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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

ALBERTO MENDEZ, Plaintiff and Respondent, v. CITY OF LONG BEACH, Defendant and Appellant.	B270627 (Los Angeles County Super. Ct. No. NC058549)

APPEAL from a judgment of the Superior Court of Los Angeles County. Laura C. Ellison, Judge. Affirmed.

Charles Parkin, City Attorney, and Latasha N. Corry, Deputy City Attorney; Alderman & Hilgers, and Allison R. Hilgers for Defendant and Appellant.

Manibog Law, and Darren A. Manibog for Plaintiff and Respondent.

City of Long Beach appeals a judgment for $99,000 in pain and suffering damages in favor of Alberto Mendez in a crosswalk trip-and-fall case. We affirm the judgment.

FACTS

The Trip-and-Fall

On December 17, 2011, then 81-year-old Mendez and his daughter, Eva Mendez, went to a boat parade in Long Beach.[1] They parked at about 6:00 to 6:30 p.m., and walked over a bridge to reach an area where they could watch the parade. At about 8:00 to 8:30 p.m., Eva and Mendez began walking back to their car along the same route that they had taken to get to the parade. A crowd of people were walking in the same direction with the Mendezes. At a point near where Second Street bridges over Appian Way, the group of walkers had to cross a public roadway in a painted crosswalk. The group waited for about one to two minutes for a break in the traffic. Eva was standing to the left of Mendez; they were surrounded by people on all sides and were almost touching the other people in the crowd.

When the people in the crowd in front of Eva and Mendez started to walk forward, Eva and Mendez went forward with the group. Eva noticed a raised "curb" to her right, and turned to tell Mendez about the curb. Just as Eva turned, she saw Mendez's right foot catch the curb, causing him to fall forward into the crosswalk in the street. Mendez suffered a broken shoulder which was treated non-surgically.

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[1] Because of the same surnames, we refer to Eva by her first name for clarity. Eva testified as the primary percipient witness to the trip-and-fall.

A photograph of the location of the fall was introduced as an exhibit at trial. It shows a painted crosswalk in a public roadway. An area of sidewalk where Mendez was standing is graded on a slope parallel to the roadway, and a cut has been made in the sidewalk curb to allow access for a person in a wheelchair to go from the sidewalk area into the painted crosswalk area in the roadway, and vice versa. Looking across the roadway, at the right hand side of the painted crosswalk, at the approximate location where Mendez had been standing and waiting to cross, a person walking from the lowest part of the sloped ramp into the painted crosswalk in the roadway would have to step over a "curb" extending into the direct line of travel. The evidence at trial showed that the curb was about four and one-half to five inches above the walkway path at its highest.[2]

The Lawsuit and Trial

In January 2013, Mendez filed a complaint against Long Beach alleging a single cause of action for premises liability based on two counts: negligence and dangerous condition of public property. The case was tried by a jury and lasted two days. Both sides presented expert testimony regarding the "curb"

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[2] Mendez's testimony was shorter but similar to Eva's. According to Mendez, he felt a little tired when the group of walkers got to the top of the bridge where they were waiting to cross the street in a crosswalk. He and Eva were standing in the middle of a group of people. He was watching the cars and the painted white lines of the crosswalk. When the people in front of him started to move forward, he started to move forward too. He described the trip-and-fall as follows: "I also tried to go forward, but two steps. And in less than one second, I lose [*sic*] my balance and I fall [*sic*]. . . . One of my feet got stuck on something there."

on which Mendez had tripped and fallen, the treatment he received, and his pain and suffering. We discuss this evidence below in addressing Long Beach's claims of error on appeal. Mendez did not present evidence of economic damages. On the third day of trial, the parties presented arguments, the trial court gave jury instructions, and the case was submitted to the jury with a special verdict form.

Minutes after the start of deliberations, the foreman sent a note to the trial court stating: "Juror number 6 would like to speak with the judge." Shortly thereafter, the court talked to Juror No. 6 outside the presence of the other jurors. The parties' lawyers were present during the discussion. Juror No. 6 expressed concern to the court that the jurors were "jumping from one point without going through it" and that this was "a short-circuiting of . . . [the] instructions." During the course of ensuing exchanges, the court at least twice explained that it did not want to get into the mindset of the jury's "deliberations," but did point out to Juror No. 6 that there was a difference between the verdict form, which had to be filled out in order, and the jury's discussion of the evidence, which the jury could do in any order. In the end, the court asked Juror No. 6 to return to the deliberation room, and told him that he could write down any of his concerns more specifically if he felt there was a continuing problem with the jury's deliberations.

After a morning recess, Juror No. 6 sent a written note to the trial court. On the record, with the parties' lawyers present, the court stated that it believed sharing the note with the lawyers would not be appropriate because the note "somewhat does reveal how it is the jury is leaning." The court then ordered the note to be sealed until after trial, and asked the jurors to

come back into the courtroom. The court told the jurors that it "just want[ed] to give [them] a quick reminder of a couple of things." The court then reiterated its instructions about answering the questions on the jury verdict form in the order provided.

Shortly before the noon recess on October 21, the jury sent out a note to the trial court reading: "We are at an impasse on [Question] number 1," which queried whether the property was in a dangerous condition at the time of the accident. The trial court discussed the matter with the parties' lawyers, including whether the lawyers might want to present further argument. The court then instructed the jury with language from the standard "deadlock" instruction (see CACI No. 5013), and offered to have the lawyers give further argument. The jury foreperson said she thought further argument would be helpful, the court asked the jury to return to the deliberation room to write down some "guidance on the particular point" that the jurors wanted "readdressed." A minute later, the jury sent a note to the court stating that it wanted further argument as follows: "Further clarification of substantial risk quantified, reargue issue of City of Long Beach incident report system concerning search parameters and results, as well as availability of report results. Clarification as to reason for new 2005 standard plans."

The lawyers for both sides gave further argument, and the jury resumed deliberations.

On October 22, 2015, the jury advised the court that it had reached a verdict. The jury returned a verdict by a 9-3 vote in favor of Mendez on the first question, finding that the crosswalk property was in a dangerous condition at the time of the incident. The jury found that the City was 51 percent responsible for the

incident, and Mendez 49 percent responsible. The jury further found Mendez had suffered $174,706 in past pain and suffering and that he would suffer $19,412 in future pain and suffering.

At some point after the jury's verdict, the trial court unsealed the note that Juror No. had sent out during deliberations. (See *ante*.) The note reads:

> "Members . . . want to discuss award prior to or as a condition for a vote on #1 & 2.
>
> "I do not want to negotiate votes for awards ($)."

Thereafter, the court applied the jury's comparative fault finding, and entered a final judgment awarding $99,000.18 to Mendez.

The New Trial Motion

Long Beach filed a motion for new trial based on the grounds of irregularity of the proceedings, alleging jurors "traded votes" for Long Beach's liability in return for lower damages. Further, Long Beach asserted the liability verdict was not supported by the evidence, the award of damages was excessive, and juror misconduct by the jury foreperson. In support of its motion, Long Beach submitted declarations from two jurors, Linda Willis and Nicole Jenkins. We have reviewed the reporter's transcript of voir dire, and it appears that Willis sat as Juror No. 3 and Jenkins as Juror No. 9. Both jurors voted against Mendez as to both the question of liability and as to the amount of damages awarded.

Juror Willis's declaration stated that, during deliberations, the jury foreman had "mentioned" that she had an ongoing case against Starbucks. (We note here that the foreman disclosed this information during voir dire.) Further: "While we were

discussing how to calculate future damages for pain and suffering, the foreman mentioned what transpired in her own case and referenced the fact that she herself experienced chronic pain but was not taking medication."

Juror Willis further stated: "We were stuck at question one . . . and just could not get past the question. We asked for clarification but it was just something we couldn't move beyond. At that time, someone suggested we move forward through the questions to avoid a hung jury. I believe that at least eight jurors agreed to this. After reviewing the additional questions, there was an agreement that by limiting the possible damage awards, some people would agree to answer 'yes' to the first question."

Finally, Juror Willis explained the final verdict as follows: "After extensive negotiation, there were 8 jurors that were willing to answer 'yes' to the first question if the damages award to Mr. Mendez was $80,000. We then went home for the evening. The next day the jury foreperson and several others wanted to award a larger amount to Mr. Mendez. We had to renegotiate. We then negotiated until we had 9 in agreement to award Mr. Mendez $98,000.00. The total award has to be more than that so once we had the agreement of $98,000.00 we then calculated to find the total award with the percentages as the City being 51% responsible and Mr. Mendez being 49% responsible."

Juror Jenkins' declaration was much less detailed than Juror Willis's declaration but related similar sentiments. She stated: "Some jurors felt that if the damages award was small enough, they would change their vote in favor of the Plaintiff in order to avoid a hung [jury]. We then discussed damages. A number was determined to be agreeable to some of the jurors, and then we went back and answered the questions on

the jury form. [¶] If we had stuck to answering the questions on the jury form in order, it would have been a hung jury."

The trial court denied Long Beach's motion for new trial.

Long Beach filed a timely notice of appeal.

DISCUSSION

I. Substantial Evidence of a Dangerous Condition

Long Beach contends the evidence is insufficient to support the jury's finding that the crosswalk was in a dangerous condition at the time of Mendez's fall. Long Beach argues that we should find the "curb" on which Mendez tripped was a "trivial defect" as a matter of law. We find the city's argument unpersuasive.

When an appellant contends insufficient evidence supports a jury's verdict, the reviewing court applies the substantial evidence standard of review. (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1188.) Under this standard, the reviewing court must examine the record in a light most favorable to the jury's verdict, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the decision of the jury. (*Holmes v. Lerner* (1999) 74 Cal.App.4th 442, 445.) The reviewing court may not disturb a jury's verdict if there is substantial evidence to support it, even if the reviewing court is of the belief that a different result should have been reached. (*Hughes v. Hughes* (2004) 122 Cal.App.4th 931, 939; see also *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766 [when finding of fact is attacked on appeal as unsupported by substantial evidence, appellate court's "sole function" is to determine whether there is substantial evidence which will support the finding].)

Government Code section 835 provides: "[A] public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either: [¶] (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or [¶] (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

Government Code section 830, subdivision (a), defines a "dangerous condition" to mean "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used."

The issue of whether a given defect is or is not a dangerous condition "usually is not a question of law, but is generally one of fact." (*Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 726 [three-quarter inch high raised edge of a segment of sidewalk held on appeal to be trivial as a matter of law; jury verdict for plaintiff reversed].) Thus, "when reasonable minds may differ as to whether a given defect is dangerous the issue should be decided by the trier[] of fact and not by the court as a matter of law." (*Ibid*.) Stated in other words, where "'different conclusions may be reasonably drawn'" from the trial evidence, the determination of whether a condition is dangerous "'should be left

to the jury and their conclusions should not be disturbed on appeal.'" (*Id.* at p. 727, quoting *Balkwill v. City of Stockton* (1942) 50 Cal.App.2d 661, 667.) "It is to be noted that when the size of the depression begins to stretch beyond one inch the courts have been reluctant to find that the defect is not dangerous as a matter of law." (*Fielder v. City of Glendale, supra*, 71 Cal.App.3d at p. 726 [summarizing after reviewing a number of the published cases].)

Here, the evidence was essentially undisputed that the "protruding" curb over which Mendez had to step to reach the painted crosswalk in the roadway was about four and one-half to five inches high at its highest point. Even without examining any other factors, we are reluctant to say as a matter of law that no reasonable mind could have found the property to be in a dangerous condition.

Further, the published cases teach that, in examining the issue of whether a condition of public property may be deemed trivial as a matter of law, a court may consider whether there were circumstances which might have rendered the defect "'more dangerous than its mere abstract [description] would indicate.'" (*Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 234.) A court may consider the nature and quality of the defect, the time of day and lighting conditions when the accident occurred, and whether there is evidence anyone else has been injured by the same defect. (*Ibid.*)

Here, the accident occurred at a crosswalk which could be foreseen to be used at night, by numerous pedestrians, all of which could limit a person's view of the curb at the crosswalk. Consequently, other factors weigh in favor of a finding that the raised curb was not a trivial defect.

We acknowledge, as Long Beach has pointed out, that there was no evidence of prior trip-and-fall accidents at the intersection, but this strikes us as going more to the weight of the evidence, and not to whether the record discloses substantial evidence in favor of the jury's verdict. The lone factor of an absence of other accidents does not compel a conclusion that a jury verdict in favor of Long Beach was the only reasonable decision to be made in Mendez's case. (See, e.g., *Dohlquist v. City of Bellflower* (1987) 196 Cal.App.3d 261, 265, 271 [piece of steel rebar that protruded from a parking abutment was not a trivial defect as a matter of law even though no complaints had been made].)

We reject Long Beach's arguments that the evidence supports a finding, to the exclusion of any other finding, that Mendez tripped and fell as a result of his own physical frailties.[3] This argument is better suited to a challenge to the jury's findings on the issue of the allocation of fault, or to the issue of causation, but not to the underlying issue of whether there was a dangerous condition at the crosswalk. Because the evidence is sufficient to support the jury's finding of a dangerous condition,

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[3] The City's medical expert, Geoffrey Miller, M.D., testified that Mendez had upwards of thirty medical conditions, half of which likely placed him at risk of falling, at the time of the accident. These included balance problems, visual impairment, cardiac issues, and numbness in the feet caused by diabetic neuropathy. Dr. Miller opined that Mendez should not have been walking outside without a walker, both to protect him from falling and to alert people around him to be careful. Dr. Miller noted that Mendez had two or three subsequent falls after the incident.

we will not reject that finding based on evidence concerning Mendez's physical condition.

Similarly, we reject Long Beach's general attack on the testimony of Mark Burns, Mendez's expert engineer. Burns' testimony is not so substantively deficient overall that it compels the rejection of the jury's "dangerous condition" finding as a matter of law, in favor of a finding of a trivial defect. Long Beach's specific challenges to certain parts of Burns' testimony as having violated the rules of evidence are a distinct issue which we address below.

II. Damages

Long Beach next contends the pain and suffering damages awarded by the jury are not supported by the evidence. Here, Long Beach argues an appellate court may reverse an award of damages when, "as a matter of law," the award "appears excessive or where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice." Although we find this issue close, Long Beach has not persuaded us that a $200,000 award for pain and suffering in favor of an elderly person who suffers a broken shoulder must be viewed as excessive as a matter of law.

First, it is within the jury's discretion to determine an appropriate amount of pain and suffering damages, with the "'only standard being such an amount as a reasonable person would estimate as fair compensation.'" (See *Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1665.) Next, a party's claim that a jury's damages award is excessive must be presented to the lower court on a motion for new trial to preserve the claim for appeal. (See *Schroeder v. Auto Driveaway Co*. (1974) 11 Cal.3d 908, 918.) There are sound reasons for this prerequisite: "The trial court is

in a far better position than an appellate court to determine whether a damage award was influenced by 'passion or prejudice.' (Code Civ. Proc., § 657.) In reviewing that issue, moreover, the trial court is vested with the power, denied to us, to weigh the evidence and resolve issues of credibility. [Citation.]" (*Schroeder, supra*, 11 Cal.3d at p. 919.)

Here, Long Beach raised its excessive damage claim in its motion for new trial. The trial court rejected the city's view that the jury's award was the result of its inflamed passions. Thus, the issue is preserved for appeal. However, Long Beach has not gotten past the next step, which is to persuade us that the jury's award was excessive as a matter of law.

"In resolving [a claim that a damages award is excessive], we bear in mind that an appellate court may reverse an award only '"When the award as a matter of law appears excessive, or where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice."' [Citations.]" (*Schroeder, supra*, 11 Cal.3d at pp. 919-920.)

Long Beach presents a summary of this case, *from its perspective*. First, Long Beach notes that the jury awarded $174,706 to Mendez for his past pain and suffering, plus another $19,412 for future pain and suffering, for a total pain and suffering award of $194,118. Further, Long Beach notes in its opening brief: Mendez's shoulder fracture was treated non-surgically and healed in a manner consistent with someone of his age and medical condition, with no complications. In the three years prior to trial, Mendez had not received any treatment or taken any medication for his shoulder. Despite his complaints at trial regarding ongoing pain, Mendez admitted that he never told any doctor, including his primary physician that he sees every

few months, that he had any pain in his shoulder in the three years before trial.

The problem with Long Beach's argument is that it focuses on evidence that would support a result that is contrary to the result reached by the jury. This is the wrong focus. We must view the record to determine if there is evidence to support the jury's decision. (*Schroeder, supra*, 11 Cal.3d at p. 920.) If there is, then we will affirm that award. (*Ibid*.)

Mendez sets forth the evidence, *presented in the light most favorable to the jury's verdict*: Mendez testified that he experienced continuous pain for the first three months after the accident and that he was incapable of doing practically anything during that time period. Eva Mendez testified that her father experienced pain during the first three months and that he was incapable of doing the exercises during his physical therapy because of the pain. Dr. Mostafi testified that someone with a broken shoulder experienced pain at the level of an eight or nine on a scale of ten during the first month. In addition to pain, there was testimony that Mendez experienced other forms of noneconomic damages such as frustration, fear, mental suffering, loss of enjoyment of life, emotional distress and inconvenience. Additionally, Dr. Mostafi testified that Mendez would likely experience loss of motion and some mild baseline pain in the future. Dr. Mostafi also stated that because Mendez's shoulder was malpositioned, he may have a future rotator cuff tear and/or arthritis. There was also a chance that the injury could progress and become very painful. Mendez testified that during the time since the accident, he feels pain whenever he moves his arm. He is only able to do half of the routine activities he did prior to the accident and household chores now take him twice as long.

Eva Mendez confirmed that Mendez still experiences pain, has less strength, and requires an additional three to four hours a day to do the chores he performed prior to the accident.

The pain and suffering award in the present case is right up against the cusp of excessiveness, but, "since [Mendez]'s arguments convince us that the evidence is adequate to sustain the award" (*Schroeder, supra*, 11 Cal.3d at p. 920), we will affirm the award.

III. Plaintiff's Expert's Testimony

Long Beach argues the trial court erred in allowing Mendez's "liability expert," Mark Burns, to testify at trial. First, Long Beach argues that Mendez designated Burns as an expert on the subject of "floors and event spaces," and that, as a consequence, the court should not have allowed him to testify on issues involving public roadways and crosswalks. Second, Long Beach argues that Burns was not qualified to give expert testimony on public roadways and crosswalks, that is, matters of civil engineering, because his degree is in mechanical engineering. We find no error in the trial court's decision to allow Burns to testify.

The Form of the Expert Designation

The use of experts is governed by Chapter 18 of the Civil Discovery Act in the Code of Civil Procedure. (Code Civ. Proc., § 2034.210 et seq.) Broadly summarized, the expert statutes require a party who intends to call an expert to testify at trial to designate the expert by a prescribed time, and to make the expert available for a deposition before trial. A trial court "shall exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed" to comply with these requirements. (Code Civ. Proc., § 2034.300.)

Code of Civil Procedure section 2034.260, subdivision (c)(2), provides that an expert declaration "shall contain . . . [a] brief narrative statement of the general substance of the testimony that the expert is expected to give." In the present case, Mendez's expert designation, served in January 2015, roughly nine months before trial occurred, stated the following:

> "Mr. Burns . . . is expected to testify regarding [his] background, education, training, knowledge and experience, as well as to the safety standards for floors in event spaces."

Mendez deposed Burns in September 2015, roughly one month before trial occurred.

Long Beach relies on *Bonds v. Roy* (1999) 20 Cal.4th 140 (*Bonds*) in arguing that the trial court erred in overruling the city's objection that Burns' inadequate expert designation barred him from testifying at trial. We find no error.

In *Bonds*, a medical malpractice case, the defendant designated an expert to testify on the evaluation of the plaintiff's injuries and damages, and the doctor was deposed as an expert before trial accordingly. Then, "[a]t trial, during the afternoon recess on the last day of testimony," the defendant "sought to expand [his expert's] testimony" to include an opinion on the issue of the standard of care. (*Bonds, supra*, 20 Cal.4th at p. 143.) The trial court denied the defendant's request. After the jury found in favor of the plaintiff, the defendant appealed. After considering the language and purposes of the expert witness statutes, the Supreme Court affirmed the judgment, ruling that the trial court had "properly limited the scope of [the expert's trial] testimony to the general substance of what was

previously described in the expert witness declaration." (*Id.* at pp. 143-149.)

Fairly recently, Division One of our court accurately summarized *Bonds* in this language: "The overarching principle in . . . *Bonds* is clear: a party's expert may not offer testimony at trial that exceeds the scope of his deposition testimony *if* the opposing party has no notice or expectation that the expert will offer the new testimony, or *if* notice of the new testimony comes at a time when deposing the expert is unreasonably difficult." (*Easterly v. Clark* (2009) 171 Cal.App.4th 772, 780, italics in original.) In other words, *Bonds* disallows "unfair surprise" in an expert's trial testimony. (*Ibid.*)

Long Beach's arguments have failed to demonstrate to us that that it suffered unfair surprise from Burns' trial testimony. As noted above, Mendez designated Burns months before trial, and Long Beach took Burns' deposition roughly one month before trial. We see no reference in Long Beach's brief to any facts or other material in the record which tends to show that Burns' trial testimony materially deviated from his testimony at his deposition. The record before us supports a conclusion that everybody understood that Burns would testify, both at his deposition and at trial, about the alleged dangerous condition of the crosswalk with the protruding curb.

While it would have been better for Mendez's expert designation to have described the "general substance" of Burns' expected trial testimony as dealing with "roadways and crosswalks" instead of "floors and event spaces," we are not persuaded that this language technicality detrimentally affected Long Beach. At trial, Long Beach's counsel tried to impeach Burns credibility by highlighting this issue as follows:

"Q: Are you aware that you were designated as an expert in safety standards for floors and event spaces"

"A: I believe that's what the designation said, yes.

"Q: And that's not the work that you did, correct? This wasn't an event space, it was a public sidewalk?

"A: Well, again, as I indicated in my deposition, obviously, a floor surface includes anything that anyone walks on. It absolutely includes sidewalks, crosswalks, curb ramps, interior walkways, a whole range of different walking surfaces. [¶] I mean, as it pertains to an event space, obviously, on the evening of the incident, there was an event that was taking place nearby which Mr. Mendez and his daughter were attending. So, I mean, it's not the most specific designation, but I believe it to be appropriate."

Plainly, the record establishes that Long Beach knew about Burns' expected trial testimony from his deposition. *Bonds* does not establish a technical rule of exclusion founded on parsing the language of an expert's designation.

The Qualification Issue

Long Beach argues that the trial court erred in denying the city's oral motion to exclude Burns' testimony on the ground that he was not qualified because he was not a civil engineer, but a mechanical engineer. We disagree.

1. Governing Rules

An expert witness is sufficiently qualified to testify at trial when he or she has sufficient skill or experience in the field so that his or her testimony would be likely to assist the jury. (Evid. Code, § 720; and see, e.g., *People v. Mayfield* (1997)

14 Cal.4th 668, 766, overruled on another ground by *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2; *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 38, overruled on another ground by *Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.4th 536, 543.) A trial court has broad discretion in determining whether an expert is qualified to testify, and its ruling on the issue is reviewed on appeal under the deferential abuse of discretion standard. (*People v. Mayfield, supra*, 14 Cal.4th at p. 766; and see also *People v. Chavez* (1985) 39 Cal.3d 823, 828.) "Such [an] abuse of discretion will be found only where "'the evidence shows that a witness clearly lack[ed] qualification as an expert. . . .'" (*Chavez, supra*, at p. 828, italics omitted.)

2. Trial Setting and Analysis

The trial court had Burns' curriculum vitae before it when Long Beach made its oral motion in limine challenging Burns' qualifications. We have reviewed the same. Further, the court indulged meaningful argument from the lawyers for both sides. Given this record, we cannot find that the trial court abused its discretion because we cannot say the court's decision was capricious, arbitrary or beyond the bounds of reason. (*Blackman v. Burrows* (1987) 193 Cal.App.3d 889, 893.)

Further, we find Burns' trial testimony speaks for itself regarding the issue of whether the trial court capriciously and unreasonably ruled on the issue of his qualifications to testify as an expert, and we think it worthy of repeating here:

"Q Mr. Burns, could you please share with us your profession?

A I work as a forensic engineer.

Q And what is a forensic engineer?

A Essentially I use my background, training and experience in engineering to investigate incidents. I determine the causes

and I provide solutions which would have prevented such an incident from occurring.

Q And who are you employed by?

A I work for a company called Wexco International Corporation.

Q And how long have you worked for Wexco?

A Since 2003, so about 12 1/2 years.

Q What is Wexco?

A Wexco is a consulting firm that provides a wide range of engineering services, including litigation support.

[¶] . . . [¶]

Q Mr. Burns, what's your educational background?

A I have a Bachelor of Science in Mechanical Engineering, and I also have a Juris Doctorate.

Q Are you a licensed professional engineer?

A Yes, I'm a licensed civil engineer in Australia. I'm not licensed in California.

Q And why not in California?

A Well, you know, basically since I moved here, I started working at Wexco. We really don't spend much time doing design work. Essentially the benefit of becoming a licensed engineer in California is the ability to stamp plans. [¶] Well, the job I've done for the last 12 1/2 years hasn't required me to design; and therefore, I found better uses for my time, including acquiring various other more relevant certifications and registrations.

Q Is it — is it necessary to be licensed in California?

A No. Unlike a few other professions, such as being an attorney or being a doctor, where you have to be licensed to practice in that field, as an engineer, there's absolutely no requirement in California for you to be licensed before practicing

engineering. [¶] In fact, based on the research and statistics I've seen, approximately 80 to 90 percent of the people who graduate an engineering degree in the U.S. don't actually acquire a license.

Q Are you a member of any professional trade organizations related to this case — relevant to this case?

A Specifically relevant to this case, I would say being in membership of the American Public Works Association.

Q What's the American Public Works Association?

A So the American Public Works Association is a worldwide organization made up of industry professionals. They provide training and development tools for those working in the public works field; and, also, they advocate in Washington for the public works field.

Q And what specifically is your experience pertaining to curb ramp incidents like the one involved in this case?

A *So as it specifically pertains to curb ramps, in the last 12 1/2 years, I have investigated probably 350 incidents.* In each one of those cases, I've analyzed the design, safety, accident reconstruction, human factors to analyze liability.

Q You mentioned human factors. Can you explain for the jury what is the professional discipline of human factors?

A So human factors is basically how we as humans interact with our environment. In this case where, in my opinion, the curb ramp was a hazard, the human factors analysis revolves around expectancy and perception. In other words, is such a curb expected; and based on the various factors at the time of the incident, should the curb have been perceivable.

Q Can you tell us about your experience doing human factors work?

A So I've been a member of the Human Factors and Ergonomics Society for the last five years. That's a nationwide organization of industry professionals who puts on various seminars and webinars; and, you know, I've attended a few of those seminars, a few of those webinars. I've been privy to a lot of state-of-the-art literature pertaining to human factors.

Q Can you give us an idea as to how many cases you've worked on which involved some kind of a human factors analysis?

A *So I would estimate that in the last 12 1/2 years, I've worked on about 5,000 cases. I would say I've given 325 expert depositions. I would estimate that, you know, well over a thousand cases I've worked on involved some analysis of human factors.*

Q *And, Mr. Burns, how many times have you qualified to testify as a safety expert involving a fall on public property?*

A In total I've testified at trial as an expert witness on approximately 120 occasions. I would say that about 20 involved a fall within the public right of way" (Italics added.)

Plainly, Burns was qualified to testify as an expert in a trip-and-fall case based on his experience.

IV. Allegations of Evidentiary Error in Plaintiff's Expert's Testimony

Long Beach contends the trial court erred in allowing Burns to testify about (1) the city's "2005 Standard Plans," basically its most recently adopted internal design and practices manual, and (2) "Guidelines" under the Americans with Disabilities Act (ADA; 42 U.S.C. § 12101 et seq.) We find no ground for reversal.

The 2005 Standard Plans

Long Beach contends the trial court prejudicially abused its discretion in allowing Burns to cite to the city's 2005 Standard Plans during his testimony. Long Beach argues this testimony should have been excluded because it was unduly prejudicial within the meaning of Evidence Code section 352. We find Long Beach forfeited this claim.

Failure to object to evidence offered in the trial court under Evidence Code section 352 forfeits any claim of error based on the section on appeal. (*Faigin v. Signature Group Holdings* Inc. (2012) 211 Cal.App.4th 726, 740; Evid. Code, § 353.) In its reply brief, Long Beach expressly acknowledges that it "does not appear that an objection to the 2005 Standard Plans was made on the record." Accordingly, we find Long Beach has forfeited any challenge and decline to address this issue further.

As a fall back, Long Beach argues in its reply brief that even given its failure to object under Evidence Code section 352 in the trial court, "the larger issue is that, even if properly admitted, the 2005 Standard Plans simply cannot constitute substantial evidence in support of the jury's verdict because [the adoption of those plans] postdate the construction of the subject intersection by 16 years." We decline to address this belatedly presented argument; it should have been raised and developed in Long Beach's opening brief on appeal within the context of its claim that the jury's verdict was not supported by substantial evidence, not for the first time in its reply brief. (See, e.g., *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482, fn. 10.)

The ADA Guidelines

Long Beach also contends the trial court prejudicially abused its discretion by allowing Burns to refer to the ADA Guidelines during his testimony. Long Beach argues the evidence concerning the ADA Guidelines was "irrelevant, prejudicial, and confusing." We disagree.

The ADA-related issue is preserved because Long Beach filed a motion in limine and obtained an order from the trial court precluding Mendez from offering any evidence to the effect that (1) Mendez was "disabled" as defined by the ADA, or that (2) the ADA was applicable to Mendez's trip-and-fall, or that (3) the city had violated the ADA.

We decline to find reversible error, however, because, after obtaining the order excluding the ADA testimony as noted above, it was Long Beach's trial counsel who first elicited testimony from Burns concerning the ADA during cross-examination. We set forth Burns' testimony to put Long Beach's argument in its correct context.

During his direct testimony, Burns offered that he had formed eight opinions based upon his review of the case: (1) the crosswalk area was a dangerous condition because of the height of the curb (four and one-half to five inches) across the line of direction in which pedestrians walked and because of "human factors" (e.g., lighting, crowds) affecting people crossing the street; (2) the crosswalk and access ramp and curb as built were not in compliance with the city's design plans;[4] (3) the dangerous

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[4] On direct, Burns did not refer to the city design plans he had reviewed. On cross-examination, Long Beach's counsel showed that Burns had reviewed the city's 2005 plans, that these plans were adopted roughly 18 years after the access ramp and

condition caused Mendez's fall; (4) Mendez had been acting reasonably when he fell; (5) Long Beach had created the dangerous condition by not following basic safety rules in building the ramp because it left a raised curb across the line that people would walk to use the crosswalk; (6) Long Beach had deviated from accepted engineering practices in building the ramp and crosswalk; (7) the trip hazard easily could have been eliminated with a guardrail or "flared sides" to the curb at the edge of the ramp; and (8) the accident would not have occurred if the ramp and curb had been designed and constructed in accord with safe design practices and standard plans. At no point during Burns' direct testimony did he make any reference to the "ADA."

On cross-examination, Long Beach first prompted Burns to discuss the ADA when he asked Burns about a professional seminar that he had attended. Specifically: "How did [the seminar] relate to general public safety, not dealing with individuals with inherent disabilities?" Burns answered this question as follows: "Well, the whole point of the ADA is to ensure that people with impairments are not discriminated against. But, obviously, when designing for those with physical or visual impairments, safe design practices means you absolutely have to take [the] general public into consideration, as well." Long Beach's counsel then continued: "So this was a seminar that dealt with ADA issues or was it roadway design, curb ramp design, or was it both?" After Burns answered that it was both, Long Beach's counsel's examination turned to other

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crosswalk had been constructed, and that Burns did not know what the citys' plans looked like at the time the ramp had been built.

issues for a handful of questions. Obviously, as the transcript shows, Burns did not refer to any ADA Guidelines during this short exchange; he did not state that his "dangerous condition" opinion was based on any violation of the ADA.

A moment later in the questioning by Long Beach's counsel returned to the issue of the ADA.

> "[Long Beach Counsel]: Can you name one code section today that tells you that you feel that a guardrail needed to be installed to prevent an accident?
>
> "[Burns]: Your Honor, given the motion in limine, I can't answer that question.
>
> "[¶] . . . [¶]
>
> "[Long Beach Counsel]: He's referred to the ADA.
>
> "[The Court]: You don't have to explain them, just give us the number.
>
> "[Burns]: The ADA Accessibility Guidelines, section 4.7.5, and Figure 12 from the ADA Accessibility Guidelines.
>
> "[Long Beach Counsel]: Are there any other code sections or provisions other than the ADA, which deals with individuals that have a known disability, that you were referring to when formulating your opinions in this case?
>
> "[Burns]: Well, again, as a safety engineer, even though the [city's] Standard Plans are dated 15 years post construction, I can still use those plans to corroborate my opinion that the design and construction was negligent and inherently dangerous."

The only other reference to the ADA came during recross-examination by Long Beach's counsel as follows.

> "[Long Beach Counsel]: What, other than the ADA, are you relying on that says when you install a bike lane, you have to put a guardrail up at an intersection?
>
> "[Burns]: Nothing. It's just the ADA.
>
> "[Long Beach Counsel]: Other than the ADA, what are you relying on that says when you go out and stripe a crosswalk, you have to put a guardrail up and flare out an intersection?
>
> "[Burns]: Just the ADA.
>
> "[Long Beach Counsel]: In fact, does the ADA say it depends on the percentage of work that you're doing relative to the amount of work that needs to be done as to whether you have to make those modifications at all?
>
> "[Burns]: No. That's untrue. That's actually a California Building Code requirement. As it pertains to public sidewalks, the correct terminology is they must affect full modifications to make it property accessible if such work would not put undue hardship on the entity and that it can be done easily and reasonably."

Long Beach's counsel and Burns then sparred over the subject of the costs that would be involved for the city to erect guardrails "at every intersection that [was] similar" to the one where Mendez had tripped and fallen. After these exchanges, Burns ended his testimony.

We reject Long Beach's claim of error arising from the presentation of ADA-related evidence because, if there was an error, it resulted from lines of questioning of Burns by the city's

own trial counsel. "If an appellant offers inadmissible matters into evidence, he cannot complain of its admission on appeal." (*Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 Cal.App.4th 1538, 1555; and see also, e.g., *Transport Ins. Co. v. TIG Ins. Co.* (2012) 202 Cal.App.4th 984, 1000 ["'Under the doctrine of invited error, when a party by its own conduct induces the commission of error, it may not claim on appeal that the judgment should be reversed because of that error.'") As we read the record, there simply would have been no allusion to the ADA by Burns absent the questions posed to him by Long Beach's trial counsel.

V. Design Immunity as an Affirmative Defense

Long Beach next contends the judgment must be reversed because the trial court erred when it granted Mendez's motion in limine to preclude the city "from arguing design immunity as an affirmative defense." We disagree.

Preliminarily, we think it important to establish the trial setting to put this argument in context. On September 17, 2015, with a trial date set for September 21, 2015, Mendez filed a motion in limine for an order prohibiting Long Beach from presenting any testimony or evidence, or from arguing about a design immunity defense. The basis for Mendez's motion was straightforward: Long Beach had not alleged design immunity in its answer as an affirmative defense. Long Beach filed an opposition to the motion in limine in which it explained that it had asked Mendez to stipulate to allowing the city to amend its answer, but that Mendez had refused. The accompanying materials showed that Long Beach asked for the stipulation in February 2015, and that Mendez had said no in late February 2015. Long Beach indicated that by February 2015, the time for

filing a noticed motion to amend its answer had passed. Long Beach argued that despite the lack of an amendment of its answer, Mendez had been on notice for many months of the possibility of a potential design immunity defense, and that he would suffer "no . . . surprise" if the city was allowed to present such a defense.

On October 14, 2015, the day the case was sent to a courtroom for trial, the trial court granted Mendez's motion in limine as to design immunity on the ground that it had not been pleaded in the Long Beach's answer.

Trial courts have wide discretion in allowing the amendment of any pleading, and, thus, a trial court's ruling on a motion to amend will not be disturbed on appeal unless a manifest or gross abuse of discretion is shown. (*Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 176; *Record v. Reason* (1999) 73 Cal.App.4th 472, 486.) Even where ""a good amendment is proposed in proper form, [an] unwarranted delay in presenting it may — of itself — be a valid reason for denial."" (*Huff v. Wilkins* (2006) 138 Cal.App.4th 732, 746.)

Here, Mendez filed his complaint against Long Beach premised on an alleged dangerous condition of public property in January 2013, and Long Beach filed its answer in April 2013. Long Beach asked Mendez to stipulate to an amendment of its answer in February 2015. Mendez filed a motion in limine in September 2015 seeking to prohibit Long Beach from presenting a design immunity defense. Most importantly, Long Beach did not apprise *the trial court* of its interest in amending its answer until October 14, 2015, the date the case was sent out for trial, when it responded to Mendez's motion in limine. Given this

history, we cannot find an abuse of discretion in the trial court's decision to deny Long Beach's efforts to amend its answer.

The issue of design immunity afforded to a public entity may implicate a number of issues. For example, design immunity might be lost where (1) an original plan or design has become dangerous because of a change in physical conditions, or (2) the public entity had actual or constructive notice that a dangerous condition had been created by a design, or (3) the public entity had a reasonable time to obtain the funds and carry out the necessary remedial work to bring the property back into conformity with a reasonable design or plan, or the public entity was unable to remedy the condition due to practical impossibility or lack of funds, and had not reasonably attempted to provide adequate warnings. (See, e.g., *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 72.) By failing to seek amendment of its answer in a more timely fashion, Long Beach deprived Mendez of the opportunity for discovery on, and investigation and evaluation of, such issues.

In summary, because of Long Beach's delay, and the potential for delay to allow further discovery on a material issue, the trial court reasonably ruled that Long Beach could not amend its answer. Because the issues for trial are framed by the pleadings, the trial court did not err in precluding Long Beach from presenting a design immunity defense to the jury.

VII. The New Trial Motion — Juror Misconduct in Trading Votes

Long Beach argues the trial court abused its discretion in denying the city's motion for new trial on the ground of juror misconduct. We find no error.

The New Trial Motion

Long Beach's new trial motion was based on an allegation, as clarified by its counsel at the hearing on the motion, that certain (unidentified) jurors "determin[ed] a number [for damages] in exchange for a vote to find liability." As noted above, the city's motion was supported by declarations of two jurors, and by the note that Juror No. 6 had sent to the trial court early during deliberations.

The trial court's minute order denying Long Beach's new trial motion shows the court found "that juror misconduct did not occur." The reporter's transcript shows the court's reasoning in this passage: "I read the declarations of the two jurors . . . . We cannot discuss and consider the jury's deliberative process, what they were thinking, how they actually decided in their minds. Those kinds of things we can't touch. But I do know by polling this jury afterwards, there were at least nine people who agreed to the questions 1 and 2 before they got to the --- the damages. They made that agreement [as to liability]. So at what point in time they decided they were going to say yes and go on, I don't know; but they clearly did answer the prior questions before they got to damages or they would not have gotten to damages. And I think that's further demonstrated by the fact that the jury had substantial questions, and we allowed reargument on the question . . . about substantial risk . . . ."

The Governing Law — New Trial Motions

"Misconduct of the jury" is one of the statutorily specified grounds for granting a new trial. (See Code Civ. Proc., § 657, subd. 2.) Misconduct is not statutorily defined, but the published case law generally teaches that "juror misconduct" may be found in any conduct that infringes the parties' right to a trial by 12

unbiased, impartial jurors. (See, e.g., *Enyart v. City of Los Angeles* (1999) 76 Cal.App.4th 499, 506 (*Enyart*).) Thus, misconduct could include a juror who slept during a trial, or was intoxicated during trial, or who considered out-of-court evidence concerning the subject of the trial. (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 408-412 [reviewing selected cases].) Juror misconduct raises a presumption of prejudice, and unless the prevailing party rebuts the presumption by showing the misconduct was harmless, a new trial should be granted. (*Enyart, supra*, 76 Cal.App.4th at p. 507.)

A trial court "is accorded a wide discretion in ruling on a motion for new trial and . . . the exercise of this discretion is given great deference on appeal. [Citations.]" (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872.) In reviewing a ruling on a motion for new trial, we accept the trial court's credibility determinations if supported by substantial evidence. (*Enyart, supra,* 76 Cal.App.4th at p. 506.) Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination. (*Enyart, supra*, 76 Cal.App.4th at p. 508; and see also *City of Los Angeles v. Decker, supra*, 18 Cal.3d at p. 872.)

The Alleged Juror Misconduct

Relying exclusively on *People v. Guzman* (1977) 66 Cal.App.3d 549 (*Guzman*), Long Beach argues that its new trial motion established that some of the jurors engaged in misconduct in the form of "improper vote trading." In *Guzman*, the prosecution jointly charged two defendants, Monkhouse and Guzman, with possession of heroin and possession of heroin for sale. After deliberating for a little over two days, the jury indicated that it had reached verdicts on both counts as to

Monkhouse When the jury was polled, one of the jurors, Updyke, said no. At about the same time, the court was alerted to the possibility that juror Updyke had proposed to other jurors that "the jury barter an acquittal of Monkhouse for a conviction of [Guzman]." (*Id*. at pp. 553-556.) When juror Updyke's conduct was finally clarified, after two more days of deliberations, defense counsel moved for a mistrial, "claiming the panel was contaminated." (*Id*. at p. 555.) The court denied a mistrial, but replaced juror Updyke, and the case was resubmitted to the reconstituted jury. (*Id*. at pp. 555-556.) The reconstituted jury eventually acquitted Monkhouse entirely, but found Guzman guilty of one charge. (*Id*. at pp. 552, 556.)

Guzman contended, and the Attorney General conceded, that juror Updyke's conduct in proposing to other jurors that they barter a guilty verdict for one defendant in exchange for an acquittal for the other defendant constituted misconduct. (*Guzman, supra,* 66 Cal.App.3d at p. 559.) Thus, the main issue was whether the misconduct had "destroyed the integrity of the remaining jurors" so as to compel reversal of Guzman's conviction. (*Ibid*.) On this point, the court of appeal correctly noted that juror misconduct raises a presumption of prejudice which the People must rebut. (*Ibid*.) The court then reviewed the entire record, including the trial court's failure to inquire more fully into juror Updyke's conduct when it first came to possible light. The court concluded: "In sum, the trial court neither minimized nor adequately explored the potential for prejudice triggered by [juror] Updyke's misconduct." (*Id*. at p. 561.) Because the presumption of prejudice was not rebutted, the Court of Appeal reversed Guzman's criminal conviction. (*Id*. at pp. 560-561.)

Analysis

As noted above, in denying Long Beach's new trial motion, the trial court found "that juror misconduct did not occur." Long Beach's arguments do not persuade us that the trial court's determination was wrong. Accordingly, we need not get into a review of whether any prejudice occurred from misconduct, because there was no misconduct.

Subject to Evidence Code section 1150, a juror's affidavit may be used to inquire into the validity of a verdict, which would include a claim of juror misconduct, in limited circumstances. Evidence Code section 1150 states in relevant part: "(a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

In *Krouse v. Graham* (1977) 19 Cal.3d 59, the Supreme Court explained that Evidence Code section 1150 "distinguishes between 'proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved, . . .'" (*Id.* at p. 80.) In *Krouse*, a defendant offered the declarations of four jurors in support of a motion for new trial. The declarations stated in effect that the verdict for each of the plaintiffs had been increased by an amount the jurors estimated would be paid by the plaintiffs in legal fees. (*Id.* at p. 79.) The plaintiffs "moved to strike the declarations on the twin grounds that they contained

inadmissible evidence and involved the 'mental processes' of the jurors. The trial court agreed, [ruling] that such declarations were always to be viewed with distrust since jurors are easily subjected to undue pressure by investigators seeking to impeach a verdict." (*Id*. at p. 80.) The Supreme Court concluded that the declarations were admissible, and remanded the case back to the trial court for a new hearing on the new trial motion, taking into consideration the jurors' affidavits. (*Id*. at pp. 80-83.)

In the present case, while the trial court expressed concerns about delving into the jurors' deliberation processes, the two juror declarations that Long Beach submitted were not explicitly rejected. Rather, the court found that the declarations did not show that juror misconduct occurred.

We have read the two jurors' declarations, and we agree with the trial court's assessment that they failed to prove juror misconduct. Neither declaration includes an objectively verifiable recollection of any other juror stating something to this effect: "I find that there was no liability, but I will vote for liability if the award is lower." Both of the juror declarations are filled with vague references to the "negotiations" during deliberations and to a "final agreement" on liability, but we do not see these statements as objective evidence of "vote trading." Rather, the two juror declarations are a prime example of the dangers of trying to get into the mindset of jurors as to the reasons they reached a decision in a case. The two jurors were basically offering their opinion for why certain, unidentified jurors ended up voting the way that they did. Long Beach has cited us to no case which supports its contention to the contrary. Juror No. 6's note shortly after the beginning of deliberations is much of the same quality. It does not offer objective evidence

showing that any other juror made a decision contrary to his or her own conscience regarding the evidence. The trial court did not find such objective evidence of "trading votes," and neither do we.

VIII. Juror Misconduct — The Jury Foreperson

Long Beach also contends the jury foreperson "improperly relied on and shared her personal experience as a plaintiff in a personal injury case." We find no ground for reversal.

Relying on personal life experiences in any given situation is human nature, and it is not misconduct in the context of a trial. "Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one the of strengths of the jury system. It is also one of its weaknesses: it has the potential to undermine determinations that should be made exclusively on the evidence introduced by the parties and the instructions given by the court. Such a weakness, however, must be tolerated. 'It is an impossible standard to require . . . [the jury] to be a laboratory, completely sterilized and freed from any external factors.' [Citation.]'" (*People v. Marshall* (1990) 50 Cal.3d 907, 950, quoting *Rideau v. Louisiana* (1963) 373 U.S. 723, 733 (dis. opn. of Clark, J.).)

"'"Jurors do not enter deliberations with their personal histories erased, in essence retaining only the experience of the trial itself. Jurors are expected to be fully functioning human beings, bringing diverse backgrounds and experiences to the matter before them"' [Citation]. [¶] . . . 'We cannot demand that jurors . . . never refer to their background during deliberations.' [Citations.]" (*People v. Loker* (2008) 44 Cal.4th 691, 753.)

This said, we acknowledge that a "'fine line exists between using one's background in analyzing the evidence, which is appropriate, even inevitable, and injecting "an opinion explicitly based on specialized information obtained from outside sources," which we have described as misconduct.' [Citation.]" (*People v. Loker, supra,* 44 Cal.4th at p. 753.) This is the focus of Long Beach's next argument.

We reject Long Beach's contention that misconduct occurred because the jury foreperson "improperly shared with other jurors her personal experience as a plaintiff in a personal injury case." This is not the type of specialized information obtained from outside sources which the juror misconduct cases condemn.

The foreperson's statement that she experienced pain but did not take medication is not misconduct. Statements about pain are within the reach of common knowledge of jurors. To the extent Long Beach refers to one of the juror's post-trial declarations stating that she "believed" the foreperson was "making a point for [the jury's] consideration," the city's argument fails to warrant to a reversal. The juror's "belief" that the foreperson may have been trying to persuade others is not proof of any objective fact undermining the jury's verdict. Similarly, the statement in the juror's declaration that the foreperson said "she chose not to accept any of the testimony provided by the City or [its] expert witnesses" is not proof of misconduct. The foreperson, like any other juror, was entitled to accept or reject whatever evidence she chose, and it is the purpose of deliberations for the jurors to express their opinions on the evidence. As correctly recognized by the trial judge, the

foreperson was free to reject the testimony provided by the City and its experts.

In the end, we conclude that the trial court heard the evidence on Long Beach's claim of misconduct, "and was well positioned to determine whether the declarations showed misconduct." (*People v. Steele* (2002) 27 Cal.4th 1230, 1267.) Because the trial court's assessment is not demonstrably wrong, we will not find it erred in denying Long Beach's motion for new trial.

IX. Alleged Appearance of Possible Juror Concealment of Bias During Voir Dire

Long Beach also claims the jury foreperson "*may have* concealed bias during voir dire." (Italics added.) We are not persuaded.

Long Beach's "concealed bias" contention is premised on a declaration from one of its appellate lawyers, Allison R. Hilgers. Long Beach included Hilgers's declaration *in the city's appellant's appendix which it filed for this appeal*. None of the information in Hilgers's declaration, insofar as we are able to ascertain, was ever introduced at any time in any form during the proceedings in the trial court, and thus, none of the information is truly appropriate for us to consider on appeal.

"It has long been the general rule and understanding that 'an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.' [Citation.] This rule reflects an 'essential distinction between the trial and the appellate court . . . that it is the province of the trial court to decide questions of fact and of the appellate court to decide questions of law. . . .' [Citation.] The rule promotes the orderly settling of

factual questions and disputes in the trial court, provides a meaningful record for review, and serves to avoid prolonged delays on appeal. 'Although appellate courts are authorized to make findings of fact on appeal by Code of Civil Procedure section 909 and rule 23 of the California Rules of Court, the authority should be exercised sparingly. [Citation.] *Absent exceptional circumstances, no such findings should be made.* [Citation].' [Citations.]" (*In re Zeth S.* (2003) 31 Cal.4th 396, 405, italics in original.)

Further, even if we were to indulge in consideration of the "facts" stated in attorney Hilgers's declaration, those facts do not support reversal of the jury's verdict. Hilgers's declaration shows that she directed "the City" to perform a "party name search" in Los Angeles County, and that she (Hilgers) subsequently received a list of 20 case numbers in which the name "Angelita DuPont" appears as a party. Hilgers then listed the 20 cases. The nature of the 20 cases is generally not shown, other than that they were predominantly "small claims" cases.

Long Beach's contention is based on an argument that the jury foreperson in Mendez's case was named "Angelita DuPont" and that the 20 "Angelita DuPont" cases listed in attorney Hilgers's declaration make it "appear" there may be a problem in that jury foreperson "Angelita DuPont" only disclosed a single case in which she was involved — a lawsuit she filed against Starbucks — during voir dire.

Long Beach's claim fails to support reversal for at least two reasons. First, attorney Hilgers's declaration offers no proof that any of the 20 identified "Angelita DuPont" cases (save for one identified case against Starbucks) involve the same Angelita DuPont who acted as the jury foreperson in the city's case with

Mendez. Second, we have read the entirety of the voir dire addressed to juror Angelita DuPont and do not see that she was ever asked how many lawsuits she filed in her life.

When juror Angelita DuPont was called to the jury box, she stated that she worked as a paralegal at the Loeb & Loeb law firm, and that she had a law degree, and graduated from law school in 2007. In response to questions from the trial court, she provided further background on her law-related work history. When it was time for the lawyers to ask questions, Mendez's counsel asked juror Angelita DuPont "How do you feel *about trip and fall cases* in general?" (italics added) and she answered: "I actually have a pending suit that is not a trip and fall but it is a personal injury case against Starbucks for an injury . . . ." There were then some questions about the nature of the lawsuit against Starbucks, and then counsel moved on to question other prospective jurors. When counsel for Long Beach questioned juror Angelita DuPont, he too inquired about the Starbucks lawsuit. While we feel that a sense of candor perhaps should have moved juror Angelita DuPont to reveal other cases, if she actually had any, she was not asked at any time during voir dire about any other cases.

Absent proof that the Angelita DuPont who acted as jury foreperson was also involved in other cases involving an Angelita DuPont, and absent a showing that juror Angelita DuPont falsely answered questions about other lawsuits during voir dire, we cannot accept Long Beach's contention that the judgment in favor of Mendez must be reversed for juror concealment of bias.

DISPOSITION

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

BIGELOW, P.J.

We concur:

RUBIN, J.

SORTINO, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.