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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CELIA SORIA et al., Plaintiffs and Appellants, v. COMPASS GROUP USA, INC., Defendant and Appellant.	B330221 (Los Angeles County Super. Ct. No. 20AVCV00611)

APPEAL from orders and a judgment of the Superior Court of Los Angeles County, Michael C. Kelley, Judge. Affirmed.

Law Office of Kenneth J. Melrose and Kenneth J. Melrose for Plaintiffs and Appellants.

Shook, Hardy & Bacon, M. Kevin Underhill and Gabriel S. Spooner for Defendant and Appellant.

The facts in this case are tragic. On September 22, 2019, 58-year-old Jaime Soria (Jaime),[1] who had been battling spastic quadriplegic cerebral palsy since birth, was admitted to the Antelope Valley Hospital (the hospital) with a diagnosis of aspiration pneumonia and associated severe sepsis. During the course of his admission to the hospital, because of his difficulty swallowing, Jaime had been placed on an NPO (nothing by mouth) food restriction. On September 24, 2019, a tray of food was mistakenly delivered to Jaime's room. After asking someone whether it was safe to feed him, Jaime's mother fed him food from the tray. Almost immediately, Jaime began to cough, gag, and vomit, which was aspirated into his lungs. Jaime passed away on September 26, 2019.

Jaime's mother, Celia Soria (Celia), both individually and on behalf of Jaime's estate, and sister, Lilia Soria Trujillo (Lilia),[2] brought this action against the hospital, one of its nurses,[3] Compass Group USA, Inc. (Compass), the hospital's contracted food and nutrition manager, and one of Compass's catering associates.[4]

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[1] Because several parties share the same last name, for clarity, we refer to them by their first names. No disrespect is intended.

[2] Celia, in her individual capacity and on behalf of Jaime's estate, and Lilia are referred to collectively as plaintiffs.

[3] This nurse was later identified as Laquita Nicole Watts (Watts).

[4] This catering associate was later identified as Christina Abalos-Reyes (Reyes).

During trial, the trial court determined that certain allegations of plaintiffs' complaint constituted binding admissions on plaintiffs and instructed the jury accordingly. The trial court also found that plaintiffs were not entitled to punitive damages. Thereafter, the jury returned a verdict in favor of Celia, as the successor in interest to Jaime, and awarded $8 million in damages. Compass filed a motion for judgment notwithstanding the verdict (JNOV) and a motion for a new trial. The trial court denied the JNOV motion and granted the motion for new trial in part, finding the damage award excessive.

Plaintiffs and Compass both appeal.

We affirm.

ISSUES ON APPEAL

At the heart of this appeal is a dispute between the parties as to who placed the food tray on Jaime's table and told Celia that she could feed the meal to her son: According to plaintiffs, Reyes entered Jaime's room with a tray of food, including soup. "After an assurance from Ms. Reyes that it was okay to feed the soup to Jaime, Celia began feeding her son."

Compass tells a different version of the story based upon allegations of plaintiffs' complaint, which the trial court found to be judicial admissions against plaintiffs. According to Compass, Reyes brought the tray to Jaime's room, but Watts was the one who gave it to Jaime and told Celia she could feed the food to Jaime.

In the appeal, we are asked to consider whether the trial court properly found that the allegations of plaintiffs' complaint constitute binding judicial admissions and accordingly instructed the jury. Relatedly, in the cross-appeal, we must determine whether Compass was entitled to a new trial because plaintiffs'

counsel and the jury disregarded the trial court's finding and instruction on judicial admissions.

In addition, plaintiffs argue that the trial court erroneously found that they failed to prove the requisite elements for punitive damages. And Compass asserts that it was entitled to a JNOV because insufficient evidence supports the judgment.

DISCUSSION

Plaintiffs' Appeal

I. *Judicial admissions*

Although not entirely clear, it appears that plaintiffs challenge the trial court's finding that they had judicially admitted nine facts and the trial court's resulting jury instruction.

A. Relevant procedural background

1. *Pleadings*

Plaintiffs filed their unverified complaint on August 28, 2020. In the introduction, plaintiffs allege that Jaime died "when an employee of [Compass] negligently delivered a food tray containing solid food to his hospital room." Specifically, "[o]n September 24, 2019 . . . an employee of [Compass], the hospital's food services vendor, brought a tray of food to [Jaime's] room, which had a cover over the top, obscuring its contents. The employee gave the tray to [Jaime's] nurse . . . , who set the covered tray down on the bed-table in front of [Jaime] without examining its contents." Celia asked the nurse in Spanish "if it was ok to feed [Jaime] the food on the tray." The nurse replied in Spanish: "If it is on the tray, he can eat it."[5]

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[5] At some point during the litigation, the parties learned that the Compass employee was Reyes and the hospital nurse was

The complaint alleges seven causes of action. As against the hospital, the complaint alleges professional negligence, negligent hiring/training/supervision, negligent infliction of emotional distress, and wrongful death. As against Compass, the complaint alleges negligence, negligent hiring/training/supervision, negligent infliction of emotional distress, and wrongful death.

In the negligence cause of action against Compass, plaintiffs allege that Compass (and Reyes) breached their duties of care to Jaime "when they negligently prepared and delivered solid food to [his] room."

Contrariwise, as against the hospital, plaintiffs allege that the hospital breached its duty of care when Watts "took delivery of the covered food tray from [Reyes], without examining its contents and placed it in front of" Jaime. Watts "further breached her duty of care when she, with no personal knowledge of the contents of the tray, instructed [Celia] to feed him the contents of the tray when she stated 'If it's on the tray, he can have it.'"

Compass filed an answer, "generally and specifically" denying each allegation of the complaint and asserting a host of affirmative defenses.

2. *Discovery*

a. Depositions

Celia, Lilia, and Lilia's daughter Jessica Trujillo (Trujillo) were all deposed, and their deposition testimonies were not entirely consistent with each other or with the allegations of the complaint.

Watts. There is no dispute that these are the unidentified individuals referenced in the complaint.

Celia's deposition testimony also seems to have conflicted with her responses to the hospital's special interrogatories.

3. *Settlement with hospital*

On March 8, 2022, the hospital filed a notice of settlement. As spelled out in the hospital's application for an order determining good faith settlement: "A tray of food was mistakenly delivered to decedent's room 252 on the afternoon of September 24, 2019. The tray was intended for room 251, but was delivered to [Jaime's] room. Plaintiffs contend they inquired of the nurse as to whether they could feed decedent. According to plaintiffs, the nurse advised [Celia], 'if it is on the tray, he can have it.'"

4. *Trial*

a. Opening statements

Trial commenced on January 30, 2023. During his opening statement, plaintiffs' counsel stated that the evidence would establish that Reyes entered Jaime's room, placed the food tray on Jaime's table, responded in Spanish when Celia asked if it was okay to feed Jaime from the food tray, and then left the room.

Compass's counsel then made his opening statement, during which he set forth plaintiffs' summaries as to what occurred on September 24, 2019. According to counsel, Lilia stated that Reyes entered the room and handed the food tray to the nurse, who put it on the table in front of Jaime. The nurse spoke Spanish. Celia then asked the nurse at least three times in Spanish if Jaime could eat the food on the tray, and the nurse answered in Spanish, "yeah."

Compass's counsel then turned to the allegations in the complaint, explaining how they matched plaintiffs' stories as to how the food ended up on Jaime's table and who told Celia that

she could feed it to him. Counsel added that plaintiffs' discovery responses confirmed that it was the nurse who erred, not Reyes.

b. Watts's trial testimony

Thereafter, plaintiffs called their first witness, Watts, to testify. Watts testified that she knew that Jaime was on an NPO. As the questioning continued, Compass's counsel objected: "[A]s we've kind of shown in the opening—and we can bring in all the evidence—this case has been about, since the opening of the complaint through discovery, written responses, through deposition testimony of both plaintiffs, that this case involves allegations that . . . Reyes, the catering associate, took the tray to the wrong room, was intercepted by a nurse who then placed the tray in front of Jaime . . . , answered questions from the family that he could eat what's on the tray, and that was the nurse." When the trial court asked whether he had deposed Watts, counsel replied that he had not.

Plaintiffs' counsel responded: First, plaintiffs' deposition testimonies conflicted, and it was up to the jury to decide what actually occurred. Second, "Watts [was] a known entity from day one in this case. The hospital disclosed her as being the nurse in charge of [Jaime's] care. If they wanted her depo, they wanted to know what she was going to say, they could have had it at any point. They made a strategic decision, for whatever reason, not to depose her."

The trial court ruled: "[T]o the extent that [Watts's] testimony today is inconsistent with other evidence, that's fair game for cross-examination, including any statements that the plaintiffs have made in the case."

The trial court then allowed Watts's testimony to continue.

Watts thereafter testified that she did not take the tray from Reyes in Jaime's room, and she did not set it down in front of him. She was not in the room when the food tray was delivered; she was unaware that a meal had been delivered until after the fact, and immediately rushed to stop the feeding. She also testified that she caught Reyes in the hallway and admonished her for delivering the meal to Jaime.

Finally, she stated that she never had a discussion with Celia or Lilia about feeding Jaime, and she does not speak Spanish.

c. Reyes's trial testimony

Reyes's testimony was inconsistent. During plaintiffs' examination, she testified that she was the one who entered Jaime's room and put the food tray in front of Jaime. But during cross-examination, she disavowed those statements, claiming that she actually did not recall. She specifically did not recall speaking to anyone in the room when she delivered the tray.

Reyes testified that she speaks Spanish fluently.

d. Compass's motion for judicial admission

On February 6, 2023, several days after trial had commenced, Compass filed a trial brief regarding plaintiffs' judicial admissions and request for jury instruction stating the truth of the matter has been admitted and no contrary evidence is allowed. Compass asserted that plaintiffs were attempting to argue, for the first time, that someone other than a hospital nurse placed the food tray in front of Jaime—an assertion contradicted by plaintiffs' complaint. "To permit Plaintiffs to change course at this point, 29 months after they filed their Complaint—simply because the Hospital is now out of the case

and Plaintiffs [now] want to point the finger 100% at Compass Group—would amount to a trial by ambush."

Over plaintiffs' opposition, the trial court found "that the allegations in the Complaint regarding the role of a nurse in [Jaime's] room on September 24, 2019 are judicial admissions. These specific allegations of the role of a nurse appear in" multiple paragraphs in the complaint. "These allegations have never been amended. And they have been essentially repeated by Plaintiffs in discovery responses, including depositions and responses to interrogatories."

The trial court concluded: "In light of the Court's conclusion that the allegations in the Complaint about the nurse's role are binding admissions, Plaintiffs are precluded from offering any evidence or argument inconsistent with those allegations. The Court will also give a jury instruction on the matter."

Plaintiffs filed a motion for reconsideration. Alternatively, plaintiffs requested leave to amend the factual allegations of their complaint to be relieved of their judicial admissions. The trial court denied their motion, finding that "[t]o permit this amendment at this time would clearly prejudice the opposing party."

e. Jury instruction

The trial court instructed the jury as follows:

"The following facts are admitted and you must accept them as true. No further evidence is required to prove them.

"1. A catering associate brought a tray of food to [Jaime's] room, which had a cover on it;

"2. The same catering associate gave the tray of food to a nurse;

"3. The nurse knew, or should have known, he was ordered on a restrictive diet by his physician;

"4. Without examining the contents of the tray, the nurse set the covered tray down on a table in front of Jaime . . . ;

"5. The same nurse turned away from Jaime . . . and the tray and busied herself with other work;

"6. Celia . . . removed the tray cover, noticed the contents, and asked the same nurse if it was okay to feed Jaime . . . the food on the tray;

"7. The nurse replied without having seen the contents of the tray that 'if it is on the tray, he can eat it,' and left the room[;]

"8. Following the nurse's instructions, Celia . . . fed Jaime soup; and

"9. The same nurse quickly ran back into the room and, for the first time, looked at the tray's contents and exclaimed that Jaime . . . should not have eaten the food."

f. Special verdict

The jury found in favor of plaintiffs.[6] It found that the September 24, 2019, aspiration event was a substantial factor in causing Jaime's death; that Compass was negligent in its training, supervision, or retention of Reyes; that Compass's negligence was a substantial factor in causing Jaime's death; that the hospital was also negligent; and that the hospital's negligence was a substantial factor in causing Jaime's death. It assigned 35 percent responsibility to Compass and 65 percent responsibility to the hospital. It awarded Celia, as Jaime's successor in interest, $8 million in damages for the loss of Jaime's

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[6] The jury's verdict was not unanimous.

love, companionship, comfort, affection, society, and moral support.

Regarding plaintiffs' claims for emotional distress, the jury found that only Celia suffered serious emotional distress and the hospital was 100 percent responsible for that distress. No monetary damages were awarded.

B. Applicable law on judicial admissions

"The pleadings are the formal allegations by the parties of their respective claims and defenses, for the judgment of the court." (Cal. Code Civ. Proc., § 420.) "[I]ssues are made by the pleadings, not by the evidence introduced." (*Shaw v. McCaslin* (1942) 50 Cal.App.2d 467, 473.)

"An admission in a pleading is conclusive on the pleader." (*Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1272.) "'Under the doctrine of "conclusiveness of pleadings," a pleader is bound by well pleaded material allegations.'" (*Valerio*, *supra*, at p. 1271; see also *Muller v. Muller* (1962) 209 Cal.App.2d 704, 707 ["A pleader is bound by his own pleadings, under the doctrine of 'conclusiveness of pleadings.'"]; *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1155 (*Thurman*), overruled in part on other grounds in *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 196, fn. 8.)

"When . . . pleadings contain allegations of fact in support of a claim or defense, the opposing party may rely on the factual statements as judicial admissions. [Citation.]" (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 746.) "'"[A] pleader cannot blow hot and cold as to the facts positively stated."' [Citation.]" (*St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co.* (2003) 111 Cal.App.4th 1234, 1248; but see

Barsegian v. Kessler & Kessler (2013) 215 Cal.App.4th 446, 451–452.)

"[U]nder the doctrine of conclusiveness of pleadings evidence may not be received to contradict an admission on the pleadings." (*Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 850.)

C. Standards of review

We apply an abuse of discretion standard of review to the trial court's conclusion that plaintiffs made a binding judicial admission as to who put the food tray on Jaime's table and who told Celia that she could feed that food to her son. (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 871.)

We likewise review alleged evidentiary errors for abuse of discretion. (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900.)

We review the trial court's judicial admission jury instruction de novo. (*Suffolk Construction Co., Inc. v. Los Angeles Unified School Dist.* (2023) 90 Cal.App.5th 849, 869.) "However, the giving of an erroneous jury instruction should not be disturbed 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."' [Citation.] Instructional error is prejudicial in a civil case where '"'"it seems probable" that the error "prejudicially affected the verdict."'"' [Citation.]" (*Suffolk Construction*, *supra*, 90 Cal.App.5th at p. 870.)

No matter the standard of review, it is not enough for an appellant to demonstrate error. An appellant must also demonstrate prejudice resulting from the alleged error. (*In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337.) "No

judgment shall be set aside . . . for any error as to any matter of pleading, or 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; see also Code Civ. Proc., § 475 ["The court must, in every stage of an action, disregard any error . . . which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment . . . shall be reversed . . . by reason of any error . . . unless it shall appear from the record that such error . . . was prejudicial . . . and that a different result would have been probable if such error . . . had not occurred or existed. There shall be no presumption that error is prejudicial"].)

D. Analysis

There is no question that a lot went wrong during the litigation of this case. The complaint alleges that (1) Compass negligently trained Reyes, and (2) Reyes brought the wrong tray to Jaime's room, and a hospital nurse took the tray, put it on Jaime's table, and told Celia that it was "ok" to feed her son. Compass was prepared to defend itself at trial against these theories of liability, and when it appeared that plaintiffs were shifting gears, Compass brought its motion for a judicial admission, which the trial court granted.

But, these allegations are arguably not unequivocal. After all, the complaint also alleges that Celia asked the unnamed nurse "in Spanish, if it was ok to feed [Jaime] the food on the tray," and that the nurse replied in Spanish that "[i]f it is on the tray, he can eat it." During discovery, it was revealed that Reyes is Hispanic and speaks Spanish; there was no deposition of Watts

to determine if she spoke Spanish.[7] But during Watts's trial testimony, she specifically stated that she does not speak Spanish. And the deposition testimonies of Celia, Lilia, and Trujillo all conflicted, further muddling what plaintiffs were actually alleging against Compass.[8]

Unfortunately, some missteps by the trial court did not help. For example, if plaintiffs' allegations constituted binding admissions, why did the trial court allow Watts to testify contrariwise? (*Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.*, *supra*, 122 Cal.App.3d at p. 850.) And the judicial admission instruction is incomplete; it does not affirm that Celia asked the nurse "in Spanish" whether she could feed her son.

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[7] Adding to the confusion is Lilia's deposition testimony, which refers to an unidentified Hispanic nurse in Jaime's room.

[8] Of course all of this could have been avoided *had plaintiffs' counsel better pleaded their complaint* or brought a timely motion to amend their complaint. Instead of specifying that it was the nurse who told Celia she could feed her son, plaintiffs' counsel could have alleged that someone on behalf of Compass and/or the hospital told Celia that she could feed her son. Such an allegation would have made sense. As Lilia explained during trial: Even though the "complaint in this action includes a cause of action against the nurse," her "complaint was to Antelope Valley Personnel. I don't know who does what. I don't know who's a nurse, who's a food person, who—that they're two different companies. I don't know none of that." She added: "We didn't go into the hospital with the mindset of let's see who's who and what we could do to get a lawsuit. We went in the hospital so my brother could get better and we could go home. That was our mindset, not who's doing what, who's who, where's where, what uniform."

While a lot of confusion may have led to the trial court's judicial admission finding and subsequent instruction, we need not decide whether the trial court erred. Assuming without deciding that the trial court erred, plaintiffs have not demonstrated any prejudice[9] from the trial court's order and instruction.[10] (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 963 [appellant bears the burden of demonstrating prejudice on appeal].) It goes without saying that the trial court's order, standing alone, did not prejudice plaintiffs. What matters is the impact of that order—which takes us to the resulting jury instruction. And, applying the legal principles summarized above, plaintiffs have not demonstrated reversible error: It is not probable that the assumed instructional error prejudicially affected the verdict. Despite the trial court's judicial admission instruction, the jury found Compass negligent in its training, supervision, or retention of Reyes; found that negligence to be a substantial factor in causing Jaime's death; and awarded Celia $8 million for wrongful death. Given the evidence of Jaime's poor health and grave prognosis, we cannot imagine a more significant damage award had the jury been instructed differently.[11] At most, the trial court's order and instruction may

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[9] On appeal, it is irrelevant whether Compass demonstrated prejudice from relying upon the so-called judicial admissions.

[10] We note that plaintiffs do not offer any argument concerning the propriety of jury instructions. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

[11] It follows that plaintiffs' challenge to the trial court's order denying them relief from their judicial admissions by granting them leave to amend their complaint is moot.

have affected the jury's allocation of liability as between the hospital and Compass. But plaintiffs have not carried their burden of showing any prejudice flowing from that allocation because, regardless of how the jury assigned fault as between the hospital and Compass, the total $8 million award would be no different.

II. *Punitive damages*

A. Relevant factual background

Tamara Frenya (Frenya) is the Compass food service director at the hospital. In that role, she has the ability to discipline someone who is not complying with policies or training. At the time of Jaime's death, there was no one above her from Compass at the hospital; she was "in charge." She did not write policies for Compass.

Kristi Susca (Susca) was a Compass patient services manager in 2017. In that role, she oversaw the catering associates and ensured that food went to the patients. She also "did patient roundings, patient medication, and . . . acted as a general manager on duty." She supervised Reyes. Her manager at the time was Frenya.

Her primary job responsibilities included the supervision and training of catering associates. Catering associates are evaluated through various tools, including a "shadow report." Susca explained that a shadow report is a "training tool" or a "coaching tool" that she would use to make sure that the catering associates were "doing their job right."

In any given shift, Susca believed there were approximately five catering associates on staff.

Compass did not have the authority to fire a catering associate; only the hospital could. It also did not have the

authority to "decide to just transfer a catering associate to another unit."

B. Relevant procedural background

In their complaint, plaintiffs sought punitive damages from Compass for its negligent hiring, supervision, and training of Reyes.

On December 12, 2022, prior to trial, the trial court determined that Frenya was not a managing agent of Compass for purposes of whether Compass had to produce her for a subpoena of a managing agent.

On February 6, 2023, plaintiffs filed a trial brief regarding their request for punitive damages. They argued, inter alia, that Frenya and Susca acted in conscious disregard of Jaime and others. Furthermore, Susca was a managing agent with discretionary power.

Compass filed a responsive brief, asserting that Susca was not a managing agent of Compass.

The trial court found that Susca did not qualify "as a managing agent with discretionary power affecting corporate policy." After all, when she was hired in 2017, "[h]er title was patient service manager. There was no employee of Compass more junior to her at the time at [the hospital]. She did oversee the hospital employees in the food service department, but she supervised no Compass employees and had no role or influence over any other Compass operations in any other hospital." After discussing some relevant case law, the trial court noted that "the critical inquiry is the degree of discretion of the employee the employee possesses in making decisions that will ultimately determine corporate policy, and that's the link that I think is lacking here."

Regarding Frenya, the trial court noted that it did not read plaintiffs' motion as making an argument concerning her, partly because it had already ruled that she was not a managing agent. But it allowed counsel to argue the issue. After entertaining oral argument, the trial court did not alter its prior ruling that Frenya was not a managing agent of Compass.

C. Relevant law

"In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." (Civ. Code, § 3294, subd, (a).) "An employer shall not be liable for damages pursuant to subdivision (a), based upon the acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct . . . or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (Civ. Code, § 3294, subd. (b).)

"Managing agents" are employees who "exercise[] substantial discretionary authority over decisions that ultimately determine corporate policy." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 573; see also *CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1274 [managing agent is one who "exercise[s] broad discretion capable of setting or influencing

corporate policy"].) That an employee with some supervisorial or administrative responsibility authorized or ratified the unlawful conduct, standing alone, is insufficient: "[T]he Legislature intended that principal liability for punitive damages not depend on employees' managerial level, but on the extent to which they exercise substantial discretionary authority over decisions that ultimately determine corporate policy. Thus, supervisors who have broad discretionary powers and exercise substantial discretionary authority in the corporation could be managing agents. Conversely, supervisors who have no discretionary authority over decisions that ultimately determine corporate policy would not be considered managing agents." (*White*, *supra,* at pp. 576–577.)

"A corporation is not deemed to ratify misconduct, and thus become liable for punitive damages, unless its officer, director, or managing agent actually knew about the misconduct and its malicious character." (*Cruz v. HomeBase* (2000) 83 Cal.App.4th 160, 163; see also *Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 167 ["a corporate employer may be liable only if the . . . ratification . . . was on the part of an officer, director or managing agent of the corporation"].)

By refusing to send the issue of punitive damages to the jury, the trial court essentially awarded Compass a nonsuit on that issue. (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 58 [no significant difference between granting a nonsuit and refusing, at the close of the plaintiff's case, to instruct on an issue].) A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by the plaintiff is insufficient to permit the jury to find in his or her favor. (*Fillpoint, LLC v. Maas* (2012) 208 Cal.App.4th 1170,

1176.) "In reviewing a grant of nonsuit, we are 'guided by the same rule requiring evaluation of the evidence in the light most favorable to the plaintiff.' [Citations.] 'We will not sustain the judgment "'unless interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law."' [Citation.]' [Citation.]" (*Stonegate Homeowners Assn. v. Staben* (2006) 144 Cal.App.4th 740, 746.)

D. Analysis

We agree with the trial court that there is no evidence that Frenya and/or Susca were managing agents of Compass. While Susca was Reyes's supervisor in 2017 and reviewed and graded her performance, plaintiffs presented no evidence that she influenced corporate policy. Similarly, while no one from Compass was above Frenya at the hospital, she also did not write company policies.

Likening Susca to a claims adjuster, plaintiffs argue that Susca should be deemed a managing agent of Compass. (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1220–1221.) We are not convinced. There is no evidence that she possessed the discretion to make decisions that would ultimately determine Compass's corporate policy. (See, e.g., *Cruz v. HomeBase*, *supra*, 83 Cal.App.4th at p. 168; *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 406.)

In light of our conclusion that neither Frenya nor Susca was a managing agent of Compass, we need not address plaintiffs' contention that they presented ample evidence of their conscious disregard of patient safety or that Compass ratified its employees' misconduct.

Compass's Cross-appeal

I. *Relevant factual background*

A. Jury instructions

As set forth above, the trial court determined that plaintiffs' allegations in the complaint about "the nurse's role" were binding admissions and instructed the jury accordingly.

B. Special verdict

The jury found in favor of plaintiffs and awarded Celia $8 million in wrongful death damages.

C. Polling of the jury

After the verdict was read, the jurors were polled. The verdict was not unanimous. In particular, Juror Nos. 8 and 9 indicated that they did not agree with the rest of the jurors concerning apportionment of fault (35 percent to Compass) and the $8 million damage award. They also answered "yes" to the question of whether Lilia suffered serious emotional distress; they disagreed that the hospital was 100 percent responsible for the emotional distress. Juror No. 8 voted to award each plaintiff $1 million in emotional distress damages. Juror No. 9 voted to award Celia $100,000 in emotional distress damages.

D. Judgment

Judgment was entered in favor of Celia, as Jaime's successor in interest, in the amount of $2.8 million (35 percent of $8 million) against Compass.

II. *JNOV*

A. Relevant factual background

1. *Expert testimony presented at trial*

Plaintiffs' expert, Dr. Mohammad Ali Ansari, testified at trial. He opined that "acute aspiration [on the day before Jaime passed] appeared to be the main [etiology[12]] of his demise." In other words, the aspiration on September 24, 2019, caused Jaime's death.

Dr. Ansari also confirmed that the "cause of death on the death certificate was listed as acute chronic respiratory failure and pneumonitis due to inhalation of food and vomit."[13]

Compass did not designate an expert, either retained or nonretained, to testify as to any claimed professional duty of care owed by Compass and/or its catering associates.

2. *Compass's motion*

Following the jury's verdict, Compass moved for a JNOV. As is relevant to the issues in this appeal, Compass argued that plaintiffs failed to elicit sufficient expert opinion (1) to establish medical causation, and (2) regarding the standard of care on their professional negligence claim.

Although not part of the appellate record, we presume that plaintiffs opposed the motion.

3. *Trial court order*

The trial court denied Compass's motion. It found sufficient evidence regarding the cause of Jaime's death.

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[12] "Etiology means reason."

[13] There appears to be no dispute that the death certificate was prepared by Jaime's treating physician, Dr. Saimi Rashid

Specifically, Jaime's treating physician "identified the aspiration event triggered by the soup as a cause of his death when she prepared the death certificate." Further, Dr. Ansari "opined that the aspiration event was the 'main etiology' of his death and that it 'caused [Jaime's] demise." The fact that Dr. Ansari may have also offered some speculation as part of his testimony did "not undermine his other direct and unqualified testimony on causation." Finally, the trial court noted that "Dr. Ansari's testimony [did] not exist in a vacuum," and there was other evidence to support causation. For example, "during [his] stay in the hospital, [Jaime] was improving up [until] the point of the aspiration event; he rapidly deteriorated thereafter; and died only 30 hours later."

The trial court also rejected Compass's contention that plaintiffs failed to present evidence of a professional standard of care. In so ruling, it determined that "the training and supervision of catering associates on how to deliver meals in the hospital [does not constitute] a 'profession.'" Despite a request from the trial court, neither plaintiffs nor Compass offered any legal authority in support of such a proposition. And, the trial court noted that Compass's failure to designate an expert witness on the standard of care "further [indicated] that the training and supervisorial responsibilities that are at the heart of this case did not require specialized knowledge to articulate."

B. Relevant law

JNOV motions are governed by Code of Civil Procedure section 629, which provides, in relevant part, that a trial court "shall render judgment in favor of the aggrieved party notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted had a

previous motion been made." (Code Civ. Proc., § 629, subd. (a).) A JNOV acts as a demurrer to the evidence. It "can be sustained only when it can be said as a matter of law that no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that the reviewing court would be compelled to reverse it, or the trial court would be compelled to set it aside as a matter of law." (*Moore v. City & County of San Francisco* (1970) 5 Cal.App.3d 728, 733.)

In considering a JNOV motion, the trial court must view the evidence in the light most favorable to the party securing the verdict. (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.) The motion may only be granted "if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support." (*Ibid.*)

"The trial court's discretion in granting a motion for judgment notwithstanding the verdict is severely limited." (*Teitel v. First Los Angeles Bank* (1991) 231 Cal.App.3d 1593, 1603.) """The trial judge cannot reweigh the evidence [citation], or judge the credibility of witnesses. [Citation.] If the evidence is conflicting or if several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied."" (*Ibid.*)

""As in the trial court, the standard of review [on appeal] is whether any substantial evidence—contradicted or uncontradicted—supports the jury's conclusion."" (*Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167, 192.)

C. Analysis

1. *Sufficient expert opinion to establish medical causation*

In order to prove their claim of negligence, plaintiffs were required to prove that Compass's conduct was a "substantial factor" in causing Jaime's death. (*Uriell v. Regents of University of California* (2015) 234 Cal.App.4th 735, 746 (*Uriell*).) And through the testimony of Dr. Ansari, they did just that. Dr. Ansari unequivocally testified that the aspiration event caused Jaime's death.

Urging us to conclude otherwise, Compass directs us to subsequent testimony. Plaintiffs' counsel asked Dr. Ansari: "Hypothetically, if [Jaime] had not been fed the meal on 9/24 and aspirated, he would have continued to improve?" Dr. Ansari replied: "He could have. These are all speculations." The problem for Compass is that the trial court struck that entire answer. Thus, it has no bearing on the issue on appeal. Even if it did, the fact that Dr. Ansari's later testimony mentioned "speculations" does not negate his earlier unequivocal testimony. Indeed, the jury was told that it was free to believe all, part, or none of an expert's testimony.

Jones v. Ortho Pharmaceutical Corp. (1985) 163 Cal.App.3d 396 (*Jones*) is readily distinguishable. "[T]he issue before the *Jones* court was whether the plaintiff met her evidentiary burden to allow the jury to decide the issue of causation where the plaintiff's expert testimony only established a possibility (less than a 50-50 chance) an oral contraceptive was causally connected to the development or aggravation of the plaintiff's cancer. [Citation.] The appellate court noted, '[t]he law is well settled that in a personal injury action causation must be proven

within a reasonable medical probability based upon competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case. [Citations.]'" (*Uriell*, *supra*, 234 Cal.App.4th at pp. 744–745.)

"*Jones* went on to explain, '[a]lthough juries are normally permitted to decide issues of causation without guidance from experts, "the unknown and mysterious etiology of cancer" is beyond the experience of laymen and can only be explained through expert testimony. [Citation.] Such testimony, however can enable a plaintiff's action *to go to the jury* only if it establishes a reasonably probable causal connection between an act and a present injury.'" (*Uriell*, *supra*, 234 Cal.App.4th at p. 745.)

Here, in contrast, the theory of causation does not depend on "esoteric scientific theories." (*Jones*, *supra*, 163 Cal.App.3d at p. 403.) Rather, it falls squarely within the realm of "'factual circumstances of probability understandable to a jury.'" (*Uriell*, *supra*, 234 Cal.App.4th at p. 745.)

It follows that we agree with the trial court that Dr. Ansari's testimony did "not exist in a vacuum." After Jaime was admitted to the hospital, he was improving up until the point of the aspiration event; after the aspiration, his condition deteriorated rapidly and he died just 30 hours later. Under these circumstances, Dr. Ansari's testimony was more than sufficient evidence of causation.

2. *Alleged professional negligence claim against Compass*

Compass asserts that plaintiffs failed to establish the standard of care through expert testimony on their professional negligence claim.

It is settled that the first element of a *professional* negligence claim, standard of care, "can only be proved by expert testimony, unless the circumstances are such that the required conduct is within the layperson's common knowledge. [Citations.]" (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968.) But Compass has not explained how the negligence claim alleged against it [mistaken delivery of a food tray to a hospital patient] constitutes a claim for professional negligence.[14]

For this reason, *Webster v. Claremont Yoga* (2018) 26 Cal.App.5th 284 does not compel a different result. In *Webster*, the Court of Appeal held that in a lawsuit against a yoga studio and instructor, a plaintiff must provide expert testimony "to establish the applicable standard of care and a breach thereof." (*Id.* at p. 289.) The court reasoned that a "'lay person's common knowledge' would not include 'the conduct required by the particular circumstances' of a yoga instructor . . . and an expert's opinion on the question would be of benefit." (*Ibid.*) In this case, the circumstances were well-within a layperson's common knowledge.

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[14] Plaintiffs' referral to Compass as a "professional" management corporation does not transmute plaintiffs' claim for negligence into one for *professional* negligence.

III. *New trial*

A. Relevant factual background

1. *Compass's motion*

Compass moved for a new trial, arguing, inter alia, (1) juror misconduct, (2) attorney misconduct, and (3) excessive damages. Regarding juror misconduct, Compass argued that despite the trial court's "clear instruction . . . on admitted facts, members of the jury purposefully did not follow the Court's instructions and, instead, supplanted them with their own version of events to the prejudice of Compass." In support, Compass offered a declaration from one of the jurors, Clarence Harris. Mr. Harris attested that at least two jurors (Juror Nos. 8 & 9) "did not follow the [trial court's] instructions on the admitted facts regarding Ms. Reyes and the nurse."

Similarly, Compass asserted that plaintiffs' counsel engaged in prejudicial misconduct by "repeatedly attempt[ing] to elicit testimony to undercut the Court's Order [regarding judicially admitted facts] and place the catering associate (Ms. Reyes) in the room with Jaime . . . and his family."

Finally, Compass contended that the damage award was excessive.

2. *Plaintiffs' opposition*

Plaintiffs opposed Compass's motion. With respect to the claim of juror misconduct, plaintiffs argued that Mr. Harris's declaration was inadmissible.

3. *Trial court order*

On June 2, 2023, after taking the matter under submission, the trial court denied Compass's motion based upon juror and attorney misconduct. Regarding juror misconduct, the trial court first found only part of Compass's evidence admissible, namely

Mr. Harris's statement that two jurors believed that it was Reyes, rather than a nurse, who mistakenly assured Celia that Jaime could eat the meal that had been delivered to his room. Based upon this evidence, the trial court determined that "two jurors did not accept the facts as established." There was "an implied agreement [between these two jurors] not to follow the Court's instruction and thus qualifies as misconduct."

That misconduct, however, was not prejudicial. "[B]ased on the polling of the jury after the verdict, the only two jurors as to whom there is any evidence of misconduct . . . did not vote with the nine other jurors on any of the verdict form questions that would have been potentially impacted by a failure to follow the Court's instruction on the admitted facts related to the conduct of the nurse."

Regarding the allegation of attorney misconduct, the trial court agreed that plaintiffs' counsel "at least stepped to 'the line' that had been established by the Court's rulings on the admitted facts. The Court also agrees that, but for the repeated and proactive objections by [Compass] and the Court's admonitions, Plaintiffs' counsel would have examined certain witnesses with the goal or effect of establishing that it was Ms. Reyes, rather than a 'nurse,' who engaged with the family in [Jaime's] room on the subject of whether [Jaime] could eat the food that everyone agreed had been brought *to* the room by Ms. Reyes. Such questioning would be a direct violation of this Court's specific order that Plaintiffs' attorney was not to elicit testimony on this subject." But, the trial court found that plaintiffs' counsel's misconduct was not prejudicial. While plaintiffs' counsel's misconduct may have led to two jurors disregarding the trial court's instructions, for the reasons set forth above, that error

was not prejudicial. It follows that any misconduct by plaintiffs' counsel was also not prejudicial.

However, the trial court had "serious issues with the amount of the jury's damages award." After summarizing the evidence, the trial court found that $1 million was "the outer limit of what a reasonable award should be for wrongful death given how speculative [Jaime's] potential recovery was." In reaching this conclusion, the trial court noted that plaintiffs' counsel's "conduct during the course of the trial" and closing argument were "prejudicial as [they] prompted the jury to render a verdict entirely unsupported by the factual record."

Thus, it conditionally granted Compass's motion "to the effect that a new trial shall be had if Plaintiffs fail to accept the remittitur of damages from $8 million to $1 million," resulting in a judgment against Compass for $350,000.[15]

It appears that plaintiffs did not accept the remittitur because a trial setting conference was scheduled for August 4, 2023.

B. Relevant law

Code of Civil Procedure section 657 provides, in relevant part: "The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: [¶] 1. Irregularity in the proceedings . . . by which [a] party was prevented from

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[15] Plaintiffs do not challenge the trial court's order conditionally granting Compass's motion for a new trial.

having a fair trial. [¶] 2. Misconduct of the jury . . . . [¶] . . . 5. Excessive . . . damages."

In ruling on a motion for new trial, the trial court sits as an independent trier of fact. "[T]he trial court's factual determinations, reflected in its decision to grant the new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations. [¶] The trial court sits much closer to the evidence than an appellate court. Even the most comprehensive study of a trial court record cannot replace the immediacy of being present at the trial, watching and hearing as the evidence unfolds. The trial court, therefore, is in the best position to assess the reliability of a jury's verdict and, to this end, the Legislature has granted trial courts broad discretion to order new trials." (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412.) In ruling upon a motion for a new trial, "the trial court is vested with the authority to disbelieve witnesses and draw inferences from the evidence contrary to those drawn by the jury." (*Eltolad Music, Inc. v. April Music, Inc.* (1983) 139 Cal.App.3d 697, 705.)

C. Alleged juror misconduct

1. *Relevant law*

"In ruling on a request for a new trial based on jury misconduct, the trial court must undertake a three-step inquiry. [Citation.] First, it must determine whether the affidavits supporting the motion are admissible. [Citation.] If the evidence is admissible, the trial court must determine whether the facts establish misconduct. [Citation.] Lastly, assuming misconduct, the trial court must determine whether the misconduct was prejudicial. [Citations.]" (*People v. Dorsey* (1995) 34 Cal.App.4th

694, 703–704.)[16] "'Prejudice exists if it is reasonably probable that a result more favorable to the complaining party would have been achieved in the absence of the misconduct.' [Citation.]" (*Bandana Trading Co., Inc. v. Quality Infusion Care, Inc.* (2008) 164 Cal.App.4th 1440, 1445; see also *Enyart v. City of Los Angeles* (1999) 76 Cal.App.4th 499, 507.)

"A trial court has broad discretion in ruling on each of these issues, and its rulings will not be disturbed absent a clear abuse of discretion. [Citations.]" (*People v. Dorsey*, *supra*, 34 Cal.App.4th at p. 704; but see *Bandana Trading Co. v. Quality Infusion Care, Inc.*, *supra*, 164 Cal.App.4th at p. 1445 ["We review the record independently to determine 'whether the act of jury misconduct, if it occurred, was prejudicial to appellant's right to a fair trial'"].)

2. *Analysis*

Under any standard of review, the trial court did not err in finding that there was no prejudicial juror misconduct. Mr. Harris's declaration provided admissible evidence that two jurors (Juror Nos. 8 & 9) disregarded its instructions concerning the judicially admitted facts. (Evid. Code, § 1150, subd. (a) ["Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly"].) Instead of following the trial court's clear instruction that it was admitted that a nurse (not Reyes) set

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[16] Holdings concerning juror misconduct in criminal cases may be applied in civil cases. (*People v. Hill* (1992) 3 Cal.App.4th 16, 37–38, fn. 8, disapproved on other grounds in *People v. Nesler* (1997) 16 Cal.4th 561, 582, fn. 5.)

the tray of food in front of Jaime and told Celia that she could feed it to him, these two jurors expressed the view that it was Reyes, and not a nurse, who assured Celia that she could feed her son the food that was on the food tray. In so doing, they impliedly agreed not to follow the trial court's instructions. (*Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1127 (*Bell*).) As such, there was juror misconduct under Code of Civil Procedure section 657.

However, that misconduct was not prejudicial. As the special verdict and polling of the jury confirm, the other jurors were not influenced by Juror Nos. 8 and 9's misconduct. Juror Nos. 8 and 9 were in the minority on the votes on both questions requiring an allocation of fault between Compass and the hospital. The fact that the majority of jurors determined that Compass was not at all responsible for the emotional distress claim was "very clear evidence that the . . . jurors whose votes determined the outcome on that claim accepted the Court's instruction that the person who answered the question about whether [Jaime] could eat the meal was a nurse and not Ms. Reyes." Thus, it is not reasonably probable that the jury would have reached a different verdict had the misconduct not occurred. (*Bandana Trading Co., Inc. v. Quality Infusion Care, Inc.*, *supra*, 164 Cal.App.4th at p. 1445.)

D. Alleged attorney misconduct

1. *Relevant law*

"Misconduct of counsel is an '[i]rregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial' [citation]. [Citation.] Attorney misconduct can justify a new trial only if it is reasonably probable that the party moving for a new trial would have obtained a more favorable result absent the misconduct. [Citations.]" (*Bell*, *supra*, 181 Cal.App.4th at p. 1122.)

"The Supreme Court has held that the appropriate standard of review for a trial court's denial of a motion for new trial based on attorney misconduct is de novo, at least on the issue of prejudice. [Citation.]" (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 296, fn. 16.)

2. *Analysis*

Assuming without deciding that plaintiffs' counsel engaged in misconduct, we conclude that his missteps were not prejudicial. Compass's argument on appeal mirrors its argument to the trial court: Counsel's misconduct led to the jurors' refusal to follow the trial court's instruction on admitted facts. As set forth above, we conclude that the two jurors' failure to follow the trial court's instruction did not cause prejudice. It follows that counsel's alleged misconduct also did not prejudice Compass.

DISPOSITION

The orders and judgment are affirmed. In accordance with the trial court's posttrial order, the matter is remanded for a new trial on the issue of damages only. Parties to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT