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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

PATRICK HALLETT and 729 MERCHANT, Plaintiffs and Respondents, v. ANDY KHAU, as an individual and as Trustee of Andy Khau 2002 Revocable Trust, Defendant and Appellant.	B280469 (Los Angeles County Super. Ct. No. BC561812)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gail Ruderman Feuer, Judge. Affirmed.

Law Offices of Morton Minikes, Morton Minikes; Law Offices of Edward C. Ip & Associates and Edward C. Ip for Defendant and Appellant.

Boren, Osher & Luftman, Stephen Z. Boren and Steven F. Kuehl for Plaintiffs and Respondents.

Defendant and appellant Andy Khau owned a commercial property located at 729 Merchant Street in downtown Los Angeles. Khau represented in advertising materials and, ultimately, a sales agreement, that the property included 8,450 square feet of warehouse space. Plaintiffs and respondents Patrick Hallett and the company he formed to buy the property, 729 Merchant, LLC, purchased the property from Khau for $1.85 million. Hallett subsequently discovered that the property had only 7,490 square feet of warehouse space, approximately 11 percent less than was advertised. Plaintiffs sued Khau for damages, alleging intentional misrepresentation, negligent misrepresentation, and breach of contract. A jury found for plaintiffs on all counts and awarded them $481,000 in compensatory damages.

On appeal, Khau contends that a disclaimer on a property information sheet and a provision in the sales agreement imposed a duty on plaintiffs to inspect the property. He argues that this duty to inspect "cancelled" any representations he made about the warehouse size and negates, as a matter of law, the jury's findings that he intended to deceive plaintiffs and that plaintiffs reasonably relied on his representations. Alternatively, Khau contends the court erroneously barred the jury from considering a particular contractual provision in connection with the misrepresentation claims. We agree with the latter claim. However, because the barred evidence was cumulative to other evidence that was before the jury, we find no miscarriage of justice and affirm.

FACTUAL BACKGROUND

Khau began leasing the real commercial property in question, 729 Merchant Street, to house his produce business in

2005. No written lease governed the arrangement, and Khau did not get the property inspected or appraised prior to his occupancy. Khau did not measure the warehouse space on the property prior to or during his tenure as a lessee.

Khau purchased the property from his landlord in 2007. The sale, like the lease that preceded it, was handled informally. Khau, a first-time buyer, did not have the assistance of an agent, broker, or lawyer and did not get the property appraised or measured, perform any research, or negotiate the price. Khau testified that he was more concerned with the attributes of the warehouse, including its coolers and loading docks, and the property's downtown location than he was with the precise size of the warehouse space.

The sales agreement Khau signed when he purchased the property stated that it had two interconnected warehouses with a total of 6,100 square feet of warehouse space. Khau admitted to signing the agreement containing that information but testified that he did not know at the time how much warehouse space the property had. Khau testified that he took the sales agreement to the bank for safekeeping after he signed it and did not look at it again.

A few years after he purchased the property, Khau hired a contractor to add more warehouse space. Khau did not give the contractor any measurements for the addition, though he requested the maximum space the city would allow and "stepped off" the area he wanted enclosed. Khau signed a contract to add 1,200 square feet of warehouse space to the property. After revising the plans to meet city requirements, the contractor ultimately added 1,390 square feet of warehouse space to the property. Plaintiffs introduced into evidence blueprints and

other documents showing that the total amount of warehouse space following the addition was 7,490 square feet. Khau testified that he did not see one of the documents until shortly before he vacated the property, and that he never saw the blueprints. At his deposition, however, he testified that he kept the documents in a filing cabinet in his office.

In 2013, Khau decided to sell the property so he could expand his produce business to a larger facility. He hired real estate agent Christopher Ahn, who prepared a listing agreement offering the property for sale at $2 million. Both Khau and Ahn testified that Khau told Ahn about the warehouse addition but did not provide any blueprints or other documents. Khau told Ahn he did not know how large the warehouse space was, so Ahn consulted public records to gather information about the property. Those records showed, inaccurately, that the property had 8,450 square feet of warehouse space. Khau reviewed and approved the listing agreement representing that the property had 8,450 square feet of warehouse space. He testified that he could "never imagine city records could be wrong."

At the time Khau listed the property for sale, Hallett and his wife, Xiangnu Chen, were looking to expand their wholesale clothing import business. Hallett and Chen testified that they were looking for a property close to the Fashion District in downtown Los Angeles, with a warehouse that had a loading dock and approximately 10,000 square feet of space. Their real estate agent, Jae Lee, testified that he showed them flyers for various properties within their requested range of 5,000 to 10,000 square feet of warehouse space. Hallett testified that the flyer for 729 Merchant Street caught his eye due to the advertised location, price, loading dock, ceiling height, and warehouse size of 8,450

square feet.

Hallett acknowledged that the advertising flyer contained a disclaimer that stated, "This information has been obtained from sources believed reliable. While we do not doubt its accuracy, we have not verified it and make no guarantee, warranty or representation about it. It is your responsibility to independently confirm its accuracy."[1] Hallett testified that he did not read the disclaimer because "[a]t the time I was only interested in . . ., the square footage, the price, the location, and that just alerted me to wanting to see the property." Chen testified that she and Hallett "Googled" the property and decided to view it in person.

After verifying the information on the advertising flyer by consulting public records—which, as noted above, were inaccurate—Lee set up an appointment for Hallett and Chen to view the property. Hallett testified that he liked what he saw: "Considering the other properties that we had looked at, this one, though a bit smaller than we wanted, did have the other criterias that we wanted. Great loading dock, space for containers to back up . . . . So the fact that a container could back up here, the ceilings were pretty high. We thought the smaller square footage, we could probably make do with that." Hallett clarified that by "smaller square footage," he meant 8,450 square feet instead of the 10,000 square feet he and Chen originally hoped to find. He further testified that he would not have been interested in the property if the flyer had said it had 7,490 square feet of warehouse space, because that amount of space was not sufficient

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[1] The flyer also contained a "note," in larger typeface, that stated, in pertinent part, "Buyer to verify all information herein. Broker does not guarantee its accuracy." Hallett was not asked about this note at trial.

for the business expansion he had planned.

Hallett offered Khau $1.85 million for the property. In the written offer, prepared on a standardized form, Hallett described the property as "a one story commercial building for approximately 8,450 square feet," located at 729 Merchant Street. The offer further provided that the closing of the transaction would be contingent upon various circumstances, including a physical inspection by Hallett "to satisfy [himself] with regard to the physical aspects and size of the property."

Khau directed Ahn to prepare a counteroffer that reflected his desire to sell the property "as-is" and "make sure the buyer verify." The seven-paragraph counteroffer did not make any alterations to Hallett's description of the property. It did, however, include a paragraph ("paragraph 4") entitled "AS-IS AND WHERE-IS CONDITION," which stated: "The Property is to be sold in its 'AS-IS' and 'WHERE-IS' condition with all faults and all upgrades as they occur. Buyer shall be solely responsible to inspect the Property and all property-recorded information, known and unknown to Seller, its representative(s) and/or Real Estate Brokers." We refer to the first sentence of this provision as the "'as-is' provision," and the second sentence as the "inspection provision."

Hallett reviewed and Chen signed the counteroffer without altering paragraph 4. Hallett testified that he understood paragraph 4 "to be if the air conditioner unit wasn't working appropriately, that I am buying that air conditioner as-is," such that he should get the property inspected. He had no understanding that paragraph 4 had anything to do with the square footage of the warehouse space on the property.

After the counteroffer was accepted, Khau and Ahn completed a form "Property Information Sheet" that by its terms was intended "to provide the brokers and the potential buyer/lessee with important information about the Property/Premises which is currently in the actual knowledge of the Owner and which the Owner is required by law to disclose." The Property Information Sheet affirmatively described the property as "an approximate 8,450 square foot building situated on approximately 11,674 square feet of land per LA County record." Elsewhere on the form, Khau wrote "Don't Know" in response to numerous questions about the property's condition and attributes. The space for additional items warranting disclosure was left blank.

The largely pre-printed Property Information Sheet contained the following language above the signature line: "The statements herein will be relied upon by brokers, buyers, lessees, lenders, and others. Therefore, Owner and/or the Owner's Property Manager has reviewed and modified this printed statement as necessary to accurately and completely state all known material facts concerning the Property. To the extent such modifications are not made, this statement may be relied upon as printed. This statement, however, shall not relieve a buyer or lessee of responsibility for independent investigation of the Property. Owner agrees to promptly notify, in writing, all appropriate parties of any material changes which may occur in the statements contained herein from the date this statement is signed until title to the Property is transferred, or the lease is executed." Khau and Chen signed the Property Information Sheet.

Hallett testified that he had the property inspected during

the contingency period. The inspection entailed "a detailed review of walls, foundation, gutters, things like that," to see if there were any structural, electrical, or plumbing problems. The inspection did not include any measurement of the property or the warehouse space thereon. The inspection satisfied Hallett that the property was in acceptable condition.

Hallett worked with an entity called BDO to obtain a mortgage to purchase the property. BDO commissioned an appraisal of the property, which stated that the property contained 8,450 square feet of warehouse space "per County/City records and confirmed by our measurements." The appraiser testified at trial, however, that he struggled to measure the warehouse due to the presence of large coolers and pallets of produce that obstructed sight lines. He further testified that the measurements he was able to take were inconclusive and did not add up to 8,450 square feet, the number he saw when he consulted the property tax roll, county records, and a commercial database. Hallett testified that he reviewed the appraisal upon receiving it and "felt relieved that the property was being represented truthfully." He further stated that he believed at that time that Khau had been truthful about the size of the property.

BDO forwarded Hallett various communications from potential lenders. In one of those emails, a potential lender indicated that the property had 6,100 square feet of warehouse space. Hallett testified that he thought that was a typo, because he "didn't realize 6,100 square feet had any relevance"; he had never seen the agreement between Khau and the former owner and was unaware that the property had 6,100 square feet of warehouse space when Khau bought it. Hallett sent an email to

BDO to clarify. Hallett later sent a second email to BDO after noticing the same "typo" in other documents. No response is in the record.

Prior to the close of escrow, Lee emailed Hallett to advise him of the results of an environmental site assessment performed on the property at the behest of Hallett's mortgage lender. The email said the results were acceptable. Hallett testified that he did not open or read the two attachments to that email, one of which was a 400-page environmental report, because he did not see a need to in light of the favorable assessment. The 400-page report mentioned several times, including in the executive summary, that the property had 7,490 square feet of warehouse space.

After the contingency period but before the close of escrow, Hallett visited the property three times in an effort to measure the warehouse space available for pallet racks he planned to purchase and install. The first time, he and his assistant unsuccessfully attempted to measure the warehouse space using a 25-foot tape measure. Hallett explained that the difficulty in measuring stemmed both from the long walls, which exceeded the span of his tape measure, and the lack of clear sight lines "[w]ith all the forklifts and the pallets and the coolers" Khau used in the produce business he was still operating on the premises. Hallett did not fare better on his second and third attempts to measure the warehouse space, when he was assisted by Ahn and a laser measuring device. Khau's expert witness, real estate broker and attorney Alan Wallace, testified that real estate brokers are not trained to measure properties, "nor is it within the standard of care to measure properties." Ahn testified that Hallett remarked during one of the trips that the property was "smaller"; Hallett

testified that this remark was directed not to the overall square footage of the property but to the "middle building" of the warehouse space, which was full of coolers at the time.

After escrow closed and Hallett and his company took title to the property, Hallett ordered pallet racks based on his understanding that the warehouse was 8,450 square feet. The racks Hallett ordered did not fit within the space, which prompted him to hire another appraiser to perform a formal square footage analysis. That appraiser measured the property, from which Khau's produce coolers and other equipment had been removed, and concluded that there was only 7,490 square feet of warehouse space. Hallett testified that he was "very surprised" by this information.

Some months later, after he filed the instant lawsuit, Hallett discovered blueprints "hidden in the attic" of the warehouse, "where all the cabling and conduits are." The blueprints, dated 2009, showed that the warehouse space on the property totaled 7,490 square feet.

PROCEDURAL HISTORY

Plaintiffs filed the instant suit against Khau, Lee, Ahn, the original appraiser, and various other defendants in October 2014. The operative second amended complaint alleged three causes of action against Khau: negligent misrepresentation, for representing the property to be 8,450 square feet when he knew or should have known otherwise; a claim of intentional misrepresentation based on the same conduct; and breach of contract, for failing to provide commercial buildings totaling 8,450 square feet and for misrepresenting the square footage of the structures.

Plaintiffs' three causes of action against Khau were the

only ones to proceed to jury trial. As discussed further below, the court granted plaintiffs' motion in limine to exclude evidence of paragraph 4 of the counteroffer as to the misrepresentation counts. The trial court denied the motion as to the breach of contract count, to the extent plaintiffs failed to prove negligent or intentional misrepresentation. Thus, under the court's ruling, the jury was permitted to consider paragraph 4 only with respect to the breach of contract claim, and only if it had already found in favor of Khau on the misrepresentation claims. The jury returned special verdicts in plaintiffs' favor on all counts, though it found that Khau did not act with malice, oppression, or fraud. It awarded plaintiffs a total of $481,000 in compensatory damages, to which the trial court added $86,801.28 in prejudgment interest. The trial court also subtracted $175,000 to offset settlements plaintiffs had reached with other defendants.

After judgment was entered, Khau moved for judgment notwithstanding the verdict (JNOV) and for a new trial. In both motions, Khau argued that Hallett failed to establish that he justifiably relied on Khau's representations because he assumed all responsibility for verifying property information and "nullified any alleged representations made by Khau and/or his agent, Ahn" by conducting his own investigation. Khau also argued that the court erred in barring his waiver defense based on the paragraph 4, and further contended that the jury's special verdicts were inconsistent. The trial court denied both motions. Khau timely appealed.

DISCUSSION

Khau raises seven issues on appeal, all of which in essence boil down to a single contention: that the trial court erred by preventing him from relying upon paragraph 4 of the counteroffer

to defend against the misrepresentation claims. While we reject Khau's assertions that paragraph 4 and the contractual duty it allegedly imposed upon Hallett absolved Khau from liability as a matter of law, we agree with Khau that the jury should have been allowed to consider paragraph 4 as a factor relevant to Khau's intentions and the reasonableness of Hallett's reliance. We find no miscarriage of justice, however, since Khau was permitted to and did rely on similar provisions to argue that he did not intend for Hallett to rely on his statements, and that Hallett's reliance on them was not reasonable.

I. Standards of Review

We review a trial court's evidentiary rulings for abuse of discretion. (*Osborne v. Todd Farm Service* (2016) 247 Cal.App.4th 43, 50-51; see also *People v. Thompson* (2016) 1 Cal.5th 1043, 1120.) Rulings on motions in limine are subject to this standard. (*Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 Cal.App.4th 257, 269.) A trial court abuses its discretion when it makes a decision so irrational or arbitrary that no reasonable person could agree with it (*People v. Carmony* (2004) 33 Cal.4th 367, 377), or when its decision rests on an error of law. (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 746.) We reverse a judgment for the erroneous exclusion of evidence only upon a showing the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; Evid. Code, § 354.) Such a showing requires the appellant to show that it is reasonably probable that a more favorable result would have been reached absent the error. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800-801.) In considering whether an appellant has shown the requisite prejudice, we consider the entirety of the record, including evidence unfavorable to the verdict. (*Id.* at pp. 801-

802.)

Khau asserts that we should apply a de novo standard of review because this matter involves the interpretation of contracts and written representations. While he is correct that the existence and scope of a contractual duty present questions of law for the court (*Linden Partners v. Wilshire Linden Associates* (1998) 62 Cal.App.4th 508, 519), that does not mean the de novo standard of review applies to all of the issues in this case. Whether and to what extent a party complied with any contractual duty are questions of fact for the jury. (*Andrews v. Mobile Aire Estates* (2005) 125 Cal.App.4th 578, 582; see also *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 495; *Green Valley Landowners Association v. City of Vallejo* (2015) 241 Cal.App.4th 425, 441.) We review a jury's resolution of factual questions for substantial evidence. (*Tesoro Del Valle Master Homeowners Assn. v. Griffin* (2011) 200 Cal.App.4th 619, 634.) Under this standard, "'"'the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below.' [Citation.] We . . . view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. [Citation.] We are not at liberty to reweigh the evidence or judge the credibility of witnesses." (*Ibid.*)

II. Motion in Limine

A. Background

Plaintiffs filed a motion in limine "to exclude evidence pertaining to contractual waiver or release clauses," based on

their expectation that Khau "may attempt to introduce evidence purporting to show that Plaintiffs waived or released claims based on any representations concerning the square footage of the real property." This evidence consisted primarily[2] of paragraph 4 of the counteroffer, which, as noted above, provided, "The Property is to be sold in its 'AS-IS' and 'WHERE-IS' condition with all faults and upgrades as they occur. Buyer shall be solely responsible to inspect the Property and all property-recorded information, known and unknown to Seller, its representative(s) and/or Real Estate Brokers." The motion did not cover the disclaimers on the advertising flyer or the Property Information Sheet, which Khau acknowledges are not part of the parties' contract. It likewise did not cover the portion of the offer concerning contingencies.

As relevant here, plaintiffs argued that Khau would contravene Civil Code section 1668 if he were permitted to rely on paragraph 4 to excuse his misrepresentations. That section provides that "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." (Civ. Code, § 1668.) Plaintiffs also pointed to

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[2] Plaintiffs' motion in limine also sought to exclude paragraph 12.3 of the offer, which provided, "In the event that Buyer learns that a Seller representation or warranty might be untrue prior to the Closing, and Buyer elects to purchase the Property anyway then, and in that event, Buyer waives any right that it may have to bring an action or proceeding against Seller or Brokers regarding said representation or warranty." The court granted this portion of the motion, and Khau does not challenge this aspect of the ruling.

Manderville v. PCG & S Group, Inc. (2007) 146 Cal.App.4th 1486 (*Manderville*), which reversed a grant of summary judgment and held that exculpatory contract provisions do not as a matter of law preclude a plaintiff from alleging and making a prima facie showing of justifiable reliance on allegedly intentional misrepresentations.

Khau opposed the motion. In addition to challenging plaintiffs' reliance on *Manderville*, which he contended "does not state that a plaintiff who alleges fraud may exclude all evidence of contractual waivers," he argued that granting the motion would lead to the undesirable result of requiring "the court to assume that Defendant is a wrongdoer to exclude evidence that could disprove any wrongdoing, an inversion of not only the procedure's order, but the very purpose in having trial at all." That is, he argued that "Civil Code § 1668 is applicable only after fraud is proven," not merely alleged. Khau further argued that Civil Code section 1668 was not applicable to plaintiffs' breach of contract claim.

At the hearing on the motion, Khau argued that paragraph 4 imposed on plaintiffs a contractual duty to inspect the property, precluding them from reasonably relying on his representations and eliminating the possibility that he intended to defraud plaintiffs. He explained, "We are saying that because of the way the parties agreed to conduct this, there was no fraud to begin with." The trial court rejected these arguments based on *Manderville* and other case law: "I understand defendant's point, which is, look, Mr. Khau sold the property as-is, so even if he made a false representation as to the square footage, . . . there can be no justifiable reliance by plaintiff. But all these cases are directly on point saying that defendant has no defense that

plaintiff should not have relied on the representation because plaintiff did not do his own investigation." The trial court also rejected Khau's reliance on *Bank of America National Trust and Savings Association v. Vannini* (1956) 140 Cal.App.2d 120 (*Vannini*). *Vannini* sustained a demurrer to a fraud claim asserted by the buyer of a gold mine. It held that the buyer had no legal right to rely on false representations made by the seller because the buyer had assumed a contractual duty to investigate the mine before exercising its option to purchase (*Vannini*, *supra*, 140 Cal.2d at pp. 132-133.) The trial court distinguished *Vannini* based on that case's "specific obligation for a lengthy investigation by the buyer," and further noted that Khau raised the case for the first time at the hearing.

The court agreed with Khau that paragraph 4 could be used to defend against the breach of contract claim, though only "if plaintiff has not proven the fraud claim." The court explained this ruling by reference to Civil Code section 1668, which mentions fraud and "willful injury," and an entry in the Witkin treatise stating, "A party to a contract who *has been guilty of fraud in its inducement* cannot absolve himself or herself from the effects of his or her fraud by any stipulation in the contract, either that no representations have been made, or that any right that may be grounded upon them is waived. Such a stipulation or waiver will be ignored, and parol evidence of misrepresentations will be admitted, for the reason that fraud renders the whole agreement voidable, including the waiver provision." (1 Witkin, Summary of Cal. Law (11th ed. 2017) Contracts, § 305, pp. 323-324 (emphasis added).) The trial court accordingly granted the motion in part, as to the misrepresentation claims, and denied it in part, as to the contract

claim.

When plaintiffs introduced the counteroffer as an exhibit, the court instructed the jury that paragraph 4 could be considered only for a limited purpose, and only in connection with the breach of contract claim. It said, "Okay. To the jury, you are about to see a document which will be admitted as Exhibit 17. I will admit that document, but have ordered that paragraph 4 of this document may only be considered in this case for a limited purpose. Civil Code section 1668 provides as follows: all contracts which have for their object directly or indirectly to exempt anyone from responsibility for his own fraud or willful injury to the personal property of another or violation of law, whether willful or negligent, are against the policy of the law. [¶] You may not consider paragraph 4 of Exhibit 17 with respect to plaintiffs' claims for fraud and negligent misrepresentation. Under certain circumstances you may consider this paragraph, paragraph 4, with respect to plaintiffs' claim for breach of contract. At the close of the case, I will give you a more specific instruction as to the purpose for which you may consider this paragraph. And, again, so at the end of the case you'll have it in writing, and I will instruct you again exactly for which purposes you can consider paragraph 4 of the document you are about to see."

At the conclusion of trial, the court instructed the jury with a modified version of CACI No. 336, regarding the affirmative defense of waiver. That instruction provided: "Waiver is not a defense to Patrick Hallett and/or 729 Merchant, LLC's claims for Intentional Misrepresentation or Negligent Misrepresentation. Under the law, all contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own

fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law. Accordingly, if you find that Patrick Hallett and/or 729 Merchant, LLC, has proved their claim for Intentional Misrepresentation or Negligent Misrepresentation, then Andy Khau cannot rely on the defense of waiver for any of his claims, including breach of contract. [¶] If you find that Patrick Hallett and/or 729 Merchant, LLC has not proven their claim for Intentional Misrepresentation or Negligent Misrepresentation, then Andy Khau may assert the defense of waiver to the claim for breach of contract asserted by Patrick Hallett and 729 Merchant, LLC. [¶] To succeed on the defense of waiver, Andy Khau must prove both of the following by clear and convincing evidence: [¶] 1. That Patrick Hallett and/or 729 Merchant, LLC knew Andy Khau was required to inspect the Property and all property recorded information, known and unknown to seller, its representatives, and/or real estate brokers; and [¶] 2. That Patrick Hallett and/or 729 Merchant, LLC freely and knowingly gave up their right to have Andy Khau perform this obligation. [¶] A waiver may be oral or written or may arise from conduct that shows that Patrick Hallett and/or 729 Merchant, LLC gave up that right."

B. Analysis

1. Paragraph 4 did not absolve Khau of liability as a matter of law

Khau first argues that the motion should have been denied in full, because paragraph 4, the advertising flyer, and the Property Information Sheet foreclosed his liability for negligent and intentional misrepresentation as a matter of law. We

disagree.[3]

Civil Code section 1668 provides that contracts "which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, whether willful or negligent, are against the policy of the law." "This provision encompasses intentional and negligent misrepresentation." (*McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 794 (*McClain*).) Its effect is to prohibit a party who engaged in fraud in the inducement from absolving itself from liability. As we explained in *McClain*, quoting the same treatise the trial court did here, "'Such a stipulation or waiver will be ignored, and parol evidence of misrepresentations will be admitted, for the reason that the fraud renders the whole agreement voidable, *including the waiver provision*.' (1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 304, p. 330.)" (*McClain*, *supra*, 159 Cal.App.4th at p. 794.) Under these principles, exculpatory contract provisions "neither bar fraud claims nor establish as a matter of law that reliance upon defendant's misrepresentations was unjustifiable." (*Ibid.*)

Khau contends these principles do not control here, however. He first claims that "what these documents say concerning the square footage of the warehouse building can be decided as matter of law," because "their interpretation does not turn upon the credibility of extrinsic evidence" such that "it is a judicial function to interpret them along with their legal effect." This contention ignores the exception to the parol evidence rule, espoused in Witkin, that applies when fraud in the inducement is at issue. The effect of alleged misrepresentations made in a

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[3] We note that Khau's counsel conceded during oral argument that paragraph 4 did not shield Khau from liability as a matter of law.

contract or other writing is not removed from the jury's consideration by virtue of the representations' written nature. Such an exception would swallow the rule of Civil Code section 1668. (See *Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 301 (*Hinesley*) ["a per se rule . . . that a party claiming fraud did not reasonably rely on representations not contained within the contract is inconsistent with California law"].)

Khau further contends that the inspection provision of paragraph 4, coupled with the advertising flyer, rendered plaintiffs' reliance on his representations unjustifiable as a matter of law. He asserts that the advertising flyer cautioned that "the information concerning the square footage of the warehouse building had not been verified and that it was the responsibility of the reader to independently verify that information. In essence, those provisions in and of themselves clearly, distinctly, unambiguously and in no uncertain terms advises [*sic*] the reader that it should not rely on the information presented concerning the Property because it had 'the responsibility to independently confirm its accuracy.'" Khau then continues, "even if by some miracle Plaintiff can overcome the cautionary provisions in the Advertising Flyer," the Property Information Sheet and the inspection provision of paragraph 4 "raise the responsibility to investigate found in the Advertising Flyer to a contractual duty . . . affirmatively obligating Plaintiffs 'to be solely responsible to inspect the Property and all property-recorded information' coupled with an agreement that they had the 'responsibility for independent investigation of the Property.'" Khau also highlights Hallett's various efforts to investigate the property— including Lee's verification of the information in the

advertising flyer, Hallett's "Googling" of the property, and the initial appraisal report—as indicative of his knowledge that he could not rely on Khau's representations. We reject these contentions.

An owner of real property "is presumed to know the size of the property and . . . a buyer is ordinarily entitled to rely upon the owner's representation of size without having to hire an expert to discover its falsity." (*Furla v. Jon Douglas Co.*, (1998) 65 Cal.App.4th 1069, 1081(*Furla*).) For this reason, "[a] misrepresentation of the area of real property is a misrepresentation of material fact, and if relied upon will warrant rescission or damages. The fact that plaintiffs visited the property does not necessarily determine that they depended upon their own observation in determining the area of the lot." (*Piazzini v. Jessup* (1957) 153 Cal.App.2d 58, 61; see also *Furla, supra*, 65 Cal.App.4th at p. 1081.) Indeed, the court in *Manderville*, *supra*, 146 Cal.App.4th at p. 1502, explained, "It is well established in California that in an action for fraud or deceit, negligence on the part of the plaintiff in failing to discover the falsity of the defendant's statement is no defense when the misrepresentation was intentional." In *Vannini*, *supra*, 140 Cal.App.2d at p. 131, the court recognized that a plaintiff who conducts an investigation " 'may still be entitled to rely upon certain representations to which the investigation does not extend,'" particularly where his or her examination was " 'imperfect because of the representations.'" The *Vannini* court nevertheless affirmed judgment in favor of the seller, holding that buyers who took on the duty to inspect a property before exercising their option to purchase it had no legal excuse for not "discovering the facts they should have discovered had they

performed their part of the contract." (*Id.* at p. 129.)

Thus, even if the inspection provision did impose an investigative duty on plaintiffs, the extent of plaintiffs' compliance and the effect their efforts had on the reasonableness of their reliance on Khau's representations, were questions of fact for the jury. Paragraph 4 would not have entitled Khau to a defense verdict as a matter of law, and the trial court was correct in so holding.

2. The jury should have been allowed to consider paragraph 4

Khau next argues that the court erred in granting the motion in limine because "triable issues of fact" exist as to whether Khau intended to mislead plaintiffs and whether they could reasonably rely on his representations in light of paragraph 4. We interpret this summary-judgment-type argument to mean that the jury should have been allowed to consider paragraph 4 as a factor in assessing intent and reliance. We agree with Khau that the trial court erred by preventing the jury from doing so.

As the court in *Hinesley* pointed out, "the rule that this kind of contract provision does not, as a matter of law, preclude a finding of fraud does not mean the contract provision is in every case irrelevant." (*Hinesley*, *supra*, 135 Cal.App.4th at p. 301.) Instead, such a provision "is a factor to be considered with all the other circumstances in determining whether the buyer has been misled." (*Driver v. Melone* (1970) 11 Cal.App.3d 746, 752.) "Whether the buyer unreasonably failed to protect himself and unjustifiably failed to discover true conditions depends upon all the circumstances," including the terms of the parties' agreement, the nature of the representations, and the buyer's diligence in discharging any obligation to inspect the property.

(*Furla*, *supra*, 65 Cal.App.4th at pp. 1078-1079.) "This presents an issue of fact for the trier of fact." (*Id.* at p. 1079; see also *McClain v. Octagon Plaza, LLC*, *supra*, 159 Cal.App.4th at pp. 794-796.)

The trial court rested its conclusion to the contrary on *Manderville*, *supra*, 146 Cal.App.4th 1486. We agree with Khau that *Manderville* does not fully support the trial court's ruling on the motion in limine. In *Manderville*, plaintiff buyers purchased real property due to defendant real estate brokers' representation that it could be subdivided into two separate lots. (*Manderville*, *supra*, 146 Cal.App.4th at pp. 1490-1491.) Despite conducting some investigation, the buyers did not discover that zoning regulations prevented them from subdividing the property until after the sale closed. (See *id.* at pp. 1493-1494.) The buyers sued the brokers, alleging negligent and intentional misrepresentation as well as suppression of facts. (*Id.* at p. 1494.) The trial court granted summary judgment to the brokers on the grounds that "Buyers contractually assumed a duty to investigate zoning and land use limits on the future development of the property, and as a matter of law Buyers could not show they justifiably relied on statements Brokers made in connection with their listing of the property." (*Id.* at pp. 1495-1496.)

The appellate court reversed, holding that "neither the exculpatory clauses . . . nor Buyers' alleged lack of due diligence in exercising their right to investigate the zoning and other laws restricting the development and use of the property, bars Buyers' cause of action against Brokers for intentional misrepresentation as a matter of law." (*Manderville*, *supra*, 146 Cal.App.4th at p. 1497.) The court reasoned that the exculpatory clauses in the contract violated Civil Code section 1668 and were therefore

unenforceable. (*Id.* at p. 1502.) However, the court did not evaluate whether the clauses could be considered by a jury; rather, it held only that the clauses did not preclude a prima facie showing that buyers reasonably relied on brokers' misrepresentations. (*Ibid.*) Cases are not authority for propositions they do not consider. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1134.) Cases that have considered the issue, like *Hinesley* and *Driver*, have held that exculpatory clauses like the ones in paragraph 4 are relevant to the seller's intent and the buyer's reliance thereon.

3. The ruling is not supported by plaintiffs' alternate theory

A court's erroneous decision to exclude evidence may nevertheless be sustained if it is "proper upon any theory of law applicable to the instant case, . . . regardless of the particular considerations which may have motivated the trial court to its decision." (*Philip Chang & Sons Associates v. La Casa Novato* (1986) 177 Cal.App.3d 159, 173.) Relying on this principle, plaintiffs contend that the trial court's motion in limine ruling should be upheld on the alternative basis that the "as-is" provision of paragraph 4 is "inapplicable to Khau's representations regarding square footage." To support this proposition, they look primarily to *Loughrin v. Superior Court* (1993) 15 Cal.App.4th 1188, 1195. That case does not support their position. It states, an "'as is' sale simply means the buyer accepts the property in the condition visible or observable by him. An added provision in the waiver clause, such as contained in this case, indicating the buyer relies on his own inspection of the property, presumably waives any obligation the seller or his broker may otherwise have to inspect the property for defects,

and hence may avoid a claim for negligent failure to know of and advise of such defects. Even such augmented 'as is' clause, however, does not address the issues of: (1) intentional misrepresentation, (2) fraudulent concealment, or even (3) negligent concealment not related to failure to inspect." This language says nothing about whether an as-is clause properly may encompass the square footage of a property.

The other cases to which plaintiffs point, *Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 742 [an as-is provision generally "means that the buyer takes the property in the condition visible to or observable by him"] and *Driver v. Melone*, *supra*, 11 Cal.App.3d at p. 752 [an as-is provision "does not in itself protect the sellers or absolve them from liability for misrepresentation or passive concealment"] also do not support their interpretation of the "as-is" provision. Even if they did, Khau rightly points out that paragraph 4 has two sentences, and plaintiffs' argument about the scope of the "as-is" provision does not reach the second sentence of paragraph 4, the inspection provision. We accordingly reject plaintiffs' contention that the trial court's ruling was correct on this ground.

4. Khau has not demonstrated a miscarriage of justice

In light of our conclusion that the court's evidentiary ruling was erroneous in part, we must consider whether it resulted in a miscarriage of justice. Khau contends it did, because it deprived him of the opportunity "to use the duty to investigate provisions imposed on Plaintiffs by ¶ 4 defensively to raise triable issues of fact as to whether (1) he intended to mislead the Plaintiffs into believing that the warehouse building was in fact 8,450 square feet where the Plaintiffs contractually assumed the duty to

investigate this representation; (2) whether Plaintiffs could reasonably and justifiably rely on this representation when they . . . contractually assumed the duty to investigate; and (3) whether Plaintiffs in fact relied on this representation when their admitted agent, BDO, hired Vanguard [the original appraiser] to make an appraisal of the Property, which included investigating the square footage of the Property resulting in a report that confirmed the square footage of the Property to be 8,450 sq. ft, which Plaintiffs apparently relied upon in purchasing the Property." Khau further asserts that the court's erroneous motion in limine ruling "in essence was mandating a finding that once the Plaintiffs established that the warehouse building was 7,490 sq. ft. rather than 8,450 sq. ft. it ipso facto established critical elements of their claims for intentional and negligent misrepresentation." We disagree.

Despite the court's evidentiary ruling precluding reliance on paragraph 4, Khau's attorney was able to introduce evidence of substantively similar provisions, those on the advertising flyer and the Property Information Sheet, to argue that Khau lacked the requisite intent and that Hallett's reliance on his representations about the size of the warehouse space was unreasonable. Khau's attorney cross-examined Hallett about Hallett's failure to heed the advisement on the advertising flyer, his efforts to measure the property, and his failure to read even the executive summary of the environmental report. The jury also had before it the offer, prepared by Hallett and his agent Lee, imposing upon Hallett an obligation "to satisfy [himself] with regard to the physical aspects and size of the property."

The jury heard competing testimony from Hallett and Khau. Hallett testified about his efforts to measure the

warehouse, the reliance he placed upon statements made by Khau and others, and the reasons for his failure to read the environmental report and fine print on the advertising flyer. Khau testified about his lack of knowledge regarding the size of the warehouse space, his unfamiliarity with the plans for the addition, his desire to sell the property "as-is," and his lack of intent to mislead or conceal facts from Hallett. However, the jury had before it evidence that Khau purchased the property with 6,100 square feet of warehouse space and added 1,390 square feet to it, measurements that were shown in documents Khau admitted seeing. It also heard that Khau changed his story about where he kept documents containing the measurements, and that Hallett found blueprints stating the true square footage of the warehouse space secreted among cables and conduits.

Khau has not persuaded us that there is a reasonable possibility he would have obtained a more favorable result if the jury been permitted to consider paragraph 4 as an additional factor. Paragraph 4, at best, was one of several substantively similar provisions. It did not refute the evidence showing that Khau knew or should have known, based on his purchase, use, and remodel of the warehouse space, that the space was smaller than 8,450 square feet. Nor did it demonstrate, any more than the other similar provisions or Hallett's failure to closely read the advertising flyer and environmental report, that Hallett unreasonably relied on Khau's representations. On this record, we conclude that the court's erroneous evidentiary ruling did not result in a miscarriage of justice.

DISPOSITION

The judgment of the trial court is affirmed. The parties are to bear their own costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.