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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MONICA HARDIN,

Plaintiff and Appellant,

v.

JASON LUKE,

Defendant and Appellant.

B334121

(Los Angeles County
Super. Ct. No. 20AVCV00590)

APPEALS from an order and postjudgment order of the Superior Court of Los Angeles County. Daniel L. Alexander, Judge. Affirmed; cross-appeal dismissed.

Singleton Schreiber, Benjamin I. Siminou; SHK Law, Adam J. Savin, Brian J. Kim, and Maureen K. Hennessey for Plaintiff and Appellant.

Tharpe & Howell, Eric B. Kunkel; Zelms Erlich Lenkov, John K. Flock and Suzanna R. Harman for Defendant and Appellant.

INTRODUCTION

Plaintiff Monica Hardin sued defendant Jason Luke for negligence after Luke crashed his recreational vehicle (RV) into her car while attempting to make an illegal U-turn. The jury awarded Hardin \$95,000 for past medical expenses and pain and suffering.

After the trial court entered judgment, Hardin moved for a new trial, arguing Luke's attorney engaged in prejudicial misconduct throughout trial, including seeking to admit evidence in violation of the court's evidentiary rulings and making several inappropriate arguments to the jury, including falsely accusing Hardin of suppressing evidence, improperly attacking the credibility of one of Hardin's experts, and suggesting to the jury that it should consider whether a large verdict in Hardin's favor would result in financial hardship for Luke and his family.

The trial court granted Hardin's new trial motion and ordered a new trial on damages, finding that Luke's attorney engaged in numerous instances of misconduct that prejudiced Hardin. Luke appeals, arguing the court abused its discretion when it ordered a new trial. Hardin filed a protective cross-appeal from the underlying judgment. We conclude that the trial court did not abuse its discretion in granting Hardin a new trial. We therefore affirm that order and dismiss as moot Hardin's cross-appeal.

BACKGROUND

1. The accident and Hardin's injuries

In late August 2018, Hardin was driving in the left-hand lane of a two-lane road in Lancaster. Luke was driving a recreational vehicle (RV) in the right-hand lane. Although a sign posted near one of the road's intersections prohibited vehicles

from making U-turns, Luke attempted to make one from the right-hand lane. As he started to move his RV into the lefthand lane, Luke crashed into the front right wheel of Hardin's car. The impact caused Hardin's car to move several feet towards the road's center median.

When Hardin returned home later that day, she began to feel sharp pain running from her neck down through her right arm and from her back down through her right leg. Hardin went to urgent care, where she received treatment for back and neck pain.

Several years after the accident, Hardin continued to experience pain in her neck and back. During that time, Hardin was treated by several doctors, each of whom diagnosed her with herniated discs in her neck and lower back. The herniated discs resulted in radiculopathy, or compressed nerves, which was causing Hardin to experience shooting pain and numbness in her limbs.

Hardin eventually consulted Dr. Stepan Kasimian, an orthopedic surgeon, who confirmed the other doctors' diagnoses and recommended surgery for her neck and back. Hardin underwent the surgeries, having the herniated disc in her neck replaced with an artificial one and pressure removed from a nerve in her lower back. Although the surgeries cured Hardin's radiculopathy, she continued to experience regular pain in her neck and back.

2. The trial

In August 2020, Hardin sued Luke. Her complaint asserted two causes of action; one for general negligence, and the other for motor vehicle negligence. Hardin sought compensatory

damages for, among other things, lost wages, medical expenses, and lost earning capacity.

A jury trial began in June 2023. During trial, the court granted Hardin's request for a partial directed verdict on causation. The court found undisputed evidence established that Luke was negligent in causing the accident and that such negligence was a substantial factor in causing Hardin at least some injury. The jury was left to decide the extent of Hardin's injuries that were caused by Luke's negligence.

2.1. Testimony about Hardin's injuries and damages

Hardin testified that at the time of the underlying accident, she was 41 years old and had never experienced chronic back or neck pain. Although Hardin strained muscles in her shoulder and back several years before the accident, she visited a doctor only once for those injuries, which resolved themselves after a few weeks. Hardin also bruised her tailbone during a fall about a year before the accident, but that injury also resolved itself and never bothered her again. Prior to the accident, Hardin was an active person, and she frequently ran and went to the gym.

After the accident, Hardin started to experience constant pain in her neck and back, including shooting pain that flowed from her neck through her right arm and from her back through her right leg. Hardin sometimes lost "power" in her right leg and arm. Hardin could no longer exercise due to her neck and back injuries.

Dr. Kasimian opined that Hardin's back and neck injuries were caused by the accident. Although the surgeries that Dr. Kasimian performed on Hardin's neck and back improved Hardin's condition, she would continue to experience pain and could require additional surgeries in the future.

Hardin's medical expert, Dr. Troy Mounts, also opined that Hardin's neck and back injuries were caused by the accident. Dr. Mounts did not believe Hardin's injuries were the result of "degeneration" because other than the areas where her injuries were located, Hardin's spine looked healthy for a woman her age. Nor did Dr. Mounts believe Hardin's injuries were muscle strains because such strains do not cause radiculopathy and would have resolved themselves within a couple of months.

Dr. Mounts believed the treatment and surgeries that Hardin received for her neck and back injuries were necessary and reasonable. Dr. Mounts also believed that Hardin would likely need additional treatment and surgery on her neck and back to relieve the pain she continued to experience.

Luke's medical expert, Dr. Amendeep Bhalla, testified that the August 2018 accident likely caused Hardin to suffer only muscle strains in her neck and back, and that any symptoms she continued to experience were the result of a "degeneration process."

Hardin's billing expert, Andrew Morris, testified that the reasonable cost of Hardin's past medical expenses was over \$320,000. Morris believed that the reasonable cost of Hardin's future medical treatment would be between \$1.38 million and \$1.66 million.

Luke's billing expert, Nancy Michalski, opined that the reasonable cost of Hardin's past medical expenses was about \$126,000, which included about \$71,000 for her neck surgery and about \$45,000 for her back surgery. According to Michalski, the reasonable cost of any future medical treatment Hardin may require was about \$311,000.

2.2. The jury's verdict

The jury awarded Hardin \$70,000 for past medical expenses, \$25,000 for past noneconomic damages, and no damages for future medical and noneconomic damages.

2.3. The new trial motion

After the court entered judgment, Hardin moved for a new trial on the grounds of attorney misconduct and inadequate damages. The trial court granted Hardin's motion and ordered a new trial on damages.

The trial court granted a new trial because it found that John K. Flock, Luke's attorney, engaged in prejudicial misconduct throughout trial.¹ Relevant here, the court found Flock committed the following misconduct:

- (1) During opening statement and the cross-examination of one of Hardin's witnesses, Flock improperly accused Hardin of suppressing evidence, even though Luke failed to timely discover that evidence;
- (2) During opening statement, Flock improperly attacked the character of Hardin's chief damages expert by stating that he (Flock) was personally familiar with the expert and falsely insinuating that more than 130 of the expert's former patients sued the expert, or at least lodged complaints that led to the expert being sued for billing fraud;

¹ Because the judge who presided over trial was reassigned to a new courtroom, a different judge ruled on Hardin's new trial motion.

- (3) Flock attempted to introduce evidence of Hardin's unrelated medical conditions in violation of the trial court's pretrial rulings excluding such evidence;
- (4) Flock made gratuitous remarks in front of the jury, including insinuating that Hardin's treating physician was a paid expert;
- (5) Flock made arguments that were not supported by the evidence, including claiming that the underlying accident did not cause Hardin any injuries despite the court's directed verdict to the contrary; and
- (6) Flock improperly appealed to the jury's sympathy by insinuating that a verdict in Hardin's favor would result in financial hardship for Luke and his family.

The trial court found that Flock's misconduct was prejudicial because it was "severe," "pervasive," and "insidious at almost every stage of trial," and it appeared to actually affect the jury's verdict. The court explained that Flock's argument appealing to the jury's sympathy and insinuating that a large verdict in favor of Hardin would result in financial hardship for Luke and his family "may have been sufficient, even without the multiple other instances of misconduct, to warrant a new trial." The court noted that some of Flock's other misrepresentations were "egregious and had the potential to seriously harm the credibility" of Hardin, her damages expert, and her treating surgeon. The court also found that Flock's misconduct likely affected the jury's verdict, as the amount of past medical expenses that the jury awarded Hardin was "significantly less

than what [Luke’s] billing expert estimated was the reasonable value of the treatments [Hardin] received.”

Luke appeals from the order granting a new trial. Hardin filed a protective cross-appeal from the underlying judgment.

DISCUSSION

1. Applicable law and standard of review

A trial court may order a new trial because of an irregularity in the proceedings that prevented one of the parties from receiving a fair trial. (Code Civ. Proc., § 657, subd. (1).) Attorney misconduct is an irregularity in the proceedings warranting a new trial if the misconduct was prejudicial to the moving party. (*Garcia v. ConMed Corp.* (2012) 204 Cal.App.4th 144, 148–149 (*Garcia*).)

We review a trial court’s ruling granting a new trial, including its findings of attorney misconduct and prejudice, for abuse of discretion. (*Simers v. Los Angeles Times Communications, LLC* (2018) 18 Cal.App.5th 1248, 1275; *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871–872 (*Decker*).) “‘So long as a reasonable or even fairly debatable justification under the law is shown for the order granting the new trial, the order will not be set aside.’ [Citation.] A new trial order ‘“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.” ’” (*Simers*, at pp. 1275–1276.) An appellant trying to overturn a trial court’s order granting a new trial “faces ‘more than a daunting task [and] an uphill battle’ in demonstrating the court exercised its discretion arbitrarily and unreasonably.” (*Nissan Motor Acceptance Cases* (2021) 63 Cal.App.5th 793, 821.)

2. The trial court did not abuse its discretion in finding Luke’s counsel committed misconduct throughout trial

At the outset, Luke argues that Hardin waived several of her claims of misconduct by failing to raise timely objections or otherwise request curative admonitions. This argument lacks merit.

A trial court may grant a new trial based on attorney misconduct even though there was no objection to the alleged misconduct. (*Seimon v. Southern Pac. Transportation Co.* (1977) 67 Cal.App.3d 600, 605.) Accordingly, “the rules applicable to ... waiver, to invited error or to estoppel, have no application when an appellate court is considering the propriety of an order granting a new trial.” (*Malkasian v. Irwin* (1964) 61 Cal.2d 738, 747 (*Malkasian*), italics added.) In other words, a reviewing court will not reverse an order granting a new trial on the grounds that the moving party failed to object below to the challenged misconduct. (*Ibid.*; see also *Miller v. Nat’l Am. Life Ins. Co.* (1976) 54 Cal.App.3d 331, 346 [“ ‘waiver and estoppel ... do not restrict the discretion of the trial judge to grant a new trial’ ”].) It is, therefore, immaterial whether Hardin objected to, or requested a curative admonition for, each instance of misconduct that supports the court’s order. (*Seimon*, at pp. 605–606.)

As we noted above, the trial court found Flock committed at least six instances of misconduct throughout trial. We address each instance of misconduct in turn.

First, the trial court found Flock committed misconduct during his opening statement by attacking the credibility of Hardin’s financial expert based on Flock’s purported personal knowledge of the expert and Flock’s false or misleading claims

that the expert engaged in billing fraud. During his opening statement, Flock told the jury, “[t]he plaintiff will be calling Dr. Morris. He is a chiropractor to testify at trial. I know Dr. Morris very well also. I encountered him at trial just a couple months ago. Dr. Morris goes to trial probably once a week. At every trial his opinions are almost identical. [¶] Dr. Morris is an interesting individual, first of all, not too long ago he was sued for 136 incidents of billing fraud. So 136 patients took issue with him excessively charging or for charging for medical procedures that were not performed. That is the Dr. Morris who is going to show up in court here.”

The next day, Hardin moved for a mistrial based on Flock’s comments about Dr. Morris’s credibility during his opening statement. Although the trial court denied Hardin’s request for a mistrial, it found Flock’s statements were false, improper, and rose “to the level of misconduct.” The court explained that Flock’s statements were based, in part, on the facts of a 2016 unpublished appellate court opinion. The court found that Flock’s claim that Dr. Morris was personally accused of billing fraud was false because the underlying accusations were made against a company in which Dr. Morris was an officer, director, or shareholder, and, according to the court, not against Dr. Morris in his personal capacity. The court also found Flock’s statement that 136 patients took issue with Dr. Morris’s charging practice was false because the unpublished opinion made clear that the accusations of billing fraud were made by an insurance company, and not by Dr. Morris’s patients. The court also found that Flock misled the jury by implying that the accusations of billing fraud were “recent,” even though the incidents giving rise to the

allegations occurred between 11 to 18 years before the trial in this case.

The court later admonished the jury, “during opening statements there was a statement made by Mr. Luke’s counsel about Dr. Morris. I admonished you at the beginning of the case that what lawyers say in opening statements is not evidence, but I also want you to understand that what was said by counsel about Dr. Morris was improper. [¶] You will not hear any evidence of what was described by counsel, which was that Dr. Morris was recently sued by 136 clients for billing fraud. You are not going to hear any evidence about that because there was no factual basis for that statement.”

An attorney may not refer to his personal knowledge when arguing an issue to the jury. (*Garden Grove School Dist. v. Hendler* (1965) 63 Cal.2d 141, 143 (*Garden Grove*).) Here, Flock told the jury that he had recently encountered Dr. Morris in another trial, that Dr. Morris frequently testifies as an expert witness, and that Dr. Morris typically offers nearly identical opinions when he testifies. These statements were improper, as they were based solely on Flock’s purported personal knowledge of Dr. Morris.

It also is improper for an attorney to make false or misleading statements to the jury. (*Malkasian, supra*, 61 Cal.2d at p. 747; *Decker, supra*, 18 Cal.3d at p. 871.) We have reviewed the unpublished opinion from which the court and parties agree that Flock drew many of his statements about Dr. Morris’s credibility. Based on our review of that opinion, it appears Flock made several false or misleading statements. While Dr. Morris was in fact sued in his personal capacity in the lawsuit underlying that opinion, nothing in that opinion suggests that

Dr. Morris's former patients ever complained about his billing practices. Rather, the opinion states that it was the insurance company who investigated and uncovered the alleged fraudulent billing practices. Similarly, Flock's statement that 136 complaints were made against Dr. Morris was misleading. At least two other doctors and two medical corporations, in addition to Dr. Morris, were named as defendants in that case. Nothing in the opinion states, or even suggests, that all of the allegedly fraudulent bills were issued by Dr. Morris. Rather, the opinion notes that the insurance company's claims arose out of payment claims submitted by 136 third parties for treatment rendered by the defendants generally, not just Dr. Morris.

In any event, regardless of whether Flock made false or misleading statements about Dr. Morris, it was improper for him to try to impeach the witness during his opening statement based on unsubstantiated allegations of fraud. (See *People v. Reese* (1963) 220 Cal.App.2d 143, 147.) The unpublished opinion from which Flock drew his statements about Dr. Morris reversed the trial court's order sustaining a demurrer filed by Dr. Morris and the other defendants. Nothing in that opinion suggests that the allegations of fraud against Dr. Morris were ever proven true. Nor did Flock point to, or otherwise present, any other evidence that establishes Dr. Morris in fact engaged in the fraudulent billing practices that Flock mentioned during his opening statement.

In short, the trial court did not abuse its discretion when it found Flock committed misconduct when he tried to attack Dr. Morris's credibility during his opening statement.

Second, the trial court found Flock committed misconduct when he argued to the jury that Hardin suppressed evidence of

her medical records. On the eve of trial, after the discovery period closed, Luke filed an ex parte application, asking the court to order Hardin to produce her medical records from her primary healthcare provider from 2011 up through the time of trial, a period of about 12 years. The trial court denied the request because it was overly broad, it asked Hardin rather than the healthcare provider to produce the requested records, and it was untimely.

Later, during his opening statement, Flock told the jury, “You will have the opportunity to see plaintiff’s medical records from Kaiser. We don’t have all of her medical records from Kaiser. We don’t have the 2010, 2011[,] [W]e don’t have the 2014, 2015, 2016 and most of the 2017. We don’t have those records. When the plaintiff takes the stand[,] I’m going to ask her, why do I not have those records? Why have you not voluntarily produced them? But we don’t have them. We do have some records, the records from 2013.” The trial court found this portion of Flock’s opening statement was improper and granted Hardin’s request for an order precluding Flock from asking Hardin why she did not voluntarily produce the medical records at issue in Luke’s ex parte application.

The trial court did not abuse its discretion in finding Flock committed misconduct by suggesting to the jury that Hardin had suppressed evidence that the trial court excluded. It is “serious misconduct” to argue the importance of excluded evidence and to ask the jury to draw negative inferences against the plaintiff because the plaintiff’s counsel successfully moved to exclude the evidence at issue. (See *Hansen v. Warco Steel Corp.* (1965) 237 Cal.App.2d 870, 878; accord, *Jackson v. Park* (2021) 66 Cal.App.5th 1196, 1214.)

Third, the trial court found Flock committed misconduct when he violated one of the court's evidentiary rulings. Before trial, the court granted Hardin's motion in limine asking the court to exclude evidence of Hardin's medical conditions that were unrelated to her lawsuit and the underlying accident, including her history of suffering from migraines.

While cross-examining Hardin, Flock asked her about her history of suffering migraines. Hardin objected to Flock's question because it violated the court's pretrial evidentiary ruling. The court sustained Hardin's objection, telling counsel at sidebar, "[t]here is clear understanding before trial that headaches and such were outside the bounds of the claims being made in the case." Later, while cross-examining one of Hardin's friends, Flock asked the witness, "Were you aware in the years before the incident occurred Ms. Hardin suffered from severe migraines." Hardin objected to Flock's question, arguing it violated the court's pretrial evidentiary ruling. The court sustained Hardin's objection.

An attorney must obey the trial court's rulings, whether those rulings are right or wrong. (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1374.) Thus, it is misconduct for an attorney to ask questions that violate "in limine ruling[s] prohibiting them" and that are the subject of "repeated sustained objections." (*Martinez v. Department of Transportation* (2015) 238 Cal.App.4th 559, 567 (*Martinez*).) Accordingly, the court did not abuse its discretion in finding Flock committed misconduct by asking multiple witnesses questions that sought to elicit testimony on topics that the court excluded.

Fourth, the trial court found Flock committed misconduct by telling the jury that Dr. Kasimian was a paid expert, as

opposed to Hardin's orthopedic surgeon. As we noted above, Dr. Kasimian was the orthopedic surgeon who performed the surgeries on Hardin's neck and back. At the time of trial, Hardin was still Dr. Kasimian's patient.

During his opening statement, Flock told the jury that Dr. Kasimian "is a professional expert. I have encountered him in dozens of cases. He will be paid, by the way, approximately [\$]12- to \$16,000 to show up to testify to tell you what he will tell you." Later, while cross-examining Hardin, Flock asked her, "Did anyone tell you that Dr. Kasimian is a professional expert who testifies at trial probably two to three times a month?" The trial court sustained Hardin's objection to Flock's question, and it told the jury "that questions of counsel are not evidence."

As we already explained, an attorney may not allude to his personal knowledge while arguing to the jury. (*Garden Grove* , *supra*, 63 Cal.2d at p. 143.) That is what Flock did here. Flock tried to undermine Dr. Kasimian's credibility by claiming that the surgeon was only testifying for money and that Flock knew Dr. Kasimian was a paid expert because he had "encountered [the surgeon] in dozens of cases." The trial court, therefore, did not abuse its discretion in finding that this line of argument was misconduct.

Fifth, the trial court found Flock committed misconduct when he argued to the jury that Hardin suffered no injuries because of the underlying accident. As we noted above, the trial court entered a directed verdict during trial finding that Luke was negligent and caused Hardin to suffer at least some injury as a result of the accident. The only issue the jury needed to determine was the extent of damages Hardin suffered. Despite the court's directed verdict, Flock told the jury multiple times

that the accident “was not an injury producing event.” The jury appeared to latch on to Flock’s line of argument, as it submitted a question during deliberations asking the court whether it was required to decide if the accident was “an injury producing event” before answering the questions on the verdict form.

An attorney commits misconduct when he tries to mislead the jury by arguing facts that he knows are false. (*Decker, supra*, 18 Cal.3d at p. 871.) Here, Flock was aware that the trial court entered a directed verdict finding that the underlying accident was an injury producing event. Accordingly, it was improper for him to argue to the jury that the accident did not produce any injuries. (See *ibid.*) The court, therefore, did not abuse its discretion in finding it was misconduct for Flock to argue to the jury that the underlying accident did not cause any injuries.

Finally, the trial court found Flock engaged in misconduct when he appealed to the jury’s sympathy by suggesting that a large damages award in Hardin’s favor would result in financial hardship for Luke and his family. The court pointed to two improper statements or arguments that Flock made during trial, the first occurred during voir dire and the second occurred at the very end of his closing argument.

During voir dire, Flock stated, “[t]here was a discussion where [Hardin’s] counsel told you not to consider whether the defendant did or did not have insurance. I’m going to ask that question I think a little bit in reverse. [¶] You will not be able to consider whether or not a sizable verdict will ruin their lives, will cause them to lose their house, will result in their wages being garnished for a very long time. You cannot consider that.” The court found that Flock utilized a rhetorical device known as “‘paralepsis’ ” to draw the jury’s attention to a prohibited

subject—in this case, how a large damages award would negatively impact Luke—by telling the jury that he (Flock) was forbidden from discussing that subject.

Later, at the very end of his closing argument, Flock asked Luke and his wife to stand up in front of the jury. Flock then said, “These are my clients. ... How is this incident impacting them? They thought they were in a fender bender. I think they were surprised that we were going to be here [for] two weeks of trial in this case and they certainly were surprised when they saw the gigantic numbers on the screen. Yes, this lawsuit impacts Ms. Hardin no doubt about it. It also has a very real impact on my clients who this plaintiff and her attorneys are going after.”

While an attorney enjoys wide latitude when arguing the law and facts, he is not permitted “ ‘to pander to the prejudice, passion or sympathy of the jury.’ ” (*Unzueta v. Akopyan* (2019) 42 Cal.App.5th 199, 222.) Consequently, it is misconduct for an attorney to “make appeals based on irrelevant financial aspects of the case such as the hardship that would be visited on a defendant from a plaintiff’s verdict.” (*Martinez, supra*, 238 Cal.App.4th at p. 566.) The trial court, therefore, did not abuse its discretion when it found it was misconduct for Flock to suggest to the jury that a large verdict in Hardin’s favor would result in financial hardship for Luke and his family.

Luke contends that Hardin’s new trial motion should have been denied as an improper motion for reconsideration of the trial court’s order denying her request for a mistrial. Luke forfeited this argument by failing to raise it below. (*Cabatit v. Sunnova Energy Corp.* (2020) 60 Cal.App.5th 317, 322.) In any event, Luke does not cite any authority, and we are aware of none, that

precludes a party from moving for a new trial after the trial court denied her request for a mistrial, even if some of the same grounds supporting the mistrial request are raised in the new trial motion. (See Cal. Judges Benchbook: Civil Proceedings – Trial (CJER 2025) Mistrials, § 10.32, pp. 701–702 [noting that the grounds raised in a denied mistrial request may later be raised in a motion for new trial].)

3. The trial court did not abuse its discretion in finding the misconduct was prejudicial

Next, Luke contends the trial court abused its discretion when it found Flock’s misconduct was prejudicial. We disagree.

In making its prejudice finding, the trial court weighed the factors set forth in *Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 320–321, which remain “the go-to criteria” for evaluating whether attorney misconduct is prejudicial. (See *Martinez, supra*, 238 Cal.App.4th at p. 568.) Those factors include: (1) the nature and seriousness of the misconduct; (2) the general atmosphere of the trial, including the judge’s control over it; (3) the likelihood that the misconduct affected the jury; and (4) the efficacy of objections or admonitions under all the circumstances. (*Sabella*, at pp. 320–321.)

The first factor, the nature and seriousness of the misconduct, weighs in favor of a finding of prejudice. Throughout trial, from his opening statement through his closing argument, Flock repeatedly committed misconduct. Although some of Flock’s misconduct was less serious, such as his questions about Hardin’s history of having migraines, several other instances of his misconduct were serious, including his personal attacks on the credibility of Hardin’s billing expert, his improper accusation that Hardin concealed evidence of her medical history, and his

arguments suggesting that the jury should consider whether a large verdict for Hardin would cause financial hardship for Luke and his family. That final instance of misconduct was especially serious, as it appealed to the jury's sympathy and was one of the final things the jurors heard before they began deliberating.

The second factor, the general atmosphere of trial, including the trial court's control over it, also weighs in favor of a finding of prejudice. As we just discussed, Flock committed misconduct throughout the entire trial. Despite Hardin objecting to several instances of misconduct, including her request for a mistrial during the middle of trial, Flock continued to commit misconduct, including disregarding some of the trial court's rulings, until the very end of his closing argument. The "authoritative force" of the court's admonitions and attempts at corrective action were, therefore, "seriously diminished by [Flock's] conduct." (*Martinez, supra*, 238 Cal.App.4th at p. 569.)

The third factor, the likelihood that the misconduct affected the jury, heavily weighs in favor of a finding of prejudice. Hardin's financial expert testified that the reasonable cost of Hardin's past financial expenses was around \$320,000, while Luke's expert testified that the reasonable cost of Hardin's past medical expenses was around \$120,000. The jury, however, awarded Hardin only \$70,000 for past medical expenses. As the trial court noted, that figure is considerably lower than the estimated value of reasonable medical expenses provided by Luke's expert.

A logical explanation for why the jury gave Hardin such a low award for past medical expenses was Flock's improper closing argument that appealed to the jury's sympathy and insinuated that a substantial verdict would result in financial hardship for

Luke and his family. That argument was one of the final things the jury heard before they began their deliberations. When it is considered with Flock's other misconduct, including his improper arguments attacking the credibility of Hardin's billing expert and claiming that the underlying accident did not cause Hardin to suffer any injuries, it was reasonable for the trial court to find that Flock's misconduct had an actual impact on the jury's deliberations, resulting in a deflated damages award.

Under the facts of this case, the fourth factor, the efficacy of objections or admonitions, is closely related to the third factor. Hardin objected to many of Flock's inappropriate questions and arguments. The trial court also admonished the jury that the lawyers' questions were not evidence, and the court admonished the jury that some of Flock's statements were improper and not based in fact. While we generally presume that the jury understood and followed the court's instructions and admonitions to disregard attorney misconduct, that presumption may be overcome where the record indicates that the jury was in fact affected by the misconduct and did not follow the court's instructions. (See *Garcia, supra*, 204 Cal.App.4th at p. 162.) For the reasons we just discussed, the record indicates that Hardin's objections and the court's admonitions did not prevent Flock's misconduct from affecting the jury's deliberations, especially when it calculated Hardin's past medical expenses. This factor, therefore, also weighs in favor of a finding of prejudice.

In summary, we see no abuse of discretion in the trial court's decision to order a new damages trial.

DISPOSITION

The order granting Hardin a new trial on the issue of damages is affirmed. Hardin's cross-appeal is dismissed as moot. Hardin shall recover her costs on appeal.

VIRAMONTES, J.

WE CONCUR:

STRATTON, P. J.

SCHERB, J.