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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

BRIAN SULLIVAN, Plaintiff and Appellant, v. DANIEL SHERLOCK et al., Defendants and Respondents.	B227274 (Los Angeles County Super. Ct. No. BC375976)

APPEAL from a judgment of the Superior Court of Los Angeles County, Debre Katz Weintraub, Judge. Affirmed.

LT Pacific Law Group and Kenneth K. Tanji, Jr., for Plaintiff and Appellant.

Law Office of Bruce Adelstein, Bruce Adelstein; Edward J. Horowitz and Edward J. Horowitz for Daniel Sherlock, Jason Blaylock and Lock House Artistry LLC, Defendants and Respondents.

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Daniel Sherlock and Jason Blaylock purchased and remodeled a home in the hills overlooking the San Fernando Valley and then resold it to Brian Sullivan. After moving in, Sullivan discovered what he contended were serious, previously undisclosed problems with the residence and sued Sherlock and Blaylock for intentional and negligent misrepresentation and concealment. The jury returned a defense verdict, finding the sellers had not misrepresented or concealed any important fact. On appeal from the judgment entered after the jury's verdict, Sullivan argues the trial court erred in denying a special jury instruction on a seller's statutory duty of disclosure and committed prejudicial error with several evidentiary rulings. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Wrightwood Drive Home Remodel*

Sherlock purchased a three-bedroom home on Wrightwood Drive in Studio City in October 2004 for $790,000 with the intention of remodeling it with his partner, Blaylock, and then reselling it. (Before this project, Sherlock and Blaylock had remodeled or renovated three other homes.) Although Sherlock and Blaylock initially hired a general contractor to oversee all the work, ultimately Sherlock performed that task himself as an owner-builder.

The Wrightwood Drive home, located in the hills of the Santa Monica Mountains overlooking the San Fernando Valley, rests on a raised foundation supported by wooden beams and girders. Using a number of different licensed contractors, Sherlock and Blaylock replaced plaster walls with drywall; moved interior walls, closets and doorways; replaced windows and doors; added two fireplaces and a small bathroom; enclosed a catwalk on the exterior of the building under the existing roofline; remodeled the kitchen; replaced or upgraded both the electrical panel and the plumbing; and installed a new roof. The total cost of the remodel was approximately $600,000.

In early February 2005 a neighbor called the City of Los Angeles's Department of Building and Safety (DBS) and requested an inspection of the work being done at the residence. On February 11, 2005, after visiting the site, DBS inspector John Hamilton

issued an order to comply ("stop order"), explaining "[a] complete remodel of the dwelling is being constructed without the required permits and approvals" and directing Sherlock and Blaylock to obtain permits for the work being done or to remove any unpermitted work. At about this same time Sherlock and Blaylock fired their general contractor because of several ongoing problems, including delays, performance of work out of order and failure to obtain permits.

After receiving the order to comply, Sherlock obtained specific permits for various aspects of the remodeling work (for example, a permit to replace windows, doors, drywall, plaster and stucco; a permit for the new electrical panel; and a permit for the added fireplaces). Hamilton subsequently wrote "compliance obtained" on the order to comply; and his successor, DBS inspector Constantino Cuellar, thereafter inspected the property and on December 29, 2005 signed off on the permits that had been obtained. Sherlock and Blaylock, however, did not obtain permits to demolish, reconstruct or reconfigure walls, nor did they obtain roofing permits.

Sherlock listed the property for sale with Gail Reed Cox in 2006. Cox was also Sullivan's real estate agent for the sale of a house he owned. Sullivan saw the listing, visited the house and entered into negotiations for its purchase. On December 13, 2006 Sherlock provided Sullivan with the transfer disclosure statement (TDS) required by Civil Code section 1102 et seq. In the section designated for disclosure of information by the seller, Sherlock had checked "no" in response to each question in section C, including, "Are you (seller) aware of any of the following: . . . 4. Room additions, structural modifications, or other alterations or repairs made without necessary permits"; "5. Room additions, structural modifications, or other alterations or repairs not in compliance with building codes"; and "15. Any notices of abatement or citations against the property."

Sullivan ultimately agreed to buy the home for $1,700,500. A home inspection performed for Sullivan did not indicate any major problems with the residence. The foundation was described as "serviceable," but the inspector recommended it be

examined further. The inspection did not investigate any potential permit issues. Escrow closed on January 11, 2007.

2. *Sullivan's Lawsuit*

Sullivan moved into the Wrightwood Drive home in March 2007 and began making repairs. In the course of this work he checked the permit history for the property. According to Sullivan, he learned there were four open permits for the remodeling work and discovered numerous other problems at the residence: The floors were substantially more uneven than had been apparent prior to the close of escrow; the roof was sagging and leaking; the walls were curving; and the foundation beam and retaining wall were cracked. Sullivan ultimately received a "substandard order" from the City of Los Angeles (apparently in response to his own requests for an inspection) finding the building deficient "due to deteriorated or defective flooring or floor supports" and ordering Sullivan to repair or replace the deteriorated or defective flooring or floor supports.

Sullivan filed his initial complaint on August 15, 2007 and the operative pleading, the sixth amended complaint, on December 31, 2008, alleging causes of action for intentional and negligent misrepresentation against Sherlock and Blaylock. A cause of action for concealment was added at trial. Sullivan also asserted various claims against realtor Cox, the home inspector and his mortgage lender. Those parties all settled with Sullivan prior to trial.

During the 15-day trial the jury heard sharply conflicting testimony. Sherlock and Blaylock testified they understood the notations from inspectors Hamilton ("compliance obtained") and Cuellar ("final OK") to mean they had completed all permitting requirements. Thus, any errors or omissions in the TDS with respect to permits or code compliance were not within their personal knowledge at the time of the sale to Sullivan. As they explained, Hamilton or Cuellar had repeatedly inspected the house; and Sherlock and Blaylock had successfully followed all their instructions. Hamilton, however, testified he wrote "compliance obtained" simply to transfer the case to Cuellar, and

Cuellar noted he only inspected portions of the project covered by specific permits obtained by the owners.

There was, of course, no dispute permits to demolish, reconstruct or reconfigure walls had not been obtained. Sherlock and Blaylock testified they had told inspector Cuellar this work had been done and believed nothing more was required from them in light of his "final OK" of the remodeling project. Cuellar, on the other hand, testified no such disclosure had been made to him. Additional testimony was introduced suggesting Cuellar must have been aware that interior walls had been moved, based on the comments he made at the time, and indicating his memory of the details of his visits to the Wrightwood Drive residence was not entirely clear.

Sherlock and Blaylock also testified their roofing contractor had agreed to obtain the roofing permits, a position supported by language in their contract. However, at trial the roofing contractor denied he had been asked to do any permitting work.

With respect to the allegedly defective foundation, civil (structural) engineer Hovik Khanjian testified Sullivan asked him to come to the property in 2007 to inspect the beams under the house. Khanjian concluded the house was old and the beams were not in perfect condition, but he saw no significant deflection or damage or any structural defect. Sullivan, on the other hand, testified he did not hire Khanjian to inspect the foundation, but to prepare a statement or report that Khanjian, who had previously done work for Sherlock and Blaylock, did not do any engineering work on the Wrightwood Drive property. Khanjian would not provide the requested report.

Sullivan's engineer Charles Laines, in contrast to Khanjian, opined the house was structurally unsound and the entire foundation needed to be replaced. This opinion and the supporting analysis of Sullivan's general contractor expert Robert McConihay were based primarily on their conclusion the remodeling project had added 30,000 pounds to the house, a 23 percent increase in weight, which caused the foundation to sink and break. The shifting of the foundation, in turn, led to the increasing unevenness of the

floors that Sullivan had observed. McConihay calculated the cost of the repairs recommended by Laines to be just under $1 million.

Sherlock and Blaylock's experts (engineering expert Rodney Spears, geologist Wayne Schick and general contractor expert Andrew Gillespie) offered a significantly different view of the condition of the house. They testified Sherlock and Blaylock had removed more weight during the remodeling process than had been added. The foundation of the house, they testified, had minor damage and deterioration but was not sinking or failing. The floors were, indeed, uneven, but not more so than at the time Sullivan inspected and then purchased the house. The few missing permits would be easy to obtain, and the cost of implementing Spears's recommended repairs would be approximately $70,000.

Sherlock and Blaylock also introduced evidence designed to erode Sullivan's credibility. Their presentation included testimony from the owners of two homes rented by Sullivan after leaving the Wrightwood Drive residence, who described numerous and, at least in their view, largely meritless complaints Sullivan had made about the condition of their properties and who concluded Sullivan was untrustworthy. They also challenged Sullivan's testimony about his prior relationship with Sherlock and Blaylock and the reason Sullivan hired Khanjian, as well as demonstrating various inconsistencies between Sullivan's trial and deposition testimony.

3. *The Jury Instructions*

The jury was instructed on intentional misrepresentation with CACI No. 1900, on concealment with CACI No. 1901, on negligent misrepresentation with CACI No. 1903 and on nondisclosure of material fact with CACI No. 1910. As modified for this case by the trial court, those instructions provided: "Mr. Sullivan claims that Mr. Sherlock and/or Mr. Blaylock made a false representation that harmed him. To establish this claim Mr. Sullivan must prove all of the following: 1. That Mr. Sherlock and/or Mr. Blaylock represented to Mr. Sullivan that an important fact was true; 2. That Mr. Sherlock and/or Mr. Blaylock's representation was false; 3. That Mr. Sherlock and/or Mr. Blaylock knew

that the representation was false when they made it or that they made the representation recklessly and without regard for its truth; 4. That Mr. Sherlock and/or Mr. Blaylock intended that Mr. Sullivan rely on the representation; 5. That Mr. Sullivan reasonably relied on Mr. Sherlock and/or Mr. Blaylock's representation; 6. That Mr. Sullivan was harmed; and 7. That Mr. Sullivan's reliance on Mr. Sherlock and/or Mr. Blaylock's representation was a substantial factor in causing his harm.

"Mr. Sullivan claims that he was harmed because Mr. Sherlock and/or Mr. Blaylock concealed certain information. To establish this claim, Mr. Sullivan must prove all of the following: 1. That Mr. Sherlock and/or Mr. Blaylock disclosed some facts to Mr. Sullivan but intentionally failed to disclose other important facts, making the disclosure deceptive, or that Mr. Sherlock and/or Mr. Blaylock intentionally failed to disclose an important fact that was known only to them and that Mr. Sullivan could not have discovered, or that Mr. Sherlock and/or Mr. Blaylock actively concealed an important fact from Mr. Sullivan or prevented him from discovering that fact; 2. That Mr. Sullivan did not know of the concealed fact . . . .

"Mr. Sullivan claims he was harmed because Mr. Sherlock and/or Mr. Blaylock negligently misrepresented an important fact. To establish this claim Mr. Sullivan must prove all of the following: 1. That Mr. Sherlock and/or Mr. Blaylock represented to [Mr. Sullivan] that an important fact was true; 2. That Mr. Sherlock and/or Mr. Blaylock's representation was not true; 3. That although Mr. Sherlock and/or Mr. Blaylock may have honestly believed the representation was true, Mr. Sherlock and/or Mr. Blaylock had no reasonable grounds for believing the representation was true when they made it . . . ."

"Mr. Sullivan claims that Mr. Sherlock and/or Mr. Blaylock failed to disclose certain information and that because of this failure to disclose, Mr. Sullivan was harmed. In order to establish this claim, Mr. Sullivan must prove all the following: 1. That Mr. Sullivan purchased the [Wrightwood Drive] property from Mr. Sherlock and/or Mr. Blaylock; 2. That Mr. Sherlock and/or Mr. Blaylock knew that certain information

was not disclosed; 3. That Mr. Sherlock and/or Mr. Blaylock did not disclose this information to Mr. Sullivan; 4. That Mr. Sullivan did not know and could not reasonably have discovered this information; 5. That Mr. Sherlock and/or Mr. Blaylock knew that Mr. Sullivan did not know and could not reasonably have discovered this information; 6. That this information significantly affected the value or desirability of the property; 7. That Mr. Sullivan was harmed; and 8. That Mr. Sherlock and/or Mr. Blaylock's failure to disclose the information was a substantial factor in Mr. Sullivan's harm."

The jury was also instructed on the definition of an "important fact" for purposes of Sullivan's causes of action for misrepresentation and concealment: "A fact is important if it would influence a reasonable person's judgment or conduct. A fact is also important if the person who represents or makes it knows that the person to whom the representation is made is likely to be influenced by it even if a reasonable person would not." (See CACI No. 1905.)

Sullivan prepared a special instruction on the statutory duty of disclosure: "A seller of a single-family residence is obligated to provide the buyer with a Transfer Disclosure Statement on a form provided by law. The Transfer Disclosure Statement must contain all information regarding the subjects covered in it which is within the personal knowledge of the seller. Each disclosure required by the form must be made in good faith. A seller who intentionally or negligently fails to provide the requested information which is in his possession in good faith is liable for a buyer's actual damages." The court denied Sullivan's request to give his special instruction No. 1, ruling the CACI instructions adequately explained the law regarding a seller's required disclosures.

4. *The Jury's Special Verdict and the Judgment for Sherlock and Blaylock*

The jury deliberated for less than an hour and returned its special verdict in favor of both Sherlock and Blaylock. On Sullivan's cause of action for intentional misrepresentation, the jury answered "No" to questions 1, "Did Mr. Sherlock make a false representation of an important fact to Mr. Sullivan?" and 6, "Did Mr. Blaylock

make a false representation of an important fact to Mr. Sullivan?" On Sullivan's cause of action for concealment, the jury answered "No" to questions 11, "Did Mr. Sherlock intentionally fail to disclose an important fact that Mr. Sullivan did not know and could not reasonably [have] discovered?" and 15, "Did Mr. Blaylock intentionally fail to disclose an important fact that Mr. Sullivan did not know and could not reasonably have discovered?" And on Sullivan's cause of action for negligent misrepresentation, the jury answered "No" to questions 19, "Did Mr. Sherlock make a false representation of an important fact to Mr. Sullivan?" and 25, "Did Mr. Blaylock make a false representation of an important fact to Mr. Sullivan?"

Judgment was entered on July 19, 2010.[1] Sullivan's motions for a new trial and for judgment notwithstanding the verdict were denied. Sullivan filed a timely notice of appeal.

DISCUSSION

1. *Refusal of Sullivan's Special Instruction No. 1 Was Not Prejudicial Error*

a. *The TDS and a residential seller's statutory duty to disclose*

A transferor of residential real estate has a statutory duty to deliver to the prospective transferee, prior to transfer of title, a written statement set forth in a statutorily prescribed transfer disclosure form attesting to whether the seller is aware of certain legislatively enumerated defects, including "[r]oom additions, structural modifications, or other alterations or repairs made without necessary permits . . . or not in compliance with building codes" and "[a]ny notices of abatement or citations against the property." (See Civ. Code, §§ 1102.3 [requiring delivery of transfer disclosure statement]; 1102.6 [providing disclosure form to be used].)[2] In addition to mandating the

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[1] The court awarded Sherlock and Blaylock costs and $348,046 in attorney fees.

[2] A seller who reasonably and in good faith believes a defect has been corrected has no statutory duty to disclose it. (See *Pagano v. Krohn* (1997) 60 Cal.App.4th 1, 11 [no statutory duty to disclose past history of water intrusion caused by sprinkler malfunction when seller reasonably and in good faith believed sprinkler adjustment had remedied the

use of the disclosure form, the Legislature requires the seller to make each disclosure in "good faith," defined as "honesty in fact in the conduct of the transaction." (Civ. Code, § 1102.7.) A willful or negligent violation of this statutory duty creates liability for any actual damages suffered by the transferee. (Civ. Code, § 1102.13.)

When establishing this statutory duty of disclosure, effective January 1, 1987, the Legislature "did not intend to affect the existing obligations of the parties to a real estate contract, or their agents, to disclose any fact materially affecting the value and desirability of the property, including, but not limited to, the physical conditions of the property . . . ." (Civ. Code, § 1102.1, subd. (a); see *Calemine v. Samuelson* (2009) 171 Cal.App.4th 153, 161 [describing seller's common law duty of disclosure]; *Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1544 [same].) Rather, "[t]he purpose of the enactment was instead to make the required disclosures specific and clear." (*Calemine*, at p. 162.)

b. *The CACI instructions adequately covered the sellers' duty to disclose*

Sullivan's claims of misrepresentation, nondisclosure and concealment against Sherlock and Blaylock were principally based on information regarding permits and potential code violations that was omitted from, or incorrectly stated on, the TDS. He concedes the trial court's CACI instructions on his common law theories of liability were accurate and complete, but insists the court erred in refusing his special instruction on the failure to make statutory disclosures as a "separate theory of liability."[3] As we understand it, Sullivan's argument is that the CACI instructions refer to the misrepresentation of "an important fact" and nondisclosure of "certain information" and the jury may not have understood those more general terms to include each specific item

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problem]; see also Civ. Code, § 1102.6 [inquiring whether seller "is aware" of certain defects; not whether certain defects existed in the past].)

[3] Sullivan's sixth amended complaint did not contain any such separate theory: The TDS was attached as an exhibit to the pleading, and the allegations concerning its purported omissions and inaccuracies were incorporated into the first cause of action for negligence/negligent misrepresentation and intentional misrepresentation.

of disclosure identified in the TDS. Every other element of the common law and statutory causes of action, including intent, causation and damage, is the same.

The trial court did not err in rejecting Sullivan's proposed special instruction.[4] The CACI instructions as given fully covered all possible types of misrepresentation and nondisclosure at issue in this case: "A party is not entitled to have the jury instructed in any particular fashion or phraseology, and many not complain if the court correctly gives the substance of the applicable law." (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 553; accord, *Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 82.)

As discussed, the CACI instructions informed the jury an "important fact" for purposes of Sullivan's causes of action was one that would influence a reasonable person's judgment or conduct or one the person making the representation (that is Sherlock or Blaylock) knew was likely to influence the person to whom it was made (Sullivan). In addition, the nondisclosure of "certain information" was expressly identified as information that "significantly affected the value or desirability of the property." Sullivan, of course, claimed that he relied on the allegedly inaccurate TDS when purchasing the Wrightwood Drive home and that the various defects of which he was unaware (and that Sherlock and Blaylock either intentionally concealed or negligently failed to disclose) would cost more than $1 million to repair. Given that testimony and the prominent role the TDS played at trial, including its admission into evidence and extended discussion of it during both counsel's closing arguments,[5] the jury

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[4] Our review of this issue is de novo. (*People v. Waidla* (2000) 22 Cal.4th 690, 733; *Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 418.)

[5] Defense counsel acknowledged in closing argument that Sherlock and Blaylock would be liable to Sullivan if they made misrepresentations in the TDS: "You've heard a lot about transfer disclosure statements. Jury instruction 1910 [on a real estate seller's nondisclosure of material facts] is more or less what a transfer disclosure statement is about." Counsel then addressed the purported nondisclosures in the TDS and argued the evidence demonstrated "we disclosed what we were supposed to disclose. We disclosed everything we knew about."

was properly instructed on the substance of the applicable law. (See, e.g., *Arato v. Avedon* (1993) 5 Cal.4th 1172, 1189, fn. 11 [court may refuse instruction requested by party when legal point is adequately covered by other instructions given]; *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1217 [rejecting claim of instructional error when requested special instructions were duplicative of instructions given]; cf. *Cristler v. Express Messenger Systems, Inc.*, *supra*, 171 Cal.App.4th at p. 82 [instructions as given to be evaluated as a whole, not in isolation].)

c. *Refusal to give the specially prepared instruction was not prejudicial*

In its responses to the special verdict questions, the jury found neither Sherlock nor Blaylock had misrepresented an important fact or intentionally failed to disclose an important fact that Sullivan did not know or could not reasonably have discovered. As Sherlock and Blaylock argue on appeal, these findings necessarily include the more particular finding that neither man intentionally or negligently made any material misrepresentation or concealed a material fact in connection with the TDS—either because there were no significant problems with the Wrightwood Drive house or because, if there were, Sherlock and Blaylock did not know about them or thought they had been corrected. Accordingly, even if it were error to refuse Sullivan's proposed special instruction, any error was harmless. (See *Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 580 ["there is no rule of automatic reversal or 'inherent' prejudice applicable to any category of civil instructional error, whether of commission or omission. A judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13.)"];[6] *Zagami v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083,

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[6] In assessing the likelihood that instructional error prejudicially affected the verdict, "[t]the reviewing court should consider not only the nature of the error . . . but [also] the likelihood of actual prejudice as reflected in the individual trial record, taking into account '(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was

1094 [in reviewing the claims of instructional error, "we must not only determine whether the trial court committed error, but whether the error resulted in a 'miscarriage of justice'"]; see also *Viner v. Sweet* (2004) 117 Cal.App.4th 1218, 1224.)

2. *The Challenged Evidentiary Rulings Were All Within the Trial Court's Broad Discretion*

a. *Standard of review*

Sullivan challenges a series of evidentiary rulings by the trial court. Applying the governing, deferential abuse-of-discretion standard of review, there was no error. (See *People v. Williams* (1997) 16 Cal.4th 153, 196-197 ["In determining the admissibility of evidence, the trial court has broad discretion. . . . On appeal, a trial court's decision to admit or not admit evidence, whether made in limine or following a hearing pursuant to Evidence Code section 402, is reviewed for abuse of discretion."]; *People v. Alvarez* (1996) 14 Cal.4th 155, 203 ["appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion"]; *Zhou v. Unisource Worldwide, Inc.* (2007) 157 Cal.App.4th 1471, 1476.) "The trial court's error in excluding evidence is grounds for reversing a judgment only if the party appealing demonstrates a 'miscarriage of justice'—that is, that a different result would have been probable if the error had not occurred." (*Zhou*, at p. 1480; see Evid. Code, § 354; Code Civ. Proc., § 475.)

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misled.'" (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 983; see *Soule v. General Motors Corp.*, *supra*, 8 Cal.4th at pp. 580-581.)

b. *Sullivan's sexual orientation*

Two witnesses, Rebecca Shakib, the owner of the first home that Sullivan rented after moving from the Wrightwood Drive home, and Donald King, Sullivan's former roommate, gave testimony that Sullivan contends improperly referred to his sexual orientation. Neither witnesses' testimony even remotely alluded to Sullivan's sexual orientation, and the court committed no evidentiary error.

Shakib was called as a witness by Sherlock and Blaylock to challenge Sullivan's credibility (based on her interactions with him regarding various landlord-tenant issues after he moved into the home she owned and her belief most of the complaints he had made were not legitimate). At one point Shakib was asked about the findings of a mold remediation company that had tested Sullivan's mattress in response to his complaint mold was growing on the bed from a sewage spill. Sullivan's counsel objected for lack of foundation. The court overruled the objection, explaining Shakib could answer if she knew the results. Shakib then stated body fluids, lubricants and some kind of animal urine had been found on Sullivan's mattress. The court then sustained a belated objection for lack of relevance. Although Sullivan's counsel did not ask the court to strike the answer, the court subsequently instructed the jury to disregard answers to questions to which an objection had been sustained: "If the witness already answered, you must ignore the answer." Sullivan insists Shakib's testimony was prejudicial but identifies no purported error by the trial court.

King was called as a defense witness to rebut Sullivan's testimony that Sullivan and King had socialized in the past with Sherlock and Blaylock. (Sullivan's testimony on this point was apparently intended to reinforce his contention he trusted Sherlock and Blaylock and was fully justified in relying on their representations concerning the remodeling project.) After an Evidence Code section 402 hearing, the court overruled Sullivan's objection to this testimony under Evidence Code section 352 (discretion to exclude evidence if probative value substantially outweighed by undue consumption of time or danger of undue prejudice or confusion), restricting King's testimony to denying

that any such socializing had taken place. King's testimony did not stray beyond those appropriate limits. The court's ruling was well within its broad discretion under Evidence Code section 352. (See *Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 Cal.App.4th 257, 271.)

c. *Testimony from Sullivan's subsequent landlords*

Shakib and the owner of the second home Sullivan moved into after leaving the Wrightwood Drive residence, Art Miller, both testified they believed Sullivan was dishonest. That opinion testimony was admissible under Evidence Code sections 785 and 1101, subdivision (c). The court overruled Sullivan's objections to both witnesses' testimony under Evidence Code section 352, rejecting his contention the testimony was unduly prejudicial and time consuming. Sullivan then extensively cross-examined each witness about the bases for their opinions and, as a result, elicited detailed testimony about the various landlord-tenant problems that had occurred when Sullivan lived in their properties. Although there can be little doubt these matters were collateral to the issues to be resolved by the jury, Sullivan's decision to pursue this line of questioning does not in any way support the conclusion the trial court abused its discretion—that is, made a ruling that was arbitrary, capricious or patently absurd—in allowing opinion testimony attacking Sullivan's credibility. (See *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10 [trial court's Evid. Code, § 352 ruling "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice"].)

d. *Threats to Cox*

Gail Cox, the listing agent, testified for Sherlock and Blaylock. Asked on direct examination whether she had discussed a geological report with Sullivan, Cox responded, "No. I never did any of these things with Brian Sullivan. This man just stalked me in the hallway and said, 'You're just here as a witness,' and something, I don't know. He found me by room 500, and then he walked away, and then he came back now and he said something about Keller Williams [(a real estate firm)]. I don't know what. And then

said, 'You could be in contempt of court' and then walked away. And I sat there and went, 'What is he talking about?' But he found me in the corner of 500 . . . ." At this point Sullivan's counsel asked for a side bar conference with the court.

At side bar Sullivan's lawyer, Ernest Franceschi, asserted, "This is a clear attempt by counsel to provoke a mistrial by having this witness blurt out things. This is a witness under his control." In response the court asked, "Did your client talk to this woman about intimidation of the witness?" Franceschi initially replied, "Absolutely not," but then acknowledged he did not know what Sullivan may have said or done prior to his own arrival at court at 10:00 a.m. The court indicated its intention to move on with the questioning of the witness and to inquire later about possible witness intimidation. Before doing so, however, the court asked Sherlock and Blaylock's lawyer, Duane Bartsch, "Were you aware of contact between them?" Bartsch said he was and explained, "[S]he was sitting by herself, and she said he had come and said something about contempt and contempt of court and what did that mean. And I said I have no idea." Franceschi complained, [T]his is all contrived"; and the court responded, "I have no reason to know whether it is or not. Let's go back and finish [the witness] . . . . We're going to deal with it."

Back in the presence of the jury Franceschi moved to strike Cox's last comments. The court agreed, "We're going to strike that last question and answer at this point in time. That whole last question and answer. And then, counsel, Ask your question again." Cox's direct examination was then completed by Bartsch; and Franceschi began his cross-examination, which continued until the noon recess.

With both counsel present Franceschi advised the court that Sullivan had, in fact, spoken with Cox before her testimony, but only to tell her he had no hard feelings about her being present to testify. Franceschi again characterized the "scurrilous allegation" as an attempt to provoke a mistrial because, in his view, "they're going down in flames here." The court asked Franceschi what he wanted it to do. Franceschi asked that the jury be instructed to disregard the statements. The court replied it had already done that

and asked if Franceschi wanted any other action. Franceschi replied he wanted Bartsch admonished to instruct his witnesses not to do this kind of thing.

For his part Bartsch repeated that Cox told him Sullivan had approached her and said she would be found in contempt of court. He asked for permission to inquire about the exchange on redirect examination. The court then asked questions directly of Sullivan, who insisted he did not say anything about contempt, and Cox, who said he had. Bartsch again asked to be allowed to question Cox; Franceschi argued it would be reversible error to allow that and advised the court he would move for a mistrial if it was permitted. The court asked, "Are you moving now for a mistrial, counsel?" Franceschi said, "I'm not moving now, but if it goes further . . . ." The court then recessed for its own lunch break, deferring any ruling and advising Bartsch that, "If something like this happens again, I want to know about it immediately. I don't want to hear about it later." Following the lunch recess, the court ruled there had been no misconduct by Bartsch, noting the statement by Cox was a nonresponsive answer to the question. However, the court added, "better judgment would have been to inform the court if you believed any witness or anyone has been intimidated." The court then ordered Sullivan not to have any contact with witnesses during the course of the trial without counsel being present. Finally, the court reiterated that it had struck Cox's comments and had preinstructed the jury not to consider anything that may be stricken: "At this point it has been struck." However, the court cautioned that, depending on areas covered by Franceschi during the balance of his cross-examination, the matter might become relevant.

On appeal Sullivan argues Cox's statement was unduly prejudicial and striking the testimony and instructing the jury the testimony that had been stricken could not be considered for any purpose was "too little, too late." Yet Sullivan's trial counsel expressly declined to ask for a mistrial, and his appellate counsel identifies no ruling (or failure to rule) by the trial court that constitutes error.

e. *Sullivan's claims against other parties*

During cross-examination Sullivan stated his lawsuit was "about the lack of disclosure from the start by your sellers that led me awry of buying this home." Sherlock and Blaylock's lawyer, Bartsch, asked, "It was the sellers' fault?" Sullivan answered, "Absolutely." Bartsch then asked, "Why did you sue Metrocities Mortgage, your loan broker?" Sullivan's counsel, Franceschi, asked for a sidebar conference and objected to questioning about the other parties who had been named as defendants in Sullivan's lawsuit as "a huge [Evidence Code section] 352 issue," essentially contending the nature of the claims against the other defendants, since dismissed from the action, was irrelevant. Bartsch, on the other hand, explained to the court the defense theory that Sullivan simply wanted out of the deal; it was not an issue of disclosures but of trying to recoup his investment from any party he could. The court initially ruled Bartsch could continue with his questioning, but cautioned the lawyer to "tie it into why it's relevant because I don't want to mislead the jury." Bartsch asked several questions concerning Sullivan's claims against JP Morgan Chase Bank and GMAC Mortgage. Ultimately, however, the court concluded the probative value of this evidence was outweighed by the likelihood of confusing the jury with respect to why other individuals or entities had been sued and what happened to those parties and precluded any further inquiry into that area (subject to reconsideration depending on Sullivan's testimony), but declined to strike the brief testimony that was already in the record: "It's already in the record. So it's done. Let's move on."

In closing argument Bartsch argued Sullivan no longer wanted the Wrightwood Drive home once the real estate market crashed and he learned he could not add a second story addition and suggested his decision to sue other parties in addition to Sherlock and Blaylock illustrated his true motive: "Why did he sue GMAC Finance? And why did he sue JP Morgan Chase Bank? And if this lawsuit from day one was always about Dan Sherlock and Jason Blaylock not disclosing, why did he sue a company called Mortgage Electronic Registration System, whose sole function is to service loan payments?

Because it's a lie." No contemporaneous objection was made to this portion of Bartsch's closing argument; but a short time later, after the jury was excused for its lunch recess, Franceschi objected that referring to other parties to the litigation violated the court's earlier rulings. The court overruled the objection, explaining, "Anything that is in evidence that was not struck or objected to, that is in evidence, can be argued with respect to it." The court also confirmed it would instruct the jury to rely only on evidence presented at trial and to disregard any testimony that had been struck.

Sullivan contends the court abused its discretion when it allowed testimony regarding his claims against the other defendants and then refused to strike Bartsch's argument based on that testimony, which, he asserts, was intended to mislead and inflame the jury. Given Sherlock and Blaylock's theory of defense, there was no error in allowing brief cross-examination of Sullivan to explore his motivation for suing parties who were not involved in the purportedly inaccurate and incomplete disclosures regarding permitting and code violations. Once the court determined the area of inquiry was likely to become unduly confusing and time-consuming, it foreclosed further questioning. Neither the decision to allow question nor the ruling stopping it was arbitrary or fell outside the bounds of reason. (See *People v. Rodriguez, supra*, 20 Cal.4th at pp. 9-10.)

Bartsch's closing argument was properly grounded on the evidence that had been admitted by the court. "In conducting closing argument, attorneys for both sides have wide latitude to discuss the case. The right of counsel to discuss the merits of a case, both as to the law and facts, is very wide, and he has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom. . . . An attorney is permitted to argue all reasonable inferences from the evidence, . . . [citation.]. Only the most persuasive reasons justify handcuffing attorneys in the exercise of their advocacy within the bounds of propriety." (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 795 [internal quotation marks omitted].) Even if Sullivan's counsel had timely

objected and asked the court to strike Bartsch's remarks, the court did not err in refusing to do so.

f. *Maloof's testimony and report*

Sami Maloof, a structural engineer, prepared a report concerning certain beams at the Wrightwood Drive house, apparently in response to a concern expressed by city inspector Cuellar. Sullivan objected to Maloof's testimony and introduction of his engineering report because he had not been designated as an expert witness. The court ruled Maloof could testify as a percipient witness only (to refute Sullivan's claim Sherlock and Blaylock had not prepared an engineering report for these beams) and his report would be admitted for the limited purpose of showing their state of mind (that is, their reliance on his report in preparing the TDS). The court gave a limiting instruction to that effect, to which both attorneys had agreed. In closing argument Bartsch simply explained Sherlock and Blaylock had hired Maloof to come to the property to prepare a report; they gave the report to Cuellar when he came for a further inspection and advised Cuellar they had put in three beams as Maloof had recommended; and Cuellar had then signed off on the work. Contrary to Sullivan's contention Maloof's testimony and his report presented "back door" expert opinion and should have been excluded as improper lay opinion, the court's ruling and limiting instruction were right on the mark.

g. *Akers's testimony*

Finally, citing Code of Civil Procedure section 2034, subdivision (h) (renumbered since 2004 as section 2034.280, subdivision (a)),[7] Sullivan contends the trial court erred in allowing Sherlock and Blaylock to supplement their expert designation to add Randall Akers, an expert on permitting and building codes, because they had previously

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[7] Code of Civil Procedure section 2034.280, subdivision (a), provides, "Within 20 days after the exchange described in Section 2034.260, any party who engaged in the exchange may submit a supplemental expert witness list containing the name and address of any experts who will express an opinion on a subject to be covered by an expert designated by an adverse party to the exchange, if the party supplementing an expert witness list has not previously retained an expert to testify on that subject."

designated Andrew Gillespie, a general contractor, as their expert on those subjects. In response to Sullivan's objection in the trial court, Sherlock and Blaylock's lawyer explained Akers had been counter-designated when they noticed Sullivan's designation included two experts on permitting issues, which led them to believe they needed an additional expert with particular familiarity with issues relating to hillside homes in the Mulholland corridor. Counsel also advised the court he had made Akers available for a deposition following the timely filing of the supplemental designation. After hearing argument and reviewing the case authority cited by Sullivan in support of his motion, the court denied the motion to strike the supplemental designation. Pursuant to the court's order Sullivan took Akers's deposition prior to his in-court testimony.

In light of Akers's greater and more specific expertise on hillside permitting issues, it was not an abuse of discretion to permit the supplemental designation based on the representation that Gillespie could not adequately address all the opinions anticipated from the experts designated by Sullivan. Sherlock and Blaylock were not attempting to substitute Akers for Gillespie because they were unhappy with Gillespie's testimony (cf. *Basham v. Babcock* (1996) 44 Cal.App.4th 1717, 1723 [party who has designated an expert to testify on a particular subject may not use supplemental designation to substitute experts]), and nothing in the record suggests they were attempting to game the discovery process. (Cf. *Fairfax v. Lords* (2006) 138 Cal.App.4th 1019, 1026-1027 [defendant intentionally refrained from participating in simultaneous exchange of expert witnesses to gain advantage].)[8] Moreover, Sullivan has failed to demonstrate how he was

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[8] In *Fairfax v. Lords, supra,* 138 Cal.App.4th 1019, cited by Sullivan to the trial court but not in his briefs on appeal, the court held a party could not fail to designate *any* experts as part of the initial exchange under Code of Civil Procedure section 2034.260 and then designate *all* of his or her experts in a supplemental exchange under section 2034.280 after viewing the timely served designation by the opposing party: "Fairfax designated only one retained expert, to address the only real disputed issue in this case . . . . Because Lords had every reason to anticipate such a designation, he had a corresponding obligation to designate whatever expert he expected to have testify on the issue *at the same time*. . . . [¶] Our system requires that defendants participate in the

unfairly prejudiced by the jury hearing from two, rather than one, defense experts on the permitting and code issues, particularly since he was able to depose both of them prior to trial. (See Code Civ. Proc., § 475 ["[n]o judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also by reason that such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed"]; *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 51-52 [prejudice will not be presumed; burden rests with party claiming error to demonstrate not only error, but also a resulting miscarriage of justice].)

DISPOSITION

The judgment is affirmed. Sherlock and Blaylock are to recover their costs on appeal.[9]

PERLUSS, P. J.

We concur:

ZELON, J. JACKSON, J.

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litigation essentially simultaneously with plaintiff. . . . [¶] . . . Lords had no right to simply delay his designation of retained experts until after he had the opportunity to view the designation timely served by Fairfax." (*Id*. at p. 1027.)

[9] On May 10, 2012 Sullivan filed a petition for writ of supersedeas to stay the trial court's order of May 7, 2012 requiring him to post an undertaking to secure that part of the judgment awarding attorney fees and costs to Sullivan and Sherlock. (Code Civ. Proc., § 917.9.) On May 11, 2012 this court issued a temporary stay of the May 7, 2012 order. The stay is vacated.