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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

ROCIO M. LANDEROS, a Minor, etc., et al., Plaintiffs and Respondents, v. GUSTAVO DAVALOS TORRES, Defendant and Appellant.	F060251 (Super. Ct. No. S-1500-CV-261305) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Horvitz & Levy, Stephen E. Norris, H. Thomas Watson; Gordon & Rees, Jewel Kolling Basse and Charles S. Custer for Defendant and Appellant.

Reed Smith, Margaret M. Grignon, Raymond A. Cardozo, and Zareh A. Jaltorossian for Plaintiffs and Respondents.

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*Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II. through V. of the Discussion.

Gustavo Davalos Torres appeals from a judgment entered in favor of Rocio M. Landeros (hereafter Landeros) and Marta L. Perez (sometimes hereafter plaintiffs).

The action arose out of an automobile collision that caused severe and permanent brain injuries to Landeros and significant but lesser injuries to Perez. Torres was intoxicated at the time of the collision. The jury awarded Landeros a total of $31,656,208 and awarded Perez $77,986.55.

The primary issue is whether Landeros was insured at the time of the collision within the meaning of Civil Code section 3333.4 (hereafter section 3333.4). If Landeros was uninsured, then section 3333.4 would prevent her from recovering $22 million in noneconomic damages awarded to her by the jury. The vehicle Landeros was driving was purchased and insured by her father, Miguel Landeros. Landeros was unlicensed at the time of the collision. As we shall explain, we conclude Landeros was insured as a permissive user under Miguel Landeros's insurance policy, notwithstanding her unlicensed status.

Torres also argues (1) the trial court erred in instructing the jury, (2) Landeros's counsel committed misconduct, and (3) the punitive damage award was not supported by substantial evidence because Landeros failed to provide meaningful evidence of Torres's financial condition. We reject each of these arguments and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

The facts related to the collision will be summarized briefly as they are not relevant to the issues on appeal.

Landeros suffered serious and permanent brain damage after the vehicle she was driving was struck by a vehicle driven by Torres. Perez was a passenger in the vehicle Landeros was driving. We focus on Landeros because the only issue related to the judgment in favor of Perez is the punitive damage award.

Landeros was in a coma for several weeks after the collision and spent over nine months in the Center for Neuro Skills, a specialized facility for people who have suffered

a brain injury, where she received intensive therapy in an attempt to recover from her injuries.

Landeros, acting through her guardian ad litem Maria Landeros, and Perez filed a complaint containing causes of action for negligence and motor vehicle negligence. The complaint also sought punitive damages.

At trial, Torres admitted his negligence was the cause of the collision and the cause of Landeros's injuries. He also admitted (1) when he was tested three hours after the collision, his blood-alcohol content was 0.10 percent; (2) he pled no contest to charges he was driving while intoxicated; and (3) he was sentenced to a term of 32 months in prison as a result of the conviction. Torres did not contest evidence that Landeros was permanently disabled, would never work, and would need assistance 24 hours a day, every day, for the rest of her life.

As a result of the stipulations, the issue at trial was damages. Even this issue was partially resolved as Torres stipulated that Landeros's reasonable and necessary past medical expenses were $1,106,208. Experts testified about Landeros's future medical needs, as well as accommodations necessitated by the injury to her brain.

On many of the issues the parties had only minor disputes. Landeros's counsel attempted to maximize Landeros's future needs, while defense counsel attempted to minimize those needs. The main points of contention were noneconomic damages and testimony by Landeros's experts that she would need 30 hours of occupational therapy a week for the rest of her life, at a cost of approximately $19 million.

Landeros's counsel requested $47 million in future economic damages. He also argued that Landeros's noneconomic damages should be compensated at $1 million per year for the rest of her life; but, because the value of money today is likely to be less than in the future, the award requested in today's dollars was $259,930,492. The total award requested for economic and noneconomic damages was $317 million.

Landeros also requested the jury award $26,000 in punitive damages. No attempt was made to explain how this figure was arrived at or the basis for this request.[1]

Torres's counsel argued the jury should award Landeros $5,351,046 in economic damages and $3.4 million for her noneconomic damages.

The jury awarded Landeros $1,106,208 in past economic damages, $7 million in future economic damages (reduced to present value), $1.1 million in lost earning capacity, $450,000 in homemaker expenses, $1 million in past noneconomic damages, and $21 million in future noneconomic damages, for a total award of $31,656,208. The jury also awarded punitive damages of $13,000. Judgment was entered consistent with the verdict.

Torres made a motion for a judgment notwithstanding the verdict and a motion for a new trial. Both motions were denied. He appeals from the judgment entered on the verdict.

DISCUSSION

I. Section 3333.4

The Statute

Section 3333.4, subdivision (a) precludes recovery of noneconomic damages incurred as a result of a motor vehicle accident when the injured plaintiff (1) was operating the vehicle in violation of Vehicle Code section 23152 (driving while under the influence of alcohol or drugs) or 23153 (causing injury while driving under the influence of alcohol or drugs), (2) owned the vehicle involved in the collision and the vehicle was

[1]Perez's attorney asked for $10 million in noneconomic damages. Torres's counsel argued that Perez should be awarded $30,000 for noneconomic damages, which did not include any damages for future noneconomic damages. The jury awarded Perez $37,986.55 in past economic damages and $40,000 in past noneconomic damages, for a total award of $77,986.55. There was no award for future noneconomic damages. The jury awarded Perez punitive damages of $1,400.

not insured as required by the financial responsibility laws of California, or (3) was the operator of a vehicle involved in a collision and he or she could not establish his or her *financial responsibility as required by the financial responsibility laws* of California.[2] Torres contends Landeros operated the vehicle without insurance, in violation of section 3333.4, subdivision (a)(3), and therefore cannot recover noneconomic damages.

Relevant Facts and Procedure

The vehicle Landeros was driving when the collision occurred was purchased by Miguel Landeros four days before the collision. He obtained insurance as required by California's financial responsibility laws and then provided the vehicle to Landeros for her use.[3] Landeros did not have a driver's license and had never taken any driver's training courses as required by law, nor had she obtained insurance on her own behalf.

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[2]Section 3333.4 states in full: "(a) Except as provided in subdivision (c), in any action to recover damages arising out of the operation or use of a motor vehicle, a person shall not recover non-economic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages if any of the following applies: [¶] (1) The injured person was at the time of the accident operating the vehicle in violation of Section 23152 or 23153 of the Vehicle Code, and was convicted of that offense. [¶] (2) The injured person was the owner of a vehicle involved in the accident and the vehicle was not insured as required by the financial responsibility laws of this state. [¶] (3) The injured person was the operator of a vehicle involved in the accident and the operator can not establish his or her financial responsibility as required by the financial responsibility laws of this state. [¶] (b) Except as provided in subdivision (c), an insurer shall not be liable, directly or indirectly, under a policy of liability or uninsured motorist insurance to indemnify for non-economic losses of a person injured as described in subdivision (a). [¶] (c) In the event a person described in paragraph (2) of subdivision (a) was injured by a motorist who at the time of the accident was operating his or her vehicle in violation of Section 23152 or 23153 of the Vehicle Code, and was convicted of that offense, the injured person shall not be barred from recovering non-economic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages."

[3]There is some confusion in the information provided by Miguel Landeros regarding ownership of the vehicle. In a declaration, he claimed that he purchased the vehicle and then gave it to Landeros, who was required to maintain the vehicle and make

Prior to trial, Torres moved the trial court to exclude any evidence that Landeros suffered noneconomic damages, arguing that she was precluded from doing so pursuant to section 3333.4. Landeros made several arguments in opposition to the motion, but the trial court found that section 3333.4 did not apply because Landeros was a permissive user of the vehicle under Miguel Landeros's insurance policy and thus was covered by insurance as required by California's financial responsibility laws.[4]

Landeros's Status as a Permissive User

Torres's argument, reduced to its essence, is that Landeros could not be a permissive user of the vehicle because she did not have a valid driver's license. We emphasize that the issue is whether Landeros would have had liability coverage for an accident in which she was at fault. The financial responsibility laws referred to in section 3333.4 require drivers and owners of vehicles to carry liability coverage with minimum limits as required by statute. (Veh. Code, § 16451.) The current statutory requirements are bodily injury limits of $15,000 per person per accident, $30,000 total per accident, and property damage limits of $5,000 per accident. (*Ibid*.) Since Torres stipulated that he was responsible for Landeros's injuries, the insurance policy obtained by Miguel Landeros was relevant only to the section 3333.4 issue.

We turn first to the language of Miguel Landeros's insurance policy. The first section in part I of the policy provides the liability coverage required by California's financial responsibility laws. As relevant to our discussion, the policy states that the insurance company "will pay damages … up to the policy limits … for which an *insured*

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all payments on it. In his deposition, he denied that anyone besides himself had an ownership interest in the vehicle, but that Landeros had permission to drive the vehicle.

[4]The trial court rejected Landeros's assertion that she was the owner of the vehicle at the time of the accident.

person is legally liable because of bodily injury or property damage resulting from the ownership, maintenance, or use of your insured car …." (Italics added.)

The second section in part I is entitled "ADDITIONAL DEFINITIONS USED IN THIS PART ONLY" and defines an insured person, "with respect to your insured car," as "(1) you or any relative[;] [¶] (2) any other person using your insured car with your express or implied permission to do so and within the scope of your permission."

The policy defines "you" as the person named in the declarations page and his or her spouse. Miguel Landeros and his companion, Martha Isela Gonzalez, were named in the declarations page as named insureds. "Relative" is defined in the policy as "a person living in your household and related to you by blood …." It is undisputed that while Landeros is Miguel Landeros's daughter, she was not living in his household. Therefore, Landeros was not covered under the policy as a named insured or as a relative.

Landeros, however, would be covered as a permissive user, unless the policy contained an exclusion eliminating coverage for an unlicensed driver. We reach this conclusion because the evidence indicates that Landeros was operating the vehicle with the permission of her father, and the definition of "insured person" quoted *ante* does not require a permissive user be licensed.

Our review of the insurance policy did not discover an exclusion that would eliminate coverage for unlicensed permissive users. Indeed, we could not find any reference to the issue. Nor has Torres cited to any policy provision excluding unlicensed drivers. Accordingly, we conclude there is no policy provision that would relieve the insurer from providing liability coverage for an accident where Landeros negligently operated the vehicle.

The insurance policy is consistent with Insurance Code section 11580.1, which mandates certain provisions be included in automobile insurance policies sold in California. Subdivision (b)(4) of Insurance Code section 11580.1 mandates coverage "to the same extent that insurance is afforded to the named insured, to any other person using

the motor vehicle, provided the use is … with [the named insured's] permission, express or implied, and within the scope of that permission …."

Relevant case law also supports our conclusion that Landeros, as a permissive user, was insured.

Permissive user coverage was the subject of *Wildman v. Government Employees' Ins. Co.* (1957) 48 Cal.2d 31 (*Wildman*). Elvaree Wildman was injured when a vehicle owned by Eusebio Bonifacio and Cecilia Bonifacio was negligently operated by Victoria Villaneuva. The insurance company issued a policy to the Bonifacios that covered the vehicle. The insurance company denied coverage for the accident, claiming the policy specifically excluded coverage when the vehicle was operated by anyone other than the Bonifacios or their immediate family members.

The Supreme Court rejected the insurance company's argument for two reasons. First, it concluded that the language on which the insurance company relied was ambiguous. Relying on the principle that ambiguities in an insurance policy are to be resolved against the insurer, the Supreme Court interpreted this ambiguous language as providing coverage for permissive users. (*Wildman, supra*, 48 Cal.2d at pp. 35-37.)

Second, the Supreme Court concluded that not only was the insurance policy ambiguous, but an attempt to exclude coverage for permissive users violated applicable statutes and California public policy. At the time of the accident, Vehicle Code section 415 required insurance policies for vehicles to insure "'the person named therein *and any other person using or responsible for the use of said motor vehicle … with the express or implied permission of said assured*.'" (*Wildman, supra*, 48 Cal.2d at p. 38.) The Supreme Court held that "section 415 must be made a part of every policy of insurance issued by an insurer since the public policy of this state is to make owners of motor vehicles financially responsible to those injured by them in the operation of such vehicles. Section 402 of the Vehicle Code provides that 'Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from

negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages.' We are of the opinion that for an insurer to issue a policy of insurance which does not cover an accident which occurs when a person, other than the insured, is driving with the permission and consent of the insured is a violation of the public policy of this state as set forth in sections 402 and 415 of the Vehicle Code." (*Id*. at p. 39.)

The provisions in former Vehicle Code sections 402 and 415 referred to by the Supreme Court are now contained in Vehicle Code sections 16450, 16451, 17150 and in Insurance Code section 11580.1, confirming that the public policy of California has not changed.

This conclusion is supported by the Supreme Court's analysis in *Metz v. Universal Underwriters Ins. Co.* (1973) 10 Cal.3d 45 (*Metz*). Richard Metz was injured in an accident with a vehicle operated by Gomer Hamlin. Hamlin had leased the automobile he was operating from National Auto Leasing Corporation (National). National was insured by Universal Underwriters Insurance Company. National's insurance policy covered all vehicles it owned and extended coverage to anyone using a vehicle it owned with its permission, either express or implied. The insurance company denied liability for the accident, relying on a policy provision that excluded coverage for any automobile rented to another person by National.

The Supreme Court identified the issue as whether the exclusion on which the insurance company relied conflicted with the permissive user requirements in the Insurance Code.[5] (*Metz, supra,* 10 Cal.3d at p. 51.) The insurance company conceded

[5]At the time the policy was written, the requirement that coverage be provided for permissive users was found in Insurance Code section 11580.1, former subdivision (d), which was repealed in 1970 (Stats. 1970, ch. 300, § 3, p. 573). That same year similar

that a provision excluding coverage of renters would be void as excluding a class of users in violation of the Insurance Code, but argued the exclusion applied to a class of automobiles (leased vehicles), not a class of users. (*Metz,* at p. 51.)

The Supreme Court rejected this distinction. "The right of the insurer to limit its coverage of automobiles, however, does not go so far as to permit the insurer by adroit wording to evade the statutory requirement for coverage of permissive users. [Citation.] For example, a policy which excluded automobiles 'when operated by a permissive user' would be clearly seen as an exclusion of persons, not vehicles and void under" the Insurance Code. (*Metz, supra,* 10 Cal.3d at p. 52, fn. omitted.) The Supreme Court concluded, "We have uniformly held that 'the *entire* automobile financial responsibility law must be liberally construed to foster its main objective of giving "monetary protection to that ever changing and tragically large group of persons who while lawfully using the highways themselves suffer grave injury through the negligent use of those highways by others."' [Citations.] Applying this principle of construction, we conclude that [Insurance Code] section 11580.1, subdivision [(b)], did not merely proscribe policy provisions that, by their terms, exclude coverage for permissive users, but also invalidated provisions which, by defining a class of excluded vehicles in terms of their operation by permissive users, serves effectively to deny coverage to those users. We hold that [the insurance company's] exclusion of automobiles 'while rented to others' conflicts with Insurance Code section 11580.1, subdivision [(b)], and is therefore ineffective to limit coverage of Hamlin." (*Id*. at p. 53, fn. omitted.)

These cases unequivocally establish that California has a strong and long-standing public policy that requires insurance policies to provide coverage for permissive users,

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language requiring coverage for permissive users was added to section 11580.1 as subdivision (b)(4) (Stats. 1970, ch. 300, § 4, pp. 573-574), where it currently is found. (*Metz, supra,* 10 Cal.3d at p. 48, fn. 1.)

and any attempt to limit that coverage will be rejected. This conclusion is supported by several cases decided before *Wildman*.

In *Fagiani v. General Acc. etc. Assur. Corp.* (1930) 105 Cal.App. 274 (*Fagiani*), Celeste Bennett was driving a vehicle that struck and injured the plaintiff. The insurance company had issued an automobile insurance policy to Celeste Bennett's husband, W.A. Bennett, which covered the vehicle involved in the accident. This policy included a provision that extended coverage "'to any person or persons while riding in or legally operating any of the automobiles described in the declarations … provided such use or operation is with the permission of the named assured ….'" (*Id*. at p. 275.) Celeste Bennett was driving the vehicle with her husband's permission but did not have a driver's license. The insurance company denied coverage because it contended Celeste Bennett was not operating the vehicle legally since she did not have a driver's license. The appellate court concluded the term "legally operating" was ambiguous.

> "The only question presented by appellant is whether Celeste Bennett was 'legally operating' the automobile within the meaning of the quoted words as used in the policy, she not having been licensed to drive any automobile. Under a liberal definition of the term, one is not 'legally operating' an automobile when he is driving it in violation of any provision of law, but obviously the term was not used in that broad sense in the policy in question, because to give it that meaning would be to destroy the protection which the policy purports to give to persons driving the automobile with the permission of the owner. It is a matter of common knowledge that nearly every automobile accident is due to a breach of some statutory provision. In *Firemen's Fund Ins. Co. v. Haley* [(1922)] 129 Miss. 525], it is said that, where there is nothing in the policy exempting the insurance company from liability because of the violation of the highway laws, 'if such a defense were permissible in this state, automobile insurance would be practically valueless.' In *Messersmith v. American Fidelity Co.* [(1921)] 232 N.Y. 161, Cardozo, J., delivering the opinion of the court, said: 'To restrict insurance to cases where liability is incurred without fault of the insured would reduce indemnity to a shadow.… Liability of the owner, who is also the operator, can never be incurred without fault that is personal. Indeed, the statute has so covered the field that it can seldom, if ever, be incurred without fault that is also crime.'

> "The foregoing considerations are to be kept in mind in construing the uncertain terms of a policy under which the insurer claims exemption from liability. 'Legally operating' an automobile, in common parlance, relates to the manner of its operation rather than to authorization to operate it, although, as stated, in a broader sense the term may include both. It is not to be presumed that by the provision of the policy in question it was intended to give a mere shadow of protection to persons driving the automobile with permission of the owner. That it was not so intended is indicated by other provisions of the policy. Under the terms thereof the defendant could not escape liability to the owner on the mere ground that he was driving the automobile at the time of the accident without an operator's license, or that it was driven, with the owner's knowledge, by his unlicensed agent, or liability to any other person 'legally responsible for the operation thereof' while it was driven by such person's unlicensed agent. If the automobile had been driven at the time of the accident by an unlicensed agent of Celeste Bennett, she knowing him to be unlicensed, the defendant would be liable to her in the same manner as if such agent had been duly licensed.
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> "If it was the intention to exempt the defendant from liability under circumstances such as are involved herein, one would naturally expect such exemption to be included in the express statement of 'Exclusions.' All of such exclusions are made applicable alike to the 'named assured' and the 'additional assureds' and no reason appears for requiring an operator's license as a condition of liability to one assured and not to the others. Undoubtedly an insurer might make such a distinction in its policy of insurance, but the fact that there is no apparent reason for the distinction may be considered in determining the meaning of an uncertain term of the policy. It is not necessary to determine what was intended by the use of the term 'legally operating,' but it is sufficient to show that it is uncertain whether it was the intention of the parties to the contract to give it the meaning for which appellant contends." (*Fagiani, supra,* 105 Cal.App. at pp. 275-277.)

After reaching this conclusion, the appellate court applied the rule that exclusions in insurance policies must be strictly construed against the insurer and held the policy provided coverage for the accident. (*Fagiani, supra,* 105 Cal.App. at p. 277.)

Fagiani found coverage for an unlicensed permissive user where the policy required that permissive users be operating the vehicle legally. Miguel Landeros's insurance policy likewise provided coverage for permissive users, but it did not require

that the permissive user be operating the vehicle legally. Therefore, there is no basis for concluding that an unlicensed permissive user is excluded from coverage.

Another case that supports our analysis is *Firkins v. Zurich Gen. A. & L. Ins. Co.* (1931) 111 Cal.App. 655 (*Firkins*). Mr. and Mrs. Delmuto purchased a policy of insurance from the insurance company to cover their vehicle. When purchasing the policy, the Delmutos informed the insurance company's agent that they did not drive and would not drive the vehicle. Instead, their 14-year-old son, who had a driver's license, would drive the vehicle. The Delmutos informed the agent that they wanted insurance to cover the vehicle while driven by their son. (*Id.* at p. 656.)

An accident occurred while the vehicle was driven by the son, and the insurance company denied coverage, relying on an exclusion in the policy that stated, "'This policy shall not cover in respect of any automobile, … while driven or manipulated by any person under the age fixed by law, or under sixteen years of age in any event.'" (*Firkins, supra,* 111 Cal.App. at p. 656.) However, the policy also had a provision providing coverage for permissive users that stated, "The policy … is hereby *extended* to apply to any person … legally responsible for the operation thereof, provided such use or operation is with the permission of the named assured ….'" (*Ibid.*) The appellate court construed the contract in a manner consistent with the intent of the parties. "It may be reasonably construed to mean that the surety company shall not be liable upon the policy 'while [the vehicle was] driven or manipulated by any person … under sixteen years of age' unless such minor was operating the car 'with the permission of an adult member of the named assured's household,' in which event the company is liable. To construe the language of this instrument otherwise would defeat the apparent intent of the parties and render the quoted language of the [permissive user provision] valueless." (*Firkins, supra,* 111 Cal.App. at p. 658.) *Swift v. Zurich Gen. Acc. & L. Ins. Co.* (1931) 112 Cal.App. 709, 711-712 reached the same conclusion, even though there was no evidence the insurance company had been informed the vehicle would be driven by a minor.

This review establishes that California has a long-standing policy of requiring automobile insurers to extend coverage to permissive users because it is the public policy of our state to broaden "insurance coverage to protect the public when the automobile to which the policy relates is operated by one other than the insured owner." (*Uber v. Ohio Casualty Ins. Co.* (1967) 247 Cal.App.2d 611, 616.) Therefore, both statutory and legal precedent strongly suggests the insurance policy issued here to Miguel Landeros not only provided liability coverage for permissive users, but it also provided liability coverage for unlicensed permissive users, so long as he or she was using the insured vehicle with Miguel Landeros's permission.

***Honsickle v. Superior Court*[6]**

Torres argues that an unlicensed driver cannot be covered by an insurance policy for a variety of reasons. First, he asserts that Landeros could not be insured because, as an unlicensed driver, she lawfully could not purchase an automobile insurance policy. Second, Torres argues that we should construe section 3333.4 broadly to prohibit recovery of noneconomic damages by unlicensed drivers because they cannot procure insurance.

To support his first argument, Torres relies on *Honsickle*. This reliance is misplaced.

Honsickle negligently operated his vehicle, causing a collision with a vehicle driven by Iwona Wysocki. Wysocki was an immigrant from Poland who entered this country on a tourist visa. She had petitioned for permanent resident status but, at the time of the accident, the petition had not been approved. Since she could not establish her presence in the United States was authorized under federal law, she could not obtain a driver's license. (Veh. Code, § 12801.5, subd. (a).) Wysocki's husband had purchased insurance for the vehicle Wysocki was driving at the time of the accident. He also had

[6] *Honsickle v. Superior Court* (1999) 69 Cal.App.4th 756 (*Honsickle*).

requested liability coverage for Wysocki. Because Wysocki was unlicensed, the insurance company refused to insure her and added an endorsement to the policy stating that no coverage would be provided while she was operating the vehicle. (*Honsickle, supra,* 69 Cal.App.4th at p. 760.)

The appellate court concluded that section 3333.4 precluded Wysocki from recovering noneconomic damages because she was uninsured at the time of the accident. (*Honsickle, supra,* 69 Cal.App.4th at p. 768.) "[Wysocki] knew she was violating the law every time she drove without a valid driver's license. The whole purpose of Proposition 213 would be undercut, if not entirely negated, by creating an exemption for an unlicensed person. [Wysocki], who deliberately and knowingly violated traffic-related laws both before and after the passage of Proposition 213, is exactly the type of person the electorate intended to bar from recovering noneconomic damages." (*Id*. at p. 766.)

We agree with the appellate court's conclusion in *Honsickle.* Under the facts of that case, Wysocki was an uninsured motorist and exactly the type of person at whom section 3333.4 was directed. We find *Honsickle* distinguishable, however, because Wysocki was specifically excluded under her husband's insurance policy, while Landeros was not excluded by the policy obtained by Miguel Landeros. Indeed, as discussed *ante,* Landeros was insured under her father's policy as a permissive user.

Torres relies on two comments in *Honsickle* to support his argument. In the opinion the appellate court stated that Wysocki could not obtain liability coverage because she was unlicensed and stated that "An application for insurance coverage for an unlicensed driver is an absurdity on its face." (*Honsickle, supra,* 69 Cal.App.4th at pp. 760, 766.) Both statements are dicta and not controlling as authority here.

Torres's argument must be rejected for at least two reasons. First, *Honsickle* cites no authority for its assertions about unlicensed drivers being unable to obtain insurance. We give little weight to an "isolated and unsupported statement" that is "not supported by any reasoning, analysis, or authority." (*Honsickle, supra,* 69 Cal.App.4th at p. 765.)

Aside from *Honsickle,* Torres has not cited any statute or case that would support this assertion. Since this proposition is the lynchpin to Torres's argument, we presume the failure to cite any authority beyond *Honsickle* is because none exists.

Second, we are not concerned with whether Landeros could have purchased an insurance policy at the time of the collision. Even if it is correct that Landeros could not have done so because she was unlicensed, it is undisputed that she did not purchase insurance, nor did she attempt to do so. Therefore, whether she could have done so is irrelevant. The issue is whether she was insured as a permissive user under the liability policy purchased by her father. *Honsickle* does not address this issue.

Failure to Pay Premiums for Coverage

We also reject Torres's assertion that neither Landeros nor her father paid a policy premium to cover the risk of Landeros's use of the vehicle. The policy purchased by Miguel Landeros included coverage for permissive users. Presumably, his insurer included a premium for this coverage. We note that the declarations page for Miguel Landeros's policy indicated that he and his companion owned three vehicles, yet there were only two drivers listed on the policy. These facts should have put the insurance company on notice that the vehicle may well have been driven by a permissive user. Moreover, the insurance company should have known that under California law, even unlicensed drivers are included within the definition of "permissive user." Since there is no evidence in the record about what information Miguel Landeros provided to the insurance agent, it may well be that the insurance company was informed fully of the use to which this vehicle would be put. In any event, there is no evidence to support Torres's assertion that Miguel Landeros did not pay a premium for coverage for permissive users.

Insurance Company Would Have Excluded Coverage for Landeros

Similarly, there is no evidence in the record that had Miguel Landeros informed his insurer that Landeros was to be the primary driver of the vehicle the insurer would

have issued an endorsement specifically excluding her as an insured under the policy, as was done in *Honsickle*. Therefore, Torres's argument is based on speculation.

Policy Obtained Through Fraud

Torres also argues that because Miguel Landeros obtained the insurance policy through fraudulent representation to his insurance agent, the policy was void from its inception. We repeat, there is no evidence in the record about what information was provided to the insurance company or its agent, so this argument is without any evidentiary support.

Second, the right to declare the insurance policy obtained by Miguel Landeros void was a right belonging to the insurance company, not Torres. Torres did not cite any authority to suggest he has standing to have the policy voided, nor are we aware of any. The undisputed evidence is that at the time of the collision the policy was in effect. Therefore, this argument is based on speculation about what the insurer may have done *if* Miguel Landeros misrepresented facts to the insurance company when he applied for the policy.

Finally, the Supreme Court rejected this argument in *Barrera v. State Farm Mut. Automobile Ins. Co.* (1969) 71 Cal.2d 659 (*Barrera*). Barrera obtained a judgment against Mr. and Mrs. Alves as a result of an accident wherein a vehicle driven by Mrs. Alves injured Barrera. Mr. Alves had obtained an insurance policy on the vehicle Mrs. Alves was driving. When notified of the accident, the insurance company rescinded the insurance policy and returned all premiums paid to Mr. Alves. The basis for the rescission was that on the application for insurance it was represented that Mr. Alves's driver's license had not been suspended in the preceding five years, when in fact it had been suspended within that timeframe.

The Supreme Court concluded the misrepresentation was a sufficient concealment to justify rescission, even if the misrepresentation was inadvertent. (*Barrera*, *supra*, 71 Cal.2d at p. 665, fn. 4.) The application, however, was signed and the policy issued

approximately two years before the accident. The insurance company did not commence any investigation into the application until after the accident occurred. The Supreme Court held the insurance company could not deny coverage because it had failed to check the application within a reasonable time period.

> "[The insurance company's] investigative practices may fail to conform to the standard of service which the public may reasonably expect of an insurance company and, more importantly here, may violate the public policy underlying California's Financial Responsibility Law. As we explain hereinafter in more detail, the 'quasi-public' nature of the insurance business and the public policy underlying the Financial Responsibility Law … impose upon the automobile liability insurer a duty both to the insured and to the public to conduct a reasonable investigation of insurability within a reasonable time after issuance of an automobile liability policy. We may characterize this duty as one sounding either in tort or quasi-contract. The label is not important. We hold, however, that in order to avoid liability to an innocent victim of the insured an insurer cannot take advantage of a breach of its duty reasonably to check an application for automobile liability insurance within a reasonable time after acceptance of that application." (*Barrera*, at pp. 667-669, fns. omitted.)

The Supreme Court went on to explain why the practice of delaying investigation into the insurability of a risk violated the public policy underlying California's financial responsibility law.

> "A rule which would permit an automobile liability insurer indefinitely to postpone determination of the validity of a liability policy and to retain its right to rescind the policy in the absence of the filing of a suit against it by a judgment creditor of the insured, defeats not only the public service obligations of the insurer but also the basic policy of the Financial Responsibility Law. That law aims 'to make owners of motor vehicles financially responsible to those injured by them in the operation of such vehicles.' [Citation.] Thus we have uniformly held that 'the *entire* automobile financial responsibility law must be liberally construed to foster its main objective of giving "monetary protection to that ever changing and tragically large group of persons who while lawfully using the highways themselves suffer grave injury through the negligent use of those highways by others."' [Citation.] As we concluded in *Interinsurance Exchange* [*v. Ohio Cas. Ins. Co.* (1962) 58 Cal.2d 142, 153], 'The pattern is clearly discernible: a desire on the part of the judiciary and the Legislature to not

only prevent the astronomical accident toll in this state, but also to provide compensation for those injured through no fault of their own.' [Citation.]" (*Barrera, supra,* 71 Cal.2 at pp. 670-671, fn. omitted.)

We recognize that here Miguel Landeros purchased the insurance policy only four days before the collision in which Landeros was injured, and that it may be unreasonable to expect an insurance company to conduct an investigation in such a short timeframe. There is no evidence in the record, however, that the insurance company sought to rescind the policy issued to Miguel Landeros. Moreover, the testimony in *Barrera* establishes the potential significance of the type of testimony that could have been obtained in this case. The insurance agent in *Barrera* testified that whenever he gave a binding receipt to the insured, the insurance company provided insurance for 30 days, even when it subsequently refused to approve the risk. (*Barrera, supra,* 71 Cal.2d at p. 666.) If Miguel Landeros's insurance company followed the same policy, then Landeros would have been insured at the time of the collision as a permissive user, regardless of the claimed misrepresentation. The absence of any testimony from Miguel Landeros's insurance agent or insurance company underscores the complete lack of evidentiary support for Torres's arguments.

Public Policy

Torres's briefs reveal a common theme we believe is the true basis for his argument. Torres repeatedly asserts that because Landeros was unlicensed, she could not obtain insurance, and therefore section 3333.4 precludes recovery of noneconomic damages. This argument, in reality, is a request that we add a new exclusion to section 3333.4, one based on whether the injured driver properly was licensed. Torres argues the public policies that resulted in the passage of Proposition 213 and the enactment of section 3333.4 also support a limitation on recovery of damages for unlicensed drivers.

We disagree for a variety of reasons, but need identify only two. First, our task is to interpret the laws enacted by the Legislature and the ballot initiative process. We do this by ascertaining the intent of the Legislature so as to give effect to the purpose of the

law. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387.) We are guided primarily by the words of the statute, giving them their ordinary meaning, and look to outside sources only if the statute is ambiguous. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

Section 3333.4 does not contain any reference to unlicensed drivers. Therefore, we may resolve this issue based on the words of the statute itself with no need to rely on the intent of the Legislature or the supporters of Proposition 213. Since the words of the statute do not preclude unlicensed drivers from recovering noneconomic damages if they are insured under a policy of insurance, we must reject Torres's argument.

Moreover, the intent of the supporters of Proposition 213 is obvious -- to encourage all drivers to obtain insurance by penalizing uninsured drivers. (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 115 [primary purpose was to limit insurance claims by uninsured motorists who contribute nothing to insurance pool].) Therefore, when analyzing section 3333.4 issues, the question is the existence of insurance, not whether the injured driver was licensed. Whether section 3333.4 should be amended to preclude unlicensed drivers from recovering noneconomic damages, or whether the Insurance Code should be amended to preclude insurance coverage for permissive users who are unlicensed, are issues to be addressed by the Legislature.

Second, Torres urges us to focus only on section 3333.4 and the goals that statute was intended to achieve when it was enacted through the initiative process. The public policy established thereby, according to Torres, must take precedence in this case. His error, however, is to ignore the long-established policy of this state requiring automobile drivers to be responsible financially for negligently caused damages and the decisions of the Supreme Court and the Legislature to further this policy by requiring every automobile insurance policy to include coverage for permissive users, including unlicensed permissive users. To exclude unlicensed drivers from permissive user coverage, or to prevent unlicensed drivers from recovering noneconomic damages, would

require an examination and weighing of the policies of each law, a task for which the Legislature is better suited than this court.

Conclusion

The plain meaning of section 3333.4 limits our inquiry to whether Landeros was a permissive user under the insurance policy purchased by her father. The insurance policy, Insurance Code section 11580.1, and the case law leaves no doubt that Landeros was included as a permissive user of the vehicle, even though she did not have a driver's license. Accordingly, the trial court correctly concluded that section 3333.4 did not apply and that Landeros was eligible to recover her noneconomic damages.[7]

II. Jury Instruction and Verdict Form on Future Noneconomic Damages[*]

The trial court instructed the jury that Landeros was seeking to recover future noneconomic damages. The relevant portions of the instruction stated:

> "No fixed standards exist for deciding the amount of these damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.
>
> "For future physical pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, anxiety, humiliation and emotional distress … *determine the amount in current dollars paid at the time of judgment* that will compensate [Landeros] for future physical pain, mental suffering, loss of enjoyment of life, physical disfigurement, physical impairment, inconvenience, anxiety, humiliation and emotional distress[.] *This amount should not be further reduced to present cash value.*" (Italics added.)

The special verdict form had a separate category for future noneconomic damages that stated:

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[7] On May 15, 2012, after oral argument, counsel for Landeros filed a request that we take judicial notice of the contents of the ballot materials that were before the voters when they voted on Proposition 213, now section 3333.4. We deny that request.

[*] See footnote, *ante*, page 1.

"Future Non-Economic Losses [*not reduced to Present Value*]

"[including Physical Pain, Mental Suffering, Disfigurement, Physical Impairment, Inconvenience, Anxiety, Humiliation, Emotional Distress, Loss of Enjoyment of Life.]" (Italics added.)

Torres argues that we must reverse the noneconomic damage award because the combination of the instruction and verdict form resulted in the jury awarding future noneconomic damages in future dollars, not current dollars.

Jury Instruction

This question of how to evaluate future noneconomic damages was addressed in *Salgado v. County of Los Angeles* (1998) 19 Cal.4th 629 (*Salgado*). In this medical malpractice action, the plaintiff alleged he was damaged as a result of the care his mother received when he was born at a hospital owned by the defendant. The injuries allegedly were permanent, and the plaintiff sought past and future economic and noneconomic damages. With regard to noneconomic damages, the jury was instructed that no standard method of calculation was established to fix the amount of these damages, but the jury should make a "calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence." (*Id*. at p. 636.)

The primary issue in *Salgado* was how Code of Civil Procedure section 667.7 should be applied in a medical malpractice case that also implicated the provisions of Civil Code section 3333.2 ($250,000 limit for noneconomic damages in a medical malpractice case). The plaintiff was awarded future noneconomic damages of $550,000. The parties, however, disagreed whether this sum represented future dollars or current dollars. After reviewing the record, the Supreme Court concluded the award represented the plaintiff's loss in current dollars, but recognized the record was unclear. (*Salgado, supra,* 19 Cal.4th at pp. 645-646.) Accordingly, it imposed a new requirement when the trial included a claim for future noneconomic damages. "To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of

future damages is a present value sum, i.e., they are to determine the amount *in current dollars paid at the time of judgment* that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value." (*Id*. at pp. 646-647.)

The jury here was instructed with the 2009 version of CACI No. 3905A, presumably the current version of the instruction available at the time of trial (February 2010). At the December 2009 meeting of the Judicial Council of California, this instruction was revised so that the last paragraph in the instruction now reads, "For future [… *pain and suffering*], determine the amount in current dollars paid at the time of judgment that will compensate [… *plaintiff*] for future [… *pain and suffering*]. [This amount of noneconomic damages should not be further reduced to present cash value because that reduction should only be performed with respect to economic damages.]" (Judicial Council of Cal., Civ. Jury Instns. (2010) CACI No. 3905A.)

The potential for confusion exists in a case where both future economic and noneconomic damages are sought by the plaintiff because future economic damages must be reduced to present cash value, while future noneconomic damages are not reduced to present cash value because the award should be in current or today's dollars. This, apparently, was the motivation for the 2010 clarification. It might be more helpful to a jury if it were advised as follows: *Since the award for future noneconomic damages, if any, is to be made in current dollars paid at the time of judgment, it should not be further reduced to present cash value*.

Nonetheless, the instruction given to the jury was a correct statement of the law. Unlike Torres, we do not view the instruction as contradictory. In reviewing the instructions, we review the entire charge, not parts of an instruction or a particular instruction. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.) This instruction informed the jury that its award for future noneconomic damages should be made in current dollars

paid at the time of judgment and reminded the jury that it should not reduce the amount awarded to present cash value. Had the instruction not informed the jury that it was to award future noneconomic damages in current dollars paid at the time of judgment, then the reference to not reducing the award to present cash value could cause confusion. Consideration of the entire instruction, however, convinces us the jury was instructed consistently with the requirements of *Salgado*.

Verdict Form

A potential for confusion did occur because the verdict form included an incomplete admonition to the jury. Next to the heading for "Future Non-Economic Losses" award, the verdict form had an admonition that this award was "not reduced to Present Value." Since the topic properly was covered by the jury instructions, the admonition should have been omitted. Or, if the parties or trial court felt an admonition was appropriate, it should have been a complete admonition, such as "in current dollars paid at the time of judgment not further reduced to present cash value." The incomplete admonition provided the jury with only a portion of an instruction and could have led to juror confusion. For example, a juror may have wondered if the award should be increased because it was going to be reduced to present cash value by the trial court. Accordingly, we conclude that the trial court erred in approving the verdict form with the incomplete admonition.

Prejudice

We may not reverse the judgment, however, unless the error has resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.) A miscarriage of justice occurs when, after an examination of the entire cause, including the evidence, we are of the opinion that it is reasonably probable the defendant would have obtained a more favorable result in the absence of error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) In this context, "probability" does not mean more likely than not, but instead requires a reasonable

chance of a better result, and more than an abstract possibility. (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)

We begin with the observation that the jury was instructed properly on the issue of future noneconomic damages and the error occurred in the verdict form. The jury was told that it was required to follow the instructions. Since we presume the jury followed the instructions (*People v. Hardy* (1992) 2 Cal.4th 86, 208), then the jury should have understood that its award was to be in current dollars paid at the time of judgment and should not have been swayed by the incomplete admonition on the verdict form. Nor was there any indication from the jury that it was confused by the incomplete admonition in the jury verdict form.

While there was considerable testimony about the present cash value of future economic damages, there was no testimony about the present cash value of future noneconomic damages. Nor was the jury given any tools by which it could reduce a future award to present cash value.

Finally, the award was not out of proportion to the injuries suffered by Landeros, nor was it close to the amount sought by Landeros. Landeros was 19 at the time of trial, and the jury was instructed that she was expected to live for an additional 63.1 years. She suffered permanent and irreversible brain damage that rendered her unable to care for herself, unable to walk unaided, and unable to function normally. Torres agreed that Landeros would need 24-hour care for the rest of her life. Her attorney argued the jury should award Landeros over $250 million in future noneconomic damages. Torres's counsel argued that while Landeros was entitled to future noneconomic damages, an award of $2.4 million was fair and reasonable. The jury's award of $21 million paled in comparison to what was requested and strongly suggested the jury understood the award was determined based on current dollars.

Also, Torres has not presented a compelling argument to support his claim of prejudice. He focuses on the instruction, which, as we have explained, was not

erroneous. He does argue prejudice was inherent because Landeros's counsel repeatedly reminded the jury that the award for future noneconomic damages is not reduced to present value. But that statement is true. Torres's counsel had the opportunity to remind the jury in closing argument that the reason the future noneconomic damages are not reduced to present value is because the award must be determined in current dollars paid at the time of judgment.

Thus, we conclude that the error in the verdict form did not result in a miscarriage of justice.

III. Attorney Misconduct*

Torres argues that both attorneys representing plaintiffs committed misconduct in closing argument. We begin our analysis with an explanation of the roles of counsel for Landeros and Perez and then proceed to the asserted acts of misconduct.

Attorney Daniel Rodriguez filed the original action on behalf of both plaintiffs. Prior to trial, Rodriguez associated Nicholas C. Rowley as counsel for both plaintiffs. Prior to jury selection, Rodriguez informed the trial court that a substitution of attorneys had been filed and that Rowley now represented Landeros and he represented Perez, thus providing both attorneys an opportunity to present closing argument.

Standard of Review

> "When presentation of the evidence is concluded in a civil trial, 'unless the case is submitted to the jury on either side or on both sides without argument, the plaintiff must commence and may conclude the argument.' [Citation.] In conducting closing argument, attorneys for both sides have wide latitude to discuss the case. '"""The right of counsel to discuss the merits of a case, both as to the law and facts, is very wide, and he has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom. The adverse party cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the consideration of the jury."'" [Citations.]

*See footnote, *ante*, page 1.

> "Counsel may vigorously argue his case and is not limited to 'Chesterfieldian politeness.'" [Citations.] "An attorney is permitted to argue all reasonable inferences from the evidence,…" [Citation.] "Only the most persuasive reasons justify handcuffing attorneys in the exercise of their advocacy within the bounds of propriety." [Citation.]' [Citation.] The same rules apply in a criminal case. [Citation.]
>
> "An attorney who exceeds this wide latitude commits misconduct. For example, '[w]hile a counsel in summing up may indulge in all fair arguments in favor of his client's case, he may not assume facts not in evidence or invite the jury to speculate as to unsupported inferences.' [Citation.] Nor may counsel properly make personally insulting or derogatory remarks directed at opposing counsel or impugn counsel's motives or character. [Citation.]" (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 795-796 (*Cassim*).)

Even if an attorney exceeds the wide latitude given during closing argument, reversal is not required unless the appellant can establish that the misconduct resulted in prejudice to him or her.

> "Our state Constitution provides that '[n]o judgment shall be set aside, or new trial granted, in any cause, … for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13.) 'The effect of this provision is to eliminate any presumption of injury from error, and to require that the appellate court examine the evidence to determine whether the error did in fact prejudice the defendant. Thus, reversible error is a relative concept, and whether a slight or gross error is ground for reversal depends on the circumstances in each case.' [Citation.]
>
> "The phrase 'miscarriage of justice' has a settled meaning in our law, having been explained in the seminal case of *People v. Watson*[, *supra*,] Cal.2d 818 …. Thus, 'a "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citation.] 'We have made clear that a "probability" in this context does not mean more likely than not, but merely a *reasonable chance,* more than an *abstract possibility.*' [Citation.]" (*Cassim, supra,* 33 Cal.4th at p. 800.)

Attorney Rodriguez

In rebuttal argument, Rodriguez pointed out that Torres testified to two different dates of his birth, one in his deposition and the other in his responses to interrogatories. Rodriguez then argued to the jury that this discrepancy was important because "if you ask any police officer, they tell you it's difficult to find the rap sheet, the accurate rap sheet for a criminal history of someone."

Torres's counsel objected and moved to strike the comment. The trial court sustained the objection and granted the motion to strike, instructing the jury, "You'll disregard the comment, ladies and gentlemen, with regard to what any police officer will tell you."

Undeterred, Rodriguez resumed his argument with the following: "Circumstantial evidence, indirect evidence. What is one thing that we can logically infer from somebody who gives one date of birth one time under oath and a different date of birth under oath at a different time? What's one reasonable thing that we can infer from that? That maybe the person doesn't want us to know that they have heard [*sic*], and the only person who knows whether or not they in fact have a rap sheet."

Once again, Torres's counsel objected, and the trial court ordered the parties to the bench for a conference. After the conference, the trial court instructed the jury as follows: "Ladies and gentlemen, you'll disregard any comments, arguments made by Mr. Rodriguez with regard to inferences to be drawn from the inconsistent birth dates. You may consider that testimony with regard to the witness' credibility as something inconsistent, but you may not draw any inference from that fact with regard to some sort of preexisting criminal record, which is what the argument is intended to do. That would be an unreasonable inference. You may not draw that inference."

Landeros does not attempt to defend this patently improper argument. Instead she asserts that Torres was not prejudiced by these "two passing statements." There can be no doubt that Rodriguez's comments were improper and constituted misconduct. As the

trial court instructed the jury, the inference suggested by Rodriguez was unreasonable. (See, e.g., *People v. Hernandez* (1977) 70 Cal.App.3d 271, 281-282.)

Torres, however, cannot establish prejudice as a result of Rodriguez's misconduct. In order to preserve this issue for appeal, Torres was required to object and seek either a curative admonition or a mistrial. (*Cassim, supra,* 33 Cal.4th at p. 794.) Torres's counsel objected and requested a curative admonition. The admonition the trial court gave was thorough and complete and resulted in Rodriguez abandoning the argument to which Torres had objected. The jury was instructed to disregard Rodriguez's comments and also was instructed that it could not infer that Torres had a criminal record because the inference was unreasonable. Under these circumstances, we conclude that it is not reasonably probable Torres would have achieved a better result if Rodriguez had not committed misconduct.

Attorney Rowley

Torres argues that Rowley made several arguments that constituted misconduct. We begin with a pattern that began with Rodriguez during opening argument. Rodriguez began talking about his background. "The way I was raised, the way I was brought up -- and I know that some lawyers might look at me, some say, well, you're just a hick lawyer from Bakersfield by way of San Bernardino, Texas. You graduated from Arvin High School. You didn't graduate from Beverly Hills High School or some place like that."

The trial court sustained Torres's objection to the extent that Rodriguez was telling a personal anecdote.

When Torres's counsel, Jewel Basse, gave her closing argument, she replied to the inference that she had attended Beverly Hills High School. "And we're -- lawyers are not supposed to talk about themselves. I think that I have a right to defend what Mr. Rodriguez said in his closing argument, that he went to Arvin High School, not Beverly Hills. If there was an implication that I went to Beverly Hills, now, let me disabuse you right now. I didn't. I went to an all Black school in South Africa. I grew

up under Apartheid …. I was the first person in my family to go to high school. And so I did not go to Beverly High or Beverly Hills High, whatever school."

After Basse finished her argument, Rowley gave his closing argument. He began by attacking opposing counsel.

> "Well, Ms. Base is good. Managing Partner Gordon & Rees, with her partner Chuck Custer, they're a team. And as you can see, this isn't their first rodeo.
>
> "You would think with the way she just talked about, if I were to speak in [Landeros's] shoes, about her sister, and the way she attacked Marta Perez for coming in here, in a place where she's never been, and sharing with you the difficulties she's had, when her whole household, there are only two girls in the family, no brothers, and their car was smashed, and she ended up with staples in her head and a brain injury, moderate, sister severe, has to put food on the table, you would think with the way that she was just attacked by this really sweet gal who speaks so softly and can piece them together, that Mr. Torres was the victim on June 14th of 2007. That's what it sounds like.
>
> "And then she almost -- you know, she broke into tears at the end of her opening statement, but as it turned out, when she came up to … Landeros, she said, I never met you. I'm new to the case. Acting lessons, folks. I hope we all see through that.
>
> "I hope we all see through acting lessons in the firm of Gordon & Rees and how they work back and forth. Chuck Custer gets up and he does -- they talked about demeanor of witnesses, but when they got cross-examined by him, screaming at them, I never dealt with anybody like him before.
>
> "And these witnesses -- when our witnesses -- when we cross-examined their witnesses, did we treat them with respect and did we ask them questions with respect? Did we cut them off? Were we rude like Mr. Custer was to witnesses?
>
> "You see, Ms. Basse and Chuck Custer are partners, good cop, bad cop, but there is this song, true colors shining through. Well, Ms. Basse's true colors shine through when she attacked [Marta] Perez, talked about these acting lessons, and she's up here stomping her feet and insulting Marta Perez. Standing up for herself and her family and her rights.

> "And then she's got crocodile tears, telling you about this is where I'm from, and she's good at it, and it's not the first time those crocodile tears have come into a courtroom. Every time she tries a case.
>
> "This team here, a team of Gordon & Rees, great firm of Gordon & Rees --"

At this point the trial court sustained Torres's counsel's objection to references to Gordon & Rees. Nonetheless, Rowley continued with his theme.

> "They're here, you can see it, you can see it right here, they're here to protect money."

The trial court again sustained Torres's counsel's objection to this argument. Rowley then took full advantage of the trial court's leniency in allowing personal anecdotes, while continuing his attack on counsel.

> "I let her get out every word, have that fair trial, to have that opportunity to try to reel you in, and she told you about where she came from. I could say, you know. Born in Iowa, expelled from every school from fourth grade to tenth grade for fighting, usually bullies."

At this point, Torres's counsel again objected, stating that when Rowley made the comment about bullies, he was looking at Basse. The trial court instructed the jury that counsels' comments were not evidence and also expressed its frustration with all counsel in the case.[8] Rowley toned down, somewhat, the personal rhetoric at that point, but returned to his personal background.

> "So if anyone were to look at me at the age of 16, they would call me a high school dropout, and I joined the military and I served in combat, and I learned how to see people that were hurt."

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[8]The trial court stated, "Well, I'll admonish the jurors that the arguments of counsel are solely that. They don't constitute evidence. Any accusation that implied that Ms. Basse is a bully, either express or not -- we started down this road with Mr. Rodriguez's personal anecdotal information, and Ms. Basse has followed up. [¶] You'll have your opportunity to tell your life story, Mr. Rowley. Maybe someday we'll get this case to the jury and they can start on their job."

The trial court then commented to the jury: "Just so you know, it goes to every one of these counsel, personal anecdotal information concerning the persons, both the attorneys, is totally improper. I missed it the first time with Mr. Rodriguez. Ms. Basse seized her opportunity. Mr. Rowley is going to get his opportunity. [¶] But just wait. Maybe they will get to the evidence of the case."

Rowley then continued his argument.

> "We all got to learn about each and every one of you and where you're from and what you are about. And we're all people here with all of our stories. [¶] And somehow I got into college through the military and I became a lawyer. So what? It means nothing. It means nothing, being a lawyer, going to law school. Whatever you learned, taking the bar exam. [¶] What matters most is standing up for people and justice, what right is, what wrong is. When people are trying to shortchange and nickel and dime another human being, you stand up and you say no. You stand up and say I'm not going to put up with that. [¶] When you have a person who's brain injured and you say okay, they need help, you give them help. No. We'll come in and we'll dip into that pot of money to pay experts and we'll call in and -- we heard about opening statement and credibility. [¶] Remember, credibility is something we all know about. Something I teach my kids about. Six boys. Teach them about credibility, the importance of honesty."

Rowley finally returned to the evidence and made his argument. Nonetheless, Torres argues that numerous acts of misconduct already had occurred.

First, Torres contends that Rowley improperly referred to insurance when he stated that Torres's attorneys were here to protect money and stating there was a pot of money being used by Torres's counsel to retain experts.

Landeros argues this reference could not be understood by the jury as a reference to insurance, but we disagree. It is unlikely the jury would have interpreted this remark as anything other than a veiled reference to insurance, especially since Torres testified that he earned $8 per hour and had no assets. Such reference was improper (Evid. Code, § 1155; 7 Witkin, Cal. Procedure (5th ed. 2008) Trial, § 217, pp. 264-266 (Witkin);

Neumann v. Bishop (1976) 59 Cal.App.3d 451, 469-470) and a violation of the trial court's in limine orders.

Second, Torres argues Rowley improperly attempted to appeal to the jury's patriotism and sought the jury's sympathy by informing the jury he had served in the military and had served in combat. Reference to matters outside the record in closing argument is misconduct. (*Malkasian v. Irwin* (1964) 61 Cal.2d 738, 747.) Landeros's only attempt to justify these comments was to blame Torres's counsel for bringing up her background. Landeros's counsel even went so far as to assert that defense counsel initiated the personal references. This is not true. Rodriguez first brought up his personal background and, in doing so, inferred that defense counsel had attended Beverly Hills High School. Basse responded to Rodriguez's remarks, although perhaps in an emotional display. Rowley, on the other hand, went far beyond the comments of either Rodriguez or Basse and took advantage of the trial court's decision to allow him to expound on his personal background at a time when an objection would have been futile and the defense had no opportunity for redress.

Third, Torres asserts Rowley referred to matters not contained in the evidence and attempted to appeal to the jury's sympathy by suggesting that if the jury failed to award sufficient damages, Landeros would, as the result of her brain injury, "end up on the streets, living under a bridge, when [her] parents are old and everybody dies. It's what happens to brain injured people if they don't get the care and justice that they need, especially if people aren't looking out for them and seeing what they need to the year 2072."

There was, of course, no testimony that Landeros would end up homeless if the jury did not return a large verdict, nor could there have been since she already had obtained a settlement in excess of $4 million. Rowley, once again, improperly was referring to matters outside the record and improperly was appealing to the sympathy of the jury. (7 Witkin, *supra*, § 216, pp. 262-263.)

Although we agree that Rowley committed misconduct, that, standing alone, does not require reversal. First, the injured party must object and request an admonition or a mistrial. (*Cassim, supra,* 33 Cal.4th at p. 794.) In the third instance of misconduct cited by Torres, counsel did not object nor request an admonition. Accordingly, this instance of misconduct is forfeited. (*Ibid*.) The first two items, however, were objected to by counsel and thus are properly the subject of review.

As stated above, the misconduct of counsel does not permit reversal unless the misconduct has resulted in a miscarriage of justice, i.e., after an examination of the entire cause we must be convinced there is a reasonable possibility that Torres would have obtained a better result if the misconduct had not occurred. We are convinced that there is *not* a reasonable possibility Torres would have achieved a better result in the absence of Rowley's misconduct.

We have reviewed the entire record. This was a trial that began on January 4, 2010, and ended with the jury's verdict on February 1, 2010. Testimony took approximately 10 court days.[9] Closing arguments took place on three court days and covered 175 pages of the reporter's transcript. Jury deliberations occurred on two days. The trial was contested by all counsel, and it was patently obvious to the jury that Landeros's attorneys and Perez's attorney had personality conflicts with Torres's attorneys. Under these circumstances, it is extremely unlikely that these brief comments by Rowley had any influence on the jury. (*Cassim, supra,* 33 Cal.4th at pp. 802-803.)

The limited scope of the trial, as well as the verdict, also suggests that the jury was not influenced by Rowley's comments. This trial was not about liability, since Torres admitted his negligence caused Landeros's injuries. Nor was it about past economic damages, since Torres stipulated to those damages. This trial was about past

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[9]The length of the trial was increased because of court closures and the many disputes between counsel.

noneconomic damages, future economic and noneconomic damages, and, to a much lesser extent, punitive damages.

A review of the amounts requested by the parties for the disputed amounts, as well as the jury's verdict, does not suggest the jury was influenced by Rowley's misconduct. These issues were hotly contested, and the jury returned a verdict on each issue much closer to the amounts suggested by Torres than the amounts suggested by Landeros.[10]

Based on these facts, the jury concluded the award sought by Landeros, as suggested by Rowley, was inflated, while the amounts suggested by Torres were undervalued. Had the jury been influenced by Rowley's misconduct, one would expect the awards to be closer to the amounts Rowely suggested.

Moreover, the amounts awarded could not be described as unreasonable. The reasons for this conclusion were discussed previously in this opinion. We repeat, Landeros was 16 when she suffered severe and irreversible injury to her brain, such that she will need assistance 24 hours a day, every day, for the rest of her life.

In addition, the trial court clearly indicated to counsel and the jury its frustration with the tactics of all counsel, including Rowley. There is nothing in the record to suggest the jury did not follow the trial court's lead and base its verdict on the evidence and ignore the clearly improper remarks made by each attorney about his or her personal background.

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[10]Landeros requested $9 million in past noneconomic damages. The jury awarded $1 million, which was the amount suggested by Torres's counsel.

Landeros sought future economic damages in excess of $44 million. Torres's counsel suggested $3,529,500. The jury awarded $8,550,000.

Finally, as discussed *ante*, Landeros sought $259,930,492 in future noneconomic damages. Torres suggested $2.4 million, and the jury awarded $21 million.

The reference to the existence of an insurance policy also was unlikely to cause Torres prejudice because the jury undoubtedly already had concluded that Landeros was seeking to recover on an insurance policy. Torres testified that he earned $8 per hour working in the fields and he had no assets. Based on this testimony, the jury knew Torres would not be able to pay any judgment, especially since his attorneys stipulated that past medical expenses alone exceeded $1 million. Therefore, the jury undoubtedly concluded that the only reason Landeros was pursuing the matter, and spending thousands of dollars on expert witnesses and attorney fees, was because there was a source of money to pay the judgment and that source likely was an insurance policy. Common sense would not permit any other conclusion.

Finally, "we also consider the ameliorating effect of the trial court's instructions to the jury to guide its decisionmaking. Absent some contrary indication in the record, we presume the jury follows its instruction [citations], 'and that its verdict reflects the legal limitations those instructions imposed.' [Citation.]" (*Cassim, supra,* 33 Cal.4th at pp. 803-804.)

The jury was instructed by the trial court to disregard the existence, if any, of insurance and to base its verdict on the law and the evidence presented to it. The jury was instructed not to let bias or sympathy influence its decision. The trial court also instructed the jury that the personal comments made by the attorneys were not evidence and were improper. We presume the jury followed these instructions and based its verdict on the evidence presented to it and the law provided by the trial court and did not let sympathy or bias affect its decision.

Torres's only argument on the issue of prejudice is a suggestion that the $21 million future noneconomic damage award was so inflated that it must have been the result of Rowley's misconduct. But we disagree, for the reasons already stated. Landeros's injuries were severe, traumatic, and permanent. On these facts, the jury's verdict was well within the range of reasonableness.

IV. Punitive Damages*

The jury awarded punitive damages against Torres in favor of Landeros in the amount of $13,000[11] and in favor of Perez in the amount of $1,400. While the United States Supreme Court has held that the due process clause of the Fourteenth Amendment places limits on the amount of punitive damages that may be awarded (see, e.g., *State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408), the due process clause is not implicated in this case. Instead, Torres relies on California law to argue the punitive damage award was not supported by substantial evidence because plaintiffs failed to adequately establish Torres's financial condition.

In *Adams v. Murakami* (1991) 54 Cal.3d 105 (*Adams*), the Supreme Court explained that the role of punitive damages in our system of jurisprudence is to punish wrongdoing and thereby protect the public from future misconduct. (*Id*. at p. 110.) The issue that must be answered by the appellate courts when punitive damages are challenged is whether the amount of damages awarded "substantially serves the societal interest," i.e., whether the amount will protect the public from future misconduct. (*Ibid*.)

To answer this question, the Supreme Court developed three criteria we must analyze in each case. First, we consider the "nature of the defendant's wrongdoing." (*Adams, supra,* 54 Cal.3d at p. 110.) Second, we look to the "amount of compensatory damages." (*Ibid*.) Finally, we must consider "'the wealth of the particular defendant; obviously, the function of deterrence … will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort.… By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter.' [Citation.]" (*Ibid*.)

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*See footnote, *ante,* page 1.

[11]Landeros's suggested punitive damages were $26,000.

> "Because the quintessence of punitive damages is to deter future misconduct by the defendant, the key question before the reviewing court is whether the amount of damages 'exceeds the level necessary to properly punish and deter.' [Citations.] The question cannot be answered in the abstract. The reviewing court must consider the amount of the award *in light of* the relevant facts. The nature of the inquiry is a comparative one. Deciding in the abstract whether an award is 'excessive' is like deciding whether it is 'bigger,' without asking 'Bigger than what?'
>
> "A reviewing court cannot make a fully informed determination of whether an award of punitive damages is excessive unless the record contains evidence of the defendant's financial condition. Since *Neal* [*v. Farmers Ins. Exchange* (1978)] 21 Cal.3d 910, we have repeatedly examined punitive damage awards in light of the defendant's financial condition. [Citations.]" (*Adams, supra,* 54 Cal.3d at pp. 110-111.)

The Supreme Court recently reaffirmed the importance of the defendant's financial condition in *Simon v. San Paolo U.S. Holding Co. Inc.* (2005) 35 Cal.4th 1159, a case in which the issue was whether a punitive damage award violated the defendant's right to due process. In discussing the importance of presenting evidence of a defendant's financial condition in light of the newly imposed equal protection limitation on awards, the Supreme Court confirmed that because a reviewing court "may consider what level of punishment is necessary to vindicate the state's legitimate interests in deterring conduct harmful to state residents, the defendant's financial condition remains a legitimate consideration in setting punitive damages. [Citation.]" (*Id.* at p. 1185.)

There was not very much evidence concerning Torres's financial condition. Torres denied owning a home or any property. He denied owning any assets. He was employed, earning $8 per hour. He stated that he had "bills to pay." He did not know if he could pay any amount of punitive damages.

Torres's wife, Maricela, testified that the house in which she and Torres currently lived was owned by her, but before the collision it was owned by both Torres and her. She denied there was any equity in the house. She testified Torres did not have a savings

account, only a small account to pay his bills. He also had approximately $7,000 in a retirement account.

This testimony showed that Torres had a job paying close to minimum wage, a small retirement account, a home with no equity, and unspecified bills that he had to pay. The record does not indicate that plaintiffs made any effort to require Torres to bring any financial records to trial, including evidence from which his liabilities could be determined.

This case is similar to *Lara v. Cadag* (1993) 13 Cal.App.4th 1061 (*Cadag*). In *Cadag,* the plaintiff elicited from the defendant evidence that he earned approximately $100,000 per year, however the plaintiff failed to present any evidence of the defendant's liabilities. The appellate court concluded that there was no "'meaningful evidence of the defendant's financial condition.'" (*Id*. at pp. 1063-1064.) Because the inquiry requires a reviewing court to consider the award in light of all the relevant facts, "evidence of a defendant's income, standing alone, is wholly inadequate. How can we determine whether a $70,000 award of punitive damages will deter future misconduct by [defendant]? How can we say whether the award is excessive? Clearly, we cannot answer either question. If [defendant] has assets worth millions of dollars and no liabilities, the fact that $70,000 is about three-fourth's of one year's income is a meaningless abstraction. [Citation.] Conversely, if he has liabilities exceeding assets and the award will force him into bankruptcy, $70,000 is excessive. [Citation.]" (*Id*. at p. 1064.)

The record here contains evidence of Torres's income and limited evidence of his liabilities. We conclude, however, the jury was provided with sufficient evidence to permit it to determine fairly an appropriate amount of punitive damages. Unlike *Cadag*, the jury was provided with more than simply Torres's income. It knew he owned a home, had a retirement account, and his debts were not significant enough for him to identify when he was asked to do so. Although this is a close case, the limited nature of

our review convinces us the evidence is substantial enough to support the punitive damage verdicts.

V. Motion for Relief Pursuant to Code of Civil Procedure Section 473*

In discussing the application of section 3333.4 to Landeros's ability to recover noneconomic damages, we stated it was undisputed that Miguel Landeros gave permission to Landeros to drive the vehicle involved in the accident. This statement was true when the trial court ruled on Torres's motion to preclude recovery of noneconomic damages and through the conclusion of trial. It also was true when Torres moved for a judgment notwithstanding the verdict and a new trial on various grounds. The trial court denied both motions on April 22, 2010. On May 21, 2010, Torres filed his notice of appeal.

On May 17, 2010, Torres's attorneys received an anonymous letter stating that Miguel Landeros had lied at his deposition when he stated that Landeros had permission to drive the vehicle at the time of the collision. According to the letter, the truth was that Miguel Landeros had instructed Landeros and her mother that Landeros was not to drive the vehicle until Landeros had obtained her driver's license.

On May 24, 2010, Torres's counsel filed a document entitled "Supplemental Declaration of Counsel in Support of Opposition to 'Motion for Relief Pursuant to California Civil Procedure Code § 473' re Taxing Costs." In this declaration, Torres's counsel provided the trial court with a copy of a declaration apparently executed by Miguel Landeros confirming that Landeros did not have permission to drive the vehicle on the day of the collision. Torres's counsel argued that if Landeros was driving the vehicle without her father's permission, she could not be a permissive user of the vehicle under his insurance policy and therefore would be precluded from recovering future noneconomic damages.

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*See footnote, *ante*, page 1.

At a hearing on June 2, 2010, the trial court refused to hear any motion related to this new information on the ground that it had been divested of jurisdiction when Torres filed his notice of appeal. At this hearing, a new attorney appeared (Mr. Tello) stating that he represented Miguel Landeros and that the declaration had been secured "under duress and under fraud" and that Miguel Landeros had withdrawn his permission to use the declaration for any purpose.

On June 14, 2010, Torres filed with this court a motion for relief from the judgment pursuant to Code of Civil Procedure section 473, arguing the judgment was fraudulently obtained because Miguel Landeros had lied, at the direction of one of Landeros's attorneys, on the issue of whether Landeros had permission to drive the vehicle on the day of the collision.

It has long been established that Code of Civil Procedure section 473, subdivision (b) will provide relief for intrinsic fraud, even though that is not a ground specifically listed in the statute. (8 Witkin, *supra,* Attack on Judgment in Trial Court, § 152, p. 745.) The issue we must address, however, is whether this court has jurisdiction to grant relief when the alleged fraud occurred in the trial court.

This issue arises because the notice of appeal was filed before any motion for relief related to the allegedly false testimony could be filed. When Torres sought relief in the trial court, the trial court concluded it was deprived of jurisdiction because the notice of appeal had been filed.

Torres argues that in this situation, this court has jurisdiction to hear the motion. To support his argument, he cites three cases. *In re Marriage of Rhoades* (1984) 157 Cal.App.3d 169 involved a dissolution proceeding. Wife obtained a default judgment against husband. The trial court denied husband's motion for relief pursuant to Code of Civil Procedure section 473. The appellate court concluded the trial court erred, reversed the order denying the motion, and remanded the case with directions to grant the motion. *Rhoades* provides no support for Torres's motion that the appellate court has jurisdiction

to hear a Code of Civil Procedure section 473 motion in the first instance for acts that occurred in the trial court.

Cornell University Medical College v. Superior Court (1974) 38 Cal.App.3d 311 (*Cornell*) also is cited by Torres. In this case the trial court denied Cornell's motion to quash service of summons on it. Under Code of Civil Procedure section 418.10, Cornell had 10 days to petition the "appropriate reviewing court" for a writ of mandate directing the trial court to grant the motion. Cornell's attorneys prepared a writ of mandate, but the courier erroneously delivered the papers to the United States Court of Appeals. By the time the mistake was discovered, the 10-day time period to file the writ had expired, and the appellate court summarily denied the petition. Cornell then applied to the trial court for an extension of time within which to file its petition, as permitted by Code of Civil Procedure section 418.10. The trial court granted the application and Cornell resubmitted its petition to the appellate court. (*Cornell*, at pp. 313-314.)

The real party in interest argued that Cornell was required to seek an extension of time to file its petition before the initial 10-day time period for filing the petition expired. The appellate court tacitly agreed with this argument. (*Cornell, supra*, 38 Cal.App.3d at p. 314.) However, the appellate court noted that the trial court had the right to grant relief pursuant to Code of Civil Procedure section 473, and in such a situation the appellate court could grant the same relief. (*Cornell*, at pp. 314-315.) Finally, the appellate court concluded that Cornell had established excusable neglect and proceeded to the merits of the petition. (*Id.* at p. 315.)

The appellate court cited as authority *In re Estate of Keating* (1910) 158 Cal. 109 (*Keating*). In *Keating* the Supreme Court stated the rule on which *Cornell* relied as follows: "[W]here default is made under circumstances which would show good cause for relief … under section 473 of the Code of Civil Procedure … this court should grant similar relief." (*Keating*, at p. 115.)

Kallmeyer v. Poore (1942) 52 Cal.App.2d 142 (*Kellmeyer*) involves similar facts. The underlying facts are quite convoluted and unnecessary to the issue before us. What is significant is that one of the parties made a motion for relief pursuant to Code of Civil Procedure section 473 in the trial court. The appellate court determined the trial court failed to rule on the motion. The appellate court concluded: "This would logically require sending it back to the trial court for appropriate action on the motion. However, such ruling would be based wholly upon the affidavits and records, all of which are now before us. Under such circumstances this court has jurisdiction to take action thereon and eliminate the cumbersome and unnecessary procedure of sending it back to the trial court. [Citations.]" (*Kellmeyer*, at pp. 152-153.)

In *Cornell*, *Keating*, and *Kallmeyer*, all of the factual information necessary to resolve the Code of Civil Procedure section 473, subdivision (b) motion was before the appellate court. Since the record in each case contained all of the information necessary to rule on the motion, the appellate court utilized its discretion to rule on a motion first made in the trial court.

Torres's Code of Civil Procedure section 473, subdivision (b) motion is different in two significant respects. First, the trial court has not ruled on the motion filed by Torres. Second, the record does not contain all of the evidence necessary to resolve the motion. The record before us is incomplete and suggests that the evidence on which Torres relies may not be credible. For this reason, it appears an evidentiary hearing probably will be required to resolve the claims made in the motion. In all probability, credibility findings will have to be made. The logical approach in these circumstances is to remand the matter to the trial court to permit it to rule in the first instance. We express no opinion on the merits of the motion.

DISPOSITION

The judgment is affirmed. Costs are awarded to Landeros and Perez. The matter is remanded to the trial court for consideration of Torres's motion for relief pursuant to

Code of Civil Procedure section 473, subdivision (b). Landeros's request that we take judicial notice of the ballot materials before the voters when they voted on Proposition 213 is denied.

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CORNELL, J.

WE CONCUR:

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WISEMAN, Acting P.J.

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KANE, J.