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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Calaveras)

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JOHN EVILSIZOR,  
  
Plaintiff and Appellant,  
  
v.  
  
CALAVERAS LUMBER COMPANY,  
  
Defendant and Respondent.

C064654  
  
(Super. Ct. No.  
CV31420)

Plaintiff John Evilsizor hired contractor Scott Hunton to remove and replace his aging decks. Hunton installed "SmartDeck" decking, which proved defective. Plaintiff sued, alleging the defective material essentially tore apart the substructure of his decking, which he subsequently paid contractor Rick Lopes over \$113,000 to completely rebuild. Hunton and US Plastic Lumber (US Plastic), the SmartDeck manufacturer, declared bankruptcy. An intermediate distributor, California Cascade (Cascade), settled on the eve of trial. The jury awarded plaintiff \$6,275.82--the purchase price of the

decking--against the local lumber company that sold it, defendant Calaveras Lumber Company.

On appeal, plaintiff heads eight contentions of error. Generally, plaintiff fails in his duty, as the appellant, to make coherent, developed prejudice arguments, and to view the evidence in the light favorable to the verdict.<sup>1</sup> As to the claims we address substantively, each lacks merit. Accordingly, we shall affirm the judgment.<sup>2</sup>

#### **FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff, a real estate broker since 1975, and manager and part owner of about a thousand apartment units, lived in Danville but also had a house in Arnold.<sup>3</sup> By 2002, the decking at the Arnold property was splintering. His son-in-law, Ken Vonderach, helped him get a bid from Hunton to do some "substructure" work and replace the front and rear decks, the

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<sup>1</sup> We have explained in detail the duty of the parties to an appeal to assist this court by fairly stating the evidence with respect to the appropriate standard of review. (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 113-114.) A party must fairly set forth the evidence and the failure to do so will forfeit all evidentiary claims. (See *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 101-102 (*Paterno*).)

<sup>2</sup> Although not explained by plaintiff's late-filed appealability statement, we find the appeal is timely because the time to appeal was extended until 30 days after plaintiff's new trial motion was denied by operation of law. (Code Civ. Proc., § 660; Cal. Rules of Court, rule 8.108(b)(1)(B).)

<sup>3</sup> Defendant disputes in passing whether plaintiff owned the Arnold home, an issue resolved adversely to defendant below. We decline to address the issue.

staircases and "any of the existing redwood tread area that you'd be walking on," and plaintiff chose brown decking, to match the house. Plaintiff claimed defendant's "decking specialist" recommended SmartDeck over Trex brand. Plaintiff further claimed that Hunton began work on the deck at the end of 2003 or beginning of 2004.<sup>4</sup>

When Hunton removed the old decking, he revealed "rotted or suspect" substructural components, which he replaced. Hunton did not replace the *front deck*; that was done by plaintiff and others in 2004, also with SmartDeck, most of which was bought from defendant in 2004.

When plaintiff first noticed problems with the decking, he suspected Hunton had not properly leveled the substructure, and although Hunton returned and made some minor adjustments, the problems grew, including discoloration and warping of the decking, with some boards cracking and popping up. By February 2005, plaintiff had sued Hunton. Later in 2005, plaintiff spoke with defendant's general manager, Eileen Hoover, who said defendant had had "isolated incidents" with brown SmartDeck, the manufacturer had gone bankrupt, and she would offer replacement decking if plaintiff paid the difference in price, but there was no offer to compensate for the labor or alleged substructural damage.

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<sup>4</sup> The witnesses' testimony as to when the decking was purchased and when the work on the deck was started and completed differed greatly. We merely relate here the various versions from testimony elicited at trial.

It was not until 2008 that Lopes began replacing the decking; plaintiff attributed the delay to "Lawyers and the court system." Lopes charged \$113,065.44, which included substantial repairs to the substructure, but not pickets and railings and not replacing a staircase between deck levels. Plaintiff sought damages for lost use from 2004 to 2008 of \$100 per month, as well as compensation for the amount he paid Lopes.

Lonnie Haughton was a construction and building codes consultant, and a licensed general contractor. He had extensive experience with decking. He had taken laboratory and online courses on wood identification and had published articles on wood construction products. He had experience with composite decking made of wood and plastic. The trial court allowed Haughton to testify as an expert on construction, code issues, installation issues, and "the thermal expansion of the SmartDeck product, and the effect of the expansion on Mr. Evilsizor's home."

Haughton inspected the decking on May 13, 2007. The front deck had some damage, "but nothing dramatic." The rear deck showed the "most dramatic decking failure I've ever seen." There were "some construction errors, but the magnitude of the decking failure" was caused by the SmartDeck decking, which "was pushing and damaging" the railing and causing structural damage by expansion. Haughton opined SmartDeck was not approved for use in California. He also testified about a moisture experiment he conducted on some SmartDeck samples, over a period of months, confirming the product swelled "unnaturally wide"

which he opined caused damage to the substructure, specifically by pulling beams apart, rotating a joist, and pulling a ledger off the wall, which meant the entire structure had loosened irreparably. Haughton summarized his opinion, stating "the cause of the movement and damage to the . . . substructure was swelling of SmartDeck boards due to water absorption."

Although Haughton opined certain construction errors by Hunton were "incidental," he also testified that one post was not properly supported, "a major construction error." Hunton did not properly use the "Shadoc Track" system for attaching the decking, the decking did not have "mid-span blocking," and joist hangers were missing. But Haughton believed the improper decking installation may have resulted in less structural damage, because when deck boards "popped" out, they relieved pressure. Haughton testified Hunton did not obtain a permit, and he installed three posts "into the dirt" in violation of code.<sup>5</sup> Had the decking been replaced earlier, less structural damage would have occurred. The front deck, built with materials purchased in 2004, did not have the same "deformities" as the rear deck. The deck Lopes built was superior, in that it was "engineered" and used pressure-treated wood for the substructure and clear heart redwood.

Lopes testified he had been a general contractor for 16 years and had been a union carpenter for 17 years before then,

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<sup>5</sup> Lopes testified all of the posts were on concrete piers, but some of the piers had been obscured by dirt.

having grown up in the construction business. He had been building residential decks for 30 years. He inspected the decking in July 2007, but it was not until he removed the decking that he could see the substructural damage, which included joists pulled away from the ledger, and the ledger pulled away from the wall, which "amazed" Lopes. This required a complete rebuild, which was done with clear heart redwood, which is more expensive than composite decking, and with pressure-treated lumber, some in larger sizes and in different places than previously. Further, the job had to be engineered, and required a building permit. The result was a larger deck, but it lacked two sets of stairs. Contrary to plaintiff's testimony, Lopes testified he also replaced the front deck.

Gregory Cole, a construction consultant and estimator who worked for the same company as Haughton, testified that he reached an estimate of \$95,324, lower than Lopes' estimate, but he explained that Lopes had to stop work and rebid once he tore the decking off, including obtaining engineered plans, and that increased Lopes's charges, which were reasonable. Cole had never been to the property, but relied on photographs, a video, and the depositions of two contractors who also provided estimates. The lifespan of the deck Lopes built would be 20 to 30 years.

Richard Rose, one of Cascade's owners, testified defendant was Cascade's largest purchaser of SmartDeck. In August 2002, defendant sent back a load of brown SmartDeck, and the paperwork indicated "poor quality" as the reason, and there were sporadic

claims about a color variation, until Cascade stopped carrying it in May 2003, due to numerous complaints, and the decking was eventually recalled.

Eileen Hoover, defendant's general manager, testified that the brown *SmartDeck* had some color matching problems, but defendant did not learn it was a defective product until 2003. Two homeowners were offered replacement material and labor costs by the manufacturer, through Cascade, but the manufacturer went bankrupt in 2004. The decking would swell and split. Although Hoover knew of "isolated" problems with a new formula used to make the decking, she had been assured the manufacturer had changed back to the prior formula, and she had no reason to doubt that. She had heard the company had replaced hardwood in the formula with soft yellow pine, then switched back.

After Hunton reported a claim, Hoover and Michael Fullaway went to plaintiff's house on May 6, 2005. The front deck looked fine, but the rear deck revealed defective decking, to the point where it was unsafe. In a letter she sent on May 18, 2005, Hoover offered to replace the defective brown *SmartDeck* with gray *SmartDeck*, because brown *SmartDeck* was no longer available, or with the more-expensive Trex, if plaintiff would pay the difference in cost, and she proposed to credit plaintiff \$6,275.82. The offer included deck screws and a disposal fee for the old material, but did not cover labor costs, because the

manufacturer had filed bankruptcy.<sup>6</sup> This was the same offer defendant made to other customers. Hoover also advised Hunton to see if his insurance would cover the labor, but Hunton declared bankruptcy.

Fullaway, the owner and son of defendant's founder, heard about color match problems with SmartDeck in 2002, but did not hear of more serious problems until spring or summer of 2003, which began as reports of minor cracking. About 30 to 35 claims were made. Plaintiff's deck was different: "I have never seen a deck like Mr. Evilsizor's. Most people called and said the color's a little off, there's minor cracking, there's a little bit of swelling in some places. We went out to the deck and said okay, got a bad decking, we'll fix it. I've never seen anything like that. Nobody left a deck to this extent." He did not see the deck until May 2005, after Hunton called about it. The front deck was fine. In part, the problem with the rear deck was deficient construction by Hunton. Defendant did not employ a "decking specialist."<sup>7</sup> As a local company, defendant would never knowingly sell defective goods, and did not do so in this case. Lopes had told Fullaway the SmartDeck had not caused plaintiff's structural damage.

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<sup>6</sup> Hoover included the costs for labor in a claim she submitted in US Plastic's bankruptcy, but testified she acted without advice of counsel when doing so.

<sup>7</sup> Diane Winsby, defendant's contractor sales manager, also testified defendant employed no decking specialists.

A videotape of Hunton's deposition was played for the jury. In part, Hunton stated he had recommended SmartDeck to Evilsizor. He, too, had never seen decking fail so dramatically, "it almost looked like a bad piece of fruit where it had just swollen and ruptured."<sup>8</sup>

Alan Phillips, a construction defect expert and licensed general contractor, inspected the deck in July 2007 and February 2008. The rear decking failed, but not in a way that damaged the substructure, and Hunton had not installed the decking correctly. Although decking was "pulling away from the deck, [it] is not pulling the deck assembly with it. This condition was there prior to any decking being installed and, in fact, was an attempt by the original contractor to try and shore up that condition prior to installing the decking." Rolled or twisted joists were not caused by the decking, but probably due to the lack of rim joists and lack of mid-span blocking, which would have kept everything "stable." The front deck had loose boards that had been installed incorrectly, but "the material didn't seem to fail anywhere near the same way as the decking material on the rear deck." The deck had been installed originally 20 or 30 years before, and Hunton did not properly address parts that

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<sup>8</sup> Plaintiff failed to include the videotape or transcript of Hunton's deposition in the appellate record. Generally, when the record is incomplete, we presume the missing portion supports the judgment. (See, e.g., *Pomerantz v. Bryan Motors, Inc.* (1949) 92 Cal.App.2d 114, 117.) Here, however, there appears to be no dispute that Hunton testified he recommended SmartDeck to Evilsizor.

had deteriorated over that time. Phillips' estimate for the rear deck was \$18,741.

The jury was instructed on negligence, products liability, implied warranty, and false representations and concealment. In an interrogative verdict,<sup>9</sup> the jury found plaintiff and Hunton had been negligent, plaintiff did *not* buy the decking (impliedly finding that Hunton bought it), and defendant did not make any false or negligent representations or conceal information causing plaintiff harm. The general verdict awarded plaintiff \$6,275.82. The 12-member jury was polled as to the general verdict, and the vote was unanimous.<sup>10</sup>

## DISCUSSION

### I

#### *Expert Witness Rulings*

Plaintiff contends the trial court improperly reversed itself on an in limine ruling and excluded testimony by Haughton about the nature of the defect, when it first manifested itself, and how the defect would affect the substructure.

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<sup>9</sup> Although plaintiff at times mischaracterizes the verdict as a "special verdict," this was not a special verdict, which finds facts and leaves legal conclusions for the trial court. (See 7 Witkin, Cal. Procedure (5th ed. 2008) Trial, §§ 342, 347, pp. 398, 404-405.)

<sup>10</sup> Plaintiff's counsel explicitly declined to have the jury polled as to the interrogative verdict. That verdict has some numbers written in the margin, but because plaintiff's counsel chose not to have the jury polled as to that verdict, we decline to infer the numbers mean anything.

Cascade had moved in limine, based on lack of expertise, to preclude Haughton from testifying about the propensity of SmartDeck "to generate twisting forces sufficient to damage or destroy" the substructure. Plaintiff opposed the motion, which was denied.

Before Haughton testified, defendant objected that Haughton's PowerPoint presentation included inadmissible material, and that Haughton was going to testify "as to some engineering issues, which is beyond his expertise." After colloquy with counsel, the trial court acknowledged this issue had been raised in limine, but stated "that was based on . . . some declarations and . . . reading the transcript of the [deposition]. I'd like to hear what the witness has to say live in front of the jury."

On voir dire, Haughton conceded the deposition in this case was the first time he had testified about wood-plastic composite materials, that he was not an engineer, his college degree was "a distance learning diploma" that required no in-class work, he had been a California contractor for only three years, and much of his work involved supervising construction for code-compliance.

The trial court found Haughton "has very limited experience with respect to wood-plastic products. He's done a lot of inspections" but "it was just all very vague of what he was doing." The trial court ruled Haughton could not testify as a "wood-plastic products expert" but could testify to his observations and his opinions as a contractor, and the trial

court cautioned that some questions would have to be evaluated on "a question-by-question basis as to what I'm going to allow. But I'm not going to allow the witness to be designated as an expert in wood-plastic products." After further voir dire, the trial court ruled Haughton could not testify about product formulations, based on hearsay materials, because he was not an expert in that subject. However, he could testify about installation techniques and the fact composite materials expand.

We review plaintiff's contention under the following rules. "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert." (Evid. Code, § 720, subd. (a).) "[T]he trial court has broad discretion to determine whether a witness is competent and qualified as an expert and its determination will not be disturbed on appeal unless "a manifest abuse of that discretion" is shown." (*Mora v. Big Lots Stores, Inc.* (2011) 194 Cal.App.4th 496, 513.)

On appeal, plaintiff reargues Haughton's qualifications. However, because Haughton had no prior experience with *SmartDeck*, had never testified about wood-plastic materials, did not have a traditional college degree, and had been a California contractor for only three years, we cannot say the trial court

abused its discretion in finding Haughton was not qualified to testify as an expert about wood-plastic materials.

Plaintiff also contends the trial court improperly precluded Haughton from testifying about material he had found on the Internet.

An expert may form opinions based on hearsay information, if it is the type of information relied on by other experts. (Evid. Code, § 801, subd. (b); see *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1523-1524.) But because Haughton was not an expert in wood-plastic products, the trial court properly concluded he could not testify about product information he found on the Internet.

Plaintiff points to *Genrich v. State of California* (1988) 202 Cal.App.3d 221 (*Genrich*), but that case is inapposite. In that case, the court permitted a *qualified* traffic expert to base his opinion in part on raw accident data contained in a computer database. (*Genrich, supra*, 202 Cal.App.3d at pp. 229-231.) *Genrich* did not hold that information from the Internet is *per se* admissible, nor did it hold that a nonexpert can rely on hearsay information to state an opinion.

Moreover, plaintiff cannot show prejudice and does not even attempt to do so, merely asserting that the excluded testimony would tend to show how much damage the decking did and tend to show defendant knew the decking was defective earlier, and claims the trial court's ruling "surprised the Appellant and significantly limited Appellant's presentation of the evidence in this case." Plaintiff fails to analyze the effect of the

admitted evidence, including the extensive testimony Haughton was allowed to give, the relevant jury instructions, and the relevant arguments. We may not reverse a judgment for a procedural or evidentiary error absent a miscarriage of justice. (Cal. Const., art. VI, § 13; Code of Civ. Proc., § 475; Evid. Code, §§ 353, subd. (b), 354; *Waller v. TJD, Inc.* (1992) 12 Cal.App.4th 830, 833.) It is plaintiff's burden to demonstrate how an alleged error caused prejudice. (*Paterno, supra*, 74 Cal.App.4th at pp. 105-106.) He has not done so.

## II

### *Exclusion of Evidence*

Plaintiff contends the trial court erroneously excluded two exhibits, exhibits 48 and 52. We are not persuaded.

When Richard Rose was asked about exhibit 48, a list of *SmartDeck* sales, he was unable to testify who prepared it or confirm that it had been prepared by a Cascade employee. When its admissibility was discussed, plaintiff asserted it would show defendant was "the biggest customer of this plastic decking by a long shot." Defendant argued that already had been shown by Rose's testimony, and the trial court agreed. The trial court found there was no foundation for the exhibit.

As the proponent of the evidence, plaintiff had the burden to show the document "was made in the regular course of a business[.]" (Evid. Code, § 1271, subd. (a); see *People v. Khaled* (2010) 186 Cal.App.4th Supp. 1, 8 ["the document cannot

be prepared in contemplation of litigation”].) Because neither Rose nor any other witness so testified, the trial court’s ruling was correct. Further, as the trial court pointed out, the fact defendant bought and sold SmartDeck was not disputed. Therefore exhibit 48 was cumulative in any event.

Exhibit 52 was an August 2, 2002, e-mail sent from US Plastics to Westmark & Associates, an intermediary in the chain of distribution, discussing the fact that US Plastics had “some bad product in the field[.]” The purported relevance was that this e-mail would tend to show knowledge that the decking was defective at a time before defendant sold it to plaintiff (or to Hunton). The trial court excluded exhibit 52 because there was no evidence it had ever been sent *to defendant* and therefore it did not tend to show *defendant’s* knowledge of the defect in 2002.

Although plaintiff disputes the point on appeal, absent any evidence defendant actually received this email, either directly from US Plastics or through an intermediary, the trial court properly found that it was irrelevant, because it lacked “any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210; see *Larson v. Solbakken* (1963) 221 Cal.App.2d 410, 419-420.) If defendant never received this email, defendant cannot be charged with knowledge of its contents. The trial court ruled correctly.

### III

#### *Fraud Claim*

Plaintiff contends the combined errors of excluding exhibits 48 and 52, and limiting Haughton's expert testimony, undermined his fraud theory.

First, we have rejected the predicate claims that the challenged evidentiary rulings were made in error.

Further, it is not clear if this argument was intended to supply the prejudice arguments missing from Parts I and II, *ante*. Plaintiff asserts the evidence was sharply conflicting, and asserts the excluded evidence would have shown defendant *knew* the product was defective when plaintiff bought it. But plaintiff does not discuss the effect of the other evidence, jury instructions, and argument on the subject of fraud and the scope of defendant's knowledge regarding the defect; nor does he explain how a miscarriage of justice occurred. If plaintiff intended to demonstrate prejudice, he did not achieve his goal. (See *Paterno, supra*, 74 Cal.App.4th at pp. 105-106.)

### IV

#### *Leave to Amend Complaint*

Near the end of the trial, plaintiff moved to amend to "conform to proof" to add a claim of breach of warranty under the Song-Beverly Consumer Warranty Act. He alleged the "only additional factor . . . is whether plaintiff is a consumer, as opposed to a merchant." Defendant objected that this was the

third motion to amend the complaint, and it would add additional remedies. After taking the matter under submission, the trial court denied the motion, finding it was similar to motions that it had denied in December 2008 and May 2009, and the amendment would prejudice the defense because Cascade had settled, and the amendment could expose defendant to an award of attorney fees.

On appeal, plaintiff appears to attack the denial of each of his three motions to amend, but does not segregate his arguments as to each motion. We reject his claims.

"While under section 473 of the Code of Civil Procedure and the case authorities pertaining thereto the trial court has wide discretion in allowing the amendment of any pleading [citations], as a matter of policy the ruling of the trial court in such matters will be upheld unless a manifest or gross abuse of discretion is shown [citations]." (*Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118, 135-136; see *Vogel v. Thrifty Drug Co.* (1954) 43 Cal.2d 184, 188-189; *Hayutin v. Weintraub* (1962) 207 Cal.App.2d 497, 505-506.)

The trial court had denied plaintiff's November 20, 2008, motion to amend to add claims under the Song-Beverly Consumer Warranty Act and the Magnusson-Moss Warranty Act, because the motion came over three years after the filing of the action, it would open the door to further discovery, and the trial date was "less than 45 days away." Plaintiff does not explicitly argue that ruling was an abuse of discretion, and given the short time before trial, it was not.

However, that initial trial date was vacated when the court suspended all civil trials due to budgetary reasons. Plaintiff used this circumstance to file a renewed motion to amend the complaint on April 21, 2009, which was also denied. Plaintiff assumes that the vacating of the initial trial date effectively cured the belatedness of his first motion to amend, and asserts no prejudice to defendant would have resulted had the trial court granted that second motion. Plaintiff likewise asserts that his mid-trial motion to amend would not have prejudiced defendants.

However, plaintiff fails to show any prejudice *to him* on appeal from the largely adverse jury verdict. Plaintiff contends the proposed amendment would have alleged "broader consumer warranty theories" and he would "be allowed broader consumer remedies." But he does not cite the statutory basis for the proposed new theories and articulate the elements of the proposed claims; nor does he articulate the purported "broader" remedies available.

The jury found defendant did not make any misrepresentations or conceal information regarding the decking. Because plaintiff has not explained how the same jury would have sustained either of the proposed additional theories on this evidence, plaintiff has failed to establish prejudice.

In *Paterno, supra*, 74 Cal.App.4th 68, we concluded the trial court improperly granted a directed verdict on a nuisance theory. (*Paterno, supra*, at pp. 102-104.) However, we concluded *Paterno* had the duty to demonstrate how the omission

of that theory prejudiced him, by spelling out the elements of the omitted theory, the evidence pertaining to it, and the jury instructions pertaining to it. (*Id.* at pp. 105-109.)

Similarly, we will not assume this jury would have found liability based on warranty act theories where no such demonstration is provided.

V

*Evidence of Damages*

In closing argument, defense counsel suggested an award of \$18,000, plus \$4,000 if the jury believed plaintiff's claim that he used some leftover material for the front deck, plus loss-of-use damages for one year. However, the jury awarded plaintiff no more than his out-of-pocket loss, the cost of the decking itself as indicated by Hoover's letter offering plaintiff a credit of \$6,275.82 towards replacement decking materials. On appeal, plaintiff asserts no substantial evidence supports the award.

"The amount of damages awarded in a case is a question of fact to be determined by the jury. [Citation.] As such, it is subject to our evaluation of whether it is supported by substantial evidence. [Citation.] In examining the sufficiency of the evidence to support an award of damages, it is not required that we be able to precisely recreate the jury's reasoning. [Citation.] We will uphold a verdict if it is within the range of possibilities supported by any of the testimony." (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515,

531-532; see *Pleasant Hill v. First Baptist Church* (1969) 1 Cal.App.3d 384, 408-409.)

The jury found both plaintiff and Hunton had been negligent, and impliedly found the defective SmartDeck decking had not caused the substructural damage. Therefore, it was rational for the jury to award plaintiff no more than what he had paid for the concededly defective decking. Further, given plaintiff's sophistication regarding property matters, the jury could rationally reject his loss-of-use claim, finding plaintiff unreasonably delayed resolving the problem.

## VI

### *Misconduct of Counsel*

In opening statements, defense counsel conceded the decking was defective. In closing argument, defense counsel argued plaintiff sought a windfall, and in particular argued there had been no showing that the decking purchased in 2004 and installed on the front deck was the same decking that had been purchased earlier and installed on the rear deck. On appeal, plaintiff contends defense counsel committed misconduct by changing the theory of the defense.

A claim of misconduct by counsel may not be raised for the first time on appeal unless the misconduct is so egregious that no curative actions by the trial court would have been effective. (See *Whitfield v. Roth* (1974) 10 Cal.3d 874, 891-893; *Menasco v. Snyder* (1984) 157 Cal.App.3d 729, 733.) Because plaintiff does not claim he objected when evidence was introduced tending to show the front deck was not defective, and

does not claim he objected during defense counsel's closing argument, the point is forfeited.

Further, plaintiff has not made a persuasive prejudice argument. Plaintiff suggests he had no opportunity to present evidence about the front deck, and that the trial court may have allowed Haughton to testify about "formula changes" in the decking. But nothing in the record on appeal supports plaintiff's suggestion that there was other evidence about the front deck that plaintiff chose not to present due to the general concession during opening statements, nor is there any reason why this issue would have changed the trial court's conclusion that Haughton lacked the training and experience to testify about product formulations.

## VII

### *Jury Misconduct*

Plaintiff claims a juror slept during trial.

No objection was lodged at trial, and therefore the record does not support the claim of error. Contrary to plaintiff's assertion in the reply brief, defendant does not concede any juror was sleeping in its brief.

The California Supreme Court has made this observation:

"Although implicitly recognizing that juror inattentiveness may constitute misconduct, courts have exhibited an understandable reluctance to overturn jury verdicts on the ground of inattentiveness during trial. In fact, not a single case has been brought to our attention which granted a new trial on that ground. Many of the reported cases involve contradicted allegations that one or more jurors slept through part of a trial. Perhaps recognizing the soporific effect of many trials when viewed

from a layman's perspective, these cases uniformly decline to order a new trial in the absence of convincing proof that the jurors were actually asleep during material portions of the trial." (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 411.)

In support of his claim of error, plaintiff relies on declarations submitted in connection with a new trial motion, by plaintiff and his attorney, alleging that a juror slept during trial. But the new trial motion was denied by operation of law when the time in which to rule expired. (See Code Civ. Proc., § 660.) The record therefore does not show the trial court credited these declarations, and a trial court may discount evidence, even if uncontradicted. (*Hicks v. Reis* (1943) 21 Cal.2d 654, 659-660.) Because the record does not show that the trial judge--who was present at trial--credited the declarations alleging a juror slept during trial, we also decline to credit the declaration.

Although plaintiff again addresses potential prejudice only summarily, we note that the jury verdict as to damages was *unanimous*, therefore plaintiff has not shown the purported somnolence of one juror would have made a difference.

#### VIII

##### *Judicial Misconduct*

During deliberations, the jury asked whether it could fill in a total damage amount without allocating fault. The trial court told the jury it could. Plaintiff asserts this was judicial misconduct, because the trial court did not notify

counsel before answering the question. As we explain, any error was harmless.<sup>11</sup>

"After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel." (Code Civ. Proc., § 614.)

The minute order for the last day of trial, December 23, 2009, reflects the following events:

"12:38 p.m. Court recesses for lunch and [jury] will begin deliberations at 1:30 p.m.

"4:14 p.m. Clerk notified jurors have a question. Clerk gives question to Court who replies. Counsel apprised of Court's response. Bailiff gives answers to jurors.

"Question 1: Regarding damages, do we need to specify percentages? Or, can we award a dollar amount with an explanation?

"Answer to Question #1: You do not need to specify percentages or provide an explanation. Just provide a net dollar amount.

"4:27 p.m. Clerk informed jurors have a verdict."

The tenor of the minutes is that counsel was "apprised" of the trial court's response *before* the bailiff delivered it to the jury. However, plaintiff asserts that counsel did not know

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<sup>11</sup> For purposes of this appeal, we will assume this claim may be raised despite the lack of a contemporaneous objection. (See *In re Estate of Melvin* (1927) 85 Cal.App. 691, 694-695.)

about the response until it was delivered, and defendant appears to concede the point on appeal.<sup>12</sup>

Assuming the trial court did not consult with counsel before giving the answer to the jury, we fail to see any prejudice. We presume the answer given to the jury was correct, because plaintiff fails to show where it requested instructions on allocation of fault, or argued allocation of fault. Nothing supports plaintiff's speculation that the jury was experiencing confusion or stress about the upcoming holiday, or that the trial court's answer caused the jury "to simply fill in an amount" on the verdict form that represented the refund offered by defendant "without completing" the part of the interrogatory verdict "regarding fault." As defendant points out, *neither* of the verdict forms contained spaces for the jury to allocate fault. Therefore, the trial court's error, if any, was harmless.

#### **DISPOSITION**

The judgment is affirmed. Plaintiff shall pay defendant's

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<sup>12</sup> In opposition to the new trial motion, defense counsel claimed to recollect "that the court advised each of us of the court's response to the jury question and inquired if we objected to the response. Neither side objected."

costs on appeal. (Cal. Rules of Court, rule 8.278 (a)(2).)

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DUARTE, J.

We concur:

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NICHOLSON, Acting P. J.

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HULL, J.