orthopedic prosthesis designer, also testified for plaintiffs. Like Dr. Ayers, Truman reviewed Wright Medical's report on plaintiff's stem and concluded the fracture originated at laser mark 6. She also reviewed the electron microscope images taken at Dr. Ayers's direction. Those images show patterns on the face of the fractured surface that reflect the origination point of the fatigue fracture. According to Truman, "[i]t is well known in the industry that laser marks reduce the fatigue strength of materials, and

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was unsure whether that procedure had been used in France on plaintiff's stem.

particularly it's well known that it does that for titanium alloys, and because of that we know not to put laser marks in highly stressed areas or no areas [*sic*] where you expect there might be significant tensile stress on your load, and in this case laser marks were put on the stem of this implant in an area where we would expect high tensile stresses. So generally the first rule is just don't do that. [¶] And in this case the crack initiated from the laser [mark], and we know that the laser reduces fatigue strength of the titanium components."

Truman went on to explain how laser marks could be used on an implant such as plaintiff's without reducing fatigue strength: "With very tight control, if you are going to go ahead and use the laser mark, then you have to keep the total depth of the laser mark and the heat effect below 25 microns or less. The lower the better." In the case of plaintiff's stem, the heat-affected area around several of the laser marks went much deeper than 25 microns.

In addition, she said, it is critical that the application of laser mark be precise and uniform as to power, speed, and number of passes, in order to minimize the heat-affected zone around the marks. Here, the irregular heat-affected areas around the laser marks indicated the laser process was "out of control," which is a manufacturing defect.

1.2. Analysis

Wright Medical contends no substantial evidence supports the jury's finding that plaintiff's device suffered from a manufacturing defect. We disagree.

A product has a manufacturing defect if it differs from the manufacturer's intended result or from other ostensibly identical units of the same product line. (*Barker v. Lull Engineering Co.*

(1978) 20 Cal.3d 413, 429.) In other words, a product has a manufacturing defect if the product as manufactured does not conform to the manufacturer's design. (*Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 190; *In re Coordinated Latex Glove Litigation* (2002) 99 Cal.App.4th 594, 607.)

Here, plaintiffs' expert testimony established:

- The stem was made from a titanium alloy commonly used for orthopedic implants. Seven orientation marks were placed on the stem by a laser.
- Laser marks applied to a titanium alloy can cause structural changes (a heat-affected area) which decrease the fracture resistance of the alloy.
- A heat-affected area deeper than 25 microns may significantly decrease the structural integrity of the surrounding area.
- Plaintiff's stem fracture originated from laser mark 6.
- The heat-affected area around laser mark 6 was approximately 105 microns.
- Images of the stem taken via an electron microscope showed changes in texture consistent with melting at the site of laser mark 6.
- The surface of the fracture site contained aluminum oxide which indicates the alloy's structure at that site had changed due to the application of heat.

- Accurate and consistent procedures must be followed when applying laser marks.
- The heat-affected areas varied significantly between the seven laser marks, ranging in depth from 28 microns to 125 microns.
- The variation in heat-affected areas indicates Wright Medical did not use accurate and consistent procedures to apply the laser marks on plaintiff's stem, which is a manufacturing defect.

The court explicitly found this evidence more credible than the evidence presented by Wright Medical. This expert opinion testimony presented by plaintiffs and reasonable inferences drawn therefrom constitute substantial evidence to support the jury's finding that plaintiff's stem contained a manufacturing defect.

Wright Medical argues plaintiffs failed to establish a manufacturing defect because neither Dr. Ayers[12] nor Truman examined other units from the same production lot to determine

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[12] Wright Medical argues we should disregard Dr. Ayers's testimony in its entirety because a juror declaration submitted by plaintiffs indicates his testimony was not a significant factor in the jurors' decision. We reject this argument because it is based upon plainly inadmissible evidence. (Evid. Code, § 1150, subd. (a); *In re Stankewitz* (1985) 40 Cal.3d 391, 398 ["jurors may testify to 'overt acts'—that is, such statements, conduct, conditions, or events as are 'open to sight, hearing, and the other senses and thus subject to corroboration'—but may not testify to 'the subjective reasoning processes of the individual juror' "].) We also decline Wright Medical's invitation to rely on the declaration in order to conclude the court's limitation on Dr. Ochoa's testimony, discussed in detail *post*, was prejudicial.

whether plaintiff's stem deviated from the other stems produced at the same time. Although that is one method which could be used to show a manufacturing defect, it is not the only one. A manufacturing defect occurs when an item is manufactured in a substandard condition. (*McCabe v. American Honda Motor Co.* (2002) 100 Cal.App.4th 1111, 1120; *Gonzalez v. Autoliv ASP, Inc.* (2007) 154 Cal.App.4th 780, 792.) In some cases, as here, the substandard condition is apparent on the face of the item.

As noted *ante*, Dr. Ayers and Truman both testified the application of laser marks should, according to industry standards, be a tightly controlled and consistent process. Even Wright Medical's witness concerning laser marks acknowledged that if laser marks are placed on an implant, the laser marks should be the same, and the intensity and power of the laser should be the same each time a mark is made. And the inconsistency in the heat-affected zones around the laser marks on plaintiff's stem indicates the process used on *that* stem was not well controlled and did not conform to industry standard. That lack of control produced a product unable to withstand plaintiff's routine activities for the expected 15-year life of the implanted device. On the facts of this case, the inconsistent results on plaintiff's stem provide a sufficient basis to find it suffered from a manufacturing defect (irregular and inadequately controlled laser marking), irrespective of whether any other device manufactured by Wright Medical contained a similar defect.

2. No new trial is warranted due to irregularity in the proceedings.

Wright Medical also asserts it is entitled to a new trial because plaintiffs' counsel deprived Wright Medical of a fair trial

by repeatedly suggesting to the jury that Wright Medical intentionally concealed relevant evidence during discovery. We disagree.

Misconduct of counsel is an "[i]rregularity in the proceedings of the court" which may, in egregious cases, prevent a party from having a fair trial. (Code Civ. Proc., § 657, subd. (1); *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 870 (*Decker*).) But attorney misconduct can justify a new trial only if it is reasonably probable that the party moving for a new trial would have obtained a more favorable result absent the misconduct. (*Cassim v. Allstate Ins. Co*. (2004) 33 Cal.4th 780, 801–802 (*Cassim*); *Decker,* at p. 872; *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1122.)

As Wright Medical suggests, plaintiffs' counsel repeatedly insinuated during proceedings before the jury that the company failed to produce evidence that was highly relevant to plaintiffs' claims. During his opening statement, counsel referenced the fact that Cremascoli, a French company purchased by Wright Medical, manufactured plaintiff's implant. He then suggested plaintiffs had requested records regarding the manufacturing process from Wright Medical but intimated that when the records were sent over from the French company, some requested documents were provided "but others just happened to be missing." Counsel then said plaintiffs wanted to know, for example, who operated the machine used to place the laser marks on the stem and what parameters were used in that process, but "[t]hat too just happened to be something that they didn't have." As counsel continued making such suggestions to the jury, specifically in reference to the fact that plaintiffs did not receive an exemplar stem from Wright Medical, defense counsel objected.

The court agreed plaintiffs' counsel "left the impression that the other side hid the ball" and admonished the jury: "Discovery is a two-way street. Each side may request exemplars or other evidence. The court can then rule on what should be provided if the parties cannot agree. Neither side raised this issue with the court, and the jury is not to consider this issue at this time."

Plaintiffs' counsel revisited the issue several times during the testimony of Deborah Daurer, Wright Medical's corporate representative. Wright Medical continued to object and eventually asked the court to declare a mistrial. The court repeatedly admonished plaintiffs' counsel and although it denied the request for a mistrial, the court gave counsel an ultimatum: "You are on notice. The next time you give the impression to a jury that something improper has been done in discovery, I will declare a mistrial. You're on notice. Try it one more time, and there will be a mistrial." The court then directly addressed the issue with the jury stating. "this court has ruled that up to this point no documents have been improperly withheld by Wright Medical, and any insinuations to the contrary are without merit."

In its order denying Wright Medical's motion for new trial, the court stated it was "satisfied that curative admonitions and admonishments to the jury (several agreed upon by both sides) were sufficient to counter any improper actions by plaintiffs' counsel. The admonishments to the jury and counsel were made by the Court immediately upon defense objections and or sua sponte by the Court." Wright Medical invites us to reject the court's conclusion in this regard, arguing "the admonition did not obviate the prejudicial effect" of counsel's conduct, "the jury's improper and excessive verdict … was due in no small part to the prejudice caused by repeated assertions of suppressing evidence,"

and "the jury's liability finding was also tainted" due to counsel's misconduct.

Although it appears plaintiffs' counsel acted inappropriately, we cannot agree that the jury's verdict was necessarily the result of his conduct. Nor is it evident on this record that the impact of the alleged misconduct prevented Wright Medical from receiving a fair trial. (See *People v. Avila* (2006) 38 Cal.4th 491, 573 [" 'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions' "].)

In the overall scheme of the trial, counsel's references to missing documents consumed a very small amount of the jury's time. Moreover, we must also consider the ameliorating effect of the trial court's instructions to the jury. "Absent some contrary indication in the record, we presume the jury follows its instructions [citations] 'and that its verdict reflects the legal limitations those instructions imposed' [citation]." (*Cassim, supra*, 33 Cal.4th at pp. 803–804.) As noted, *ante,* the trial court specifically instructed the jury that Wright Medical had not withheld documents and counsel's insinuations to the contrary should be disregarded. That admonition was responsive to Wright Medical's objection, timely presented to the jury, and explicit. We presume the jury followed this instruction.

3. No new trial is warranted due to the court's evidentiary rulings.

3.1. Wright Medical failed to timely object or move to strike the bulk of Dr. Ayers's testimony regarding aluminum oxide.

Wright Medical argues the trial court erred by allowing plaintiffs to present expert testimony at trial that had not previously been disclosed. We see no error in the court's ruling.

As Wright Medical points out, a court may exclude expert opinion testimony at trial where that opinion was not offered during an expert's deposition where the expert purports to disclose all of his or her opinions. (See, e.g., *Jones v. Moore* (2000) 80 Cal.App.4th 557, 565–566; *Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 918–919.) We review the court's decision for an abuse of discretion. (See *Kennemur*, at p. 926.)

Here, as explained *ante*, plaintiffs presented expert testimony by Dr. Reed Ayers concerning the properties of titanium alloys such as the alloy used in plaintiff's stem. Wright Medical complains that Dr. Ayers did not testify at his deposition concerning the presence of aluminum oxide on the stem yet offered some testimony in that regard at trial. Plaintiffs concede the testimony was outside the scope of the opinions offered at Dr. Ayers's deposition.

The dispositive factor here is that Wright Medical did not object to the bulk of Dr. Ayers's testimony regarding aluminum oxide. Plaintiffs' counsel questioned Dr. Ayers about a report which contained the results of tests performed on plaintiff's stem by Wright Medical. Dr. Ayers commented on several conclusions in the report including the statement that: "The laser mark at the fracture initiation site was examined. Embedded aluminum oxide

was evident on the outside diameter of the stem, including the laser mark." In response to counsel's questions, Dr. Ayers indicated he agreed with the conclusion and that he also observed aluminum oxide at the site of laser mark 6. Dr. Ayers also testified that although aluminum is part of the alloy used to make the Profemur R stem, aluminum oxide is not normally present in the alloy. Dr. Ayers stated, "[t]he laser mark chemically was mostly aluminum oxide" such that it "was not a metal alloy anymore. That laser mark had become a brittle ceramic." The transformation of the material was significant, Dr. Ayers concluded, because it substantially reduced the material's resistance to fracturing, so much so that "it has actually no fatigue resistance whatsoever." None of that testimony drew an objection from the defense.

Wright Medical did object, however, when plaintiffs' counsel asked Dr. Ayers what effect the change in the alloy, such that it included aluminum oxide, would have on plaintiff's stem. But by that time, the jury already heard Dr. Ayers testify that aluminum oxide was present at the laser mark on plaintiff's stem where the fracture originated and that the presence of aluminum oxide indicated the material had almost no fatigue resistance at that location. Notably, Wright Medical never moved to strike the prior testimony.

When Dr. Ayers resumed his testimony the following day, plaintiffs' counsel brought up the issue again, this time in reference to an energy dispersive spectroscopy study of the fracture face performed by Wright Medical. Consistent with his prior testimony, Dr. Ayers confirmed that Wright Medical's study showed the presence of atypical amounts of aluminum and oxygen on the fracture face. The court overruled Wright Medical's

objection, apparently because the testimony was consistent with Dr. Ayers's prior testimony and merely explained what Wright Medical's own report plainly stated.

We conclude Wright Medical forfeited this issue by failing to make a timely objection during Dr. Ayers's initial testimony regarding the presence of aluminum oxide at laser mark 6 and by failing to move to strike the testimony just described. (Evid. Code, § 353, subd. (a); see, e.g., *Heiner v. Kmart Corp*. (2000) 84 Cal.App.4th 335, 346 [failure to timely object to expert testimony forfeits issue on appeal]; *Pineda v. Los Angeles Turf Club, Inc.* (1980) 112 Cal.App.3d 53, 61 [failure to object and make motion to strike when testimony is given results in failure to preserve point in trial court].)

3.2. The court did not abuse its discretion by prohibiting the use of x-rays by Wright Medical's biomechanical engineering expert.

Wright Medical also contends the court erred in prohibiting Dr. Jorge Ochoa, a biomechanical engineer, from reading and interpreting x-rays in front of the jury. We disagree.

The determination of an expert's qualifications is ordinarily a matter addressed to the sound discretion of the trial court and will not be disturbed on appeal absent a clear showing of abuse. (*Huffman v. Lindquist* (1951) 37 Cal.2d 465, 476; see *People v. Dowl* (2013) 57 Cal.4th 1079, 1089.) Here, the court conducted a 45-minute hearing under Evidence Code section 402 to determine whether Dr. Ochoa was qualified to offer expert opinion by reading and interpreting x-rays. The test to be applied at such a hearing is whether the witness possessed the "special knowledge, skill, experience, training, or education sufficient to qualify him

as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).)

Dr. Ochoa is a biomechanical engineer who earned a bachelor's degree in mechanical engineering as well as a master's degree and Ph.D. in biomechanical engineering. His work experience has focused on design and development of orthopedic devices. Dr. Ochoa stated he had previously testified about x-rays in three cases and his work routinely involves reviewing x-rays. And his opinions in this case were based in part upon review and interpretation of plaintiff's x-rays. As for his most relevant formal training, Dr. Ochoa took three medical school courses: gross anatomy, bone physiology, and cartilage physiology.

On the basis of this evidence, the court concluded Dr. Ochoa had insufficient formal training to qualify him to read and interpret x-rays as an expert in front of the jury. However, the court indicated Dr. Ochoa could say he reviewed x-rays as part of his work on this case, which he did.

As an initial matter, we note Wright Medical overstates the scope of the court's ruling. Wright Medical argues, for example, "[t]he trial court erroneously precluded Dr. Jorge Ochoa from offering opinions on the biomechanics of [plaintiff's] hip implant device." Specifically, "Wright Medical sought to offer Dr. Ochoa as a biomechanical engineer to explain the gaps that historically existed in the radiographic evidence and how the gaps contributed to the failure of the device. Dr. Ochoa was not going to offer a medical opinion, but rather to look at the physical relationship between the prosthesis and Mr. Warner's femur as depicted in the x-rays."

In fact, much of Dr. Ochoa's testimony addressed these specific issues. He opined, for example, standard elements of

stress (movement and body weight) and subpar bone quality caused plaintiff's stem fracture. According to this witness, the stem was subjected to very high bending stresses because a large section of the upper/proximal portion of the implant was unsupported by the surrounding bone. And on the particular point raised here, he used a model of the stem and stated, "[a]s others had testified before and I came to learn from the record, there was a very large amount of the proximal femoral component. That means the very top up here that was unsupported." He went on: "So when this stem was fit into the cavity, there was room all the way around it. And by my review, the stem was also fairly high inside the bone, and I could tell that there was no support all the way around…." Discussing the issue further, he emphasized "[t]here was a gap all around the proximal stem, between the stem, the proximal body, and the bone, substantial gap." And his conclusion also emphasized the gap between the bone and the stem: "[T]he combination of the poor bone stock as described in his medical records and the lack of fit and fill due to no opposition or no proximity of the metal to the bone proximally created a condition of insufficient bone support." Dr. Ochoa further opined the stem did not have a manufacturing defect; rather, the fracture occurred as a result of overstress caused by normal activities (walking, bending) because the femur provided so little, practically nonexistent, proximal support for the stem.

In light of the limited scope of the court's ruling and Dr. Ochoa's lack of formal training, we see no abuse of discretion. Moreover, even if the court's ruling was erroneous, Wright Medical cannot show the ruling was prejudicial.

As noted, the court only restricted Dr. Ochoa's use of plaintiff's June 2009 and October 2010 x-rays. Wright Medical argues it was prevented from presenting evidence "about the mechanics of [plaintiff's] implant failure, including a review of the x-rays to explain to the jury the significance in the historical gaps and lucencies surrounding the implant in his body." But Wright Medical's expert orthopedic surgeon—a medical doctor with training in reading and interpreting x-rays—reviewed those films, and others, in detail with the jury. And he reached the same conclusion Dr. Ochoa reached. Interpreting the June 2009 x-ray, Dr. Windsor observed a substantial amount of radiolucency around the proximal portion of the stem, which indicated that the bone was not in contact with the stem and therefore failed to support the stem. And in the October 2010 x-ray depicting the stem fracture, Dr. Windsor indicated the x-ray showed a "really substantial loss of proximal bone support" for the stem. Overall, Dr. Windsor concluded, the x-rays taken from 2007 (after the stem was implanted) to 2010 (at the time of the fracture) depicted "a significant, profound loss of cortical support." In short, Dr. Windsor provided the x-ray interpretation Wright Medical claims was relevant and necessary to its defenses. Thus, even if the court's ruling was erroneous it was not prejudicial.[13]

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[13] Because we have rejected each of Wrights Medical's claims of error, we need not address its contention that the cumulative effect of the alleged errors deprived it of a fair trial.

4. The court's order granting the motion for new trial on damages fails to include an adequate statement of reasons and must therefore be reversed.

Plaintiffs argue the court's new trial order must be reversed because the court failed to provide a sufficient statement of reasons to facilitate appellate review and because the court's conclusion that the jury's damages awards are excessive is unsupported by substantial evidence. As to the first contention, we agree.

It is well established that trial courts have broad discretion in granting or denying a motion for new trial. The degree of appellate deference to the trial court is particularly strong where a new trial is granted. (*Santillan, supra,* 202 Cal.App.4th at pp. 727–728.) Generally, an order granting a new trial will be disturbed on appeal only if the record demonstrates a manifest and unmistakable abuse of discretion. And we indulge all presumptions in favor of the new trial order and will affirm so long as the order can be sustained on any ground.[14] (See *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 932 [where trial

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[14] At oral argument, counsel for Wright Medical urged us to affirm the new trial order on the alternative ground of jury misconduct. Specifically, counsel represented (based on the inadmissible juror statements discussed *ante*) that the jurors considered improper factors during their deliberations on damages. However, the court declined to find the jurors committed misconduct: "[T]he jury's non awards and verdict indicate they were not unduly influenced by any purported improper discussions during deliberations (which were never reported to the Court)." And we cannot evaluate Wright Medical's argument below (or even confirm that Wright Medical made this argument below) because the new trial motion was not included in the record on appeal.

court grants new trial on the issue of excessive damages, presumption of correctness normally accorded to jury verdict replaced by presumption in favor of new trial order].)

But although the court's ruling here is entitled to substantial deference, the court's discretion to grant a new trial is not unlimited. For this reason, the Legislature requires a trial court to provide some explanation of its ruling to facilitate appellate review. Specifically, Code of Civil Procedure section 657 (section 657) requires that: "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 or reasons for granting the new trial upon each ground stated." As pertinent here, section 657 further provides: "On appeal from an order granting a new trial ... upon the ground of excessive or inadequate damages, it shall be conclusively presumed that said order as to such ground was made only for the reasons specified in said order or said specification of reasons, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons."

Interpreting this section, our courts consistently require a court granting a new trial to "furnish[ ] a concise but clear statement of the reasons why [the court] finds one or more of the grounds of the motion to be applicable to the case before [it.]" (*Mercer v. Perez* (1968) 68 Cal.2d 104, 115; see also *Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 633–634 (*Oakland Raiders*).) " 'In specifying its reasons for granting the motion for a new trial, the trial court must briefly identify the portion of the record which convinces the court that the jury clearly should have reached a different verdict. [Citations.]' " (*Truhitte v. French Hospital* (1982) 128 Cal.App.3d 332, 352

(*Truhitte*).) The statement of reasons must be "specific enough to facilitate appellate review and avoid any need for the appellate court to rely on inference or speculation" and "must refer to evidence, not ultimate facts." (*Oakland Raiders,* pp. 634–635.) And where a new trial order is based on excessive damages it should, at a minimum, "indicate the respects in which the evidence dictated a less sizable verdict" and reference some "portion of the record that would tend to support the judge's ruling." (*Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 62 (*Stevens*).)

What constitutes an adequate statement of reasons necessarily varies depending on the specific issues and evidence present in each case. A specification of reasons for granting a conditional new trial based on excessive or inadequate damages is sufficient where it focuses on the specific types and amounts of damages. For example, the appellate court upheld a new trial order finding that a damages award was inadequate where the court computed what the verdict would cover ($416 per year for plaintiff's future medical expenses, $811 per year for loss of earning capacity, and $994 per year for pain and suffering) and then stated why these amounts were inadequate, specifically referring to evidence of plaintiff's past expenses and losses, the likelihood of further surgery, continuing pain and suffering, and drastic changes in her lifestyle. (*Truhitte, supra*, 128 Cal.App.3d at p. 352.)

By contrast, conclusory statements that damages are inadequate or excessive do not provide enough detail to allow for appellate review. We find some guidance in *Dizon v. Pope* (1974) 44 Cal.App.3d 146 (*Dizon*), where the appellate court reversed an order granting a new trial on excessive damages if the plaintiff

did not accept a reduction in the judgment from $35,000 to $15,000. The trial court's specification of reasons stated: " 'The motion for new trial will be granted on the grounds that the verdict is excessive. The plaintiff sustained special damages of $1536.00. The injury was to soft tissue and does not appear to be permanent. ... ' " (*Id.* at pp. 147–148.) The appellate court concluded the statement of reasons was inadequate because "[t]he court in its order did not discuss the evidence[,] ... did not set forth how it arrived at the total of special damages mentioned in the order or the significance of its statement regarding soft tissue[,] [and] ... [¶] ... did not specify the evidence which convinced the court that appellant's 'injury ... does not appear to be permanent.' " (*Id.* at p. 149, fn. omitted.)

Similarly, in *Stevens,* the Supreme Court reversed an order granting a new trial on the ground of excessive damages. The trial court's specification of reasons explained, " 'the Court finds that the verdict is excessive, that it is not sustained by the evidence, and that it is based upon prejudice and passion on the part of the jury.' " (*Stevens, supra,* 9 Cal.3d at p. 59, fn. 9.) The *Stevens* court concluded this statement was insufficient because "[i]t does not indicate the respects in which the evidence dictated a less sizable verdict, and fails even to hint at any portion of the record that would tend to support the judge's ruling." (*Id.* at p. 62; see also *Bigboy v. County of San Diego* (1984) 154 Cal.App.3d 397, 402, 404 ["[a] general statement one figure is too high and another figure too low is insufficient," as is a general statement that an award is "excessive" in comparison to other awards in similar cases].)

The court's order in this case suffers from the defects present in *Stevens* and *Dizon*. Here, the new trial order contains

the following statement of reasons: "[T]he Court finds that there was insufficient basis in fact or evidence for the amounts awarded each plaintiff by the jury. [CCP section 657(5)]. Plaintiffs' counsel specified no amount for pain and suffering, past or future, and the Court finds the amounts awarded disproportionate to the evidence. [¶] In light of the fact that the jury gave $0.00 for future medicals, it is clear that they found there would be no need for further surgery or other medical care."

Like the statements discussed above, the court's order here does not discuss any evidence relating to plaintiff's pain and suffering or Mrs. Warner's loss of consortium claim. We are therefore left to guess what evidence led the court to its conclusion: Why did it believe the jury clearly should have reached a different verdict and what evidence did it rely upon in calculating its proposed remitted amounts? This is precisely the sort of guesswork section 657 was meant to obviate. And the court's statement that the noneconomic damages awards are disproportionate to $0 (the amount awarded for future medical care) adds nothing to its reasons for granting a new trial. Here, for whatever reason, plaintiffs chose not to introduce detailed evidence of their past or projected future medical expenses. But that does not in any manner invalidate plaintiffs' claims for noneconomic damages which, in this case, relate not only to past and potential future medical procedures and subsequent recovery, but also to the significant and ongoing limitations in lifestyle they both suffered and will continue to suffer due to plaintiff's condition.[15]

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[15] For example, after his implant fractured, plaintiff has trouble getting in and out of cars and crutches have become a permanent part of his life. Similarly, plaintiffs' sex life is "shot to hell."

We cannot remand the case to permit the trial court to correct an insufficient statement of reasons. (*Oakland Raiders, supra,* 41 Cal.4th at p. 635.) Instead, we must reverse the trial court's new trial order and reinstate the jury's verdict. (*Stevens, supra,* 9 Cal.3d at p. 63; *Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 699.)

DISPOSITION

The court's September 21, 2015 order is reversed insofar as it grants Wright Medical's motion for new trial. The judgment entered on July 23, 2015 is reinstated in its entirety and, as reinstated, is affirmed. (*Stevens, supra*, 9 Cal.3d at p. 63.) Plaintiffs to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

CURREY, 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.