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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MARTHA MCKINDRA et al., Plaintiffs and Respondents, v. THARALDSON FINANCIAL GROUP, INC., Defendant and Appellant.	E069896 (Super.Ct.No. CIVDS1502829) OPINION

APPEAL from the Superior Court of San Bernardino County. Thomas S. Garza, Judge. Affirmed in part; reversed in part.

Law Offices of Muhar, Garber, Av & Duncan, James Sohn, George Muhar; Greines, Martin, Stein & Richland, Robert A. Olson, Cynthia E. Tobisman and Eleanor S. Ruth for Defendant and Appellant.

Mybedbuglawyer, Brian J. Virag; The Ehrlich Law Firm and Jeffrey I. Ehrlich for Plaintiffs and Respondents.

Martha McKindra, Alex McKindra, and Marcus McKindra sued Tharaldson Financial Group, Inc., which does business as the Heritage Inn of Rancho Cucamonga (the Hotel) for, among other things, negligence/premises liability and intentional infliction of emotional distress. A jury awarded (1) $375,000 to Martha,[1] (2) $119,000 to Alex, (3) $2,500 to Marcus, and (4) $50,000 in punitive damages to Martha. The trial court awarded Martha, Alex, and Marcus (collectively, the McKindras) $95,250 in attorney fees. (Code Civ. Proc., § 1021.5.)[2]

The Hotel raises seven issues on appeal. First, the Hotel contends the finding that the Hotel intentionally inflicted emotional distress is not supported by substantial evidence. Second, the Hotel asserts the punitive damage award should be reversed. Third, the Hotel contends the trial court erred by permitting an expert to testify to case-specific hearsay. Fourth, the Hotel asserts the trial court erred by barring objections to deposition testimony read at trial. Fifth, the Hotel contends the McKindras' trial counsel committed misconduct during closing argument. Sixth, the Hotel asserts the cumulative effect of the trial court's errors requires reversal of the judgment. Seventh, the Hotel contends the trial court erred by awarding attorney fees to the McKindras. (§ 1021.5.) We affirm in part and reverse in part.

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[1] We use first names for the sake of clarity because multiple parties share the same last name. No disrespect is intended.

[2] All subsequent statutory references will be to the Code of Civil Procedure unless otherwise indicated.

FACTUAL AND PROCEDURAL HISTORY

A. PRETRIAL CONCESSIONS

Prior to trial, the Hotel conceded it was liable for negligence/premises liability. A jury trial proceeded on the issues of damages and intentional infliction of emotional distress.

B. EVIDENCE

The Hotel is a Hilton Garden Inn franchise, located in Rancho Cucamonga. The Hotel has 122 rooms. The Hotel's gross revenues are approximately $3,600,000. Expenses are approximately 50 percent of revenues. Thus, the Hotel's profits are approximately $1,800,000.

Martha and Alex were married. Marcus was Martha and Alex's son. In 2013, Alex, who had been an army colonel, worked as a military contractor at Fort Irwin near Barstow. Martha and Alex resided at Fort Irwin. In 2013, Marcus worked in Colorado Springs and was in the military reserves. Marcus had reserve duty at Vandenburg Air Force Base. Martha and Alex planned to lend a car to Marcus while he was at Vandenburg.

On March 16, 2013, Martha and Alex drove two vehicles to the Hotel and checked-in at approximately 3:00 p.m. After approximately 30 minutes in the hotel room, they left to pick up food, and then they returned to the hotel room to eat and watch television. During that time, the room appeared clean. At approximately 8:00 p.m., Alex and Martha left to pick up Marcus at the Burbank airport. After picking-up Marcus, the McKindras arrived at the Hotel after 11:00 p.m.

The McKindras' hotel room had two beds. Martha and Alex shared one bed, and Marcus was in the other bed. The McKindras went to sleep shortly after arriving at the Hotel. At approximately 4:00 a.m., Martha awoke to the feeling of something crawling on her neck. Martha then felt something crawling on her hand. Martha turned on the light. Martha saw a bedbug on her hand and blood. Martha yelled, " 'What is this?' " Martha woke Alex and pulled the covers back. Martha saw bedbugs "all in the bed." Alex turned his pillow over and "there were tons of bugs under the pillow." Martha looked down and saw "bugs all over [her] gown and bloodstains." Martha estimated she saw 50 bedbugs on the bed. Martha felt frightened and disgusted seeing the bedbugs. Martha was shaking.

Marcus awoke to Martha yelling. Marcus saw five to 10 bedbugs on his bed, and five to 10 bedbugs on his parents' bed. Marcus did not have any signs of having been bitten by bedbugs. Martha went to the bathroom to remove her nightgown and remove the bedbugs from her body. After Martha removed her nightgown, the bedbugs crawled up the bathroom wall. Martha put on other clothes and called the front desk. After approximately 15 minutes an employee (Sam) answered the phone. Sam came to the room and saw the bedbugs on the bed. Sam took a photograph of a bedbug that the McKindras had captured. While Sam was present, the McKindras looked behind and under the headboard and found dried bloodstains on the wall in the space between the bed and the headboard. Martha believed the dried blood meant "somebody else's blood had dried up under the headboard."

Sam did not offer advice to the McKindras on how to handle their clothes or other belongings. Sam found the McKindras a room at the Embassy Suites because the Hotel was fully booked. Sam provided the McKindras with a letter reflecting the Hotel would pay for their new room due to bedbugs. Sam also provided the McKindras with his cell phone number. The McKindras placed their belongings in the back of their truck, because they did not know "much about bed bugs and how they . . . move around." The McKindras felt the Hotel lacked a protocol for bedbug incidents because Sam "gave [them] no support," such as instructions on how to handle their belongings and he had no means of documenting the incident.

At 5:11 a.m., Martha called "Hilton's main number, the toll free number" to report the bedbug incident at the Hotel. Hilton refunded the costs of the room and gave them 25,000 points for a free one- or two-night stay at a Hilton.

Upon arriving at the Embassy Suites, the McKindras presented the Hotel's letter to the clerk. Martha felt ashamed and embarrassed because she thought the clerk would believe the McKindras "were bringing dirt into his place; [that they were] the ones that[were] dirty with bed bugs." Alex also felt embarrassed due to the Embassy Suites clerk reading that the McKindras had bedbugs in their room. Upon checking into their new room, Martha showered because she "had those things crawling, all those things crawling up [her] neck and [she] felt like they were in [her] hair." Alex showered, and then Marcus showered. After the three showered, they left the Embassy Suites. Marcus went to Vandenburg. Martha and Alex returned to Barstow.

Upon arriving home, Martha showered again. Martha's bedbug bites transformed into itching, burning, blistering welts while she was in the shower. They became "red and big and puss-like." On the night of March 17, Martha was unable to sleep. Martha had approximately 30 bites on her neck, shoulder, arm, the right side of her face, and her right leg. Alex sustained bites on his arms, legs, and head. People have varied reactions to bedbug bites; 35 to 40 percent of people do not have a visible reaction to bedbug bites.

Martha had an appointment for a colonoscopy at 7:00 a.m. on March 18. Martha felt humiliated, ashamed, and dirty because the nurses who assisted her at the colonoscopy appointment saw her bedbug bites and "they kind of backed up and said, 'Wow, what's this?' " The nurses then spoke with the doctor about whether Martha could proceed with the colonoscopy, which the doctor permitted. The doctor who performed the colonoscopy advised Martha to see her primary care doctor the next day concerning the bedbug bites because she was "having a bad reaction."

Later on March 18, Martha went to her primary care doctor, Dr. Green. Dr. Green diagnosed Martha as suffering an allergic reaction to bedbug bites and prescribed her hydrocortisone and Benadryl for the itching and burning sensations. Martha felt embarrassed and humiliated at the primary care appointment because she felt the nurse and doctor might think Martha was "dirty" because she could have bedbugs in her home.

After the appointment, Martha picked up her prescriptions. The hydrocortisone cream soothed the itching and burning sensations. Alex also used the hydrocortisone

cream prescribed to Martha. After one week the redness of the bites on Martha faded but the bites remained. Martha experienced difficulty sleeping the week after the bedbug incident because she would close her eyes and "picture the bugs on [her] body." Martha explained, "And when I close my eyes and try to go to sleep, I may sleep for an hour or so and then I wake up and turn the lights on, look[ing] and trying to see if there's any bugs anywhere. I mean, for the that first—I mean, for the first year, it was hard to even try to get that out of my head, and it's still in my head." After a year, the physical scars from the bedbug bites mostly faded, but they left discoloration on Martha's leg and neck, along with "little dents."

During the first year after the bedbug incident, "Martha would wake up several times a week and [she and Alex] would go through the routine of turning the lights on, checking the bed . . . , and [they] still did not travel very much because [Martha] didn't want to travel. [Alex] did not want to travel because [they] did not want to experience anything like this again." Due to the lack of sleep, Alex was unable to go hunting. Alex enjoyed hunting, but the lack of sleep would cause him to pose a danger to other hunters. Alex and Martha were also unable to visit their children and grandchildren as often as they would like because of Martha's fear of traveling. When Alex and Martha travelled, they tried to stay at military bases because military bases have procedures for bedbug prevention and remediation. If Alex and Martha stayed at a hotel, then the first thing they did upon checking in is inspect the room for bedbugs.

Marcus did not have any visible signs of bedbug bites. Marcus "felt kind of embarrassed" checking into the Embassy Suites because he did not want the clerk to

think the McKindras "contaminated them or something like that." While at Vandenberg, for two weeks, Marcus continued checking his bed for bedbugs. Upon arriving home, the first night, Marcus checked his bed for bedbugs. After that, Marcus felt safe. Marcus did not experience difficulty sleeping. When Marcus stayed in hotels, he checked the room for bedbugs. Marcus knew that Martha was "stressed" due to the bedbug incident. Marcus was upset that Martha "ha[d] to go through this."

In 2016, Martha told her primary care doctor, that she "felt something always crawling on [her] . . . like . . . in [her] veins." The doctor told Martha "there's nothing there," and that Martha should see a psychologist. Martha saw a therapist and told the therapist that she felt "crawling things on [her] body all the time, but there was nothing there." Martha explained, "Whenever I go somewhere, I'm looking around my surroundings and paranoid, thinking there's bugs." Martha told the therapist, "I'm afraid that when we go to a hotel, I'm going to get bed bug bites again."

Dr. Richard Kaae, who has a Ph.D. in entomology/pest management opined that the population of bedbugs in the McKindras' room "was very large." Bedbugs do not need to eat every day, so the number of bedbugs that Martha saw was "about a fourth or fifth of the population." Kaae estimated there were 100 or more bedbugs living in the McKindras' hotel room. Kaae opined that bedbugs were in the room prior to the McKindras' arrival because the bedbugs were "established in that room," in that they had "trails and they ha[d] a mechanism to where they're hiding [and] to where the food is."

When inspecting for bedbugs, one removed the bed from the frame, looked at the springs, looked at the bed, and checked the headboard. In September 2017, the standard for removing bedbugs involved spraying a chemical and then vacuuming or applying heat. For example, if a room were heated to 130-degrees, it would kill the bedbugs.

In regard to the McKindras' March 2013 bedbug incident, Kaae explained, "There was a lot of confusion as to who actually did the pest control . . . . The [Hotel's] manager indicated that Eco-Lab came in the day after and did the pest control. . . . But there are no records of that happening." Instead, there was a record of Terminix coming to the Hotel two or three days after the bedbug incident and performing minimal spraying, which was not the standard in September 2017. Kaae did not fault Terminix because "pest control do[es] what they're paid for."

Kaae believed the Hotel was in a particularly vulnerable location for having bedbugs because it was located near an airport, which resulted in guests from around the world and high turnover. Kaae asserted that a hotel in such a location "should have a good bed bug control procedure." Kaae opined that the Hotel's training "was very poor" in relation to bedbugs. Kaae explained that the Hotel's manager "had no formal training," and she was responsible for training the housekeepers. Kaae explained that the housekeepers could have inspected for bedbugs on the bed, in outlets, and behind picture frames. Kaae opined, "[C]onsidering how many bed bugs were there, if they had inspected, they would have found them."

Kaae concluded it was "outrageous" that the Hotel had a reactive, rather than proactive, bedbug control policy. Kaae explained that large pest control companies

have dogs that detect bedbugs. A pest control company will bring a dog to a hotel and in two hours a dog can sniff through 40 rooms to determine if there are bedbugs, so a hotel can fix a bedbug issue before it becomes "a major problem." A dog bedbug inspection costs $900 to $1,600.

In 2016, Ashley Tinajero (Tinajero) had been the Hotel's general manager for four years, and before that she was the Hotel's director of sales for six years. The Hotel had posters about bedbugs posted in the housekeeping office. Ecolab was the Hotel's pest control company. Ecolab showed Tinajero how to check for bedbugs, but Tinajero never had formal instruction concerning bedbugs. Tinajero trained the Hotel's supervisors, such as the housekeeping supervisor. Tinajero trained the housekeeping supervisor on how to inspect rooms for bedbugs.

The Hotel's inspection process involved the housekeepers removing the bedsheets, and looking "around the perimeter of the bed" for bloodstains. Housekeepers also checked for bedbugs on the cords of the lamps and clocks, the outlets, the thermostat, the headboard, and the picture frames. Ecolab treated the Hotel once a month for insects of all sorts—not specifically for bedbugs.

Tinajero did not go to the McKindras' room after they checked-out. The Hotel's chief engineer went to the room, and confirmed bedbugs were present. Tinajero "put the room out of order in the system, and [the chief engineer] called Ecolab." Ecolab confirmed there were bedbugs. Ecolab tore open the box spring and mattress and fumigated them. Ecolab placed powder inside the outlets. After two days, all the linens and the mattresses were thrown away. Then the room was inspected a second time, and

new mattresses were installed. Tinajero did not have any paperwork reflecting Ecolab treated the McKindras' room, but did have paperwork reflecting Ecolab performed bedbug work at the Hotel a month after the McKindras' stay. Tinajero guessed that the Hotel may have used Terminex rather than Ecolab immediately after the McKindras' stay.

Tinajero recalled a prior bedbug incident at the Hotel in 2011, when she was Director of Sales. Tinajero knew of a bedbug incident that occurred in mid 2015, after the McKindras' stay at the Hotel.

C. MOTION FOR NONSUIT

At the close of the McKindras' evidence, the Hotel made a motion for nonsuit on the intentional infliction of emotional distress (IIED) cause of action and the request for punitive damages. The Hotel asserted the McKindras failed to provide evidence that the Hotel's actions or omissions were directed toward the McKindras. The Hotel asserted there was no evidence of the Hotel failing to train housekeepers so as to specifically target the McKindras for bedbug bites.

The McKindras asserted their IIED cause of action was based upon a theory of reckless disregard. The McKindras did not explain what evidence supported a theory of reckless disregard, saying, "I don't believe it's necessary to rehash all the facts that the Court is already aware of."

The trial court denied the motion. The trial court explained that the jury could base an IIED finding on the Hotel's failure to properly train its staff when it was foreseeable that the Hotel would have guests coming "from a nearby airport." The

Hotel asserted that foreseeability is not the standard for IIED, rather, conduct directed at the plaintiffs is the standard. The trial court responded, "I think your view is much too narrow. It's voluntary or volitional conduct by the hotel and they did what they did."

DISCUSSION

A. IIED

The Hotel contends the finding of intentional infliction of emotional distress is not supported by substantial evidence.

Under the substantial evidence standard, " 'our review begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, to support the findings below.' [Citation.] 'In assessing whether any substantial evidence exists, we view the record in the light most favorable to respondents, giving them the benefit of every reasonable inference and resolving all conflicts in their favor.' [Citation.] ' "[I]t is not our role to reweigh the evidence, redetermine the credibility of the witnesses, or resolve conflicts in the testimony, and we will not disturb the judgment if there is evidence to support it." ' " (*Orange Catholic Foundation v. Arvizu* (2018) 28 Cal.App.5th 283, 292.)

"The elements of the tort of intentional infliction of emotional distress are: ' "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." ' " (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.)

"Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209.) In order for conduct to be outrageous, there must be (1) a specific intent to injure, or (2) a reckless disregard of the substantial certainty of a severe emotional injury. (*Id.* at p. 210 ["Absent an intent to injure, such inaction is not the kind of 'extreme and outrageous conduct' that gives rise to liability under the 'intentional infliction of emotional distress' tort"]; *Christensen v. Superior Court*, *supra*, 54 Cal.3d at p. 903 ["substantially certain to cause extreme emotional distress"].)

It is the specific intent to harm or the reckless disregard of a substantial certainty of severe injury that distinguishes intentional infliction of emotional distress from negligent infliction of emotional distress. (*Christensen v. Superior Court*, *supra*, 54 Cal.3d at p. 904.) And it is that intent to inflict severe harm or disregard of a substantial certainty of severe harm that makes the conduct outrageous, "such that it would cause an average member of the community to immediately react in outrage." (*Gormon v. TRW, Inc.* (1994) 28 Cal.App.4th 1161, 1172.)

In regard to the element of outrageousness, the McKindras argued, during closing argument, "So let's talk about what's outrageous in this case as far as the facts in this case. No pest control inspections for bed bugs. No K9 [*sic*] inspections. No policies and procedures. They're near the airport. It's foreseeable. Obviously, there's people coming and going." We infer from the McKindras' argument that the outrageous conduct consisted of (1) failing to have proactive bedbug inspections; and (2) failing to have protocols for bedbug incidents. Also during closing argument, the

McKindras argued a theory of reckless disregard, as opposed to a theory of specific intent.

The record does not include evidence reflecting nearly all people have physical reactions to bedbug bites. The record does not include evidence reflecting nearly all people have severe emotional reactions to seeing bedbugs or being bitten by bedbugs. As a result, one cannot conclude that the Hotel disregarded a substantial certainty of the McKindras having a severe emotional reaction.

The evidence elicited at trial reflects 35 to 40 percent of people do not have a visible/physical reaction to bedbug bites. Marcus testified that he had five to 10 bedbugs in his bed and had no visible signs of bedbug bites. Marcus was not emotionally impacted by seeing the bedbugs, other than in how it distressed Martha and some embarrassment in checking in at the Embassy Suites. Given that more than one-third of people would be unaware that they were bitten by bedbugs, and one-third of the McKindras were not severely emotionally impacted by their bedbug experience, there is a lack of evidence reflecting a substantial certainty of severe emotional harm.

On direct examination, the McKindras asked Darvish, a dermatologist, "Do people react differently to bed bug bites?" Darvish responded, "Yes. Some people don't have such a difficult course, and some other patients have more difficult courses." Darvish testified that after being bitten by bedbugs "sometimes [patients] get preoccupied with the fact that they go with the idea that there's things crawling on them or insects in different places." As Darvish continued testifying he said, "Every situation is different. Some people react more intensely to the bites, some less, some people have

anxiety, some people do not, some people have severe anxiety, thoughts of bugs crawling on them, some people don't."[3]

Darvish's testimony reflects people have varied physical and emotional reactions to bedbug bites. Darvish did not testify that a high percentage of people suffer severe emotional reactions to bedbug bites, such that one could conclude the Hotel disregarded a substantial certainty of a severe emotional reaction. In sum, the McKindras failed to present evidence that a high percentage of people suffer severe emotional reactions to the sight of bedbugs or to being bitten by bedbugs. The McKindras instead offered evidence supporting a finding that people have widely varied physical and emotional reactions to seeing or being bitten by bedbugs. Because the McKindras failed to provide evidence that a high percentage of people suffer severe emotional reactions to the sight of bedbugs or to being bitten by bedbugs, there is not substantial evidence that the Hotel disregarded a substantial certainty of the McKindras having a severe emotional reaction.

Further, in regard to the outrageous nature of the Hotel's conduct, the McKindras failed to provide evidence of standard hotel bedbug procedures in March 2013. Instead, the McKindras provided expert testimony concerning bedbug inspection and extermination options available in September 2017. (*Velasquez v. Centrome, Inc.* (2015) 233 Cal.App.4th 1191, 1216 ["the standard of care in the food flavoring industry

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[3] During opening statements, the McKindras asserted, "Evidence is going to show that bed bugs, like any other insect, affect people differently. Some people, they say 30 percent of people who are exposed to bed bugs show no visible signs of bites at all. . . . It also shows that it causes severe anxiety and sleeplessness for some people."

at the time"]; *Spann v. Irwin Memorial Blood Centers* (1995) 34 Cal.App.4th 644, 655 ["He did not state what the industry was actually doing at the time"].)

For example, Kaae testified, in September 2017, "[T]he standard nowadays is you have to use something in addition to a spray, such as vacuuming or heat or some other procedure. That standard is pretty well set now." Kaae discussed the "standard nowadays" and said it "is pretty well set now." Kaae described a standard that has evolved. Kaae's testimony that the standard "is pretty well set now" suggests that, at some point, it was not well set. It is unclear from Kaae's testimony what the standard was in March 2013, since the standard has changed over time. Because the standard has evolved, and Kaae focused on the inspection and extermination options available in September 2017, it is unknown what bedbug procedures were utilized by hotels in March 2013, such that one could determine if the procedures utilized by the Hotel exceeded the bounds of civil society.

When Kaae criticized the Hotel's remedy for the bedbugs in the McKindras' room, he again spoke of what the Hotel should have done per September 2017 standards. Kaae said, "Their spray was minimal. They used chemicals. That isn't the standard nowadays. The standard nowadays, as I mentioned, is you use chemicals and you use something else. You use heat or steaming or vacuuming or use all of that." Kaae did not explain what the hotel industry's standard of care for detecting and exterminating bedbugs was in March 2013; instead, he spoke of the standard "nowadays," i.e., in September 2017.

Further, in regard to the canine inspectors, Kaae testified, "Yeah, that's a fairly new process. Nowadays, they train dogs to sniff out bed bugs." Kaae failed to explain if canine bedbug inspectors were widely used and available in 2013, such that it would have exceeded the bounds of civil society for the Hotel to have not utilized such a service. Kaae's September 2017 testimony that the canine service was "fairly new" indicates that it likely did not constitute an industry standard in 2013.

In sum, (1) not only does the record not reflect a substantial certainty of a severe emotional reaction, it reflects the opposite—that one cannot gauge how people will react to bedbugs because responses are so varied; and (2) the record does not reveal whether proactive bedbug inspections were an industry standard in March 2013 such that it would have exceeded all bounds of civil society to not have proactive inspections. Due to the lack of evidence in the record, there is not substantial evidence that the Hotel's omissions exceeded the bounds of civil society.

The McKindras assert there is substantial evidence that the Hotel's omissions were outrageous because the Hotel "was aware that bedbugs presented a serious pest-control problem that required careful daily inspection of its rooms, but it had no bedbug prevention program." The McKindras provide no record citations to support their assertion that, in March 2013, daily bedbug inspections were an industry standard, such that it exceeded the bounds of civil society for the Hotel not to conduct such inspections. Due to the McKindras' failure to support their assertion with references to the record, we find their assertion to be unpersuasive. Accordingly, we will reverse the IIED verdict due to a lack of substantial evidence.

B. PUNITIVE DAMAGES

1. *REVERSAL OF THE IIED VERDICT*

The Hotel contends that if the IIED verdict is reversed, then the punitive damages award must also be reversed.

"Because punitive damages are imposed 'for the sake of example and by way of punishing the defendant' [citation], they are typically awarded for intentional torts such as . . . intentional infliction of emotional distress . . . . [Citation.] . . . [¶] On the other hand, cases involving unintentional torts are far fewer and the courts have had to consider various factors in determining whether the defendant's conduct was despicable. Thus, punitive damage awards have been reversed where the defendant's conduct was merely in bad faith and overzealous." (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1212.)

Question No. 6 of the jury's verdict form asked, "If you find that [the Hotel] is liable for Intentional Infliction of Emotional Distress as to Martha McKindra, has she proved by clear and convincing evidence that [the Hotel] engaged in conduct constituting malice, oppression, or fraud by one or more [of] its officers, directors, or managing agents of [*sic*] acting on behalf of [the Hotel]?" The jury marked the line under "Yes." Question No. 7 asked the jury, "What amount of punitive damages, if any, do you award Martha McKindra?" The jury wrote "$50,000." (All caps. omitted.)

Question No. 6 reflects that the punitive damage award was linked to the IIED verdict, in that the punitive damage award was explicitly conditioned on a finding of IIED. Because the IIED verdict is being reversed due to a lack of substantial evidence,

the punitive damage award that was conditioned on the IIED finding must also be reversed.

The McKindras assert, "No distinct damages were sought or awarded based on the intentional-infliction-of-emotional distress (IIED) claim. Rather, the trial court used that claim as a predicate to determine whether the McKindras' showing was sufficient to pursue a punitive-damage award." It appears the McKindras have conceded that the IIED verdict was a condition of the punitive damages award because they acknowledge the IIED verdict was "a predicate" to the punitive damage award. Given the McKindras' concession, we conclude that the reversal of the IIED verdict results in the reversal of the punitive damages award.

2. *REMAINING CONTENTIONS*

The Hotel contends the punitive damages award should be reversed because (1) it is not supported by substantial evidence, and (2) the trial court erred by resurrecting the punitive damages claim after striking it without prejudice. Because we have concluded the punitive damages award must be reversed, we conclude these remaining contentions are moot. (*Vernon v. State of California* (2004) 116 Cal.App.4th 114, 120 [issue is moot when no effective relief can be granted].)

C. EXPERT TESTIMONY

1. *PROCEDURAL HISTORY*

Darvish, a dermatologist, testified that he examined Martha once. The examination occurred on the same day he testified at trial. While testifying, Darvish said that he reviewed notes made by Martha's therapist. The Hotel, citing *People v.*

Sanchez (2016) 63 Cal.4th 665 (*Sanchez*), objected to Darvish reading the therapist's notes to the jury. The trial court overruled the objection explaining "the authority you cited is a criminal case, and we're in a civil matter." Darvish proceeded to read the therapist's notes aloud.

Darvish said, "The notes here are 'high-functioning, retired teacher. Attacked by bed bugs in hotel in 2013, had bad allergic reaction. Since then has become preoccupied with aversion to almost all kinds of bugs. Anxious and tense about it. Spends inordinate amount of time to trying to [*sic*] prevent contact with them. Fears contact whenever she feels sensation on her skin . . . .' [¶] . . . [¶] . . . Used to enjoy travel a great deal and now does not, avoids it a lot due to having to stay in hotels.' "

Darvish continued reading aloud the therapist's notes concerning the therapist's recommendations. Davish said, "The notes here, 'prescribed breathing exercises and progressive relaxation, and then visualization of positive hotel experiences. [Cognitive behavioral therapy] to address prospective and attitude towards bugs. Encouraged reframing, cognitive shifting to stop momentum of intrusive thought patterns.' "

2. *ANALYSIS*

The Hotel contends the trial court erred by permitting Darvish to testify to case-specific hearsay in violation of *Sanchez, supra,* 63 Cal.4th at page 676. The McKindras concede the trial court erred, but assert the error was harmless.

In *Sanchez*, our Supreme Court explained, "[A]n expert has traditionally been precluded from relating case-specific facts about which the expert has no independent knowledge. Case-specific facts are those relating to the particular events and

participants alleged to have been involved in the case being tried. Generally, parties try to establish the facts on which their theory of the case depends by calling witnesses with personal knowledge of those case-specific facts. An expert may then testify about more generalized information to help jurors understand the significance of those case-specific facts. An expert is also allowed to give an opinion about what those facts may mean. The expert is generally not permitted, however, to supply case-specific facts about which he has no personal knowledge." (*Sanchez*, *supra,* 63 Cal.4th at p. 676.) The foregoing law set forth in *Sanchez* applies in civil cases. (*People ex rel. Reisig v. Acuna* (2017) 9 Cal.App.5th 1, 10.)

Darvish, a dermatologist, read Martha's therapist's notes aloud to the jury. That portion of Darvish's testimony consisted of hearsay of which Darvish had no independent knowledge. The hearsay was case-specific, in that it was explicitly about the therapist's observations and treatment of Martha. We conclude the trial court erred by permitting Darvish "to supply case-specific facts about which he ha[d] no personal knowledge." (*Sanchez*, *supra*, 63 Cal.4th at p. 676.)

" 'We review the erroneous admission of expert testimony under the state standard of prejudice.' [Citation.] The standard for prejudice applicable to state law error in admitting hearsay evidence is whether it is reasonably probable the appellant would have obtained a more favorable result absent the error." (*Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1286.)

The McKindras assert the trial court's error was harmless because Darvish's hearsay testimony was duplicative of Martha's testimony. Martha testified that she

spoke to a psychologist. Martha said she told the psychologist that she felt "crawling things on [her] body all the time" and that "whenever [she] go[es] somewhere, [she is] looking around [her] surroundings and paranoid, thinking there's bugs." Martha also explained that the psychologist "gave [her] exercises" such as thinking of her mother touching her when she feels the sensation of a bug crawling on her.

Martha's testimony is cumulative of Darvish's hearsay testimony in that they both discussed Martha's meeting with the psychologist. Martha's testimony is not cumulative of Darvish's hearsay testimony in that Darvish's testimony provided medical confirmation of Martha's testimony. (See *People v. Powell* (2018) 6 Cal.5th 136, 177 [counsel intended "to use the doctor to enhance defendant's credibility"]; see also *People v. Ward* (2005) 36 Cal.4th 186, 211 ["the point of [the expert's] explanation is to support another witness's credibility"]; see also *People v. Roscoe* (1985) 168 Cal.App.3d 1093, 1099 [expert testimony is admissible "to support the victim's credibility"].)

The psychologist's records read by Darvish provide, " 'Anxious and tense about it.' " The psychologist's records can be understood as providing the psychologist's observation that Martha was suffering from anxiety. That medical confirmation of Martha's testimony is not duplicative of Martha's testimony; rather, it is medical validation and confirmation of Martha's testimony regarding her anxiety.

Further, the jury submitted the following question to the trial court during deliberations: " 'Can we have a copy of [Martha's] therapy records from 2016?' " The Hotel objected to giving the therapy records to the jury because the records were not

admitted into evidence. The trial court responded to the jury: " 'No, only admitted exhibits can be reviewed.' " The jury's question reflects that, during deliberations, it discussed Darvish's testimony concerning the psychologist's records.

The McKindras do not direct this court to other medical records or medical testimony in the record wherein medical confirmation of Martha's diagnosis was provided to support Martha's testimony. The McKindras dispute that the medical records read by Darvish included the psychologist's diagnosis of Martha. The psychologist's records read, "Anxious and tense about it." One could reasonably understand that note to be the psychologist's observation and diagnosis that Martha was tense and suffering from anxiety. Because Darvish's hearsay testimony can be understood as providing medical confirmation of Martha's testimony, it is reasonably probable that the Hotel would have obtained a more favorable result absent the error. If Martha testified about her anxiety without any medical confirmation, the jury may not have been as persuaded by her story. Therefore, it is reasonably probable the jury would not have awarded Martha the same amount of damages absent medical confirmation of her condition. In sum, the trial court's error was prejudicial. Therefore, we will reverse the damage award as it pertains to Martha.

Further, we will reverse the damages as they pertain to Alex because Alex's award of damages was inextricably linked with Martha's claim of suffering. Alex testified that Martha suffered embarrassment and anxiety after being bitten. Alex was asked how he felt about Martha's feelings of embarrassment and anxiety. Alex said, "Terrible. Again, I couldn't protect her. I felt humiliated because all I wanted to do

was protect her. That's all I wanted to do." Alex further testified that Martha had difficulty sleeping after being bitten. Alex said, "And for the first year, several times a week we went through that episode of the lights coming on, doing inspections, and she would wake up and I would rub her back. It's something you never want to go through." Alex was asked how that made him feel. Alex responded, "It made me feel terrible. It cause a lot of stress but I had to deal with it." Alex described missing hunting trips because it is unsafe to hunt when tired.

During closing argument, the McKindras argued, "[B]ecause of the trauma she went through, had a direct impact on all the trauma that he's going through because they're together. They're a unit. And if your wife is hurting, you're hurting. And that's the way it is. If your wife is not healthy, you're not feeling healthy. If your wife is not emotionally good, you're not you're not—how is your day knowing—how is your day? How do you go through your day the same way knowing that your wife is no[t] good? You don't know. Does it have an impact? If you love your wife and if you care about her and it's important to you, then it obviously affects you."

Alex testified that he suffered due to witnessing Martha's suffering. The McKindras argued that Alex suffered because Martha suffered. Because the McKindras presented evidence and argument linking Alex's suffering to Martha's suffering, the improper expert testimony about Martha's suffering must also result in the reversal of Alex's award of damages.

D. DEPOSITION TESTIMONY

1. *PROCEDURAL HISTORY*

The Hotel moved in limine "to exclude evidence of other instances involving bed bugs" on the basis that the Hotel admitted negligence and therefore the evidence was irrelevant and unduly prejudicial. (Evid. Code, §§ 210 [relevance] & 352.) The trial court said, "[S]ince liability is not admitted and remains contested with the intentional infliction of emotional distress, the relevant and probative value would remain." The court said its tentative ruling was to deny the Hotel's motion.

Prior to opening statements, the court addressed the McKindras' request to use Tinajero's deposition testimony during trial, rather than have her testify. In Tinajero's deposition, she testified about two other incidents of bedbugs at the Hotel. The Hotel said it agreed to the use of Tinajero's deposition testimony, provided it could still raise objections. The trial court responded, "If there has been no objection to the deposition transcript at the time that it was taken, and there was counsel representing the deponent, that objection would be deemed waived."

The Hotel argued that it was permitted to raise relevancy objections, even if it did not object on relevancy grounds during the deposition. The trial court responded, "[W]ith the respect [*sic*] to the deposition transcripts, all objections not indicated in the deposition would be deemed waived regardless of the grounds."

During trial, prior to the McKindras reading Tinajero's deposition testimony to the jury, the following conversation occurred outside the presence of the jury:

"[The Hotel]: Your Honor, I apologize. I know we have kind of talked about this before.

"The Court: Make your record.

"[The Hotel]: Just on the record I want to preserve the objection. I am going to object to the reading of transcripts on the basis I am not going to be allowed to object to any of the questions that are going to be read from the transcript. I feel it is my right to make those objections, but I know the feeling of the court.

"The Court: You are correct, we have discussed this at length with regards to the Code of Civil Procedure section that allows a party to read in deposition transcripts for any purpose together with the court discussing the aspect of any objections that were not raised at the time of the deposition were deemed waived and if there is a live witness, you are free and have preserved every one of their objections to live testimony.

"The Hotel: All right. Thank you."

2. *ANALYSIS*

The Hotel contends the trial court erred by not permitting the Hotel to raise objections during the reading of Tinajero's deposition testimony. (§ 2025.460, subd. (c).) Specifically, the Hotel wanted to object to Tinajero's testimony concerning other bedbug incidents at the Hotel.

The McKindras contend the Hotel forfeited the foregoing contention by failing to object in the trial court. During pretrial motions, the Hotel objected to the introduction of other bedbug incidents. The Hotel did not obtain a final ruling on that objection. During trial, the Hotel objected to the trial court's denial of the Hotel's right to raise

objections during the reading of Tinajero's deposition testimony. (§ 2025.460, subd. (c).) Given the Hotel's repeated objections, we conclude the issue was not forfeited.

When deposition testimony is read at trial, one cannot object "to the form of any question or answer" because such objections are forfeited by the failure to raise them at the deposition. (§ 2025.460, subd. (b).) Such forfeiture is understandable because the form of the questions and answers cannot be repaired at trial due to the lack of a live witness. However, "[o]bjections . . . to the relevancy, materiality, or admissibility at trial of the testimony . . . are not waived by failure to make them before or during the deposition." (§ 2025.460, subd. (c).)

The Hotel should have been permitted to object to the relevancy, materiality, or admissibility of Tinajero's deposition testimony. (Code Civ. Proc., § 2025.460, subd. (c).) The trial court erred by denying the Hotel the opportunity to present its objections during trial. We will not examine whether the trial court's error was prejudicial because evidence of other bedbug incidents is relevant to IIED and punitive damages and we have already reversed the verdict and award pertaining to those issues. (See Civ. Code, § 3294, subd. (a) [punitive damages may be proven by evidence of malice].) Because we can offer the Hotel no further relief on the issues of IIED and punitive damages, we conclude the issue of prejudice is moot. (*Vernon v. State of California*, *supra*, 116 Cal.App.4th at p. 120 [issue is moot when no effective relief can be granted].)

E. CLOSING ARGUMENT

1. *PROCEDURAL HISTORY*

The following are excerpts from the McKindras' closing arguments:

- "First, what's going to happen is you are going to go unsuspectingly into a hotel room, you are going to sleep there. You are going to wake up with bugs biting you all over. You are going to wake up with your own blood all over the sheets. You are going to see your husband in the same situation."
- "Why [did the Hotel] send a guy who's never tried a case in his whole life? Who doesn't know the law. Who doesn't know how to interpret the law?"
- "When [Alex] was fighting [in] Desert Storm people were dying around him, bombs going off. [The Hotel's attorney] was probably still in grade school, playing handball."
- "Because that's what [the Hotel's attorney] learned in law school probably a couple years ago."
- "Marcus McKindra, a young man who was the backbone of this country, who has come—who has served his country, who has followed in the footsteps of his father, defending our right to be here."
- "You don't find a more honorable person on—in this country. What [Martha] does enables people like Alex to go and fight wars for us. To train our soldiers so they don't die when they go to war. He's been deployed 100, 200 times to every place on the planet."
- "I mean, when you think of this concept, you spend 37 years—34 years defending this country, so we can have a democracy. [¶] . . . [W]hen I saw the Colonel

[(Alex)] on that stand and he talked—I asked about the medals, the Bronze Star. And he said, you know what, soldiers really don't care about the medals."

- "Well, I'll read it to you. This is basically what it says—and it's called, A Military Wife's Prayer. It says, 'Give me the greatness of heart to see, the difference between duty and his love for me. Give me the understanding so that I may know when duty calls him, he must go. Give me a task to do each day to fill the time when he's away.'"

- "So just like I said in the beginning, he carried the flag for me and for us. Now I have to carry the flag for him."

- "How proud are we to have folks like this in our country. To spend his whole life, now he's here fighting for his wife and his family to protect the community and keep it safe. That's the Soldier's Creed. That's what he lives by. He is an American soldier. He's a warrior and a member of a team. He serves the people of the United States and lives the Army values. 'I will always place the mission first. I will never accept defeat. I will never quit. I will never leave fallen comrades.' "

- "This is Hilton worldwide. Worldwide. 4,000 or something hotels and resorts. And there's not a policy or procedure in place, even after they know. Even after they know, I'm sure, that this is multiple claims [*sic*] that are coming out of this place. Intolerable in a civilized society."

- "These are companies that make millions of dollars. So if you don't send a message loud—and what it says here on this, it says Big Tobacco, it says Takata Airbags."

- "This is the recordkeeping system at that place, the Hilton hotel. Multi, multi, millions of dollars that they are generating a year and this is their recordkeeping system."

2. *ANALYSIS*

The Hotel contends the McKindras' counsel committed misconduct and improperly inflamed the jury's passions during closing argument by (1) presenting a Golden Rule argument, i.e., inviting the jurors to place themselves in the McKindras' situation; (2) disparaging the Hotel's trial attorney; (3) arguing that Hilton Worldwide, as opposed to the Hotel, which is a franchisee, was the defendant; and (4) contrasting Hilton Worldwide with the McKindras' military service.

In order to contend on appeal that a respondent's trial counsel committed misconduct, the appellant must have objected in the trial court and requested an admonition. If an objection was not raised and an admonition was not requested, then the matter is forfeited on appeal. (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 509.)

The Hotel did not object to the McKindras' closing arguments while in the trial court. The Hotel asserts it could not object because (1) it was the Hotel's trial attorney's first trial, and (2) objections would have been futile given the trial court's ruling barring objections to Tinajero's deposition testimony. As to it being counsel's first trial, that is not an excuse for imposition of a lesser standard of performance. As is often noted, self-represented litigants are not provided a lesser standard of performance; they are held to same standards as attorneys. (*Kobayashi v. Superior Court* (2009) 175

Cal.App.4th 536, 543.) If we do not provide self-represented litigants with a lesser standard of performance, then we will not provide one to attorneys who are new to jury trials. Accordingly, the argument that it was the Hotel's trial counsel's first jury trial does not excuse his failure to object.

In regard to objections being futile, adverse rulings concerning Tinajero's deposition testimony did not mean an objection during closing argument would have been futile. The trial court made an error in regard to Tinajero's deposition testimony, but there is nothing indicating the trial court refused to listen to the Hotel's concerns or was predisposed to ruling against the Hotel.

Moreover, there was a recess during the McKindras' closing argument, during which the Hotel could have spoken to the trial court, on the record, about the McKindras' closing argument. We also note that, prior to the Hotel beginning its closing argument it raised "a quick housekeeping matter" concerning exhibit No. 8. If the Hotel's trial counsel felt an objection would have been futile, it could have, at the very least, made a record of his concerns during the various breaks that occurred in the closing arguments. We conclude the Hotel forfeited the issue of closing argument misconduct because the Hotel's trial counsel failed to object and failed to make any record of his concerns. (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1411-1412 ["A party ordinarily cannot complain on appeal of attorney misconduct at trial unless the party timely objected to the misconduct and requested that the jury be admonished"].)

The Hotel contends that, even without an objection, an appellate court cannot ignore flagrant and repeated acts of attorney misconduct. The purpose of the forfeiture

rule, set forth *ante,* is that counsel cannot sit by in the trial court, doing nothing, and then seek a reversal on appeal. Counsel must object in the trial court so that the trial court may attempt to remedy the issue to "avoid the necessity of a retrial; a timely objection may prevent further misconduct, and an admonition to the jury to disregard the offending matter may eliminate the potential prejudice." (*Rayii v. Gatica, supra,* 218 Cal.App.4th at p. 1412.)

If the McKindras' trial attorney's alleged misconduct was repetitious, then it was incumbent on the Hotel's attorney to object or call the misconduct to the trial court's attention during a recess or before arguments started the following day so as to stop the misconduct. The misconduct might not have been repeated had the Hotel objected in a timely manner. The Hotel's decision to sit by and permit the alleged misconduct without objection or discussion forfeits the issue on appeal.

F. CUMULATIVE ERROR

The Hotel contends the trial court's multiple errors, combined with the McKindras' trial counsel inflaming the jury's passions during closing arguments, resulted in an award of damages that is disproportionate to the injuries suffered.

We have reversed the damages that were relevant to the trial court's errors, i.e., the punitive damages and the damages awarded to Martha and Alex. We have concluded that the Hotel forfeited the argument concerning misconduct during closing argument. Therefore, the Hotel would need to explain how the trial court's errors are relevant to the $2,500 in damages awarded to Marcus, i.e., the remaining piece of the jury's verdict. The Hotel fails to present such an argument. The Hotel provides the

general assertion that "half a million dollars is excessive given the facts." Because the Hotel fails to explain how the trial court's errors were relevant to the $2,500 in damages awarded to Marcus, we will not reverse that award. (See *Central Valley Gas Storage, LLC v. Southam* (2017) 11 Cal.App.5th 686, 694-695 [when a point is asserted without meaningful argument, it " 'requires no discussion by the reviewing court' "].)

G. ATTORNEY FEES

1. *PROCEDURAL HISTORY*

The McKindras moved for an award of attorney fees. (§ 1021.5.) The McKindras asserted their lawsuit served the "[p]ublic's [i]nterest to be provided a [h]otel room that that [*sic*] is free from dangers (i.e., [b]edbugs)." The Hotel contended the McKindras' lawsuit did not involve enforcement of a public right. The Hotel argued that this was a standard personal injury case, and if attorney fees were awarded in this case then they would be awarded in "every trip-and-fall claim involving a public sidewalk or even a lawsuit for injuries from an auto accident since one negligent driver could harm multiple people." The trial court found the McKindras' lawsuit served "a public benefit." The trial court awarded the McKindras $95,250 in attorney fees.

2. *ANALYSIS*

The Hotel contends the trial court erred by awarding attorney fees to the McKindras. (§ 1021.5.)

"Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether

pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any." (§ 1021.5.)

The foregoing third element of the statute "is met if the cost of the claimant's legal victory transcends his personal interest—that is, when the burden of the litigation was disproportionate to the plaintiff's individual stake in the matter." (*Roybal v. Governing Bd. of Salinas City Elementary School Dist.* (2008) 159 Cal.App.4th 1143, 1151.)

"The purpose of an award of attorneys fees pursuant to section 1021.5, is to encourage suits that enforce 'common interests of significant societal importance, but which do not involve any individual's financial interest to the extent necessary to encourage private litigation to enforce the right. [Citation.] To encourage such suits, attorneys fees are awarded when a significant public benefit is conferred through litigation pursued by one whose personal stake is insufficient to otherwise encourage the action. [Citation.] Section 1021.5 was not designed as a method for rewarding litigants motivated by their own pecuniary interests who only coincidentally protect the public interest.' " (*Satrap v. Pacific Gas & Electric Co.* (1996) 42 Cal.App.4th 72, 77.) We apply the abuse of discretion standard of review. (*Ibid.*)

The financial burden on the McKindras was not disproportionate to their interest in the matter. The McKindras sued because they suffered injuries. During closing

arguments, the McKindras said to the jury, "But when you lose the enjoyment of life, and I think about this lady and everything she's been through for her life for this country and all she wanted to do was retire and be with her husband and travel and do all these nice things, and now she's—she's lost that enjoyment to do that. That's a major loss. That is a major, major loss."

The McKindras continued, arguing, "So disfigurement, like I told you, we all know what that—permanent change to somebody's body. She's got holes in her neck. She got scars on her legs. Inconvenience. Physical impairment. I put on this—you know, the grief, anxiety, and humiliation, and shame, and all these things. You know, because grief is different. Feeling of sadness and anxiety is different. And all of these things are different. And she's experienced them all. She we got to try to make her whole as best we can. And this is—because of our system of justice, this is how we do it. [¶] So the number on past is 760 for her. For future economic damages, I also put the same chart together for you good folks. And that's her number. 510 in future."

The McKindras were motivated by their personal interests, as evinced by their closing argument requesting an award of millions of dollars for their personal suffering. The fact that some hotels might increase their bedbug prevention and remediation procedures due to this lawsuit is coincidental. The trial court abused its discretion in concluding the McKindras' financial burden was disproportionate to their personal interest in the lawsuit.

The McKindras' contend that the value of the case should be set by the Hotel's settlement offers. The Hotel made two settlement offers: (1) $6,000, and (2) $10,000.

The McKindras assert, "Under that valuation, it was proper for the trial court to grant the McKindras' request for a fee award." The McKindras provide no law to support their assertion that a disproportionate financial burden exists when a damage award exceeds a prior settlement offer. Due to the McKindras' failure to support their assertion with law, we find their argument to be unpersuasive. We will reverse the award of attorney fees.

DISPOSITION

(1) The intentional infliction of emotional distress verdict; (2) the $375,000 award of damages for Martha McKindra; (3) the $50,000 award of punitive damages for Martha McKindra; (4) the $119,000 award of damages for Alex McKindra; and (5) the $95,250 award of attorney fees (§ 1021.5) are reversed. In all other respects, the judgment is affirmed. The Hotel is awarded its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3).)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
Acting P. J.

We concur:

CODRINGTON
J.

SLOUGH
J.