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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

BRIAN LINDQUIST, Plaintiff and Appellant, v. ARTHUR L. HERMAN FAMILY, LLC, et al., Defendants and Respondents.	B282429 (Los Angeles County Super. Ct. No. BC522308)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory W. Alarcon, Judge. Affirmed.

Wein Law Group and Steven L. Weinberg for Plaintiff and Appellant.

Citron & Citron, Thomas H. Citron and Katherine A. Tatikian for Defendants and Respondents.

Brian Lindquist (Lindquist), a tenant, sued his landlord (Arthur L. Herman Family Trust) and related family members and entities (Arthur L. Herman, Leesl Herman, and Arthur L. Herman Family LLC), as well as the property's manager (Bradley Jakobsen and Jakobsen Management) (collectively, Herman) for breach of contract, nuisance, negligence, and conversion. A jury returned a verdict in favor of Herman on all of Lindquist's claims.

On appeal, Lindquist raises eleven separate challenges to the judgment, including claims of improperly excluded evidence, improperly admitted evidence, and allegedly flawed jury instructions. As discussed in more detail below, we are not persuaded by any of Lindquist's arguments. Accordingly, we affirm the judgment.

BACKGROUND

In 1985, Lindquist entered into a lease with Herman for the rental of a one bedroom apartment in a complex located in Santa Monica.

I. Lindquist's petition to the Santa Monica Rent Control Board

In June 2011, Lindquist petitioned the Santa Monica Rent Control Board (SMRCB) for a rent reduction. Lindquist's petition was based on a lengthy list of unresolved issues with his apartment. Among Lindquist's complaints was a claim that his carpet was "[w]orn and threadbare" and that the "[s]lab" under the carpet had "cracked."

In April 2012, the SMRCB issued a decision in Lindquist's favor, reducing his rent from $729 per month to $493 per month. According to the SMRCB's decision, Lindquist "proved by a preponderance of the evidence that he is entitled to a rent decrease based on the condition of the carpet . . . and the cracked

slab under the carpet." The SMRCB assigned a portion of the rent decrease ($60) to the condition of the carpet. During the course of the proceedings before the SMRCB, Herman indicated that it intended to fix the crack in the slab before replacing Lindquist's carpet. The SMRCB, however, did not require as part of its order that the crack be repaired before the new carpeting was installed. Instead, the SMRCB stated that "[t]he decrease will remain in effect until the carpet and padding . . . [are] replaced and the cracks in the slab have been repaired."

In May 2013, in a subsequent decision, the SMRCB decided not to restore to Lindquist's rent the full amount previously deducted for the condition of the carpet. Instead, because new carpeting had been installed, the SMRCB added $30 back to Lindquist's rent. However, because Herman had failed to repair the crack, the SMRCB left in place a $30 reduction in Lindquist's rent.

II. Lindquist's lawsuit

In September 2013, Lindquist filed a complaint against, Herman. In his complaint Lindquist alleged eight causes of action: breach of contract; conversion; nuisance; negligence; abuse of process; negligent infliction of emotional distress; intentional infliction of emotional distress; and breach of the covenant of good faith and fair dealing.

In January 2014, Herman, pursuant to section 425.16 of the Code of Civil Procedure, filed an anti-SLAPP[1] motion to strike four causes of action: abuse of process; negligent infliction

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[1] SLAPP is an acronym for "strategic lawsuit against public participation." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.)

of emotional distress; intentional infliction of emotional distress; and breach of the covenant of good faith and fair dealing. Herman argued that because those causes of action were based on an eviction notice that Herman served on Lindquist in October 2012 for his alleged failure to give Herman access to the apartment to replace the carpet, those causes of action were subject to the anti-SLAPP statute, and were barred by the litigation privilege.[2] In March 2014, the trial court granted Herman's motion.[3]

For three of Lindquist's four remaining causes of action (breach of contract, negligence, and nuisance) the central allegation was that Herman had failed to repair the crack in the floor/foundation of his apartment. The final cause of action (conversion) was based on Herman's alleged failure to return certain items of personal property, principally some water hoses and lawn chairs.

In October and November 2016, the trial court presided over a jury trial on Lindquist's four remaining claims against Herman. On November 2, 2016, the jury returned a verdict in favor of Herman on all causes of action.

Following the verdict, Lindquist moved for judgment notwithstanding the verdict (JNOV) and for a new trial. The

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[2] In his appellate briefing, Lindquist refers to a second eviction notice that Herman served on him in September 2013 for allegedly delinquent rent payments. However, the only eviction notice that Lindquist mentions in his complaint is the one issued in October 2012.

[3] On appeal, we affirmed the trial court's decision. (See *Lindquist v. Arthur L. Herman Family LLC, et al*. (July 28, 2015, B256218 [nonpub. opn.].)

trial court denied both motions, finding that "there is not a reasonable probability that a more favorable result could have been obtained but for any error, and . . . substantial evidence does support the verdict."

DISCUSSION

I. Exclusion of evidence

Lindquist argues that the trial court erred by excluding (a) the testimony of Ricardo Booth, (b) Lindquist's rent-related damages evidence, (c) Herman's eviction notices, and (d) evidence concerning the SMRCB proceedings.

A. STANDARD OF REVIEW

We review a claim for the erroneous admission or exclusion of evidence—either at trial or through a pretrial motion in limine—under the abuse of discretion standard of review. " 'As a general matter, a trial court is vested with broad discretion in ruling on the admissibility of evidence. The court's ruling will be upset only if there is a clear showing of an abuse of discretion, i.e., that the court exceeded the bounds of reason.' " (*People v. Dean* (2009) 174 Cal.App.4th 186, 193; *McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 295–296.) In addition, " '[i]t is . . . well settled that the erroneous admission or exclusion of evidence does not require a reversal except where the error or errors caused a miscarriage of justice. [Citation.] "[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." ' " (*People v. Fields* (2009) 175 Cal.App.4th 1001, 1018.)

B. THE TESTIMONY OF RICARDO BOOTH

1. Background

Ricardo Booth (Booth) is a California-licensed civil engineer. In late 2003 or early 2004, he was retained by Herman to make some "structural observations" with regards to Lindquist's apartment. After inspecting the apartment and examining, among other things, the crack in Lindquist's floor, Booth believed that "part of the unit was sinking"; accordingly, he recommended that Herman "contact a soils engineer or geotechnical engineer . . . to give a more in-depth assessment of the situation." In 2011, Herman again retained Booth for an assessment of Lindquist's apartment and, after inspecting the apartment and noticing that the cracks were "somewhat worse," Booth again recommended that a soils engineer or geotechnical engineer be retained to conduct a more thorough assessment.

In 2012, after Lindquist contacted him, Booth returned to the apartment and made a third structural observation. He noted that the cracks were getting worse, which reinforced his conclusion that the building was "sinking." Booth told Lindquist that he believed the apartment was a "safety hazard" and "needed to be repaired as soon as possible."

At trial, Herman moved to preclude Booth from testifying on the grounds that he was not designated as an expert and that his testimony would be duplicative of the testimony to be offered by Steven Helfrich (Helfrich), a California-licensed civil and geotechnical engineer, who was Lindquist's designated expert. Lindquist opposed the motion on the ground that he was calling Booth as a "percipient witness," not as an expert. In an attempt to resolve the controversy, the trial court, pursuant to Evidence Code section 402, conducted a hearing outside the presence of the

jury. After listening to Booth's testimony at the section 402 hearing, the trial court concluded that Booth would not "just be a percipient witness," but would instead be "giving conclusions" and "testifying as an expert." Because Helfrich was "going to testify to the same information" as Booth, the trial court offered Lindquist a choice: he could have either Booth or Helfrich testify, but not both. Lindquist elected to have Helfrich testify.

While on the stand Helfrich testified about Booth's reports. In addition, during his direct examination, Lindquist testified about Booth's inspection of his apartment in 2003 and 2011 and Booth's 2011 report. Moreover, during the testimony of Leesl Herman, Lindquist's counsel cross-examined her extensively with regard to Booth's 2011 report.

On appeal, Lindquist argues that the trial court's ruling was in error because he was entitled to call Booth as a percipient witness who could also offer opinions, in much the same way a treating physician can offer opinions on facts that he/she acquired independently of litigation.

2. Analysis

A trial court "may, at any time before or during the trial of an action, limit the number of expert witnesses to be called by any party." (Evid. Code, § 723; *People v. Ramos* (1997) 15 Cal.4th 1133, 1175–1176 [affirming exclusion of expert because it would be duplicative of both defendant's testimony and another "equally credentialed expert"].) In addition, the trial court may exclude any evidence, including expert evidence, if it finds such evidence to be cumulative. (See Evid. Code, § 352; *Horn v. General Motors Corp*. (1976) 17 Cal.3d 359, 371 [affirming exclusion of fifth expert's testimony because it was cumulative].)

Here, Lindquist failed to show that Booth's testimony about the crack in his apartment floor would have " 'differed in quality and substance' " (*People v. Lucero* (1988) 44 Cal.3d 1006, 1029) from either the percipient witness testimony offered by himself or the expert testimony offered by Helfrich, his designated expert who appeared to be equally as well-credentialed as Booth. As a result, the trial court's decision to limit Lindquist to either the expert testimony of Booth or Helfrich did not exceed the bounds of reason. Even if the decision was in error, there was no prejudice, since the sum and substance of Booth's observations and recommendations were presented to the jury through the testimony of other witnesses. Accordingly, we affirm the trial court's exclusion of Booth's testimony.

C. LINDQUIST'S RENT-RELATED DAMAGES EVIDENCE

1. Background

During direct examination, Lindquist testified about a number of issues related to his alleged damages as a result of the alleged breach of the implied warranties of habitability and quiet enjoyment. For example, Lindquist testified about a "sewer gas" smell that purportedly "penetrates" his apartment, a smell that he attributed to the sinking of his apartment's foundation, which began in 2003 when the crack in his floor first appeared. In addition, he testified that his apartment was infested with ants that came up through the crack in the floor and, due to the shifting foundation, he was forced to plane his doors so that they would continue to open and close. Moreover, Lindquist testified that he feared for his life due to the risk of asbestos exposure from the crack which had damaged asbestos-containing floor tiles.

Through cross-examination and redirect examination, Lindquist's damages testimony was refined. For example, on cross-examination, Lindquist admitted that, although the crack in his floor damaged tiles containing asbestos, he has not been treated for asbestos exposure and no doctor has ever told him that his professed fear of asbestos exposure was warranted. On redirect, Lindquist testified that while he has not yet suffered any physical injury as a result of the cracked floor, he has been inconvenienced by it and he has had to tell guests to watch their step because the crack is a "legal, tripping hazard."

However, one aspect of Lindquist's alleged damages was not covered on direct examination—the amount of rent he overpaid for an apartment whose habitability was allegedly compromised ($107,000 since 2004). Near the conclusion of his direct examination, Lindquist's counsel began asking questions about his client's rent payments, but then abruptly ended his line of questioning after encountering various evidentiary objections. As Lindquist's counsel later explained to the trial court, through his own "innocent omission," he became "distracted" and failed to complete his direct examination. On several occasions throughout the trial, beginning just before the completion of Lindquist's redirect examination and continuing until shortly before closing arguments, Lindquist's counsel, pursuant to Evidence Code section 772, sought leave to reopen his direct examination of Lindquist so as to address his client's alleged rent-related damages. The trial court denied those requests because it believed that to do so would prejudice Herman: "You don't bring up damages on rebuttal. You bring it up on direct so that counsel can have a chance to cross on it." "You had your

client on for *two days* and he didn't [testify about rent]. [¶] . . . [¶] *Two days*." (Italics added.)

On appeal, Lindquist contends that the trial court's refusal to allow him to reopen his direct examination on his rent-related damages was an error, because Herman would not have been prejudiced—prior to trial Herman had been "fully appri[s]ed of all of [Lindquist's] claimed damages by way of his extensive and detailed" written discovery responses and Herman "would have had an opportunity to fully cross-examine."

2. Analysis

Under Evidence Code section 772, a trial court may, in its discretion allow a party to "interrupt his cross-examination, redirect examination, or recross-examination of a witness, in order to examine the witness upon a matter *not* within the scope of a previous examination of the witness. (Evid. Code, § 772, subd. (c), italics added; *People v. McDermand* (1984) 162 Cal.App.3d 770, 792 [all phases of examination of witness need not be concluded without interruption].)

However, a trial court also has the "inherent authority and responsibility to fairly and efficiently administer the judicial proceedings before it. [Citations.] This authority includes the power to supervise proceedings for the orderly conduct of the court's business and to guard against inept procedures and unnecessary indulgences that tend to delay the conduct of its proceedings." (*California Crane School, Inc. v. National Com. for Certification of Crane Operators* (2014) 226 Cal.App.4th 12, 22 (*California Crane School*); Code Civ. Proc., § 128, subd. (a)(3) [every court has the power "[t]o provide for the orderly conduct of proceedings before it"].) In fact, a trial court, "has the power to expedite proceedings which, in the court's view, are dragging on

too long without significantly aiding the trier of fact." (*California Crane School*, at p. 22.) As with evidentiary rulings, we review the trial court's trial time management rulings for abuse of discretion. (*Id.* at pp. 17, 24.)

Here, the trial court elected not to exercise its discretion under Evidence Code section 772, due to considerations of prejudice and judicial efficiency. The trial court's decision is fairly supported by the record, which shows that Lindquist's counsel freely elected to terminate the direct examination of his client before completing the issue of rent-related damages. The record shows further that Lindquist's counsel made that decision after conducting a lengthy direct examination of his client—Lindquist's direct examination began on the afternoon of the first day of testimony, extended through the morning of the second day, and finally concluded on the afternoon of the second day. Moreover, the trial court, which is in the best position to judge such matters, observed that Lindquist's direct examination had not been conducted in an efficient and economic manner, but had been unnecessarily drawn out. Under such circumstances, we cannot conclude that the trial court's decision exceeded the bounds of reason. (*People v. Dean, supra,* 174 Cal.App.4th at p. 193; *McCoy v. Pacific Maritime Assoc.*, *supra*, 216 Cal.App.4th at pp. 295–296.)

Even if the trial court had abused its discretion, any such error would have been harmless. The testimony at issue (Lindquist's history of rent payments) was relevant only to damages, not liability. On the issue of liability, the jury found in favor of Herman. It is hard to see how the admission of Lindquist's rent payments would have convinced the jury to find Herman liable on any of the claims advanced by Lindquist.

Accordingly, it is not reasonably probable that a result more favorable to Lindquist would have been reached in the absence of the alleged error.

D. HERMAN'S EVICTION NOTICES

1. Background

Before trial, Herman filed a motion in limine to preclude any evidence related to the stricken causes of action that were based on the October 2012 eviction notice. Herman, pursuant to Evidence Code section 350 and 352, argued that any such evidence would be irrelevant or, if relevant, would create a substantial danger of undue prejudice to Herman and/or confuse the jury and/or consume an undue amount of time. Lindquist opposed the motion on the ground that the anti-SLAPP statute applies only to causes of action, not to evidence. The trial court, without explanation, granted Herman's motion, stating that "no mention should be made of dismissed causes of action." Although the court's order excluded reference only to dismissed causes of action, the court repeatedly sustained objections to evidence relating to the eviction notices on the basis of its order granting the motion.

On appeal, Lindquist argues that the eviction notices support his claim that Herman violated provisions of the Santa Monica Rent Control Charter and the Santa Monica Municipal Code.

2. Analysis

Lindquist's argument is without merit because *none* of the causes of action tried to the jury was based upon violations of Santa Monica law. As a result, the trial court did not abuse its discretion in granting Herman's motion to exclude the eviction notices.

Even if it was error to exclude evidence related to the eviction notices, any such error was harmless. The allegedly baseless nature of the eviction notices was relevant to Lindquist's claim for punitive damages (i.e., the notices were evidence of Herman's alleged oppression, fraud or malice (see Civ. Code, § 3294)); the excluded evidence, however, was not relevant to Herman's alleged liability. As a result, the trial court's purported error in precluding that evidence was harmless given that the jury found there was no basis upon which to award punitive damages—the jury found in favor of Herman on all of Lindquist's substantive claims.

E. SMRCB PROCEEDINGS

1. Background

Prior to trial, Herman filed a motion in limine to preclude any evidence related to Lindquist's 2011 petition to the SMRCB. Herman maintained that such evidence was inadmissible on a variety of grounds: it was precluded by chapter 8 of the Santa Monica Rent Control Law; it was irrelevant or, if relevant, it constituted inadmissible character evidence and/or its probative value was outweighed by the risk of consuming a disproportionate amount of time at trial and/or confusing the jury.

Lindquist opposed the motion, arguing that his petition was filed pursuant to chapter 4 of the Santa Monica Rent Control Law, not chapter 8. In addition, Lindquist argued that such evidence was relevant for two principal reasons: First, during the SMRCB proceedings Jakobsen purportedly made a number of critical admissions, including that Herman intended to fix the crack before installing the carpet and that Lindquist had never refused access to his apartment to install carpeting. Second,

Lindquist intended to use the evidence from the proceedings, including testimony by the SMRCB's investigator, not as evidence of Herman's character, but to "supplement and corroborate Plaintiff's own testimony about the condition[ ]" of his apartment. Lindquist, however, did not reveal how much time he planned to devote to the SMRCB proceedings at trial.

The trial court granted the motion "after [Evidence Code section] 352 balancing." Lindquist contends on appeal that this decision was error, because evidence from the SMRCB proceedings was "critical" to his case; without the testimony of the SMRCB witnesses, he "wound up being the only percipient witness in his entire affirmative case."

2. Analysis

Evidence Code section 352 "allows trial courts to exclude otherwise admissible evidence whose 'probative value is substantially outweighed' by its potential for unfair prejudice, confusion, or undue consumption of time." (*People v. Wheeler* (1992) 4 Cal.4th 284, 291.) "[I]t is the exclusive province of the trial court to determine whether the probative value of evidence outweighs its possible prejudicial effect." (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 402.) And the trial court's exercise of discretion on this issue will not be disturbed on appeal absent a clear showing of abuse. (*Ibid.*)

The proceedings before the SMRCB were extensive. In addition to Lindquist's petition and the proceedings leading up to the board's initial decision in June 2012, there were at least four subsequent proposed addendums to that initial decision. As a result, the SMRCB conducted multiple inspections of the apartment (e.g., Nov. 23, 2011, May 25, 2012, June 13, 2012, Aug. 8, 2012, Oct. 17 & 29, 2012, Aug. 2, 2013). The report on the

November 23, 2011 inspection, with photos, was more than 70 pages due to the wide array of complaints advanced by Lindquist.). In addition, there were multiple hearings on the petition and the proposed addendums (e.g., Dec. 1, 2011, Jan. 10, 2012, Aug. 15, 2012, Dec. 10, 2012).

In light of the extensive nature of the SMRCB proceedings, and given that Lindquist and his experts could competently testify regarding the central factual issue at trial—the crack in the floor and its alleged dangers—the trial court reasonably concluded that the probative value of the SMRCB evidence was substantially outweighed by the risk of confusing and/or misleading the jury and/or consuming an undue amount of trial time. Since the trial court's decision was not beyond the bounds of reason, we hold that it did not abuse its discretion in excluding evidence relating to the SMRCB proceedings.

III. Admission of evidence

Lindquist argues that the trial court erred by improperly allowing the admission of evidence regarding (a) his alleged settlement communications with Herman and (b) exhibit 2125.[4]

A. LINDQUIST'S SETTLEMENT COMMUNICATIONS

1. Background

Prior to trial, pursuant to Evidence Code sections 1154 and 352, Lindquist filed a motion in limine to exclude any evidence related to his settlement communications with Herman. Those communications included, among other things, a July 2012 letter that Lindquist sent to Arthur Herman presenting him with three

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[4] As noted above, we review Lindquist's claims under the deferential abuse of discretion standard. (See *Kim v. The True Church Members of Holy Hill Community Church* (2015) 236 Cal.App.4th 1438, 1449.)

options: (1) sell to Lindquist an interest in the property in exchange for Lindquist paying for all necessary repairs to the foundation and the abatement of asbestos; (2) Lindquist would waive all SMRB sanctions if Herman agreed to make all necessary repairs to Lindquist's apartment; or (3) Lindquist would sue Herman if his complaints were not addressed.

Herman opposed the motion on the ground that Lindquist's communications were not settlement negotiations, but "unilateral threats of litigation." Herman argued further that even if Lindquist's communications were settlement efforts, they were nonetheless admissible because they were not being offered to prove Lindquist's liability. Rather, Herman intended to use the correspondence to show that Lindquist filed the instant lawsuit for an improper purpose. The trial court denied Lindquist's motion.

On appeal, Lindquist contends that the trial court's ruling was error because the provisions of the Evidence Code protecting settlement communications are necessarily broad and, as a result, protect even unilateral or unanswered communications and offers.

2. Analysis

a. The trial court erred

The admission or exclusion of settlement offers is governed in the main by sections 1152 and 1154 of the Evidence Code. Evidence Code section 1152, subdivision (a), provides, "Evidence that a person has, in compromise . . . , furnished or offered or promised to furnish money or any other thing . . . to another who has sustained . . . loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it."

Evidence Code section 1154 provides, "Evidence that a person has . . . offered . . . to accept a sum of money or any other thing . . . in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it."

Both of these statutes "are based on the public policy in favor of the settlement of disputes without litigation and are intended to promote candor in settlement negotiations: 'The rule prevents parties from being deterred from *making* offers of settlement and facilitates the type of candid discussion that may lead to settlement.' " (*Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1475, italics added.)

Here, the settlement communications were attempts to settle the parties' dispute regarding the condition and repair of Lindquist's apartment. The fact that Lindquist's settlement overtures went unanswered does not diminish their status as settlement communications. Moreover, Herman admitted to the trial court that he intended to use the letters to show that Lindquist's claims about the condition of his apartment were invalid because they were an attempt "to force the Herman family to sell the Property to him." In other words, the value of the settlement communications to Herman was that they allowed him to argue at trial that Lindquist's core claims for breach of contract, negligence and nuisance were baseless—that is, Lindquist was not really worried about asbestos poisoning or the building collapsing on him; those alleged fears were merely pretexts to get Herman to sell the property (or an interest in the property) to him. Evidence Code section 1154, however, by its very terms precludes the use of settlement offers to " 'prove the invalidity' " of a claim. (See *Zhou v. Unisource Worldwide*, *supra*,

157 Cal.App.4th at p. 1478 [" 'Section 1154 makes an offer of compromise inadmissible to show *invalidity* of the claim to which the offer related' "].)

Moreover, as noted above, Evidence Code section 1154 is based on the public policy of encouraging candid discussions that may lead to settlement. Here, Lindquist was being candid about his interest in settling the parties' disputes with *or without* the sale of the property. For example, the July 2012 letter's second proposal was for Lindquist to drop all demands for SMRCB sanctions in exchange for Herman making all necessary repairs to the apartment—thus, Lindquist's second settlement option was not conditioned in any way upon a sale.

Accordingly, the trial court erred by denying Lindquist's motion in limine.

b. The error was harmless

Lindquist contends that, as a result of the trial court's ruling allowing admission of his settlement communications, the trial "turned into a morass of accusations and denials" about whether Lindquist harassed Herman. Although there was testimony by Lindquist, Arthur Herman and Leesl Herman about the disputed communications, the bulk of their testimony was about Lindquist's complaints regarding the condition of his apartment. In addition, there was extensive expert witness testimony at trial about the condition of Lindquist's apartment. In other words, despite the admission of the settlement correspondence, the trial's evidentiary focus was on Lindquist's claims about the state and safety of his apartment. Accordingly, on the record before us, we hold that the admission of the settlement letters was harmless error.

B. EXHIBIT 2125

1. Background

In July 2016, Lindquist noticed the deposition of Leesl Herman. As part of that notice, Lindquist requested the production of various documents, including all documents constituting communications between himself and Leesl Herman regarding the apartment during the period 1985 to 2016. In October 2016, the trial court granted Lindquist's motion to compel Leesl Herman's deposition and the production of documents responsive to the deposition notice.

On October 28, 2016, during his cross-examination of Lindquist, Herman introduced exhibit 2125, a redacted copy of a letter dated March 13, 2014, from Leesl Herman to Lindquist, which, in pertinent part, stated as follows: "We would like to schedule a time to come in and evaluate the work that needs to be done to repair the floor crack in your apartment. Please give us some potential times and dates that would work for this. We do not have a key to your apartment since you have changed the locks and failed to furnish us with the new key." Lindquist's counsel immediately objected to the document on the ground that it had not been produced during discovery. The trial court overruled the objection on the ground that an "impeachment [document] does not have to be turned over in discovery. It does not have to be given to you until the time of trial."

On appeal, Lindquist argues that the trial court's decision was an "extreme[ly]" prejudicial error. The exhibit, which Lindquist had never seen before, was never produced in discovery even though the trial court had ordered Herman to produce all such documents shortly before trial when it compelled the deposition of Leesl Herman. As a result, Lindquist argues, the

admission of the exhibit at trial constituted improper " 'trial by surprise.' " In response, Herman argues that even if the exhibit was erroneously admitted there was no harm, as the jury found that Lindquist had done all "things that the [lease] required him to do."

2. Analysis

a. The trial court erred

It is well established that a trial court's "inherent power to curb abuses and promote fair process extends to the preclusion of evidence." (*Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 288.) In fact, "trial courts regularly exercise their 'basic power to insure that all parties receive a fair trial' by precluding evidence." (*Ibid*.) Two cases illustrate the exercise of such power: *Thoren v. Johnston and Washer* (1972) 29 Cal.App.3d 270 (*Thoren*); *Deeter v. Angus* (1986) 179 Cal.App.3d 241 (*Deeter*).

In *Thoren*, the appellate court held that the trial court properly barred the testimony of a witness that the plaintiff willfully excluded from an answer to an interrogatory seeking the names of witnesses to an accident. *Thoren* explained, "[a]n order which bars the testimony of a witness whose name was deliberately excluded in an answer to an interrogatory seeking the names of witnesses protects the interrogating party from the oppression otherwise flowing from the answer. One of the principal purposes of civil discovery is to do away with 'the sporting theory of litigation—namely, surprise at the trial.' [Citation.] The purpose is accomplished by giving 'greater assistance to the parties in ascertaining the truth and in checking and preventing perjury,' and by providing 'an effective means of detecting and exposing false, fraudulent and sham

claims and defenses.' [Citation.] Where the party served with an interrogatory asking the names of witnesses to an occurrence then known to him deprives his adversary of that information by a willfully[5] false response, he subjects the adversary to unfair surprise at trial. He deprives his adversary of the opportunity of preparation which could disclose whether the witness will tell the truth and whether a claim based upon the witness's testimony is a sham, false, or fraudulent." (*Thoren*, *supra*, 29 Cal.App.3d at p. 274.)

The court in *Deeter*, *supra*, 179 Cal.App.3d 241, reached a similar conclusion. There, the plaintiffs sought to introduce at trial a tape recording of a telephone conversation. Defendants objected on the grounds that "plaintiffs failed to produce the tape when defendants initially requested production of documents, then continued to conceal its existence in response to defendants' interrogatories." (*Id*. at p. 254.) The trial court excluded the tape, and the Court of Appeal approved the ruling, relying in

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[5] The discovery statute extant when *Thoren*, *supra*, 29 Cal.App.3d 270, was decided (former Code Civ. Proc., § 2034, subd. (d)), authorized the imposition of an evidence sanction for the willful failure to serve and file answers to interrogatories. While current law continues to treat a failure to respond to discovery as a "misuse[ ] of the discovery process" (Code Civ. Proc., § 2023.010, subds. (d) and (g), see, e.g., §§ 2023.030, subd. (c), 2031.300, subd. (c)), the imposition of an evidence sanction is now conditioned upon the violation of an order compelling the response. (See Code Civ. Proc., §§ 2023.030, subd. (c), 2025.450, subd. (h), 2030.290, subd. (c).) Thus, current law has replaced the former "wilful" requirement for the imposition of an evidence sanction with the requirement that the responding party first violate an order compelling the response.

principal part on *Thoren*, *supra*, 29 Cal.App.3d 270: "We see no reason why the [*Thoren*] rule should not apply to the willful withholding of evidence such as the tape here at issue." (*Deeter*, *supra*, 179 Cal.App.3d at pp. 254–255.)

Exhibit 2125, which was dated more than two years before trial, was not privileged and was responsive to Lindquist's document demand that accompanied his notice of Leesl Herman's deposition. The court ordered Leesl Herman to comply with that demand. As a result, under the teachings of *Deeter*, *supra*, 179 Cal.App.3d 241, and *Thoren*, *supra*, 29 Cal.App.3d 270, its surprise production at trial should not have been allowed. Accordingly, we hold that the trial court erred by allowing exhibit 2125 to be admitted into evidence.

b. The error was harmless

On the record before us, we cannot agree with Lindquist that the error was prejudicial, let alone extremely prejudicial. Herman spent very little time on the exhibit during cross-examination, with defense counsel asking Lindquist only whether he had seen the document before (he had not) and whether the address on the letter for him was correct (it was). The questioning took up less than one page in the reporter's transcript, which contained more than 500 pages of trial testimony. Moreover, during closing arguments, Herman never referred to the exhibit. The admission of exhibit 2125 and its limited use by Herman was counter-balanced by Lindquist's steadfast testimony that he never denied Herman access to his apartment. The record shows that the jury regarded Lindquist as the more credible party on the issue of access: the jury found that Lindquist did "all, or substantially all of the significant things that the [lease] required him to do." On such a record, we cannot

conclude that it was "reasonably probable that a result more favorable to [Lindquist] would have been reached in the absence of the error." ' " (*People v. Fields*, *supra*, 175 Cal.App.4th at p. 1018.)[6]

IV. Jury Instructions

Lindquist advances two arguments with regard to the jury instructions. First, he argues that the trial court failed to give jury instructions that he requested on "breach of the warranty of habitability and quiet enjoyment even though those claims are [the] gravamen of the case." (Italics omitted.) Second, he contends that the trial court "refused to give instructions on Santa Monica rent control law even though the jury sought guidance on that law." (Italics omitted.)

A. STANDARD OF REVIEW

" 'The propriety of jury instructions is a question of law that we review de novo.' " (*Ted Jacob Engineering Group, Inc. v. The Ratcliff Architects* (2010) 187 Cal.App.4th 945, 961).)

B. INSTRUCTIONS ON HABITABILITY AND QUIET ENJOYMENT

1. Background

In his complaint, Lindquist did not assert a stand-alone cause of action based on either the implied warranty of

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[6] Our holding on this issue should not be construed as countenancing Herman's failure to produce exhibit 2125 before trial. As our Supreme Court held long ago, the discovery rules are intended "to take the 'game' element out of trial preparation" and to " 'make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.' " (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 376.)

habitability or the implied warranty of quiet enjoyment. Instead, under his breach of contract cause of action, Lindquist asserted that Herman breached the implied warranty of habitability contained in the lease by "continuously failing to maintain the floor . . . in proper and good repair making the apartment unfit to live in." In his nuisance cause of action, Lindquist alleged that the crack in the floor of his apartment, among other things, interfered with the " 'comfortable enjoyment' " of his property.

a. Lindquist's proposed jury instructions

On October 17, 2016, Lindquist filed a list of the titles of his proposed jury instructions without providing the actual wording of each instruction. Most of Lindquist's proposed instructions were seemingly premised on unmodified versions of various Judicial Council of California Civil Jury Instructions (CACI). Lindquist's list of titles also included five special instructions, two of which concerned, respectively, the "Tortious Breach of the Warranty of Habitability" and the "Tortious Breach of the Warranty of Quiet Enjoyment." On October 26, 2016, Herman filed objections to the titles of Lindquist's proposed Special Instructions and on October 28, 2016 objections to his proposed listing of CACI instructions.

On November 1, 2016, Lindquist filed with the court the text of his proposed jury instructions. Included among Lindquist's proposed instructions were special instructions for breach of the implied warranties of habitability and quiet enjoyment.

However, it is not clear from the record exactly *when* on November 1 Lindquist filed his proposed jury instructions—before the court was formally in session, while the court was in session, or after the trial court had ended its work for the day. In his reply brief on appeal, Lindquist asserts that he filed his jury

instructions "[o]n the morning of November 1, 2016." Lindquist's record citation does not confirm this assertion—it merely indicates that his proposed jury instructions were received by the court sometime on November 1.[7] Other portions of the record, however, suggest that the filing did not occur until late in the day on November 1. For example, on the morning of November 2, the day after Lindquist filed his proposed instructions, the trial court reprimanded Lindquist's counsel for not timely submitting proposed jury instructions: "You know, for the record, you *never* filed jury instructions . . . , and now you're objecting to what the other side filed. You *never* gave us anything except for *today*. I asked for it days ago. It's required in the Code.[8] You didn't

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[7] It also unclear when Lindquist served Herman with his proposed jury instructions. In the record before us, no proof of service is attached to Lindquist's proposed jury instructions. The record suggests that service may not have been effected until November 2. On the morning of November 2, the day after Lindquist filed the proposed instructions with the court, Herman's counsel complained to the trial court that he "was provided with a slurry of documents *this morning*, none of which [he] had a chance to cite check, to look at the law on. . . , to address." (Italics added.)

[8] Section 607a of the Code of Civil Procedure, in pertinent part, provides as follows: "In every case which is being tried before the court with a jury, it shall be the duty of counsel for the respective parties, before the first witness is sworn, to deliver to the judge presiding at the trial and serve upon opposing counsel, all proposed instructions to the jury covering the law as disclosed by the pleadings. Thereafter, and before the commencement of the argument, counsel may deliver to such judge, and serve upon opposing counsel, additional proposed instructions to the jury

comply." (Italics added.) Lindquist's counsel did not state or suggest that the trial court's statement was in any way inaccurate. In a written order dated that same day, the trial court stated that it refused to accept Lindquist's proposed instructions because they were "*not filed in a timely manner by Plaintiff*." (Italics added.) Lindquist never complained to the trial court that its statement about his untimely proposed instructions was inaccurate.

b. The trial court's instruction of the jury

On November 1 and 2, 2016, as the parties and the trial court reached agreement on various sets of instructions for the jury, those instructions were then presented to the jury in a series. More specifically, on the afternoon of November 1, the trial court gave the bulk of the instructions, including those dealing with Lindquist's four causes of action (breach of contract, nuisance, negligence and conversion). Later that same afternoon, the trial court gave the jury instructions relating to agency, the statute of limitations, and punitive damages. On the morning of November 2, after the jury had begun deliberations, the trial court instructed the jury on estoppel and allowed the parties' counsel to offer argument to the jury with respect to that issue.

Throughout this serial instruction process, although Lindquist objected to the omission of other proposed instructions,[9] he did not expressly object (orally or in writing) to

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upon questions of law developed by the evidence and not disclosed by the pleadings."

[9] For example, Lindquist objected to the omission of CACI No. 456. The court found merit in the objection and that instruction ultimately was not given to the jury.

the absence of special instructions on the implied warranties of habitability and quiet enjoyment.

However, on November 1, as the court was reading the first set of approved instructions to the jury, Lindquist's counsel objected to an instruction that was arguably related to implied warranties. The instruction, a version of CACI No. 322, provided, in pertinent part, as follows: "The parties agreed in their contract that Defendants would not have to fulfill any obligation they had to make repairs and conduct inspections unless Plaintiff Brian Lindquist allowed Defendants access to his apartment at any time during his occupancy of that apartment for the purpose of making repairs and conducting inspections."[10] Lindquist's counsel interrupted the reading of that instruction to tell the trial court that this particular instruction was not among his "stack" of approved jury instructions. After the clerk denied altering the collection of approved instructions, and after defense counsel noted that Lindquist's counsel had initialed the instruction at issue, the trial court stated, "If you initialed it, it's pretty strong evidence that you agreed to it." In response, Lindquist's counsel did not deny initializing the instruction; instead, he simply said, "Okay." The following day, after the jury had begun

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[10] CACI No. 322 provides as follows: "The parties agreed in their contract that [name of defendant] would not have to [insert duty] unless [insert condition precedent]. [Name of defendant] contends that this condition did not occur and that [he/she/it] did not have to [insert duty]. To overcome this contention, [name of plaintiff] must prove that [insert condition precedent]. [¶] If [name of plaintiff] does not prove that [insert condition precedent], then [name of defendant] was not required to [insert duty]." (Boldface and italics omitted.)

deliberations, Lindquist's counsel, explained that he did not approve of the way that instruction had been written because in exchange for his rent Lindquist was supposed to receive "a habitable premises" and, as a result, he was belatedly lodging an "objection for the record." Again, Lindquist's counsel did not offer any explanation for why his initial approval of that instruction was invalid or why it should be disregarded after the fact.

2. Analysis

In general, if a party requests a proper jury instruction and the court refuses to give the instruction, the party is deemed to have objected. (Code Civ. Proc., § 647; *Green v. State of California* (2007) 42 Cal.4th 254, 266; *Manguso v. Oceanside Unified School Dist*. (1984) 153 Cal.App.3d 574, 581–582.) But if a party invites the error by requesting or acquiescing in a particular instruction, that party cannot appeal the giving of that instruction. (*Transport Ins. Co. v. TIG Ins. Co*. (2012) 202 Cal.App.4th 984, 1000.)

Indeed, " '[i]t is an elementary principle of appellate law that "[a] party may not complain of the giving of instructions which he has requested. [Citation.]" [Citations.]' [Citation.] 'The invited error doctrine applies "with particular force in the area of jury instructions. Whereas in criminal cases a court has strong sua sponte duties to instruct the jury on a wide variety of subjects, a court in a civil case has no parallel responsibilities. A civil litigant must propose complete instructions in accordance with his or her theory of the litigation and a trial court is not 'obligated to seek out theories [a party] might have advanced, or to articulate for him that which he has left unspoken.' " ' " (*Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1090–1091.)

However, the doctrine of invited error "does not apply when a party, while making the appropriate objections, acquiesces in a judicial determination. [Citation.] . . . ' "An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible." ' " (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212–213.)

Here, the record before us shows that Lindquist did not request instructions on the implied warranties of habitability and quiet enjoyment in a timely manner—according to the trial court, Lindquist "never" submitted full-text proposed instructions until *after* the jury had begun deliberations. Moreover, the record indicates further that Lindquist did more than acquiesce in the giving of instructions that omitted any express discussion of the implied warranties—he affirmatively approved those instructions. Although he later objected to the jury being instructed on CACI No. 322, the inclusion of that instruction was something that Lindquist expressly approved.

In his reply brief Lindquist does not address Herman's arguments regarding the invited error doctrine. Instead, he argues that, because he raised the implied warranties of habitability and quiet enjoyment in his complaint, the trial court was required to instruct the jury on those claims. However, as our Supreme Court has held, " 'In a civil case, *each* of the parties must propose *complete and comprehensive* instructions in accordance with his theory of the litigation; if the parties do not do so, the court has *no* duty to instruct on its own motion.' " (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 950–951, italics added,

disapproved on another ground in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4.) "[T]he exception is a *complete* failure to instruct on material issues and controlling legal principles which may amount to reversible error. " (*Id.*, at p. 951, italics added.)

Here, the trial court did not completely fail to instruct on the implied warranties. For example, the trial court instructed the jury that Herman had a contractual "obligation" to make "repairs and conduct inspections." The trial court further instructed that "a person who owns or manages property is negligent if he or she fails to use reasonable care to keep the property in a reasonably safe condition," and that a "person who owns or manages property must use reasonable care to discover any unsafe conditions and to repair, replace or give adequate warning of anything that could be reasonably be expected to harm others." In addition, as to Lindquist's nuisance cause of action, the trial court instructed the jury on Lindquist's claim that Herman "interfered with [his] use and enjoyment of his land."

Under these circumstances, we hold the invited error doctrine defeats Lindquist's arguments regarding the trial court's alleged failure to give instructions that Lindquist did not request in a timely manner.

C. INSTRUCTIONS ON SANTA MONICA RENT CONTROL LAW

1. Background

In his complaint, although Lindquist premised some of his claims on a number of different state statutes, he did not base any of his claims on a violation of Santa Monica's rent control laws. He referred only to "Santa Monica Rent Control Board decisions."

In his October 17, 2016 list of proposed jury instruction titles Lindquist included two special instructions based, respectively, on articles IV and XVIII of the Santa Monica Rent Control Charter Amendment. Herman filed objections to that list of titles, including the titles referencing Santa Monica's rent control laws. As discussed above in the preceding section, the record before us indicates that because Lindquist failed to serve the text of his proposed jury instructions in a timely manner, the trial court refused to consider them.

2. Analysis

Here, the trial court did not err by failing to instruct the jury on Santa Monica's rent control laws. First, the burden of requesting such an instruction was on Lindquist, not the trial court. (*Agarwal v. Johnson*, *supra*, 25 Cal.3d at pp. 950–951; *Mayes v. Bryan*, *supra*, 139 Cal.App.4th at pp. 1090–1091.) As discussed above, Lindquist failed to request such an instruction in a timely manner. Second, even if Lindquist's proposed jury instructions had been timely, the instruction on Santa Monica rent control law was not warranted. Although litigants have the " ' " 'right to have the jury instructed as to the law applicable to all their theories of the case which were supported by the pleadings and the evidence,' " ' " (*Mayes*, at p. 1092), neither the pleadings nor the evidence justified an instruction on Santa Monica's rent control law. In his complaint, Lindquist did not assert any claims based on Santa Monica rent control law and, due to the trial court's proper ruling excluding reference to the proceedings before the SMRCB, there was no evidence requiring instruction on Santa Monica rent control law. The fact that the jury, during the presentation of evidence, asked for guidance on "the laws of the City of Santa Monica that govern landlords and

tenants" is beside the point. It is the responsibility of the trial court, not the jury, to give instructions on "all matters of law which it thinks necessary for the [jurors'] information in giving their verdict." (Code Civ. Proc., § 608.) As noted above, an instruction on Santa Monica's rent control law was not warranted by either the pleadings or the evidence.

V. Special verdict form

Lindquist contends that the special verdict form (SVF) contained a materially misleading instruction regarding the basis for his nuisance cause of action.

A. STANDARD OF REVIEW

A special verdict's correctness is analyzed as a matter of law and therefore subject to de novo review. (*Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287, 303.) A failure to properly instruct a jury is not necessarily or inherently prejudicial. "There is no *automatic* reversal merely because a trial court has failed to properly instruct a jury." (*Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1156.)

B. LINDQUIST INVITED THE DEFECTIVE SVF

1. Background

On November 1, 2016, Herman filed a proposed SVF. As to Lindquist's nuisance claim, Herman's proposed form asserted that there were two independent bases for that claim: "harm to health" and interference with "use or enjoyment." However, instead of directing the jury to independently consider whether the condition of Lindquist's apartment was harmful to his health or interfered with his use or enjoyment of the property as set out in CACI No. 2012, Herman's proposed SVF directed the jury to end its nuisance inquiry and move on to consider Lindquist's

conversion claim if it found that the condition of the apartment was not harmful to his health.

Lindquist filed a one-page objection to Herman's proposed SVF. Lindquist, however, did not specifically object to the organization of the nuisance questions. Instead, he objected generally to the SVF as "ambiguous and/or unclear," limiting his specific objections to matters concerning the statute of limitations. The trial court overruled Lindquist's written objections to the SVF.

On the morning of November 2, while the jury was deliberating, Lindquist objected, among other things to the omission of Arthur Herman and the Arthur Herman Family LLC from question 11 in the negligence section of the SVF. Those objections were sustained and corrections were made to the final version of the SVF. At that time, Lindquist, did not object to the organization of the questions in the nuisance section.

At 2:22 p.m. on the afternoon of November 2, the jury indicated that they had reached a verdict. Shortly thereafter, but before the jury returned to the courtroom at 2:30 p.m., Lindquist again objected to the SVF, but this time he objected specifically to the organization of the nuisance questions, in particular question 18 and its instruction that the jury should conclude its nuisance inquiry if it found that the apartment's condition was not harmful to health without also considering whether the apartment's condition affected his use or enjoyment. Before the jury returned with its verdict, the trial court overruled Lindquist's objection: "If there's any error, it's invited error by you by not objecting and by not proposing your own special verdict form. [¶] . . . [¶] And you agreed on it. You approved it."

When the jury returned its verdict, question 19 (use or enjoyment) was not answered.

In support of his motion for a new trial, Lindquist submitted the declaration of Juror No. 10.[11] Juror No. 10 stated that, due to the wording of question 18, the jury "never deliberated over (or resolved) whether any condition existed which interfered with Mr. Lindquist's 'use or enjoyment' of land."[12] Juror No. 10 stated further that "[b]ased on the actual discussion in the jury room, if the jury was instructed that an interference to Mr. Lindquist's 'use and enjoyment' of land would suffice alone to comprise a valid nuisance, our answer to

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[11] We refer to Juror No. 10's document as a declaration even though it is styled as an "affidavit." We do so because no jurat by a notary public is attached to the document and because the document contains the "under penalty of perjury" affirmation required for a declaration made in California. (§ 2015.5; see Cal. Rules of Court, rule 3.1306(a).)

[12] This statement by Juror No. 10 is arguably admissible, because it discusses objective facts: the SVF's instruction in question 18 to not consider question 19 (quiet enjoyment) if it found no harm to Lindquist's health; and the fact that the jury, as evidenced by its completed form, did not answer question 19. (See Evid. Code, § 1150, subd. (a); *People v. Hutchinson* (1969) 71 Cal.2d 342, 349–350; cf. *People v. Hall* (1980) 108 Cal.App.3d 373, 380–381 [affirming order striking juror declarations because they "made no reference to any objective events which might account for their asserted mistakes, much less to any objective evidence of misconduct"]; *Cove, Inc. v. Mora* (1985) 172 Cal.App.3d 97, 100 [reversing order granting new trial because juror declarations did not "set forth any overt, objectively verifiable acts or statements"].)

question 19 would have been 'yes' had we been instructed to answer it."[13]

On appeal, Lindquist argues that although his objection to question 18 was first raised just moments after the jury had announced its verdict, there was an easy solution at hand: before the jury returned to the courtroom, the trial court could have simply sent a modified SVF into the jury and asked them to continue their deliberations. For support, Lindquist notes that, before the jury announced that it had reached a verdict, the trial court (at 2:13 p.m.) sent to the jury a modified SVF, which corrected a typographical error that the jury had identified just three minutes earlier (at 2:10 p.m.).

2. Analysis

The SVF used by the jury to render its verdict was flawed. With respect to the nuisance cause of action, the trial court, pursuant to CACI No. 2021, instructed the jury that Lindquist claimed that Herman "interfered with [his] use and enjoyment of his land." Throughout the nuisance instructions, the trial court repeatedly stated that the nuisance claim was based on Herman's alleged interference with Lindquist's use and/or enjoyment of his

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[13] This particular statement by Juror No. 10 is inadmissible. "Evidence of jurors' internal thought processes is inadmissible to impeach a verdict." (*Bell v Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1124; see *id*. at pp. 1125–1126, 1128 [declaration discussing jurors' understanding of terms in special verdict form inadmissible]; see also Evid Code, § 1150, subd. (a) ["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"].)

apartment. At no time, did the trial court instruct the jury that that Lindquist's nuisance claim was based on a harm to his health. However, the SVF failed to conform to the trial court's instructions. The SVF not only asked whether the condition of Lindquist's apartment was harmful to his health, but it did not ask the jury to consider independently whether the apartment's condition interfered with his use or enjoyment of the property.

Lindquist, however, invited the flawed SVF. Under the California Rules of Court, a litigant requesting special findings is required to present the proposed questions before closing argument unless otherwise ordered. (Cal. Rules of Court, rule 3.1580.[14]) Here, Lindquist did not submit his own proposed SVF before closing argument or at any time. Instead, Lindquist opted to rely on the proposed SVF submitted by Herman. Lindquist also chose not to inspect Herman's submission closely. As his counsel explained to the trial court after he belatedly objected to the final version of the SVF submitted to the jury, he "assumed" or "over assumed" that Herman's proposed SVF would conform to the elements required in CACI No. 2021.

The doctrine of invited error contemplates "affirmative conduct demonstrating a deliberate tactical choice on the part of the challenging party." (*Huffman v. Interstate Brands Corp*. (2004) 121 Cal.App.4th 679, 706.) Here, Lindquist and his counsel made just such a tactical choice—they freely elected not to propose their own version of the SVF. Instead of submitting their own proposed SVF, Lindquist and his counsel chose to rely

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[14] Under the trial court's local rules, "jury instruction requests" must be submitted five days prior to the final status conference, which in the instant case was held on October 19, 2016. (See Super. Ct. L.A. County, Local Rules, rule 3.25(f)(1).)

solely on the proposed SVF submitted by Herman. Moreover, despite making this risky tactical decision, they failed to minimize the risk by scrutinizing Herman's proposed SVF at the earliest possible time in order to ensure that it fully reflected all of their claims, including the nuisance claim. Unquestionably, it was not until *after* the jury had announced that it had reached its verdict that Lindquist finally objected to the wording of question 18.

Under such conditions, we hold that the invited error doctrine defeats Lindquist's arguments regarding the SVF.

VI. Motion for JNOV

On appeal, Lindquist argues that substantial evidence does not support the verdict with regard to three of his four claims: breach of contract, negligence, and nuisance.

A. STANDARD OF REVIEW

On appeal from the denial of a JNOV motion, we " 'review[ ] the record in order to make an independent determination whether there is any substantial evidence to support the jury's findings.' [Citation.] 'The scope of the review is limited to determining whether there is any substantial evidence, contradicted or not, to support the jury's verdict. [Citation.] Applying the substantial evidence rule, we resolve "all conflicts in the evidence and all legitimate and reasonable inferences that may arise therefrom in favor of the jury's findings and the verdict. [Citations.]" [Citation.] Thus, this court must accept as true the evidence supporting the verdict, disregard conflicting evidence, and indulge every legitimate inference to support the verdict. [Citation.] Accordingly, we do not weigh the evidence or judge the credibility of the witnesses. [Citation.] If sufficient evidence supports the verdict, we must uphold the trial court's

denial of the JNOV motion.' " (*Scott v. Ford Motor Co*. (2014) 224 Cal.App.4th 1492, 1499.)

B. ANALYSIS

Substantial evidence supports the verdict with regard to each of the challenged causes of action. Those causes of action were based primarily on Herman's alleged failure to repair the crack in the floor/foundation of Lindquist's apartment. At trial, Herman presented substantial evidence in the form of expert testimony that (a) the crack was a "minor," "insignificant" issue, a "stress crack" that did not render the building "unsafe"; (b) the crack could be repaired at relatively little cost and effort; and (c) the crack had not released asbestos fibers into the air of Lindquist's apartment and there was no threat at present to Lindquist's health from asbestos exposure. Accordingly, we hold that the trial court properly denied the motion for JNOV.

VII. Motion for new trial

Lindquist argues that the trial court erred when it denied his motion for a new trial, because, a new trial was warranted due to the following: irregularity in the proceedings (erroneous jury instructions and the improper exclusion and admission of evidence); insufficiency of the evidence; and errors in law (lack of proper jury instructions and a flawed SVF). (Code Civ. Proc., § 657, subds. 1, 6 & 7.)

A. STANDARD OF REVIEW

The standard of review from denial of a motion for a new trial is abuse of discretion. (*Garcia v. Rehrig Internat., Inc*. (2002) 99 Cal.App.4th 869, 874.) "A trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption that it properly exercised that discretion. ' "The determination of a motion for a new trial rests so

completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.' " (*People v. Davis* (1995) 10 Cal.4th 463, 524.) "An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice." (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 752.) "An order denying a motion for new trial will not be set aside unless there was an abuse of discretion that resulted in prejudicial error." (*Jenks v. DLA Piper Rudnick Gray Cary US LLP* (2015) 243 Cal.App.4th 1, 8.)

B. ANALYSIS

1. Irregularity in the proceedings

As discussed above, the trial court properly excluded the testimony of Booth, evidence regarding Lindquist's rent-related damages evidence, the eviction notices, and evidence from the SMRCB proceedings. Although the trial court erred by allowing the admission of Lindquist's settlement communications and exhibit 2125, those errors were harmless and did not "prevent him from having a fair trial." (Code Civ. Proc., § 657, subd. 1.) As for the trial court's alleged errors regarding the jury instructions and the SVF, those were invited by Lindquist. Accordingly, we hold that the trial court did not abuse its discretion in denying Lindquist's motion on irregularity grounds.

2. Insufficiency of the evidence

The Code of Civil Procedure provides that "[a] new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict . . . , unless after weighing the evidence the court is convinced from the entire record, including

reasonable inferences therefrom, that the . . . jury clearly should have reached a different verdict or decision." (Code Civ. Proc., § 657, par. 3.) "Accordingly, we can reverse the denial of a new trial motion based on insufficiency of the evidence . . . only if there is no substantial conflict in the evidence and the evidence compels the conclusion that the motion should have been granted." (*Fassberg Construction Co. v. Housing Authority of City of Los Angele*, *supra*, 152 Cal.App.4th at p. 752.)

Lindquist argues that the trial court should have granted his motion because it was undisputed that there was a crack in the floor/foundation of his apartment. Lindquist's argument is unavailing because it ignores that there was a substantial conflict in the evidence about the significance of that crack. While Lindquist and his experts regarded the crack as a potentially serious health risk that could cost $200,000 to remedy, Herman's experts took a decidedly different view, that the crack was a minor, insignificant issue which would cost approximately $38,000 to fix. In light of this fundamental conflict about the central factual issue at trial, the trial court properly denied the new trial motion contending that the verdict was against the weight of the evidence.

3. Errors in law

As discussed above, Lindquist's claims that the jury instructions were improper/incomplete and that the SVF was flawed were forfeited under the invited error doctrine. Since Lindquist failed to timely submit his proposed jury instructions and never submitted his own proposed SVF, the trial court correctly denied the new trial motion asserting errors in law.

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.