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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MARIA W. FERNANDEZ, Plaintiff and Appellant, v. SUNQUEST EXECUTIVE AIR CHARTER, INC., Defendant and Respondent.	B226728 (Los Angeles County Super. Ct. No. BC380656)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rita Miller, Judge. Affirmed.

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Law Offices of Ian Herzog, Ian Herzog, Evan D. Marshall and Thomas F. Yuhas for Plaintiff and Appellant.

Perkins Coie, Ronald A. McIntire and Melora M. Garrison; Gladstone Michel Weisberg Willner & Sloane, Arthur I. Willner for Defendant and Respondent.

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Maria W. Fernandez appeals from the judgment entered after a jury found that her late husband, Fernando Fernandez, was an employee, not an independent contractor, of Sunquest Executive Air Charter, Inc. (Sunquest) at the time of his death, which rendered her unable to pursue this tort action against Sunquest. Maria contends that the trial court prejudicially erred in instructing the jury and improperly limited the time allotted to her counsel to question prospective jurors.[1] We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Complaint and Answer*

On November 13, 2007, Maria filed a tort action against Sunquest and several other parties relating to an airplane crash on January 12, 2007, which caused Fernando's death. According to the complaint, the airplane, for which Fernando "was acting as a contract co-pilot, crashed while attempting to return to land at Van Nuys Airport after experiencing a forward baggage door open-in-flight emergency on departure." Sunquest, the charter company that had hired Fernando to copilot the aircraft, asserted in its answer as an affirmative defense that Maria's action against it was barred because workers' compensation was her exclusive remedy.

2. *The Trial*

a. *The bifurcated issue for trial*

All defendants except Sunquest were eliminated from the case before trial. Based on its affirmative defense, the threshold issue as to Sunquest was whether Fernando at the time of his death was an employee, which would bar Maria's tort action, or an independent contractor, which would allow her to pursue the action. In a bifurcated trial the jury initially decided the question of employee versus independent contractor status.

b. *Sunquest's operations and its pilots*

During the bifurcated trial, Mark Smith, the director of operations and president of Sunquest, testified that he had cofounded the company with Frank Kratzer in 1991 as an

[1] Because Maria and her late husband share the same last name, we refer to Maria and Fernando by their first names for purposes of clarity.

air taxi or on-demand air carrier service. Early in the company's operations, Smith was a pilot, also employed by the Los Angeles Police Department, and wrote Sunquest's operations manual with Kratzer. Kratzer was the director of operations and a pilot. After three years, Smith became the company's chief pilot. Both Fernando and Kratzer, who was the pilot of the aircraft, were killed in the January 12, 2007 accident. Smith then retired from the police department to take on his current role with Sunquest, assuming Kratzer's position with the company.

When Sunquest first began operating, it treated some pilots as employees and others as independent contractors. According to Smith, "[s]ome of the pilots were treated as independent contractors because they showed up or we put them to work, they were already trained, their training would have been paid for by another source, and that if somebody comes to the company already trained by somebody else, we would use them as an independent contractor or 1099 them. Also because they were trained by somebody else, and they were possibly working for somebody else, that they could be available or not available based on their schedule and those we would make independent contractors or at least treat them by not . . . withholding workers' comp and 1099 [them] at the end of the year." Independent contractors were not compensated through payroll, but submitted an invoice to the company's controller, who would issue a check without withholding, and they were not covered by Sunquest's workers' compensation policy.

In 2005, however, the state Employment Development Department audited Sunquest and fined it because it had paid pilots, whom it considered independent contractors, without withholding from their paychecks or covering them on its workers' compensation policy. Since the audit Sunquest has treated pilots as employees, not independent contractors. It takes out withholding and pays for workers' compensation and "treat[s] every pilot as an employee."[2]

[2] Sunquest made two exceptions to its post-audit policy of treating pilots as employees. The first was for a business manager of the owner of one of the aircrafts operating out of Sunquest's facility. According to Smith, the business manager "brought [Sunquest] the plane. He was responsible for managing the airplane and [the] owner of

c. *Fernando's work as a copilot at Sunquest*

Fernando began work at Sunquest in August 2006 as an entry-level copilot on a certain jet aircraft. Fernando came to Sunquest through Kratzer, whose wife had referred Fernando to Sunquest after meeting him at the flight school owned by Kratzer and her. When hired, Fernando told Smith that "he had sold a business and was semi retired, living off the proceeds of his business and that he wanted to be a pilot and fly jet aircraft." Smith found Fernandez's situation attractive to the company "because having an employee who had a source of income [and] didn't have to depend on receiving a regular salary of a minimum income, . . . then he would be willing to work for the terms [Sunquest] offered him" as an entry-level copilot, which was $150 per day of copilot work, plus the cost of training Fernando in the aircraft. Smith hoped to schedule Fernando for 20 to 25 trips per month, and Fernando was to "make himself available unless by prior arrangement. If he couldn't be available, he could call and say . . . I'm not available this day or the next day. The whole idea was that he wanted to fly as much as he could and wanted to take every trip he could get, and he made himself available . . . every time [Sunquest] called him." Because Sunquest was paying for training, Fernando would not fly for other companies while working for Sunquest. Sunquest agreed to renegotiate the terms of Fernando's salary and training after he had completed one year of work for the company.[3]

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that plane paid him directly when he flew with the owner and paid for his training and through mutual agreement between [Smith] and . . . Kratzer, even in light of [Sunquest's] experience with [the Employment Development Department], [Sunquest] elected to risk that in order to keep the plane there to operate it." The second exception "was a former employee, one of [Sunquest's] pilots who came back as a favor to [Sunquest] to do one trip, one or two trips and that was it, not to work on a continual basis, just to help [Sunquest] through a short time before [it] got another pilot to replace him." Other than those two individuals, since the audit, Sunquest treated pilots as employees.

[3] Although Sunquest generally required its pilots to sign a note indicating that if they left Sunquest within a year of being hired then they would reimburse the company for training costs, it did not require Fernandez to do so because of his prior connection with the Kratzers.

Just as with its other pilots after the 2005 audit, Sunquest treated Fernando as an employee, taking withholding, including federal and state taxes, social security, disability, Medicare and unemployment insurance out of his paycheck, requiring him to fill out a W-4 form and issuing him a W-2 at the end of the year. It did not issue Fernandez a 1099 form, nor did Fernando express any concern about the withholding from his paycheck, the manner in which Sunquest was paying him or its identification of him on his paycheck as an employee. Fernando was covered under Sunquest's workers' compensation policy. Late 2006 guidelines from the Federal Aviation Administration (FAA) confirmed to Sunquest that it had made the correct decision to treat its pilots as employees rather than independent contractors.

After Fernando's hiring, Sunquest trained him on the designated jet aircraft, costing the company about $8,000. When Fernando copiloted a flight, he had to arrive to a specified location at least an hour before work, wear an appropriate uniform and brief himself with aspects of the flight. Sunquest provided the aircraft in which Fernando would fly and the fuel. It directed Fernando as to the catering on a particular flight, the navigation charts and maps, the place to check weather and the weather briefing. He also was required to implement company policy on briefing passengers and checking their identification before a flight. For overnight trips, Sunquest scheduled a hotel for Fernando and paid him a per diem rate for expenses. Fernando was required to follow Sunquest's operations manual and used Sunquest's offices at the Van Nuys Airport. Smith acknowledged that some of the flying operations and requirements, including following FAA regulations, would be the same whether a copilot was an employee or an independent contractor.

In the months after Fernando's hire, Sunquest experienced a business slowdown. Fernando told Smith that he wanted to fly more. Smith "explained to him that business had been slow and that [Sunquest] had anticipated more flying, but . . . [was] basically on demand."

On November 28, 2006, Fernando, with Maria's assistance, wrote a letter to Smith and Kratzer, stating that he had "been flying on average only twelve days a month,

something that is not sustainable at the daily rate [he] agreed to in August. [¶] . . . If [he were] to continue to be committed to Sunquest full-time, [he] would require a bi-weekly salary or some combination of weekly guarantee with per flight bonus." Fernando said that he would "leave it up to [Smith and Kratzer] to initiate a call or meeting to advance or conclude [their] business arrangement." In response to Fernando's letter, Kratzer and Smith agreed, and Kratzer communicated to Fernando, that Sunquest would train him on a different jet aircraft, which would give him the opportunity to fly more.

Soon after, on December 8, 2006, Fernando, again with Maria, wrote a letter to Smith and Kratzer: "Thank you for speaking with me this week and for training me in the King Air. While I appreciate the opportunity to expand my skills and maximize my chances of logging more flight time in different aircraft, the core issue remains the same: I need a minimum weekly salary, or a guarantee of the 20 to 25 days a month in the air [Smith] led me to expect when I joined. Very obviously, no one can live on $150 a week, and sometimes nothing at all, while being committed to a company 24/7. [¶] That said, I have no option but to look for another job. I'll be available to you on a contract basis at the rate of $175 per flight, if you choose. I can't guarantee my availability but will try to accommodate Sunquest when and if I can. [¶] If you can offer me a weekly salary or other guarantee, as well as further training, I'd be happy to remain with the company full time."

Smith never saw the December 2006 letter, but Kratzer discussed the contents with him. Initially, Smith was angry because Sunquest and Fernando "had an agreement [it] would spend all this money for his training and then he would commit to [Sunquest] . . . to fly for this amount to help [the company] recoup [its] training costs, and [Smith] was surprised because [he] thought [Fernando] . . . understood [that] [Sunquest] [was] going to try to fly him as much as [it] could." Smith did not understand Fernando's statement in his letter that he would be available on a "contract basis" as changing the nature of Fernando's status as a Sunquest employee. Smith would have terminated Fernando's employment rather than have treated him as an independent

contractor. In any case, neither Smith nor Kratzer would have made Fernando an independent contractor without first clearing it with the other and informing the company's controller, and that never happened. Fernando never expressed to Smith that he desired to quit or not fly for Sunquest, nor did he say he wanted to be an independent contractor.

From early December to the time of the accident on January 12, 2007, Fernando received additional training and copiloted eight or nine flights. Sunquest did not change the way it treated Fernando, paying him in the same manner and at the rate of $150 per day, deducting withholding from his paycheck and keeping him on the workers' compensation policy. Fernando did not complain that Sunquest still was paying him at the $150 rate. Kratzer did not report to his wife in either November or December 2006 that Fernando had quit or changed his employment status, and she would have expected Kratzer to tell her if that had occurred because she had referred Fernando to Sunquest. To Smith's knowledge, Fernando never turned down a flight, and, according to Smith, he would have been informed if Fernando had done so. Sunquest's scheduler and dispatcher also did not remember Fernando ever turning down a flight and, if Fernando had done so, he would have called Smith or Kratzer immediately because pilots with an arrangement like Fernando's were "not supposed to be able to turn down a trip" and it would have been a big deal. Fernando did not tell Smith that he was looking for flying opportunities with other companies.

According to Maria, after the December 2006 letter, "as thank you [to Sunquest] for [Fernando's] having had the opportunity to fly at Sunquest, [she and Fernando] purchased two bottles of champagne, was the Christmas period[,] and put them in silk sacks . . . and wrote thank you notes, and [Fernando] dropped those off. [He] also . . . went to Sunquest to pick up his stuff." "It was entirely clear to [Maria and Fernado] that he [had] quit and was gone." Maria said that after the December 2006 letter Fernando "was no longer a Sunquest employee. He had quit. So he was happy to fly if he was available . . . ." Maria and Fernando took time off over the holidays, but Fernando flew for Sunquest when he was available. Maria reported that Sunquest had called Fernando

to fly for Christmas Eve day, but he said he would not, and she thought he had received other calls as well. The chief pilot for another charter company testified that in late November 2006 Fernando had inquired about flying for that company and that he had told Fernando to come see him in mid-January 2007 when they might be able to work out an arrangement. According to Maria, Fernando was talking to various charter operations about a position.

Smith never discussed Fernando's complaints with Maria, and, after the accident, Maria did not object that Fernando's last paycheck was at the rate of $150 per day or that his paycheck included withholdings. Maria, however, said that she spoke to Smith on the telephone after the December 2006 letter and told him that she was sorry that Fernando had had to quit, but "the deal was that he would be flying a lot." Neither Smith nor Kratzer's wife or the company's controller heard any talk at the December 2006 company holiday party from Maria or Fernando that Fernando was no longer a Sunquest employee and had become an independent contractor. According to Maria, she thanked Kratzer at the party for giving Fernando the opportunity to fly with Sunquest and Kratzer told her that he was "sorry to see [Fernando] go" and was "happy to . . . maintain an association . . . ." Maria said that in that conversation "it was very clear that [Kratzer] was sorry that Fernando . . . had quit."

3. *The Jury's Verdict and Judgment*

The jury unanimously found that Fernando was an employee of Sunquest, and the trial court entered judgment in Sunquest's favor. Maria filed a timely notice of appeal.

DISCUSSION

1. *The Trial Court Did Not Commit Prejudicial Instructional Error*

a. *The requirements for jury instructions*

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him [that] is supported by substantial evidence." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) "'Instructions should state rules of law in general terms and should not be calculated to amount to an argument to the jury in the guise of a statement of law. [Citations.] Moreover, it is error to give, and proper to refuse, instructions that unduly overemphasize issues, theories or defenses either by repetition or singling them out or making them unduly prominent although the instruction may be a legal proposition. [Citations.]' [Citation.]" (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1217.)

b. *The trial court's instruction*

With respect to the issue of Fernando's status as an employee or independent contractor, the trial court instructed the jury under a modified version of California Civil Jury Instructions (CACI) No. 3704 as follows: "'Sunquest Executive Air Charter claims that Fernando Fernandez was a Sunquest Executive Air Charter employee at the time of the accident. Maria W. Fernandez claims that Fernando Fernandez was an independent contractor at the time of the accident. You must decide whether at the time of the accident Fernando Fernandez was an employee of Sunquest or instead was an independent contractor. In deciding between employee or independent contractor status, the principal thing you should consider is whether or not Sunquest had the right to control how Fernando Fernandez performed the work rather than just the right to specify the result. The right to control tends to show an employer/employee relationship while the lack of control tends to show an independent contractor relationship. It does not matter whether Sunquest exercised the right to control. There may have been some things that neither Sunquest nor Fernando Fernandez had the right to control. If so, do not consider these things in reaching your decision. You should also consider all the circumstances in deciding whether Fernando Fernandez was a Sunquest employee. The following factors,

if true, may show that Fernando Fernandez was an employee of Sunquest. If not true, they may show that he was an independent contractor. A, Sunquest provides the equipment, tools and place of work. B, The work being done by Fernando Fernandez was part of regular business of Sunquest. C, The work being done by Fernando Fernandez was the only occupation or business of Fernando Fernandez. D, The kind of work performed by Fernando Fernandez is usually done under direction of a supervisor rather than by a specialist working without supervision. E, The kind of work performed by Fernando Fernandez does not require specialized or professional skill. And F, Sunquest and Fernando Fernandez acted as if they had an employer/employee relationship. Another thing that you should consider is whether or not Fernando Fernandez and Sunquest entered into a contract that Fernando Fernandez would be an independent contractor rather than an employee of Sunquest. If the parties entered into such a contract, that would tend to show that Fernando Fernandez was an independent contractor and that would be a significant factor for consideration. Some of these factors may be inapplicable. You may give them whatever weight you believe they deserve.'"

c. *Maria's claims of error*

Maria contends that the trial court erred by using this modified version of CACI No. 3704 as the basis for the jury's determination whether Fernando was an employee or independent contractor. She claims the instruction (1) improperly focused on the issue of control without explaining to the jury the relevance of control in a tort action such as this involving the regulated field of aviation where the employer asserts workers' compensation exclusivity as a defense; (2) did not appropriately emphasize to the jury the significance of a finding that after the December 8, 2006 letter an agreement existed between Fernando and Sunquest that he was an independent contractor; and (3) was used without also giving necessary special instructions she had requested regarding contract formation and acceptance by conduct. None of her claims has merit.

(1) *The issue of control*

Contrary to Maria's claim, the modified version of CACI No. 3704 did not place undue focus on the issue of control. The instruction correctly defined "whether or not

Sunquest had the right to control how Fernando Fernandez performed the work, rather than just the right to specify the result[,]" as the "principal" issue for the jury to consider. (See *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350 ["right to control work details is the 'most important' or 'most significant' consideration" in determining where an employment relationship exists].) It then listed additional factors for consideration derived from the Restatement Second of Agency and, during the drafting of the instruction, eliminated certain other factors from consideration at Maria's request. (See *id*. at pp. 350-351 ["Additional factors [for consideration in the determination of an employment relationship] have been derived principally from the Restatement Second of Agency"].) And it incorporated Maria's theory of the case by telling the jury it should consider whether Fernando and Sunquest had entered into a contract that Fernando would be an independent contractor and that such a finding "would be a significant factor for consideration." Finally, the instruction told the jury that some factors may be inapplicable and it should give them whatever weight it believed they deserved. (See *id*. at p. 351 ["'individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations'"].) The instruction thus appropriately set out for the jury the relevant considerations in determining whether Fernando was Sunquest's employee or an independent contractor.[4]

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[4] The 2003 version of CACI No. 3704 instructed that "the right of control, *by itself*, gave rise to an employer-employee relationship." (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 303 (*Bowman*).) In 2010, soon after the trial in this case, the court in *Bowman* disapproved that wording. The trial court here did not use the part of the pattern instruction later held erroneous. Rather, the court instructed that control was "the "principal thing[,]" listing additional factors and incorporating Maria's theory of the case. The court's instruction is consistent with the approach for determining the existence of an employment relationship. (*Ibid*. ["right of control is an important factor in determining whether a worker is an employee or an independent contractor, but it is not the only factor"; "cases consistently endorse a multifactor test that considers not only the right of control, but also secondary factors"].) In December 2010, after *Bowman*, CACI No. 3704 was revised to reflect this approach. Maria contends that the trial court should have given her special instruction No. 39, rather than the modified version of CACI No. 3704.

Maria contends the trial court's modified version of CACI No. 3704 did not fit in this case because it failed to incorporate the principal that "courts generally are more exacting in requiring proof of an employment relationship when such a relationship is asserted as a defense by the employer to a common law action." (*Spradlin v. Cox* (1988) 201 Cal.App.3d 799, 808.) We disagree. Before reading its modified version of the pattern instruction, the court told the jury under CACI No. 2800, "'Sunquest Executive Air Charter claims that it is not responsible for any harm that Fernando Fernandez may have suffered because he was Sunquest Executive Air Charter's employee and therefore can only recover under California['s] Worker's Compensation Act. To succeed, Sunquest Executive Air Charter must prove all of the following. 1, That Fernando Fernandez was Sunquest Executive Air Charter's employee. And, 2, that Fernando Fernandez's injury occurred while he was performing a task for or related to the work Sunquest Executive Air Charter hired him to do." The directions for use of CACI No. 2800 state, "This instruction is intended for cases where the plaintiff is suing a defendant claiming to be the plaintiff's employer. . . . [¶] For other instructions regarding employment status, such as special employment and independent contractors, see instructions in the Vicarious Responsibility series (CACI Nos. 3700-3726). These instructions may need to be modified to fit this context." (Directions for Use to CACI No. 2800 (2011 ed.).) The court followed the direction of CACI No. 2800 by giving that instruction, applicable, as here, when a plaintiff is suing a defendant claiming to be the plaintiff's employer, and then turning to CACI No. 3704 to address the determination of employee versus independent contractor status and modifying it to fit the circumstances of this case.

But, as discussed, the instruction given properly laid out the considerations for the jury to determine whether Fernando was Sunquest's employee, and it substantially covered all aspects of Maria's special instruction No. 39. Thus, the court did not err by declining to give Maria's special instruction No. 39. (*Major v. Western Home Ins. Co., supra*, 169 Cal.App.4th at p. 1217 ["'[e]rror cannot be predicated on the trial court's refusal to give a requested instruction if the subject matter is substantially covered by the instructions given'"].)

Maria also argues that the instruction did not account for Sunquest's inability to control certain aspects of Fernando's work, which were regulated by the FAA. (See *Southwest Research Institute v. Unemployment Ins. Appeals Bd.* (2000) 81 Cal.App.4th 705, 709-710 [following federally mandated requirements does not constitute control such as to establish an employee relationship].) According to the evidence, however, Sunquest controlled many aspects of Fernando's work apart from the federally regulated components of his job, including when, what plane and to what destination he flew, when he was required to report to work, what he was to wear, where he was to stay on overnight trips, how he would greet and brief passengers, what type of catering would be used on a particular flight and his training. Moreover, to the extent the FAA regulated components of Fernando's job, the instruction covered that issue, "There may have been some things that neither Sunquest nor Fernando Fernandez had the right to control. If so, do not consider these things in reaching your decision." The instruction thus accounted for FAA regulation.[5]

(2) *The issue of the contract*

Maria's contends that the modified version of CACI No. 3704 did not emphasize appropriately the significance of a finding that Fernando and Sunquest had a contract regarding the nature of his relationship with the company. The trial court, however, specifically tailored the instruction to incorporate Maria's theory that after Fernando sent his December 8, 2006 letter and Sunquest continued to use his services they entered into a contract altering his status to that of an independent contractor. The instruction provided, separately from the issue of control and from the additional factors for consideration, "Another thing that you should consider is whether or not Fernando Fernandez and Sunquest entered into a contract that Fernando Fernandez would be an independent contractor rather than an employee of Sunquest. If the parties entered into

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[5] Maria claims that the instruction gave the jury no basis for differentiating between an employee pilot and an independent contractor pilot. The instruction, however, included factors that, as applied to the evidence, would distinguish between employee and independent contractor pilots.

such a contract, that would tend to show that Fernando Fernandez was an independent contractor, and that would be a significant factor for consideration." The instruction thus not only directed the jury to consider Maria's contract theory but also said the finding of a contract would be significant. Any greater emphasis on her contract theory would have been undue and thus improper. (See *Major v. Western Home Ins. Co.*, *supra*, 169 Cal.App.4th at p. 1217.)

(3) *The issue of contract formation and acceptance by conduct*

As noted, Maria argued that the December 8, 2006 letter constituted an offer by Fernando to work for Sunquest as an independent contractor and Sunquest's using Fernando as a copilot after that time was an acceptance of a change from employee to independent contractor status. She proposed a number of special instructions relating to that contract formation and acceptance by conduct. She contends that the trial court erred by not giving certain of them (referring to proposed special instruction Nos. 36, 45 to 51 and 52). We disagree.

After Maria proposed the special instructions, the trial court suggested that all instructions relating to her contract theory be incorporated into one instruction and that the parties use wording from the CACI instructions. The court and the parties worked together extensively to formulate an instruction embodying Maria's contract theory, which was labeled special instruction No. A. Maria then withdrew some of her requested special instructions—Nos. 46, 48, 50 and 51—because special instruction No. A incorporated them. After the conclusion of the presentation of evidence, before the court instructed the jury, Maria, through counsel, asked the court not to give the jury special instruction No. A, maintaining that it contained incorrect statements of law. Sunquest agreed to withdraw special instruction No. A. Maria agreed that withdrawal was appropriate and did not request that the court instead give any of her proposed special instructions on her contract theory. The court thus did not give special instruction No. A, "leav[ing] [the contract theory] to argument." Given Maria's withdrawal of special instructions Nos. 46, 48, 50 and 51, and her agreement that the court should not give special instruction No. A, she cannot obtain reversal of the judgment based on an

allegedly erroneous failure to give her special instructions Nos. 46, 48, 50 and 51. (*Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal.App.3d 278, 312 [appellant cannot claim instructional error based on instruction that it has withdrawn].)

Nor can Maria obtain reversal of the judgment based on the court's failure to give her special instructions Nos. 36, 47, 49 and 52. "[I]f the record does not show whether an instruction was refused or 'withdrawn, abandoned, or lost in the shuffle,' the reviewing court must presume that the appellant withdrew the instruction. [Citation.]" (*Bullock v. Phillip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 678.) According to the record, Maria withdrew special instruction No. 36. The record is unclear as to whether special instruction No. 47 was withdrawn, but does not indicate the instruction was refused. It provides that a ruling on special instruction No. 49 was deferred, but does not show refusal of the instruction. It includes no discussion, let alone a refusal, of special instruction No. 52. Failure to give those instructions thus does not present reversible error.[6]

The record does reflect that the trial court refused Maria's special instruction No. 45, but failure to give that instruction was not error. Special instruction No. 45, purporting to tell the jury that a worker could change his status from employee to independent contractor by stating he would be an independent contractor and then continuing to work without his employer rejecting that offer, did not state a correct proposition of law.[7] The case Maria cited to support the instruction does not involve an

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[6] Even if Maria had preserved her request for special instruction Nos. 36 and 46 to 52, the trial court would not have erred by refusing to give them. Those special instructions overemphasized Maria's contract theory, some interlaced with argument, and thus were not proper for the jury's consideration. (*Major v. Western Home Ins. Co.*, *supra*, 169 Cal.App.4th at p. 1217 [instructions that amount to argument or that overemphasize issues or theories are not proper].)

[7] Special instruction No. 45 stated, "Where an employer and worker have an agreement under which each can terminate the agreement at any time, the unilateral statement by the worker that he will continue to provide services in the future only as an independent contractor constitutes a termination of the prior employment agreement by the worker and an offer to provide services under the newly stated terms. If the employer

independent-contractor issue or an employee's ability to change his status to that of an independent contractor; rather, it affirms an employer's capacity to alter the compensation of an employee-at-will who continues to work for the employer after the offer of a unilateral contract with new terms. (See *DiGiacinto v. Ameriko-Omserv Corp.* (1997) 59 Cal.App.4th 629, 637, 638-639.) Special instruction No. 45 was an improper attempt to present "'argument to the jury in the guise of a statement of law.'" (*Major v. Western Home Ins. Co.*, *supra*, 169 Cal.App.4th at p. 1217.)

2. *The Trial Court Did Not Improperly Limit the Time for Maria's Counsel to Question Prospective Jurors*

Maria contends generally that the trial court did not afford her counsel adequate time to question prospective jurors and specifically that it improperly restricted his questioning of one of those jurors. Neither her general nor specific contention has merit.

As Maria notes, the trial court initially gave each side 20 minutes to question prospective jurors in the first group, later extended the time to 30 minutes per side and ultimately allowed Maria's counsel 36 minutes total to complete his questioning of that group (and gave the same amount of time to Sunquest's counsel). The jury selection process was extensive, lasting over the course of three days and comprising almost 400 pages of the reporter's transcript. Nevertheless, Maria contends that the time limit placed on her counsel for questioning was arbitrary and thus impermissible. We disagree. The trial court has the authority to place reasonable time limits on counsel's questioning of prospective jurors. (*People v. Carter* (2005) 36 Cal.4th 1215, 1251 [no error in time limit imposed for voir dire when it "did not prevent defense counsel from making reasonable inquiries into the fitness of prospective jurors to serve on the jury"].) The time limit imposed by the court was well within that authority. Nothing intimates that Maria's counsel was unable to adequately question prospective jurors to gather the information necessary to select a jury.

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fails to reject that offer and continues to use the worker's services without any further agreement by the parties, the employer will be deemed to have entered into an independent contractor relationship with the employee regardless of the nature of the prior relationship."

Maria complains that the trial court impermissibly "cut off" her counsel's questioning of one prospective juror as jury selection was nearing completion. After the court questioned this prospective juror, the parties and the court discussed the juror out of her presence. When she returned, Maria's counsel asked her questions, and, after he had exceeded by about two minutes the five minutes afforded to him, the court granted his request to ask two additional questions. When counsel asked to continue with a third additional question, the court refused, indicating that the selection process was consuming a great deal of time. Sunquest's counsel then asked the prospective juror several questions. At the end of the questioning, Maria's counsel moved to discharge the prospective juror for cause, and the court denied the motion (a ruling that Maria does not challenge on appeal). Maria's counsel exercised a peremptory challenge as to the prospective juror. Maria does not suggest that the court's decision to preclude the third additional question affected its ruling on the motion to discharge for cause. Nor does she explain how the court's purported decision to "cut off" the questioning prejudiced her case, particularly given her counsel's exercise of a peremptory challenge as to this prospective juror.

DISPOSITION

The judgment is affirmed. Sunquest is entitled to recover its costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.