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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

AARON R. THOMAS,

Plaintiff and Respondent,

v.

F.R. STEWART, as Trustee etc., et al.,

Defendants and Appellants.

G046016

(Super. Ct. No. 30-2008-00113818)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregory H. Lewis, Judge. Affirmed.

Gray Duffy, and Kevin H. Park; Pollak, Vida & Fisher, and Daniel P. Barer, for Defendants and Appellants.

Frank P. Barbaro & Associates, and Sherri L. Honer, for Plaintiff and Respondent.

F.R. Stewart, as trustee of the F.R. Stewart Trust, and John Moore, as trustee of the John M. Moore and Caryll D. Moore Trust (hereafter collectively defendants, unless the context indicates otherwise), appeal from a judgment awarding Aaron R. Thomas damages in this personal injury action. Thomas was severely injured in a commercial building owned by defendants, which he was viewing to possibly lease, when he fell from the top of a fixed ladder leading to the building's roof after the roof hatch slammed shut on his head. On appeal, defendants contend the trial court abused its discretion by admitting evidence of: (1) a safety regulation promulgated under the California Occupational Safety and Health Act (Cal-OSHA) (Lab. Code, § 6300 et seq.) pertaining to a fixed ladder's relationship to a safe access hatch; and (2) defendants' failure to inspect or repair the roof hatch after the accident or to inform subsequent prospective tenants about Thomas's accident. We find no prejudicial abuse of discretion and affirm the judgment.

### *The Accident*

On February 14, 2008, Thomas, his girlfriend, his aunt, and one of his employees, Noel Thomas (no relation to Thomas and for convenience hereafter referred to as Noel), went with a real estate agent to look at the building, built in 1987 and owned by defendants, as a potential leased space for his furniture making business. The agent gave Thomas and Noel permission to inspect the roof, which was accessed from an interior fixed ladder that led to a steel roof hatch. The ladder and steel roof hatch were part of the original construction of the building. The approximately three-foot by three-foot roof hatch weighed about 20 pounds. It had a handle mechanism to open the hatch when one was standing on the ladder. A cable on one end of the hatch supported it so it would not fly open all the way. On either side of the hatch were piston-lifting devices which defendants' expert explained were spring shocks and which appeared to be part of the original hatch assembly when installed.

Noel went up first, opened the roof hatch, looked around, and came back down, leaving the hatch open for Thomas. Thomas went up next. After briefly inspecting the building's roof, Thomas stepped onto the ladder to come back down. While at the top of the ladder, the roof hatch slammed down on Thomas's head causing him to fall off the ladder, hitting face first on the concrete floor 25 feet below. Thomas suffered extensive fractures to his face, teeth, and skull, and broke his nose. He had bleeds in parts of his brain, traumatic brain injury, and permanent frontal lobe damage. One of his knees was shattered, and both of his hands were broken.

#### *Noel's Testimony*

Noel testified he had prior experience climbing ladders and poles from when he worked for a telephone company. He also sometimes climbed ladders as part of his work for Thomas. Noel also had experience opening roof hatches because at Thomas's then current location, there were two roof hatches he and Thomas sometimes accessed to get onto the roof. In Noel's experience, he would open the roof hatches by turning or pulling an apparatus to unlock the hatch, upon which it would spring part way open. He could then push the hatches all the way open and they would open fully and stay up. When Noel closed the roof hatches, they would pull down to a certain spot where they would bounce and there would be resistance. At that point, the hatch would not close further unless pulled the rest of the way—the hatches would not slam shut on their own.

When accessing defendants' building's roof on the day of Thomas's accident, Noel unlatched the roof hatch when he reached the top of the ladder. The hatch did not spring open; rather Noel had to push it open the entire way. Once the hatch was open past 90 degrees, it stayed open. Noel was not concerned it could slam back down because of his past experience with roof hatches.

At his deposition, Noel testified he saw Thomas, as he stood on the top of the ladder, turn with one hand to close the hatch, before it slammed shut on him. Noel

clarified at trial he was assuming Thomas was trying to close the hatch—he could not actually see that Thomas was trying to close the hatch. What he saw was Thomas’s arm reaching up towards the hatch, “like he was shielding himself,” right before being struck by the hatch. Sometime after Thomas’s accident, Thomas told him the wind blew the roof hatch shut.

#### *Thomas’s Testimony*

Thomas testified he also had experience climbing ladders, from working in the construction industry, and knew to keep three parts of his body on the ladder at all times for safety. Thomas also had experience operating roof hatches because he had used them at the building he was renting, and had used them at other locations as well. Thomas explained that when he opened a roof hatch by turning a lever, the hatch “basically explodes upward,” and then slowly raises to the open position. When the hatch is closed, there is tension, so that the user must pull the hatch hard to close it and then slam and hook it so that it will not pop back open. Of the 20 or so different roof hatches Thomas had opened over the years, all operated similarly. On the day of the accident, Thomas got to the top of the ladder, went through the already open hatch, climbed onto the roof, and inspected the roof. When he went to climb back inside, he lowered himself down from the top of the ledge onto the ladder. Thomas then stepped down to a lower rung and had his hands on the top rung. His head and shoulders were still above the roof hatch opening when the hatch lid slammed down on his head. Thomas testified he was not in the process of trying to close the hatch when it shut on him. He could not recall if it was windy that day.

#### *Moore’s Testimony*

Defendant John Moore, who had a degree in mechanical engineering and was in the building demolition business, testified defendants acquired the property in 2002, and he managed it. Moore had personally used the hatch approximately 10 times before Thomas’s accident. To open the hatch, Moore would unlatch the hatch and have

to push on the hatch to open it, and between his lifting the hatch and the hatch's own operation, the hatch would lift open and stay open. When Moore closed the hatch, he would feel resistance when the hatch was open past 90 degrees, and had to pull the hatch to get it past 90 degrees. But once the hatch was closed past 90 degrees he could feel the weight of the hatch wanting to close down, so he would keep his hand on the hatch as he lowered it back down over his head, to make sure it did not fall on his head. From 2002 until the time of trial, there were no changes, alterations or repairs to the roof hatch, and Moore did not clean, lubricate, or adjust the pistons on the hatch to make sure they were working properly. No previous tenants ever informed Moore about any problems with the roof hatch. A roofer, who worked on the roof before the accident, did not complain of any problem with the hatch. After learning about Thomas's accident, Moore did not "make any special trip to the property to inspect the ladder or the roof hatch to see if it was operating properly," nor did he tell subsequent tenants about the accident. There were no signs or warnings near the roof hatch explaining how it operates.

*Plaintiff's Expert's Testimony*

Thomas's expert witness, John Martinet, was a registered deputy building inspector and licensed general contractor. He was experienced in safety issues as they relate to construction in general and roof hatches in particular. Martinet testified that since approximately 1972, all roof hatch manufacturers make their roof hatches to meet at least the minimum standards set forth in Cal-OSHA regulations and federal-OSHA, on which Cal-OSHA is based. He explained there are federal and Cal-OSHA regulations concerning fixed ladders, in which there is a reference to roof hatch standards and a diagram demonstrating what is an acceptable "counterweight[ed]" roof hatch. The relevant Cal-OSHA regulation, California Code of Regulations, title 8, section 3277, subdivision (f)(7), refers to the relationship between a fixed ladder and "an acceptable

hatch cover” as illustrated in Figure 9 of the regulation (hereafter referred to as Diagram 9).<sup>1</sup>

Martinet explained the Cal-OSHA regulation’s Diagram 9 depicts an old-fashioned, counterweighted roof hatch in which a counterweight, weighing more than the roof hatch, was located behind the hinge point of the hatch. Because there was more weight behind the hatch’s hinge point, as soon as the hatch was opened, the extra weight would cause the hatch to automatically spring open. The extra weight would then cause resistance the entire time the roof hatch was being closed, so if at any time before the hatch was actually latched, it was released, the counterweight would cause the roof hatch to spring back open, instead of slamming shut on top of the person accessing the roof hatch. Martinet explained this counterweight system was essential for safety because a roof hatch is always at the top of a ladder, and the person accessing the roof hatch is always in a precarious position while trying to close the hatch. Martinet explained the counterweighted roof hatch depicted in the Cal-OSHA regulation’s Diagram 9 demonstrated the safety standard that is modernly used. But the drawing itself was “old fashioned” because the hatch as drawn had an actual separate catch or hold-open device. Such a device would lock the roof hatch into place once it was opened to prevent external forces (such as gust of wind) from closing the roof hatch until the hatch was intended to be closed. That actual style of hatch had not been manufactured since at least 1972. The more modern roof hatches, including the roof hatch at issue in this case, use pistons or springs to serve as the “functional equivalent” of the old-fashioned counterweight—the pistons or springs will cause the roof hatch to spring open as soon as it is unlatched, and to resist the entire way down until it is locked shut.

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<sup>1</sup> The corresponding federal-OSHA regulation is found at 29 C.F.R. § 1910.27(c)(7), and refers to the relationship between a fixed ladder and “an acceptable counterweighted hatch cover” as illustrated in figure D-6 of that regulation. The illustration is identical to the illustration found in the Cal-OSHA regulation.

Martinet conducted an on-site inspection of the subject roof hatch in July 2009. (Moore testified there had been no alternations or changes to the roof hatch since the accident or since 2002 when the trustees purchased the property, and the roof hatch operated the same way after the accident as it did before.) When Martinet unlatched the roof hatch, it did not spring open at all. He attempted to lift the roof hatch three times by pushing it open approximately 15 degrees, and each time the hatch stayed in contact with his hand. Each time he released the hatch, there was no resistance, and it slammed back down. Because the roof hatch failed to open and close properly, Martinet considered it to be dangerous, and for safety reasons he did not open the hatch the entire way. Martinet saw piston-type devices on both sides of the hatch, but concluded they were not functioning properly because they failed to spring the hatch open when it was unlocked and failed to provide any resistance when the roof hatch was closing. Martinet observed there was no separate catch or hold-up device on the hatch. Accordingly, the pistons, if properly functioning, should have acted as a catch or hold-open device, which they did not. Martinet noted that when a roof hatch is opened past 90 degrees its own weight will keep it open, unless some external force, such as a gust of wind, was applied to the hatch causing it to slam closed.

Based on the foregoing, Martinet opined the subject roof hatch at issue, operated properly when installed in the late 1980's, but was not functioning properly and was unsafe at the time of the accident, because it failed to spring open when unlatched, failed to stay open, and lacked resistance the entire way down. He believed the roof hatch was blown shut by a gust of wind, due to the lack of a properly operating catch or hold-open device. Martinet opined the hatch failed to operate properly because of a lack of maintenance. Moreover, he opined defendants had knowledge of the dangerous condition of the roof hatch prior to the accident because Moore stated he used the roof hatch numerous times before the accident, each time he used it he had to push the roof hatch open, and when closing the hatch, could feel the weight of the steel hatch coming

down on him (i.e., not resisting). Martinet testified it takes three to four hours to replace a defective roof hatch with a properly operating one, at a cost of approximately \$1,500.

*Defense Expert*

Defendants' expert witness, Marc Viau, also was a licensed contractor and building inspector. Although he testified he had experience using roof hatches, there was no testimony as to how many times he had inspected or even accessed roof hatches.

Viau agreed roof hatches are manufactured to comply with the minimum standards of Cal-OSHA and federal-OSHA, both of which require roof hatches have counterweights or have their functional equivalent. Viau disagreed with Martinet as to what the counterweight, in particular the pistons, were supposed to do. Viau considered the counterweight on a roof hatch to be the equivalent of a shock absorber on a car hood. The counterweight, or pistons, should provide some tension while closing the hatch, and when the hatch reaches a certain point, the hatch should release and want to slam down. Viau testified it was not until after the late 1990's that roof hatches were designed to resist closing the entire way. (Martinet disagreed with Viau's opinion, pointing out a roof hatch should not behave the same way a car hood does, because unlike a car hood, a person standing on a ladder is always underneath the roof hatch.)

Viau inspected the subject roof hatch almost two years after Thomas's accident. The roof hatch complied with the Uniform Building Code, although Viau agreed those standards do not deal with the proper operation of a roof hatch. When Viau unlatched the roof hatch, there was some spring to the hatch, but he had to push it open; it did not spring open. Once open, the springs held the roof hatch open. When Viau closed the roof hatch, there was tension on it, and when the hatch got to one-half or three-quarters of the way down, he could feel it wanted to slam shut. Viau opined the accident was caused by the roof hatch reaching a certain point and wanting to slam down. But he believed the roof hatch operated properly because that was what a hatch of that era

was supposed to do. The winds were gusting up to 13 miles per hour on the day of the accident.

### *Procedure*

Thomas's complaint alleged premises liability/negligence against defendants. A jury returned a special verdict finding defendants were negligent in the use or maintenance of the property, the negligence was a substantial factor in causing Thomas harm, and Thomas was not negligent. The jury awarded Thomas a total of \$1,297,874.90, but the amount was later modified to reduce past medical expenses by subtracting amounts billed but not owed. The modified damages award was \$1,245,796.45, comprised of \$105,103.07 reduced past medical expense damages; \$244,693.40 future medical expenses; \$471,000 past noneconomic loss; and \$425,000 future noneconomic loss. The trial court denied defendants' motions for new trial and for judgment notwithstanding the verdict. The court awarded Thomas \$45,776.20 in costs, which included expert witness fees, and \$115,396.58 in prejudgment interest, pursuant to Civil Code section 3291 and Code of Civil Procedure section 998.

## DISCUSSION

### *1. Admissibility of OSHA Regulations*

Defendants contend the trial court abused its discretion by allowing Thomas's attorney to question expert witnesses regarding OSHA regulations. They contend the evidence should have been excluded under Evidence Code section 352. Defendants have waived the contention because no such objection was ever raised by them.

Before trial began, defendants filed a motion in limine to exclude evidence of "workers compensation law standards" and in particular evidence concerning California Code of Regulations, title 8, section 3277. Defendants argued Thomas

intended to use the Cal-OSHA regulation to establish negligence per se.<sup>2</sup> Defendants’ motion argued the Cal-OSHA regulation could not be used to establish a standard of care, and it could not be used to establish negligence per se, because Thomas was not in the class of persons the regulation was meant to protect. The motion made no mention of Evidence Code section 352. At argument on the motion, defendants’ counsel explained he was objecting in particular to the introduction of Diagram 9—the drawing of a counterweighted roof hatch—because there was nothing in the Cal-OSHA regulation that said a roof hatch had to be counterweighted, so there could be no argument defendants “violated a labor code by this particular roof hatch . . . .” Thomas’s attorney argued there were two aspects to the use of the regulation: one was to establish negligence per se, the other was to demonstrate generally how a safe roof hatch should work. Counsel explained regardless of whether there was a violation of the OSHA regulation, Thomas’s expert would testify all roof hatches (including the one at issue) are manufactured to meet the OSHA standards, i.e., to have a counterweight or its functional equivalent to prevent them from slamming shut. The evidence would go to whether this roof hatch was properly maintained.<sup>3</sup> After a lengthy discussion about the general admissibility of OSHA regulations to establish negligence per se, the trial court ruled Thomas could not

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<sup>2</sup> The negligence per se doctrine, as codified in Evidence Code section 669, creates a presumption of negligence if four elements are established: “(1) the defendant violated a statute, ordinance, or regulation of a public entity; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence of the nature of which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.” (*Galvez v. Frields* (2001) 88 Cal.App.4th 1410, 1420.)

<sup>3</sup> As our Supreme Court recently observed, “Cal-OSHA provisions are to be treated like any other statute or regulation and may be admitted to establish a standard or duty of care in all negligence and wrongful death actions, including third party actions.” [Citation.]” (*Cortez v. Abich* (2011) 51 Cal.4th 285, 292.)

use the OSHA regulations to establish negligence per se,<sup>4</sup> but he could use the regulations to show the hatch was negligently maintained.

At the beginning of Thomas's expert's testimony, when Thomas's counsel asked about a military construction project Martinet worked on early in his career and whether it had to "meet any sort of [Cal-OSHA] regulation," defendants' counsel objected to the question as being not relevant and "vague and ambiguous." The court overruled the objection and stated it would "treat this as a continuing objection." Later, when defendants' counsel objected to admission of Diagram 9 into evidence "based on our earlier discussion," the court overruled the objection and admitted the document.

Defendants now contend the evidence of the Cal-OSHA regulation and Diagram 9 in particular should have been excluded under Evidence Code section 352, which allows the trial court discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Defendants argue the OSHA regulation had little probative value because Thomas's expert could have opined on how a roof hatch was supposed to work without making any mention of the OSHA regulation. And defendants argue reference to the OSHA regulation was highly prejudicial because it conveyed an erroneous impression defendants were held to the standards of employers "rather than the lower standard of care of a landlord showing a vacant building to a prospective business tenant[,] and "gave Thomas's expert's opinion the imprimatur of being based on an inapplicable public regulation."

We decline to consider defendants' argument because they failed to raise their Evidence Code section 352 objection below. (Evid. Code, § 353, subd. (a).) We reject defendants' argument we should infer an Evidence Code section 352 objection

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<sup>4</sup> The trial court instructed the jury on negligence and premises liability but was on negligence per se.

from their relevance objections. (See *People v. Valdez* (2012) 55 Cal.4th 82, 138 (*Valdez*) [defendant's objections evidence was irrelevant, lacked foundation, and prosecution questions leading insufficient to preserve Evidence Code section 352 objection for appeal].) "If a proper objection under [Evidence Code] section 352 is raised, the record must affirmatively demonstrate that the trial court did in fact weigh prejudice against probative value." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 599.) Here, the record does not demonstrate the trial court undertook to perform Evidence Code section 352's weighing function. Presuming, as we must, the trial court did not shirk its obligations, we must conclude no objection was properly and timely made under Evidence Code section 352.

## *2. Admissibility of Moore's Testimony About Failing to Inspect or Warn After the Accident*

Defendants contend the trial court abused its discretion by allowing Thomas to question Moore about not inspecting the roof hatch after Thomas's accident and not telling the subsequent tenant about the accident. We find no prejudicial abuse of discretion.

On direct examination by Thomas's attorney, Moore, the person with most knowledge about the maintenance, inspection, and repair of the building, confirmed the roof hatch was in the same condition at the time of trial as it had been when defendants bought the building. He was aware a realtor was bringing someone to look at the building on February 14, 2008. Moore testified prior tenants were responsible for building maintenance, which would include accessing the roof to make sure roof drains were clear of debris and to maintain roof top air conditioning units. Moore did not provide tenants with any instructions on using the roof hatch. Following the above testimony, Thomas's attorney asked Moore if when he leased the building about one month after Thomas's accident, "[D]id you ever tell anyone at [the new tenant] about

. . . Thomas[‘s] fall?” Defendants’ attorney objected, “Relevance[,]” and the court overruled the objection.

Thomas’s attorney then questioned Moore about his use and operation of the hatch. Moore testified he had used it about 10 times; when he unlatched the hatch it did not “spring” open on its own, but had to be pushed open; and when being closed, he could feel the weight of the hatch wanting to come down and would hold it as it closed as a precaution to keep it from falling on his head (although he never tested by removing his hand to see if the hatch really would drop). Moore agreed he had never told any of his tenants they should hold the hatch as it was closing. Thomas’s attorney then asked Moore, “And after you learned . . . Thomas had fallen off the ladder, you didn’t make any special trip to the property to inspect the ladder or the roof hatch to see if it was operating properly, correct?” Defendants objected, “Relevance[,]” and the court overruled the objection. On cross-examination, defendants’ counsel elicited testimony from Moore there were no complaints made to him by prior tenants or by “subcontractors, air conditioning, roofers” about any problems with the roof hatch.

Defendants contend the court abused its discretion by overruling their objections to Moore’s testimony. Defendants argue the evidence was character evidence made inadmissible by Evidence Code sections 1101 and 1104. They also argue the evidence was inadmissible under Evidence Code section 1151, which generally prohibits evidence of subsequent remedial conduct (or in this case lack thereof) to establish negligence in connection with the event. Defendants did not object to the evidence on these grounds—their only objection was as to relevance—and, thus, these objections are not preserved for appeal. (Evid. Code, § 353, subd. (a); see *Valdez, supra*, 55 Cal.4th at p. 130 [objections evidence was irrelevant, cumulative, lacking in foundation, or prejudicial insufficient inadmissible character evidence claim for appeal].)

“[T]he trial court ‘has broad discretion in determining the relevance of evidence [citations], but lacks discretion to admit irrelevant evidence.’ [Citation.]”

(*People v. Weaver* (2001) 26 Cal.4th 876, 933; Evid. Code, § 350 [“No evidence is admissible except relevant evidence”].) Defendants contend evidence Moore did not tell the subsequent tenant about the accident and did not inspect the roof hatch after the accident had no tendency to prove or disprove any disputed facts in this premises liability case (Evid. Code, § 210), and thus was irrelevant and inadmissible.

The elements of a cause of action for premises liability on a negligence theory are duty, breach, causation, and damages. (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205.) To impose liability for injuries suffered by an invitee due to dangerous condition on the premises, the owner or occupier “““must have either actual or constructive knowledge . . . or have been able by the exercise of ordinary care to discover the condition, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises[.]”” [Citation.]” (*Id.* at p. 1206.)

Defendants argue the evidence was not relevant to any of the salient issues raised by Thomas’s premises liability cause of action, i.e., whether the property was in a dangerous condition, whether defendants had notice of the dangerous condition, and whether defendants failed to warn of the dangerous condition. We disagree. The evidence was at least marginally relevant to whether defendants had knowledge of the dangerous condition of the roof hatch and failed to warn of the dangerous condition. Defendants asserted they had no knowledge of any problems with the roof hatch because there were no prior complaints or accidents. That after this accident, defendants undertook no investigation and did not warn subsequent tenants about problems with the roof hatch slamming closed, was at least marginally relevant to impeach what is implied in that claim—that had defendants known of a problem, they would have remedied it. (See *People v. Lockheed Shipbuilding & Const. Co.* (1975) 50 Cal.App.3d Supp. 15, 35 [subsequent remedial measures admissible for impeachment].)

More importantly, even if the evidence was improperly admitted, a judgment may not be reversed due to erroneous admission of evidence unless it resulted

in a miscarriage of justice. (Evid. Code, § 353, subd. (b); see also Cal. Const., art. VI, § 13.) A “‘miscarriage of justice’ should be declared only when the [reviewing] court, ‘after an examination of the entire cause, including the evidence,’ is of the ‘opinion’ that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800 (*Cassim*).

Defendants argue they were severely prejudiced by the evidence because it allowed Thomas’s counsel to “vilify” them in closing argument. Counsel mentioned in her argument that defendants presented evidence they had no prior complaints about problems with the roof hatch. But she argued even if they had, it would not have made any difference because they would not have done anything about it in view of Moore’s testimony that even after the accident, no inspection was made and no warning given to the new tenants. But as defendants concede, there was no objection to this argument by Thomas’s counsel and it was within the permissible wide latitude given counsel in conducting closing argument. (*Cassim, supra*, 33 Cal.4th at pp. 795-796.)

Moreover, there was other unchallenged evidence in the record that supported the argument. Moore testified, without objection, that from the time defendants acquired the property until the accident, and from the time of the accident until trial, there have been no signs or warnings posted explaining how the hatch operates or warning of danger associated with operating it. Defendants’ expert, Viau, testified without objection, that when he examined the hatch in November 2009 (a year and a half after the accident), there was no warning notice concerning how the roof hatch operated. That unchallenged testimony supported the argument that even after Thomas’s accident, defendants gave no warnings about any dangers associated with the hatch. Additionally, Moore testified, without objection, there were no changes, alterations, or repairs to the hatch from the time defendants acquired the building until the time of trial, which

supports an argument that had defendants received a complaint about the hatch before the accident, it would not have been addressed.

Defendants also argue this was an extremely close case and the erroneously admitted evidence likely tipped the scales in Thomas's favor. We disagree. Defendants first point out the jury verdict was not unanimous—the jury split 11 to 1 the question of whether defendants were negligent, and 10 to 2 on the questions of whether Thomas was also negligent and whether defendants' negligence was a substantial factor in causing Thomas's injury. They engage in no legal analysis of this point. We note that while the verdict was not unanimous, it was reached fairly quickly with no indication the jury was struggling with the evidence or the issues. After argument and instruction, the jury deliberated for 25 minutes and then took a short break. One-half hour after resuming deliberations, the jury asked a question about the amount that had been agreed upon as past economic loss and where on the special verdict form it was to insert that amount, indicating it had resolved the liability issues at that point. After being given a response to the single question, the jury resumed deliberations for 45 minutes and then notified the clerk it had reached a verdict.

Contrary to defendants' assertion, this was not a particularly "close case." Thomas introduced abundant evidence concerning how a roof hatch is manufactured to safely operate, how this roof hatch did not safely operate, and how defendants were put on notice the hatch did not operate safely.

As to *how* a roof hatch should safely operate, there was abundant evidence a roof hatch should be counterweighted (or the functional equivalent through springs and pistons), so that it does not slam down. Thomas's expert, Martinet, explained the roof hatch is designed with a counterweight function so there is resistance the entire time the roof hatch is being closed, so if at any time before the hatch was actually latched shut, it was released, the counterweight would cause the roof hatch to spring back open, instead of slamming shut on top of the person accessing the roof hatch. Martinet effectively

refuted Viau's testimony comparing the roof hatch to a car hood. Viau testified that like a car hood, a roof hatch should resist some of the way down but then release and want to slam down at the very end. As Martinet explained, unlike a car hood (being closed from above), there is always a person at the top of a ladder under a closing roof hatch. Thomas and Noel both testified to their experience with opening and closing other roof hatches, which was consistent with Martinet's testimony—the hatches would resist the entire way down and have to be pulled shut—they would not slam shut on their own.

As to the unsafe condition of this roof hatch, and defendants' knowledge of its condition, there was also substantial evidence. Noel testified the hatch did not spring open when he unlatched it—he had to push it open—indicating the pistons were not operating properly. Martinet testified when he attempted to open the hatch, he could feel it wanting to slam right back down, so he did not attempt to open it all the way. Moore testified that when he used the hatch, it did not really spring open and he had to push it open. And when closing the hatch, he could feel that it wanted to slam down and he would hold on to it so it would not. Even defense expert Viau testified the hatch did not really spring open when unlatch, it had to be pushed all the way open, and when shutting the hatch once it got to one-half or three-quarters of the way shut, it lost tension and wanted to slam shut. Viau opined the accident was caused by the roof hatch reaching a certain point and wanting to slam down.

Nor can we agree with defendants that the evidence of Thomas's comparative fault was close. Defendants contend Thomas negligently slammed the hatch on his own head while closing the roof hatch. But Thomas testified he was not yet trying to close the roof hatch, he had both hands and feet on the ladder, when the hatch slammed down and struck him. Noel testified Thomas told him after the accident the wind blew the hatch shut. Defendants' make much of Noel's deposition testimony that Thomas was reaching up to close the hatch when he fell, but at trial he clarified he was assuming Thomas was trying to close the hatch—but he could not actually see that Thomas was

trying to close the hatch. What he saw was Thomas's arm reaching up towards the hatch, "like he was shielding himself," right before being struck by the hatch. Furthermore, even if Thomas had been reaching up in the process of closing the hatch, the uncontroverted evidence was that this 20-pound steel hatch lacked tension when closing and would slam shut on its own, rather than having to be pulled shut by the person below. In sum, we cannot say it is reasonably probable that had the trial court excluded Moore's testimony he did not inspect the roof hatch after the accident and did not tell the new tenant about Thomas's accident, defendants would have achieved a more favorable result. (*Cassim, supra*, 33 Cal.4th at p. 800.) Accordingly, we must affirm the judgment.<sup>5</sup>

#### DISPOSITION

The judgment is affirmed. Respondent is awarded his costs on appeal.

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

FYBEL, J.

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<sup>5</sup> In view of this conclusion, we need not address defendants' remaining argument that reversal of the judgment requires reversal of the costs and prejudgment interest award.