THE REAL PROPERTY SECTION
OF THE BAR ASSOCIATION OF SAN FRANCISCO

Presents

BEST USE OF EXPERT WITNESSES IN REAL ESTATE CASES

Speakers

Harold Justman, Esq.
Justman Associates

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Moderator

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BASF Real Property Executive Committee Member

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Recent Cases of Interest:

- ***Howard v. Omni Hotels*** **(2012) 203 Cal.App.4th 403 (expert testimony not allowed re consumer expectations of a product)**
- ***Bell v. Mason*** **(2011) 194 Cal.App.4th 1102 (trial court's exclusion of expert's testimony for lack of personal interview with subject reversed)**
- ***People v. Jones*** **(2012) 54 Cal.4th 1 (expert unqualified only if s/he clearly lacks necessary qualifications)**
- ***Sanchez v. Brooke*** **(2012) 204 Cal.App.4th 126 (expert testimony not allowed re risk of fire from smoking in bed)**
- ***Cole v. Town of Los Gatos*** **(2012) 205 Cal.App.4th (expert testimony re risk posed by gravel strip admissible as were statements re motorists' intended conduct)**

PRESENTER BIOGRAPHIES

HAROLD A. JUSTMAN, ESQ.

Harold Justman graduated from Stanford University in 1972, and he graduated from Hastings Law School in 1975. After the passing of Bob Bruss in 2007, Harold (Bob's longtime friend and personal real estate attorney of more than 25 years) took over preparation/distribution of the California Real Estate Law Newsletter and the annual seminar covering the year's most significant real estate cases.

Harold continues to teach the Legal Aspects of Real Estate Class, which he taught in partnership with Bob for many years at the College of San Mateo. In addition to being an Assistant Professor of Real Estate at the College of San Mateo, Harold also is an adjunct professor at Menlo College.

Harold is an expert witness on the standard of care of real estate brokers and agents and is qualified as a trial expert in Santa Clara, San Mateo, San Francisco, Marin Sonoma, Alameda, Contra Costa, Fresno and San Joaquin Counties, and he is a former board attorney for the Silicon Valley Association of REALTORS®.

ROGER G. HONEY, ESQ.

Roger G. Honey is the managing attorney of Carlson Law Group, Inc.'s Northern California office located in Pleasanton, California. Mr. Honey has over seventeen years experience as a litigator and trial lawyer. For the last ten years, he has focused his career in the areas of real estate litigation, construction law and business litigation. In addition to maintaining his license to practice law, Mr. Honey is a licensed real estate broker, operating Preferred Real Estate in the Santa Clarita Valley of Southern California prior to his relocation to the San Francisco Bay Area.

Mr. Honey is a 1994 graduate of the University of Southern California School of Law and obtained his bachelor's degree, with honors from San Diego State University.

Over the years Mr. Honey has had several successful jury and bench trials dating back to his second year in practice. In 2006 Mr. Honey took six cases to trial in counties as diverse as Mariposa, Alameda, San Francisco and Contra Costa.

In addition to his litigation experience, Mr. Honey has written materials and presented seminars to insurance, construction and real estate professionals on subjects including residential transactions and financing, disclosure obligations and contractual issues.

SEAN E. PONIST, ESQ.

Sean Ponist specializes in the representation of clients in real estate and business litigation and has successfully tried over 25 cases to verdict. As a skilled civil litigator and former prosecutor, Mr. Ponist brings significant litigation and trial experience to his representation of clients. His practice covers a broad range of real estate and business disputes, including disputes concerning real estate sales and ownership, real estate brokerage, real estate development, construction and construction defect, title and boundary issues, commercial unlawful detainer and landlord-tenant issues as well as business contract and partnership disputes.

Mr. Ponist was recently selected as a 2011 Northern California Super Lawyer. He has also published numerous articles on real estate topics, including recent articles in The Daily Journal ("Recovering Lost Profits in Real Estate Transactions" and "Should Equitable Indemnity Apply Against Negligent Misrepresentation Claims?") and California Lawyer magazine ("The Nonrefundable Deposit – Not!"). Additionally, he has lectured for the San Francisco Bar Association ("Bringing Down the House: Assessing Damages in Real Estate Cases"), the San Mateo County Bar Association ("When Real Estate Deals Go Bad") and for the National Business Institute ("Direct and Cross-Examination for Civil Litigators").

Mr. Ponist graduated from *UC Davis School of Law*, receiving his Juris Doctor degree in 1999. Prior to law school, Mr. Ponist attended *UCLA* where he earned a Bachelor of Arts in Philosophy in 1995 and was a Departmental Scholar.

BEST USE OF EXPERT WITNESSES IN REAL ESTATE CASES

I. When is expert testimony admissible? (Evidence Code § 801)

A. General standards of admissibility

1. An expert is a person who provides opinion evidence on a subject which is beyond the common experience of the trier of fact when said opinion will assist the trier of fact. Howard v. Omni Hotels (2012) 203 Cal.App.4th 403.

2. An expert need not have personal knowledge of the facts, but draws conclusions from facts which are in evidence. Dina v. Dept. of Transportation (2007) 151 Cal.App.4th 1029; see also, McCoy v. Gustafson (2010) 180 Cal.App.4th 56.

3. Opinion on ultimate issue: expert opinion testimony may embrace the ultimate issue to be decided by the jury. Evid. Code § 805; Miller v. Los Angeles County Flood Control Dist. (1973) 8 Cal.3d 689.

4. Weight v. Admissibility: the admissibility of expert opinion is determined by the court as a matter of law, but the weight to be given expert opinion testimony is normally determined by the trier of fact (jury). Kastner v. Los Angeles Metropolitan Transit Auth. (1965) 63 Cal.2d 52.

B. Appropriate subjects for expert testimony.

1. Standard of conduct (fiduciary duties). Mirabito v. Liccardo (1992) 4 Cal.App.4th 41.

2. Standard of care of attorneys. Stanley v. Richmond (1995) 35 Cal.App.4th 1070.

3. Standard of care of real estate brokers. Padgett v. Phariss (1997) 54 Cal.App.4th 1270.

4. Standard of care of other professionals. Stonegate Homeowners Association v. Staben (2006) 144 Cal.App.4th 740.

5. Customs and practices in an industry. PM Group Inc. v. Stewart (2007) 154 Cal.App.4th 55.

6. Value of Real Property. Evidence Code §§ 810 to 824; Saunders v. Taylor (1996) 42 Cal.App.4th 1538.

C. Inappropriate subjects.

1. The law: Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal.3d 863; Summers v. A.L. Gilbert Co. (1999) 69 Cal.App.4th 1155.

2. Conduct which is not a legal cause of damages. Ulloa v. McMillin Real Estate Mortgage (2007) 149 Cal.App.4th 333; Lazy Acres Market Inc. v. Tseng (2007) 152 Cal.App.4th 1431.

3. Subject not beyond common experience of jury.

II. The role of an expert.

A. Consultant to advance knowledge of case and provide theme of case; work product privilege.

B. Assistant with discovery, document evaluation, good faith, expert meetings, ADR and motion for summary judgment. Nardizzi v. Harbor Chrysler Plymouth Sales, Inc. (2006) 136 Cal.App.4th 1409;Johnson v. Superior Court (2006) 143 Cal.App.4th 297; WRI v. Cooper (2007) 154 Cal.App.4th 525.

C. Expert as an advocate of his or her opinion and the case (compare with State Bar Rule 5-310(B) [a member may not "[d]irectly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case"]).

III. How to choose an expert.

A. Qualifications: an expert is a witness who has special knowledge, skill, experience, training, or education sufficient to qualify him or her as an expert on the subject to which his or her testimony relates. Evidence Code § 720(a).

B. Cross-over experts. Mann v. Cracchiolo (1985) 38 Cal.3d 18.

(See Handout re Proper Foundation for Cross-Over Experts)

C. Credibility: A credible scenario has no major gaps in evidence or logic.

D. Demeanor of expert.

E. Ability to communicate: The expert as a teacher.

F. Independence and impartiality.

G. Prior experience.

H. Note: when to retain expert.

I. The conflict's trap: Western Digital Corp. v. Superior Court (1998) 60 Cal.App.4th 1471; Collins v. California (2004) 121 Cal.App.4th 1112; Shandralina v. Homonchuk (2007) 147 Cal.App.4th 395.

(See attached Conflicts Checklist as an example.)

IV. Preparing the Expert.

A. Scope of assignment.

B. Pleadings.

C. Documents.

D. Depositions.

E. Client/Party interview/meeting (but see Evidence Code § 721 and Evidence Code § 952).

F. Interrogatories, motions for summary judgment, mediation statements (but see Evidence Code § 1128).

G. Use of opposing counsel's notes: Rico v. Mitsubishi Motors (2007) 42 Cal.4th 807.

H. Discuss unfavorable aspects of the case.

V. Expert discovery.

A. Timing of expert discovery

1. Demand for exchange: 10 days after initial trial setting or 70 days before trial (C.C.P. § 2034.210).

2. Exchange: 50 days before initial trial date (C.C.P. § 2034.230).

3. Discovery cutoff: 15 days before initial trial date (C.C.P. § 2024.030).

B. Expert witness declaration (C.C.P. § 2034.260).

1. Disclose experts or state no experts (Fairfax v. Lords (2006) 138 Cal.App.4th 1019).

2. Non-retained or party experts (e.g., Evidence Code § 813 [owner of property]).

3. Substance of Declaration

a. Qualifications: A brief statement of the expert's qualifications (C.C.P. § 2034.260(c)(1)).

b. General substance of intended testimony (C.C.P. § 2034.260(c)(2)).

c. Ready to testify: representation that the expert has agreed to testify at trial and will be sufficiently familiar with the pending action to provide a meaningful oral deposition (C.C.P. § 2034.260(c)(3) & (4)).

d. Costs and fees: a statement of the expert's hourly and daily fee for providing deposition testimony and for consulting with the retaining attorney (C.C.P. § 2034.260(c)(5)).

4. Supplemental disclosure (C.C.P. § 2034.280).

C. Production of Discoverable Reports and Writings: if demand is made for reports and writings, parties are required to produce all discoverable reports and writings (C.C.P. § 2034.270).

1. Handling communications with experts.

2. To prepare or not to prepare a written report.

(See Expert Discovery Stipulation)

D. Depositions.

1. The basic issues.

(a) Qualifications.

(b) Expert must state all opinions which she intends to give at trial. Jones v. Moore (2000)80 Cal.App.4th 557; DePalma v. Rodriguez (2007) 151 Cal.App.4th 159.

(i) Opinions withheld at deposition inadmissible. Jones v. Moore (2000) 80 Cal.App.4th 557.

(ii) Expansion on opinions offered at deposition admissible. DePalma v. Rodriguez (2007) 151 Cal.App.4th 159.

(iii) Changed or additional opinions may be admissible. Easterby v. Clark (2009) 171 Cal.App.4th 772.

(c) Hearsay

(i) An expert witness may state on direct examination both the reasons for his or her opinion and the matters on which it is based. Evid. Code § 802; People v. Catlin (2001) 26 Cal.4th 81.

(ii) The opinion may be based on matters "perceived by ... the witness ... before the hearing, whether or not admissible" if of a type that experts reasonably rely upon in forming such opinions. Evid. Code § 801(b); Catlin, 26 Cal.4th at 137.

(iii) Nonetheless, the hearsay generally does not become admissible. Ibid.; see also, People v. Archuleta (2011) 202 Cal.App.4th 493 (setting forth guidelines for trial court's treatment of hearsay relied upon by experts).

(d) Secondary sources and parties.

(e) Additional work.

2. Cross-examination issues (Evidence Code § 721).

(a) Bias toward litigation work and/or plaintiff's or defense side. Stony Brook I Homeowners v. Sup. Ct. (2000) 84 Cal.App.4th 691.

(b) Matters referred to, considered or relied upon.

(c) Books admitted to be a reliable authority.

(d) Basis for opinions.

(e) Hypothetical questions: looking for the major gap in facts or logic.

(f) Criticisms of opposing expert.

(g) Questions for expert deposition (see attached Expert Deposition Outline).

3. Deposition particulars.

The general rules for depositions apply to expert depositions (C.C.P. § 2034.410), with the exception of the following:

a. Location of deposition: within 75 miles of the courthouse where the action is pending (C.C.P. § 2034.420).

b. Compensation for deposition.

(i) Party taking deposition shall pay "the expert's reasonable and customary hourly or daily fee for any time spent at the deposition from the time noticed … until the expert is dismissed (C.C.P. § 2034.430(b)).

(ii) "The party designating an expert is responsible for any fee charged by the expert for preparing for a deposition and for traveling to the place of the deposition" (C.C.P. § 2034.440).

(iii) "The party taking the deposition shall either accompany the service of the deposition notice with a tender of the expert's fee based on the anticipated length of the deposition, or tender that fee at the commencement of the deposition … If the deposition of the expert takes longer than anticipated, the party giving notice of the deposition shall pay the balance of the expert's fee within five days of receipt of an itemized statement from the expert" (C.C.P. 2034.450).

VI. Trial Testimony

A. Bringing the expert up-to-date.

B. Evidence Code Section 402 hearing on qualifications. Avivi v. Centro Medico Urgente Medical Center (2008) 159 Cal.App.4th 463.

C. Motions in limine to exclude expert testimony. AmTower v. Photon Dynamics (2008) 158 Cal.App.4th 1582.

Common bases to move to exclude expert or expert testimony:

- Testimony irrelevant. (Evid. Code § 350);
- Witness not qualified as expert on particular subject to which opinion relates (Evid. Code § 801(a));
- Opinion not likely to assist jury (not "sufficiently beyond common experience") (Evid. Code § 801(a));
- Opinion not based on reliable facts or data (not matters "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject") (Evid. Code § 801(b));
- Opinion based on speculation, conjecture or other "improper matter" (e.g., no admissible evidence of assumed facts) (Evid. Code § 803);
- Opinion as to a matter of law (Summers v. Al. Gilbert Co. (1999) 69 Cal.App.4th 1155);
- Opinion likely to prejudice, confuse or mislead jury ("probative value substantially outweighed") (Evid. Code § 352).

D. Limitations on impeachment by non-disclosed expert. Fish v. Guevara (1953) 12 Cal.App.4th 142.

E. Direct Examination

1. Qualifying the Expert

a. Before expert opinion testimony may be offered, the expert must be shown to have "special knowledge, skill, experience, training, or education" about the subject involved. Evid. Code § 720(a); People v. Loker (2008) 44 Cal.4th 691.

b. Testimony in this area generally includes discussion of the following qualifications:

- Education, including degrees and honors received.
- Certification, licensing and/or registration obtained.
- Professional membership in expert's field or expertise.
- Publications.
- Teaching experience.
- Professional experience.
- Prior experience as an expert.
- Any other professional accomplishments related to area of expertise.

c. Optional - "Your Honor, I would offer Mr./Mrs. [Blank] as an expert on the standard of care of [blank]."

Practice tip: have expert prepare and provide attorney with a detailed C.V. or summary of foregoing information.

2. Eliciting the Expert Opinion: after qualification, the expert will be asked to express an opinion on matters within his or her expertise. An expert's opinion testimony is usually elicited either by:

- Asking expert to describe assignment;
- Hypothetical questions (see generally, People v. Vang (2011) 52 Cal.4th 1038); or
- Questions based on courtroom observations.

The foregoing serve as segues to ask the following critical questions:

- Question: What is your opinion as to ... ?
- Question: What is your basis for that opinion?

F. Cross-Examination

"Once an expert offers his opinion ... he exposes himself to the kind of inquiry which ordinarily would have no place in the cross-examination of the factual witness. The expert ... may be subjected to the most rigid cross-examination concerning his qualifications, and his opinion and its sources." Grimshaw v. Ford Motor Co. (1981) 119 Cal.App.3d at 757.

1. Common proper areas of cross-examination include:

- Expert qualifications;
- Subject matter of the expert testimony;
- Matters on which the expert opinion is based;
- Reasons for the opinion;
- Bias;
- Prior inconsistent statements;
- Qualifications of opposing expert;
- Altering assumptions/hypotheticals;
- Limited factual basis;
- Compensation.

See generally, Evid. Code § 721.

2. Common materials to cross-examine expert include:

- Expert's own deposition;
- Depositions of key witnesses;
- Textbooks, rules and regulations, and other secondary sources;
- Documents utilized in relation to the litigation;
- Discovery responses; and
- Information provided by opposing expert.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

JOHN DOE, Plaintiff, vs. ANITA ROE and ABC REALTY, Defendants.	Case No. XOXOXOXOXOXOXO **STIPULATION AND ORDER REGARDING DISCLOSURE AND DISCOVERY OF EXPERT TESTIMONY**

1. PURPOSES AND LIMITATIONS

Disclosure and discovery activity in this action are likely to involve attorney-expert communications for which disclosure and discovery and use for any purpose would chill and discourage the interactive process between an attorney and an expert. Accordingly, the parties hereby stipulate to and petition the Court to enter the following Stipulation and Order Regarding Disclosure and Discovery of Expert Testimony ("Order"). The parties intend that this Order will confer the same work-product privilege in this action that is available pursuant to Rule 26, Section (b)(4)B and (b)(4)(c) of the Federal Rules of Civil Procedure.

2. DEFINITIONS

2.1 PARTY: any party to this action, including all of its officers, directors, employees, consultants, and their support staff.

2.2 DISCLOSURE or DISCOVERY MATERIAL: all items or information, regardless of the medium or manner generated, stored, or maintained (including, among other things, testimony, transcripts, or tangible things) that are produced or generated in communications by and between the expert of a PARTY and that PARTY and/or that PARTY's COUNSEL. This definition includes trial consultants retained in connection with this litigation.

2.3 COUNSEL: attorneys who are retained to represent or advise a PARTY in this action.

2.4 TRIAL EXPERT: a person with specialized knowledge or experience in a matter pertinent to the litigation who has been retained by a PARTY or its COUNSEL to serve as a trial expert witness in this action.

2.5 RECEIVING PARTY: a PARTY who receives DISCLOSURE or DISCOVERY MATERIAL.

3. SCOPE

The protections conferred by this Order cover not only DISCLOSURE or DISCOVERY MATERIAL (as defined above), but also any information copied or extracted therefrom, as well as all copies, excerpts, summaries, or compilations thereof, plus testimony, conversations, or presentations by PARTIES or COUNSEL to or in court or in other settings that might reveal DISCLOSURE or DISCOVERY MATERIAL.

4. DURATION

Even after the termination of this litigation, the confidentiality obligations imposed by this Order shall remain in effect until the parties agree otherwise in writing or a court order otherwise directs.

5. DISCLOSURE AND DISCOVERY LIMITATIONS

5.1 TRIAL EXPERT Preparation Protection for Draft Reports: The work-product privilege shall protect drafts of any report or disclosure regardless of the form in which the draft is recorded.

5.2 Trial Preparation Protection for Communications Between a PARTY and PARTY'S COUNSEL and Expert Witnesses: The work-product privilege shall protect communications between a PARTY or a PARTY's attorney and any TRIAL EXPERT regardless of the form of the communication, except to the extent that the communications:

(a) relate to compensation for the expert's study or testimony;

(b) identify facts or data that the PARTY or PARTY's attorney provided and that the expert considered in forming the opinions to be expressed; or

(c) identify assumptions that the PARTY or PARTY's attorney provided and that the expert relied on in forming the opinions to be expressed.

6. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

If a RECEIVING PARTY learns that, by inadvertence or otherwise, it has received DISCLOSURE or DISCOVERY MATERIAL from any person or in any circumstance not authorized under this Order, the RECEIVING PARTY must immediately (a) notify in writing the other parties of the unauthorized disclosures, (b) use its best efforts to retrieve all copies of the DISCLOSURE and DISCOVERY MATERIAL, and (c) inform the person or person to whom unauthorized disclosures were made of all the terms of this Order.

7. MISCELLANEOUS

7.1 Right to Further Relief: Nothing in this Order abridges the

right of any person to seek its modification by the Court in the future.

7.2 Right to Assert Other Objections: By stipulating to the entry of this Order, no PARTY waives any right it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Order. Similarly, no PARTY waives any right to object on any ground to use in evidence of any of the material covered by this Order.

7.3 The parties agree to be bound by the terms of this Stipulation and Order.

IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD,

Dated: _____

_____
Attorney for Plaintiff JOHN DOE

Dated: _____

_____
Attorney for Defendant ANITA ROE

Dated: _____

_____
Attorney for Defendant ABC REALTY

IT IS SO ORDERED:

Dated: _____

_____
JUDGE OF THE SUPERIOR COURT

HAROLD JUSTMAN
EXPERT WITNESS CONFLICT CHECKLIST

Parties	Attorneys
Buyer:	
Listing Agent:	
Selling Agent:	
Seller:	
Others:	
Venue:	Trial Date:

Upon completion of review of the checklist, I shall confirm whether or not you can disclose me as your expert. There is no charge for my time in completing the conflicts check.

haj conflicts check form

EXPERT DEPOSITION QUESTIONS

1. When retained and by whom.

2. Brief review of CV.

3. Prior work as consultant or expert witness:

   A. Number of times.

   B. Number of times for this attorney.

   C. Number of times for plaintiffs v. defendants.

   D. Types of cases.

   E. Names of other cases, depos. and counsel.

4. How many hours spent on this case, including:

   A. Review of documents and material.

   B. Conferences with others.

   C. Research.

   D. Examination, tests and demonstrations.

5. Opinions or conclusions reached in this case.

6. Facts relied upon in forming these opinions.

7. What facts inconsistent with these opinions, or that cannot be reconciled with opinions.

   (Repeat 5-7 as many times as necessary, always asking, "Any other opinions?")

8. Do you need any further research, review, examinations, testing, demonstration, etc.

9. Review experts' file and mark as exhibits.

10. What else would you like to do in this matter if possible.

Proper Foundation For Cross-Over Expert

Attorney License / Real Estate Agent License

Professional overlap

Professional commonality of issues

Commonality of education training and licensure

Sufficient knowledge of standard of care based on education experience observation or association

CROSS-EXAMINATION OF QUALIFICATIONS OF ACADEMIC EXPERT ON STANDARD OF CARE OF REAL ESTATE BROKERS

IV.A.

Q: You are a professor of real estate law, is that correct?

A:

Q: Have you ever listed a home for sale?

A:

Q: Have you ever written up an offer for a home buyer?

A:

Q: Have you ever represented a seller or buyer in the purchase of a home?

A:

Q: Are your students taking your class to obtain a degree?

A:

Q: But isn't it true that your students do not have a degree?

A:

Q: Are your students licensed as professionals by the State of California?

A:

Q: Do your students have a real estate license?

A:

Q: In order to qualify as a professor did you undergo years of study and schooling?

A:

Q: Is it your opinion that you are qualified as an expert witness merely because you have completed years of schooling?

CROSS-EXAMINATION OF EXPERT OPINION TESTIMONY ON THE STANDARD OF CARE OF A BUYER

I.A.

Q: Is it your opinion that the buyer failed to protect her own interest?

A:

Q: Is it your opinion that if the buyer had read the preliminary report she would have known that there was a sewer easement against the property?

A:

Q: In summary, is it your opinion that the buyer's conduct fell beneath the standard of care of a buyer?

A:

Q: But wouldn't you agree that the buyer's duty is to exercise reasonable care in protecting her own interest?

A:

Q: And isn't it true that the buyer's real estate agent had a duty of utmost care to protect the buyer's interest?

A:

Q: Then let me ask a hypothetical question. If the buyer had read the preliminary report, would the buyer exercising reasonable care have known that there was a sewer easement against the property?

A:

Q: Accordingly, wouldn't you agree that if the real estate agent for the buyer had read the preliminary report, the real estate agent exercising the utmost care to protect the buyer would have known that there was sewer easement against the property?

A:

Q: Finally, if the buyer's real estate agent had known that there was a sewer easement against the property, wouldn't the agent have a duty to tell the buyer about the sewer easement?

A:

CROSS-EXAMINATION OF EXPERT REGARDING MATTERS RELIED UPON

VI.F(2)

Q: Did you know that you could have interviewed my client with my consent?

A:

Q: Did you interview my client?

A:

Q: Did you at least come to court and watch my client testify?

A:

Q: Isn't it true that all you did was read my client's deposition?

A:

Q: How can you judge my client's credibility by just reading her deposition?

A:

203 Cal.App.4th 403
Court of Appeal, Fourth District, Division 1, California.

Ronald HOWARD, Plaintiff, Appellant and Respondent,
v.
OMNI HOTELS MANAGEMENT CORPORATION, Defendant and Appellant,
Kohler Co., Defendant and Respondent.

No. D057627. | Jan. 11, 2012.

Synopsis

Background: Hotel guest who slipped and fell in bathtub brought action against bathtub manufacturer and hotel, alleging negligence and strict product liability claims against manufacturer and negligence and premises liability claims against hotel. The Superior Court, San Diego County, No. 37–2008–00088240–CU–PO–CTL, Ronald L. Styn, J., granted manufacturer's and hotel's motions for summary judgment, but thereafter granted new trial as to claims against hotel. Guest and hotel both appealed.

Holdings: The Court of Appeal, Huffman, J., held that:
[1] expert's unsupported opinion testimony was insufficient to establish that manufacturer knew or should have had knowledge of any greater dangers that should have been addressed in its allegedly defective design of tub's nonslip surface;
[2] manufacturer, which complied with industry standards, met applicable duty of care to hotel guest regarding slipperiness of tub; and
[3] two tub-slipping incidents in another state did not place hotel owner on notice of a dangerous condition at the subject property.

Affirmed in part and reversed in part.

West Headnotes (39)

[1] **Products Liability**
Care required
Products Liability
Knowledge of defect or danger
Products Liability
Negligence

In negligence and due care determinations, a manufacturer's compliance with regulations, directives or trade custom does not necessarily eliminate negligence but instead simply constitutes evidence for jury consideration with other facts and circumstances; in a case in which the manufacturer or supplier knows of, or has reason to know of, greater dangers above and despite its compliance with regulations, then the manufacturer may not be insulated from negligence liability.

[2] **Negligence**
Standard established by statute or other regulation

A defendant property owner's compliance with a law or safety regulation, in and of itself, does not establish that the owner has utilized due care; the owner's compliance with applicable safety regulations, while relevant to show due care, is not dispositive, if there are other circumstances requiring a higher degree of care.

[3] **Judgment**
Torts

A plaintiff seeking recovery for negligence against a landowner must establish sufficient facts or circumstances that support an inference of a breach of duty, to defeat a defense summary judgment motion; it is not enough to provide speculation or conjecture that a dangerous condition of property might have been present at the time of the accident.

[4] **Judgment**
Motion or Other Application

The parties, during summary judgment proceedings, are assuming that only particular causes of action and certain issues are actually raised by the pleadings; to create a triable issue of material fact, the opposition evidence must be directed to those issues raised by the pleadings.

[5] **Judgment**
Motion or Other Application

If the pleading or answer minimally advises the opposing party of the nature of the theory or defense pursued during summary judgment motion proceedings, the courts may, in appropriate cases, evaluate the evidence presented as supplementing the bare bones of the pleading or defense.

[6] **Products Liability**
Strict liability

For a theory of strict tort liability, manufacturers are not insurers of their products; they are liable in tort only when defects in their products cause injury.

[7] **Products Liability**
Design
Products Liability
Consumer expectations

There are two alternative ways to prove a design defect, each appropriate to its own circumstances: (1) the consumer expectations test, or (2) a theory of design defect, citing to technical and mechanical details in obscure components of a mechanism or complex circumstances of an accident.

[8] **Products Liability**
Consumer expectations
Products Liability
Design defect

The consumer expectations test is reserved for cases in which the everyday experience of the product's users permits a conclusion that the product's design violated minimum safety assumptions, and is thus defective regardless of expert opinion about the merits of the design.

[9] **Evidence**
Matters directly in issue

Where the minimum safety of a product is within the common knowledge of lay jurors, expert witnesses may not be used to demonstrate what an ordinary consumer would or should expect; use of expert testimony for that purpose would invade the jury's function and would invite circumvention of the rule that the risks and benefits of a challenged design must be carefully balanced whenever the issue of design defect goes beyond the common experience of the product's users.

[10] **Products Liability**
Negligence
Products Liability
Defenses and Mitigating Circumstances

The rule that a manufacturer is not entitled to a complete defense that it complied with industry standards applies to negligence cases and also, to some extent, applies to product liability cases.

Deviation from an industry norm is not necessarily the test for a defective product.

[11] **Products Liability**
Risk-utility test

In the established design defect test for strict liability for a defective product, the issue is whether the claimed product defect design embodies excessive preventable danger; in such a case, the jury considers if the benefits of the design outweigh the risk of danger inherent in such design.

[12] **Products Liability**
Risk-utility test

The design defect determination as to whether the benefits of the design outweigh the risk of danger inherent in such design involves technical issues of feasibility, cost, practicality, risk, and benefit which are impossible to avoid; in such cases, the jury must consider the manufacturer's evidence of competing design considerations, and the issue of design defect cannot fairly be resolved by standardless reference to the expectations of an ordinary consumer.

[13] **Products Liability**
Design defect

In a design defect product liability case, expert testimony is required to assist the finder of fact.

[14] **Products Liability**
Nature of Product and Existence of Defect or Danger

[15] **Evidence**
Construction and Repair of Structures, Machinery, and Appliances
Products Liability
Design
Products Liability
Design defect

When the plaintiff alleges strict product liability/design defect, any evidence of compliance with industry standards, while not a complete defense, is not irrelevant, but instead properly should be taken into account through expert testimony as part of the design defect balancing process.

[16] **Products Liability**
Strict liability
Products Liability
Negligence or fault

In strict product liability actions, the issue is not whether defendant exercised reasonable care, but in negligence it is.

[17] **Evidence**
Construction and Repair of Structures, Machinery, and Appliances

Expert evidence about compliance with industry standards can be considered on the issue of defective design, in light of all other relevant circumstances, even if such compliance is not a complete defense.

[18] **Evidence**
Construction and Repair of Structures, Machinery, and Appliances

An action on a design defect theory can be prosecuted and defended through expert testimony that is addressed to the elements of such a claim, including risk-benefit considerations.

[19] **Judgment**
Torts

Expert's testimony, submitted on motion for summary judgment, that he believed that bathtub manufacturer needed to meet higher safety standards than industry standards regarding nonslip tub surface, which was unsupported by anything other than the expert's own opinion, was insufficient to establish that manufacturer knew or should have had knowledge of any greater dangers that should have been addressed in its allegedly defective design of the nonslip surface, as required for hotel guest to maintain strict product liability action against manufacturer based on allegedly defective tub, in light of manufacturer's evidence of its compliance with industry standards, together with the methods that manufacturer showed it used for quality control in producing the tub.

[20] **Evidence**
Construction and Repair of Structures, Machinery, and Appliances

Expert opinion is admissible for purposes of assessing risks and benefits of the product's design, to avoid resolving unsuitable cases on a standardless reference to the expectations of an ordinary consumer.

[21] **Evidence**
Construction and Repair of Structures, Machinery, and Appliances
Products Liability
Design defect

A fact finder in a design defect action may receive expert advice on reasonable safety expectations for the product, to assist it to apply clear guidelines, and decide accordingly whether the product's design is an acceptable compromise of competing considerations.

[22] **Evidence**
Construction and Repair of Structures, Machinery, and Appliances
Products Liability
Risk-utility test

Whenever the issue of design defect goes beyond the common experience of the product's users, the rule is that the risks and benefits of a challenged design must be carefully balanced, and expert testimony is proper to assist the finder of fact in deciding if a product is defective.

[23] **Evidence**
Necessity and sufficiency
Evidence
Speculation, guess, or conjecture

An expert's opinions and conclusions must have reasonable bases and reflect more than speculation or conjecture.

[24] **Evidence**
⇐Sources of Data
Evidence
⇐Speculation, guess, or conjecture

It is not proper for an expert witness to base opinions on assumptions that are not supported by the record, or on information that would not be reasonably relied upon by other experts.

[25] **Products Liability**
⇐Care required
Products Liability
⇐Buildings and building components and materials

Bathtub manufacturer that complied with industry standards met applicable duty of care to hotel guest regarding slipperiness of tub. CACI 1221.

[26] **Appeal and Error**
⇐Competency of witness
Evidence
⇐Determination of question of competency

It is for the trial court to determine, in the exercise of a sound discretion, the competency and qualification of an expert witness to give his opinion in evidence, and its ruling will not be disturbed on appeal unless a manifest abuse of that discretion is shown.

[27] **Negligence**
⇐Care Required of Store and Business Proprietors

Commercial property owners are not insurers of the safety of their patrons, although they owe the patrons duties to exercise reasonable care in keeping the premises reasonably safe.

[28] **Negligence**
⇐Inspection and discovery

To exercise a degree of care that is commensurate with the risks involved, a commercial property owner must make reasonable inspections of the portions of the premises open to customers.

[29] **Negligence**
⇐Defect or dangerous conditions generally
Negligence
⇐Knowledge or Notice in General

A commercial property owner is liable for harm caused by a dangerous condition, of which the owner had actual or constructive knowledge.

[30] **Negligence**
⇐Knowledge or Notice in General
Negligence
⇐Premises Liability

An injured plaintiff has the burden of showing that the commercial property owner had notice of the defect in sufficient time to correct it, but failed to take reasonable steps to do so; one way to carry that burden is to raise an inference that the hazardous condition existed long enough for the owner to have discovered it, if an owner exercising reasonable care would have learned of it.

[31] **Innkeepers**

Injury to Person of Guest

Hotel proprietors have a special relationship with their guests that gives rise to a duty to protect them against unreasonable risk of physical harm.

[32] **Innkeepers**
Injury to Person of Guest

The hotel owner's duty to a guest, as with common carriers, is only one to exercise reasonable care under the circumstances; the owner is not liable where he neither knows nor should know of the unreasonable risk.

[33] **Innkeepers**
Defects in premises or appliances in general

Hotel guests can reasonably expect that the hotel owner will be reasonably diligent in inspecting its rooms for defects, and correcting them upon discovery, but the guest cannot reasonably expect that the owner will correct defects of which the owner is unaware and that cannot be discerned by a reasonable inspection.

[34] **Negligence**
Happening of accident or injury

The fact that an accident occurred does not give rise to a presumption that it was caused by negligence.

[35] **Judgment**
Torts

The injured plaintiff must establish sufficient facts or circumstances that support an inference of a breach of duty to defeat a summary judgment motion by a commercial property owner defendant that is asserting due care was exercised; it is not enough for the plaintiff to provide speculation or conjecture that a dangerous condition of property might have been present at the time of the accident.

[36] **Negligence**
Similar facts and transactions; other accidents

Although no two accidents happen in the same way, to be admissible for showing notice to a landowner of a dangerous condition, evidence of another similar accident must have occurred under substantially the same circumstances.

[37] **Appeal and Error**
Rulings on admissibility of evidence in general
Negligence
Similar facts and transactions; other accidents

The evaluation of similarity between two accidents, for purpose of determining admissibility for purpose of showing notice to a landowner of a dangerous condition, is a discretionary determination by the trial court, subject to correction for abuse of discretion, if the record does not support it.

[38] **Innkeepers**
Bathrooms

Two tub-slipping incidents in hotel in

Connecticut did not place hotel chain owner on notice of a dangerous condition on its San Diego property, which had bathtub that met industry standards for coefficient of friction and surface coverage of the anti-slip coating, or place it on a heightened duty of injury to ask tub manufacturer if there had been any further incidents; incident reports did not show substantially similar accidents, show any detail about the conditions of or in the bathtubs, or show the circumstances or medical conditions of the guests before they fell in the bathtubs, and hotel's director of security stated that the San Diego hotel had been in operation for 22 months, the tub had been in use and had been cleaned throughout that period, and that there had not been any other reports there of bathtub injuries.

See Annot., Liability of hotel or motel operator for injury or death of guest or privy resulting from condition in plumbing or bathroom of room or suite (1979) 93 A.L.R.3d 253; 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 654; Cal. Jur. 3d, Premises Liability, § 15 et seq.; Cal. Civil Practice (Thomson Reuters 2011) Real Property Litigation, § 26:3.

[39] **Innkeepers**
Defects in premises or appliances in general
Innkeepers
Admissibility of evidence

Although evidence that the condition of a hotel property is in compliance with "industry" standards is relevant, that is not the only inquiry necessary for applying California premises liability standards; the overall question is whether the owner used reasonable care under all the relevant known circumstances, to discover and correct any identifiable dangerous condition of its property.

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Opinion

HUFFMAN, J.

***410** While he was a guest at the San Diego Omni Hotel, plaintiff, appellant and respondent Ronald Howard (Howard) slipped in a bathtub and was injured. Howard brought a personal injury action for damages against the manufacturer of the bathtub, defendant and respondent, Kohler Co. (Kohler), on theories of negligence and strict product liability. Howard also sued defendant and appellant Omni Hotels Management Corporation (Omni; sometimes referred to with Kohler as Defendants) on theories of premises liability and negligence. Howard's complaint alleges that the hotel bathtub was defective because its Kohler-supplied coating did not comply with "applicable standards," and Omni failed to protect him from an unreasonable level of danger there.[1]

Defendants each brought successful summary judgment motions, contending Howard could not prove essential elements of his cases against them. (Code Civ. Proc., § 437c; all statutory references are to this code unless noted.) The trial court, however, granted Howard's motion for new trial as to Omni, thus setting aside the Omni summary judgment. (§ 657.) Howard appeals the summary judgment in favor of Kohler, while Omni appeals the new trial order.

In Howard's appeal of the judgment for Kohler, he contends the trial court erroneously failed to recognize that he had presented sufficient expert opinion and evidence from which a trier of fact could have found Kohler liable on either negligence or strict product liability theories, utilizing a consumer expectations test. (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 430, 143 Cal.Rptr. 225, 573 P.2d 443 (*Barker*).) Specifically, Howard contends the trial court erroneously adopted Kohler's evidence of industry standards ***411** regarding bathtub manufacturing, when it decided that no

product defect or negligence had been demonstrated as a matter of law, nor were there any remaining triable issues of fact regarding causation of harm.

Alternatively, Howard argues it was incorrect for the trial court to rely on professional negligence authorities, when it assessed the strengths and weaknesses of Howard's expert testimony about negligent design or defects. (See, e.g., *Spann v. Irwin Memorial Blood Centers of San Francisco Medical Society, Inc.* (1995) 34 Cal.App.4th 644, 653–655, 40 Cal.Rptr.2d 360 (*Spann*).)
In its appeal of the new trial order, Omni contends the trial court erred as a matter of law when it concluded that triable issues of fact existed regarding actual or constructive notice to Omni, based on ****745** accidents in another of its hotels (or based on other information available to Kohler), of unreasonably dangerous conditions in Howard's rented room. Omni argues it lacked adequate notice that further protective measures might be required, in an exercise of its reasonable care, because the prior incidents were not shown to be substantially similar, and therefore they amounted to an inadequate showing, as a matter of law, to support any grant of a new trial on the complaint. (*Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1209, 43 Cal.Rptr.2d 836, 899 P.2d 905.)

On review of the summary judgment for Kohler, we agree with the trial court that the evidence produced by Howard, both expert and lay opinion, was insufficient to establish any triable issues of fact on his claims, and Kohler was entitled to judgment as a matter of law.

The trial court erred, however, in granting Howard's motion for new trial on his allegations against Omni, because the undisputed facts supported only one legal conclusion, that Howard would not be able to prevail on his premises liability or negligence theories, because he could not demonstrate Omni was placed on sufficient actual or constructive notice of any dangerous condition of the bathtub. The new trial order is reversed with directions to enter summary judgment for Omni, while the summary judgment for Kohler is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

A. Howard's Injury; Complaint

The basic circumstances of Howard's injuries are undisputed. In February 2006, while taking a shower in his hotel room at the San Diego Omni, Howard slipped and fell out of the bathtub, badly injuring himself. He could not remember the exact circumstances of the accident, but remembered that ***412** he was standing in front of the running water and turning, when he slipped and "zip," "flew out of" the shower.

As he waited in the bathroom for the paramedics to arrive, Howard felt around inside the tub and found some anti-slip material in the bottom of the tub, but "not much." He "felt a slick surface" and found just a "little bit" of "material" on the "bottom of the tub." He noticed there was a grab bar down by the tub line, but no bathmat.

The bathtub in which Howard slipped and fell was a "Villager K–713" porcelain enamel bathtub manufactured by Kohler (the bathtub or tub) and sold to Omni for installation (in this, one of its 511 rooms there). After enameling a bathtub, Kohler routinely created a slip-resistant treatment (Safeguard) that involves essentially sandblasting grit at the floor of the bathtub's surface to create "peaks and valleys."

As against Kohler, Howard's complaint alleged it was negligent in its design and manufacturing processes, because "the coating of the bathtub did not comply with *applicable standards,* rendering the bottom surface of the bathtub slick and slippery." For strict product liability, Howard claimed the bathtub was defective because it was "so smooth, slippery, and slick as to have provided no friction or slip resistance because the coating of the bathtub did not comply with *applicable standards.*" (Italics added.)

With respect to Omni, Howard pled negligence, in that Omni "knew or should have known of the unreasonable risk presented by the bathtub" in its hotel room, but failed to protect Howard, a user, from that risk or to keep the premises in a reasonably safe condition. Howard also alleged a claim against Omni for premises liability, by alleging that it was on notice of an unreasonably dangerous condition of its ****746** property, but failed to take reasonable care to protect Howard from "a slippery and slick bathtub."

Both defendants answered the complaint, alleging numerous affirmative defenses.

B. Summary Judgment Motions

Following discovery, Defendants filed their motions for summary judgment. Both Kohler and Omni relied on expert engineering evidence presented by Kohler, supporting its claim that it had complied with industry

standards in manufacturing the bathtub and its anti-slip coating.

*413 *1. Kohler*

In Kohler's motion, it argued summary judgment was appropriate based on its evidence of its compliance with applicable industry manufacturing standards, with regard to providing a safe degree of friction on the surface of the tub. Howard had failed to meet his burden of proof to dispute the adequacy of such compliance, for either of his causes of action.

In his declaration and deposition testimony, Kohler's senior engineer Jeffery Collins described his inspection and testing of the bathtub and its anti-slip surface. Collins supplied evidence detailing the technical industry standards Kohler used during manufacture, as provided by two trade associations, the Associated Society of Mechanical Engineers (ASME), and the Associated Society for Testing and Materials (ASTM). He attached to his declaration a copy of the ASME standard that applied to the bathtub's manufactured coating (ASME A112.19.1M–1994, and its Supplement 1–1998).

Also, Collins attached to his declaration a copy of ASTM F 462–79, the other such industry standard (for testing purposes). Both these standards utilize a numerical co-efficient of friction, which is a measure of the relative difficulty with which the surface of one material will slide over a surface adjoining it, or of another material. They also specify the surface area to be treated or tested.

Specifically, Collins's declaration explained that Kohler's anti-slip surface (Safeguard) is applied by essentially sandblasting the porcelain enamel surface of the bathtub in a pattern with aluminum oxide, or grit. This anti-slip treatment is formulated under the ASME standards for porcelain enamel bathing fixtures (ASME A112.19.1M–1994 and its Supplement 1–1998), which address the coefficient of friction and also the surface area of the anti-slip treatment, as follows. The bathing surface of the bathtub must yield a coefficient of friction of no less than .04, pursuant to ASTM F 462–79. The treatment must be applied according to a prescribed template, for coverage of "2 in. measured from all side and wall radii and 3 in. measured from the centerline of the drain and from the compound corner radii."

At the factory, Kohler staff audits five bathtubs per week to ensure that these standards are met, by bringing them from production to the laboratory where the testing equipment is kept. The staff also replaces the grit that is used for sandblasting on a routine basis, to assure that it does everything that is supposed to do. Cleaning materials are not abrasive enough to damage the slip resistant surface, because it is harder than glass. Kohler is routinely notified of any lawsuit, insurance claims, or consumer complaints about slippery tubs, and responds to them with investigations.

***414** As prescribed by the ASTM standards, Collins tested nine zones in the Safeguard application on this bathtub, by using a "NIST Brungraber Tester" (a framed device with legs and little silicone feet). ****747** when measuring the tUb, collins found that the tested nine zones each showed an acceptable coefficient of friction level at .04 or more. The average coefficient of friction he found was .16, or four times more than required by ASTM F 462–79 and ASME (Supplement 1–1998 to ASME A112.19.1M–1994).

Likewise, in Collins's measurement of the bathtub, he found that the Safeguard application started within two inches from the radius break of the bathtub (a point allowing for its curvature), as prescribed by the standards. When he measured the distance between the start of the Safeguard application and the centerline drain of the bathtub, also making an allowance for the compound corners radii of the bathtub, he determined that the application appropriately started three inches from those benchmarks. Collins thus determined that the Safeguard application was in compliance with the ASME requirements (Supplement 1–1998 to ASME A112.19.1M–1994), in terms of its placement according to the template.

Kohler argued that Howard's discovery responses do not controvert the above evidence that these industry standards were met, but only claimed that discovery was ongoing.

2. Omni

In Omni's motion, it first argued that since it had purchased the bathtub from Kohler, and since Kohler had shown that the bathtub complied with industry standards for friction and slip resistance, this tub did not create an unreasonable risk of injury. Based on the knowledge it had, Omni argued it had not breached any duties that it owed to its guests, such as Howard. Kohler did not recommend the use of, and Omni did not routinely provide, bathmats to guests, but Omni would obtain them if they were requested (which they were not). Omni therefore argued it had not breached any duty owed to its

guest, Howard, by its provision of a reasonably safe bathtub.

Omni provided a declaration from its independent engineer, T. Page Eskridge, stating that his test of the bathtub showed that it met industry standards for the friction coefficient. Omni's director of security, Lars Renteria, stated in his declaration that the San Diego hotel had been in operation for 22 months, this tub had been used and cleaned regularly, and there had not been any other reports there of bathtub injuries.

***415 C. Opposition Showings**

1. Kohler

In his opposition to Kohler's motion, Howard argued his expert evidence raised triable issues of fact as to whether this bathtub was dangerously slippery. Howard provided deposition excerpts from Dr. Kenneth A. Solomon, an engineer who is the chief scientist and founder of the Institute of Risk and Safety Analysis. Dr. Solomon described his inspection and testing of the bathtub and its anti-slip surface, and explained his views about the ASTM and ASME technical industry standards. He found that (a) Kohler's bathtub complied with the minimal industry standards for coefficient of friction and surface area coverage, but nevertheless, (b) the tub remained dangerously slippery, and should have been made safer (using simple, inexpensive means, such as a bathmat, more bars, or an after-market appliqué).
Specifically, Dr. Solomon's measurements showed that the "footprint" of the tub's Safeguard surface was "right on the margin," but met the template standard. Dr. Solomon testified the Safeguard application on the floor of this bathtub had a coefficient of friction of .22 to .60. Thus, ****748** the tub's coefficient of friction "met" the ASTM's 0.04 standard.[2]

Nevertheless, Dr. Solomon stated that this industry 0.04 friction standard is "very, very lenient," and is "so low that it is very slippery," or "right about the order of ice or Teflon." When bathtubs are in use, they develop a "much higher variability in coefficient of friction," when coated with water, soap or shampoo. Thus, the 0.04 standard "is just not a good practice." In his opinion, a coefficient of friction of 0.30 would be safer, and he would recommend to manufacturers a coefficient of friction level closer to .40.

Dr. Solomon opined that the industry standards are minimal and not stringent enough to satisfy basic "principles of forensic safety." ASTM F 462–79 was a standard, not a code. Dr. Solomon thus drew a distinction between the industry standards used, and his expert opinion, which interpreted principles of forensic safety.
Howard further argued that in the exercise of due care, Kohler should have made some recommendations to purchasers and/or users of the bathtub to ***416** implement additional safety measures for the protection of bathers. These included the use of bathmats, more bars, or an after-market anti-slip treatment.[3]

2. Omni

Howard next argued that even if Kohler were entitled to summary judgment, triable issues remain regarding notice to Omni of a dangerous condition on its premises, because (1) "ample evidence" supports a finding that the tub was dangerously slippery, and (2) Kohler's compliance with its industry standards in manufacturing the tub had nothing to do with the reasonableness of Omni's conduct in response to notice that its bathtubs were dangerous, as it had gained from reports of other hotel bathtub injuries that were in its corporate possession. At deposition, William Dingler, Omni's director of engineering, produced two Omni "Incident Reports" from March 2004 and August 2005, arising from slips in Kohler bathtubs by two different guests of the New Haven Omni. Each of those New Haven Omni guests, like Howard, required a hospital visit to treat the injuries. According to Howard, it was therefore reasonably foreseeable to Omni that additional protective measures should be taken (mainly providing a bathmat).

Further, Howard argued that Omni should be deemed to be upon constructive notice of at least four more hotel slip incidents in Kohler tubs, based upon knowledge that Kohler had gained about them. Howard believes that when Omni learned of the New Haven slipping incidents, it was placed upon a duty of inquiry to find out from Kohler if there were any further such incidents. Also, Howard contended that Omni lacked any adequate safety policies or communication among its hotels.

****749** In reply, Omni disputed that it had any actual or constructive notice of any "dangerous condition" on its premises. Although Dingler, its director of engineering, had provided reports to Howard about the two incidents at the New Haven Omni, those reports were too general to amount to substantially similar accidents that would have placed Omni on notice of any dangerous condition. In their reply showings, both Kohler and Omni objected to

Howard's reliance on those reports for that purpose.

*417 D. Ruling: Kohler

In its order granting summary judgment to Kohler, the court framed the issues raised by the pleadings, as to whether the coating on the bathtub complied with "applicable standards." As relevant here, the court kept out an Omni-prepared incident report about Howard's fall, at Howard's objection that it was hearsay and prejudicial. The court also sustained in part the evidentiary objection by Kohler (made on relevance and foundation grounds) to Howard's reliance on passages in and exhibits to the Dingler deposition (the New Haven reports). The effect of this was that the trial court admitted and considered the evidence of the two New Haven incident reports "to show that defendant may have notice of a few other incidents of falling in a bathtub." Other evidentiary rulings are not directly challenged on appeal.

The court found that Kohler had carried its initial burden on summary judgment by presenting evidence that the bathtub complied with the industry standards (ASTM and ASME) for bathtubs. Howard had not shown a triable issue of fact by providing his expert's opinions, which did not amount to a different "standard." The court relied on the text of CACI No. 1221, defining the applicable negligence standard of care, as requiring a manufacturer to use the amount of care that a reasonably careful designer and/or manufacturer would use in similar circumstances, to avoid exposing users to a foreseeable risk. According to that standard of care language, Dr. Solomon's opinions that a greater standard would be better did not have sufficient factual support.

To further explain its reasoning about the deficiencies of the expert opinion offered by Howard, the court referred in its ruling to *Spann, supra,* 34 Cal.App.4th 644, 40 Cal.Rptr.2d 360. The trial court explained that when Kohler showed that the bathtub met the ASME/ASTM industry standards, the burden was shifted to Howard to establish that a different standard applied to the bathtub's coating. Merely offering expert opinion that the bathtub "violated the principles of forensic safety," without a showing of a different applicable standard, did not create a triable issue of fact. The court granted Kohler's motion for summary judgment.

Later, Howard brought a motion for a new trial as to Kohler, asserting that his reference to "applicable standards" in his complaint did not mean "industry standards." Howard argued that since industry standards should not be read to establish an absolute standard of care in ordinary negligence actions, the trial court incorrectly granted summary judgment. Howard made a similar argument on the product liability claim, and contended that he had demonstrated there were triable issues of fact on whether the bathtub should meet more stringent legal safety standards. The trial court denied the motion, ***418** noting that the only factual allegation by Howard was that the bathtub did not meet applicable standards, but he had failed to establish that different standards were controlling.

**750 E. Omni Ruling and New Trial Order

In originally granting summary judgment to Omni, the trial court interpreted Omni's objections to Howard's opposing evidence (which relied on the New Haven incident reports), as raising "foundation" grounds, which were unmeritorious. The court relied in its reasoning on those incident reports, which was not inappropriate regarding the notice argument. At the summary judgment proceedings, the court thus ruled that the two instances of actual notice to Omni of accidents in Kohler's tub (New Haven incidents) did not amount to adequate notice of unreasonable danger, because those were out-of-state Omni hotels, and not enough was known about the factual circumstances of those other accidents or the condition of those bathtubs, to determine if they were substantially similar in nature.

In granting summary judgment to Omni, the court originally followed the same product defect reasoning that it utilized regarding the Kohler motion, to the extent that it concluded Omni must have lacked any actual or constructive notice that the tub (meeting industry standards) was nevertheless dangerously slippery in some way. However, the court did not expressly rule on whether the tub was or was not an unreasonably dangerous condition of property.

In Howard's new trial motion, he argued that the order granting summary judgment for Omni was erroneous as a matter of law, on the same showing, because he had successfully raised triable issues of fact about the extent of actual or constructive notice, from the New Haven incidents, that Omni had of the dangers generally presented by the tubs.

Following oral argument, the trial court took the Omni motion under submission. In its order granting Howard a new trial, the court observed that the complaint did not

specifically tie its liability allegations against Omni to any violation of "applicable standards." Rather, the court rejected "Omni's argument that the court's ruling as to [Kohler] on the 'applicable standard' issue precludes a finding of liability against Omni on the negligent and premises liability causes of action." Instead, the court found there were different allegations in the complaint as to each defendant, and there is "no reference to 'applicable standards' as to Omni." The court concluded that triable issues of fact existed about Omni's duty to take corrective action, in light of the extent of notice it had obtained.

Howard appeals Kohler's summary judgment, and Omni appeals the grant of a new trial to Howard.

*419 DISCUSSION

Howard contends the trial court erred in granting summary judgment to Kohler, because the expert and lay opinion he offered amply supported conclusions that its bathtub was defective under the consumer expectation standard, and/or Kohler breached its duty of reasonable care in producing and designing its products. Howard contends that when his pleading and proof are broadly read, according to the proper approach in summary judgment proceedings, he has presented triable material issues of fact and legal issues on whether "applicable standards" of safety should be interpreted differently and more stringently than industry standards.

For its part, Omni adopts the Kohler approach that it fully met the "applicable standards" for safety at its premises, by way of Kohler's compliance with industry standards. Omni further argues that under the usual standards for premises liability and negligence, it had no sufficient actual or constructive notice of any unreasonably **751 dangerous conditions on its premises. We next set forth the relevant standards on appeal for defining and evaluating the scope of the issues raised by the pleadings, or the gist of the current causes of action, to determine whether triable issues of fact remain for resolution.

I

APPLICABLE STANDARDS

A. Basic Summary Judgment Rules

Established rules require review of summary judgment rulings under a de novo standard. (*Lunardi v. Great–West Life Assurance Co.* (1995) 37 Cal.App.4th 807, 819, 44 Cal.Rptr.2d 56; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768, 107 Cal.Rptr.2d 617, 23 P.3d 1143.) The same issues of law are presented on appellate review of the grant of new trial on the claims against Omni. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859, 107 Cal.Rptr.2d 841, 24 P.3d 493 (*Aguilar*).) We "apply the same rules and standards that govern a trial court's determination of a motion for summary judgment." (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1258, 102 Cal.Rptr.2d 813.) Summary judgment should be granted if "all the papers submitted show that there is no triable issue of material fact and ... the moving party is entitled to judgment as a matter of law." (§ 437c, subd. (c).)

To satisfy its burden in seeking summary judgment, a moving defendant is not required to "conclusively negate an element of the plaintiff's cause of **420 action.... All that the defendant need do is to 'show[ ] that one or more elements of the cause of action ... cannot be established' by the plaintiff." (*Aguilar, supra,* 25 Cal.4th 826, 853, 107 Cal.Rptr.2d 841, 24 P.3d 493.) Once this defendant's burden is met, the "burden shifts to the plaintiff ... to show that a triable issue of one or more material facts exists ...." (§ 437c, subd. (p)(2).) As the opposing party, the plaintiff must direct any opposition evidence toward the issues raised by the pleadings. (*Distefano, supra,* 85 Cal.App.4th 1249, 1264–1265, 102 Cal.Rptr.2d 813.) It is not appropriate, at that time, to raise new legal theories or claims not yet pleaded, if there has been no request for leave to amend accordingly, prior to the summary judgment proceedings. (*Ibid.*)

On de novo review, we view the evidence in the light most favorable to the losing plaintiff, liberally construing the plaintiff's submissions and strictly scrutinizing the defendant's showing, to resolve any evidentiary doubts or ambiguities in plaintiff's favor. (*Committee to Save the Beverly Highlands Homes Assn. v. Beverly Highlands Homes Assn.* (2001) 92 Cal.App.4th 1247, 1260, 112 Cal.Rptr.2d 732.) "Summary judgment will be upheld when, viewed in such a light, the evidentiary submissions conclusively negate a necessary element of plaintiff's cause of action, or show that under no hypothesis is there a material issue of fact requiring the process of a trial, thus defendant is entitled to judgment as a matter of law. [Citation.]" (*Thompson v. Sacramento City Unified School Dist.* (2003) 107 Cal.App.4th 1352, 1360–1361, 132 Cal.Rptr.2d 748.)

B. Specific Summary Judgment Issues About Scope of Pleadings

We first address the parties' dispute about the scope of the pleadings and how they defined the issues properly presented for decision in these motion proceedings. As against Kohler, Howard could properly claim product liability, by using alternative theories of strict tort liability and negligence. ****752** (*Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791, 1829, 34 Cal.Rptr.2d 732 (*Hernandez*); *Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 382–383, 93 Cal.Rptr. 769, 482 P.2d 681.) Howard broadly claims that his expert evidence about defective design was sufficient to oppose the motion, but that as a manufacturer, Kohler "*cannot defend a product liability action with evidence it met its industry's customs or standards on safety.*" (*Buell–Wilson v. Ford Motor Co.* (2006) 141 Cal.App.4th 525, 545, 46 Cal.Rptr.3d 147 (*Buell–Wilson*), judgment vacated on other grounds and cause remanded *sub. nom. Ford Motor Co. v. Buell–Wilson* (2007) 550 U.S. 931, 127 S.Ct. 2250, 167 L.Ed.2d 1087; italics added.)

[1] However, admissibility of expert evidence about a manufacturer's compliance with regulations or trade custom varies with the types of theories ***421** under which liability for a product defect is sought. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 566, 34 Cal.Rptr.2d 607, 882 P.2d 298 (*Soule*).) In negligence and due care determinations, a manufacturer's "compliance with regulations, directives or trade custom does not necessarily eliminate negligence but instead simply constitutes evidence for jury consideration with other facts and circumstances." (*Hernandez, supra,* 28 Cal.App.4th 1791, 1830–1831, 34 Cal.Rptr.2d 732, citing, e.g., *Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 65, 107 Cal.Rptr. 45, 507 P.2d 653.) For example, in a case in which "the manufacturer or supplier knows of, or has reason to know of, greater dangers [above and despite its compliance with regulations]," then the manufacturer may not be insulated from negligence liability. (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 407, 185 Cal.Rptr. 654, 650 P.2d 1171 (*Hasson*).)

[2] [3] There are similar conceptual concerns in Howard's efforts to prove his two theories about Omni's potential liability under negligence and/or premises liability theories. As against Omni, Howard alleged that it, as a landowner, did not act reasonably under all the circumstances, when Omni came into possession of some actual or constructive notice that this type of bathtub had been involved in two or more slipping incidents that injured other hotel guests. In *Amos v. Alpha Property Management* (1999) 73 Cal.App.4th 895, 901, 87 Cal.Rptr.2d 34, the court refers to the concept that a defendant property owner's compliance with a law or safety regulation, in and of itself, does not establish that the owner has utilized due care. The owner's compliance with applicable safety regulations, while relevant to show due care, is not dispositive, if there are other circumstances requiring a higher degree of care. (*Ibid.*) A plaintiff seeking recovery for negligence against a landowner must establish sufficient facts or circumstances that support an inference of a breach of duty, to defeat a defense summary judgment motion. (*Buehler v. Alpha Beta Co.* (1990) 224 Cal.App.3d 729, 734, 274 Cal.Rptr. 14 (*Buehler*).) It is not enough to provide speculation or conjecture that a dangerous condition of property might have been present at the time of the accident. (*Ibid.*)

Because of the manner of pleading of Howard's somewhat conclusory allegations about the manufacturer's failure to meet "applicable standards," Kohler relies on cases such as *580 Folsom Associates v. Prometheus Development Co.* (1990) 223 Cal.App.3d 1, 18, 272 Cal.Rptr. 227, to define the scope of the issues properly to be addressed in its summary judgment motion. Generally, such proceedings are limited to the claims framed by the pleadings. (*Distefano, supra,* 85 Cal.App.4th at pp. 1264–1265, 102 Cal.Rptr.2d 813.) A moving party seeking summary judgment ****753** or adjudication is not required to go beyond the allegations of the pleading, with respect to new theories that could have been pled, but for which no motion to amend or supplement the pleading was brought, prior to the hearing on the dispositive motion. (*Ibid.; 580 Folsom Associates, supra,* at p. 18, 272 Cal.Rptr. 227.)

***422** On the other hand, cases such as *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 385, 282 Cal.Rptr. 508 (*FPI*), have expressed the view that trial courts are empowered to read the pleadings broadly, "in the light of the facts adduced in the summary judgment proceeding," if those pleadings give fair notice to the opposing party of the theories on which relief is generally being sought. (*Ibid.*) The test is whether such a particular theory or defense is one that the opposing party could have reasonably anticipated would be pursued, and whether a request for leave to amend accordingly would likely have been granted (in that case, to add a potentially meritorious defense). (*Ibid.*)

[4] [5] Even the liberal analytical framework developed by *FPI, supra,* 231 Cal.App.3d 367, 381–385, 282 Cal.Rptr. 508 acknowledges that the parties, during the motion proceedings, are assuming that only particular causes of action and certain issues are actually raised by the pleadings. To create a triable issue of material fact, the opposition evidence must be directed to those issues raised by the pleadings. (*Distefano, supra,* 85 Cal.App.4th at pp. 1264–1265, 102 Cal.Rptr.2d 813.) Nevertheless, by analogy to the theory of trial, if the pleading (or answer)

minimally advises the opposing party of the nature of the theory (or defense) pursued during the motion proceedings, the courts may, in appropriate cases, evaluate the evidence presented as supplementing the bare bones of the pleading (there, a defense). (*FPI, supra,* at p. 385, 282 Cal.Rptr. 508; also see *American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1117–1118, 51 Cal.Rptr.2d 251, 912 P.2d 1198 [when a defendant's motion for summary judgment tests the sufficiency of the complaint, the courts assume the truth of the allegations of the complaint, and liberally construe them, seeking to attain substantial justice among the parties, as in a motion for judgment on the pleadings].)

The lesson we take from all these authorities is that we must consider the different causes of action differently, with respect to the factually specific allegations against each defendant. As against Kohler, we agree with Howard that ordinary negligence standards are within the scope of the "applicable standards" pled, and industry standards are only part of the inquiry. However, Kohler is not claiming its compliance with industry standards was a complete defense, but rather that all its evidence establishes that Kohler acted with due care in designing and fabricating its product, and that the evidence brought forward by Howard fails to controvert that showing. But Howard cannot, either at the time of the motion or on appeal, seek to expand the issues by redefining "applicable standards" to enlarge the particular duties owed to Howard by Kohler, through his own expert's testimony. Specifically, Howard is now claiming his expert can prove that Kohler failed to meet all applicable standards of care, when it failed to utilize his recommended different coefficient of friction standard, or failed to issue warnings of additional dangers in its product, or failed to advise its users that they must add ***423** safeguards, such as the use of a bathmat or more bars. However, the complaint is not that specific, and the next issue is whether the expert, without more, can so define Kohler's duties.

****754** As to the scope of the pleadings against Omni, it is a reasonable reading of the complaint (as the trial court did) that Howard's "applicable standards" allegations were specific to Kohler and did not control the pertinent allegations against Omni, as to industry standards. We agree with Howard that any ruling on the products liability/negligence claims against Kohler will not necessarily be dispositive as to the claims against Omni. Under negligence rules, it is theoretically possible that even a nondefective product, if poorly maintained or altered in an unsafe manner, could give rise to a premises liability finding against the owner of the location of the product, if an injury foreseeably occurred due to a lack of due care that should have been exercised, under all the known circumstances. Thus, even if it is determined that Howard has a failure of proof of any design defect or strict product liability against Kohler (pt. II, *post*), Howard's slightly different claims against Omni must be separately analyzed under premises liability authority (pt. III, *post*), and we next address those questions.

II

CLAIMS AGAINST KOHLER

Both as to negligence and strict products liability, Howard's complaint alleged that Kohler's design and manufacturing processes were defective, because "the coating of the bathtub did not comply with applicable standards," rendering the bottom surface of the bathtub dangerous or defective, for lack of sufficient friction or slip resistance. We next outline the arguments and criteria for the products liability claims, then turn to the negligence arguments.

A. Manner of Proof of Product Liability: Role of Expert Evidence

[6] **[7]** For a theory of strict tort liability, "manufacturers are not insurers of their products; they are liable in tort only when 'defects' in their products cause injury. [Citation.]" (*Soule, supra,* 8 Cal.4th 548, 568, fn. 5, 34 Cal.Rptr.2d 607, 882 P.2d 298.) There are two alternative ways to prove a design defect, each appropriate to its own circumstances: (1) the consumer expectations test, or (2) a theory of design defect, citing to technical and mechanical details in obscure components of a mechanism or complex circumstances of an accident. (*Stephen v. Ford Motor Co.* (2005) 134 Cal.App.4th 1363, 1370–1371, 37 Cal.Rptr.3d 9, fn. 6 (*Stephen*), citing *Soule, supra,* 8 Cal.4th 548, 567–570, 34 Cal.Rptr.2d 607, 882 P.2d 298, and *Barker, supra,* 20 Cal.3d 413, 430, 143 Cal.Rptr. 225, 573 P.2d 443.)

***424** On appeal, Howard's briefing cites the consumer expectations test as the appropriate standard for establishing the bathtub was defective. However, Howard's evidence also seemed to rely on the design defect test, by providing expert evidence from Dr. Solomon about the risks and benefits in the tub design and about the desirability of providing additional safety devices, such as bathmats, and failure to warn. This raises a problem on this record, because different definitions of

defective product were brought before the trial court in the pleading and proof, and different rules have been developed for the proper role of expert evidence in addressing these product liability claims. (*Soule, supra,* 8 Cal.4th 548, 567–570, 34 Cal.Rptr.2d 607, 882 P.2d 298.) We examine the record on each theory.

1. Consumer Expectations Test

In his opening brief, Howard alleges that even though the tub's anti-slip surface complied with industry standards, the tub as a whole was dangerously slippery, and ****755** "if Howard slipped on the Safeguard surface, it was not safe." That argument disregards the principle that "manufacturers are not insurers of their products; they are liable in tort only when 'defects' in their products cause injury. [Citation.]" (*Soule, supra,* 8 Cal.4th 548, 568, fn. 5, 34 Cal.Rptr.2d 607, 882 P.2d 298.)

[8] [9] To the extent Howard is contending that the bathtub "*failed to perform as the ordinary consumer would expect,*" he is limited in the amount of expert testimony he can present on such a theory. The consumer expectations test "is reserved for cases in which the everyday experience of the product's users permits a conclusion that the product's design violated minimum safety assumptions, and is thus defective regardless of expert opinion about the merits of the design. It follows that where the minimum safety of a product is within the common knowledge of lay jurors, expert witnesses may not be used to demonstrate what an ordinary consumer would or should expect. *Use of expert testimony for that purpose would invade the jury's function* [citation], and would invite circumvention of the rule that the risks and benefits of a challenged design must be carefully balanced whenever the issue of design defect goes beyond the common experience of the product's users." (*Soule, supra,* 8 Cal.4th at p. 567, 34 Cal.Rptr.2d 607, 882 P.2d 298, italics added; see *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 126–127, 184 Cal.Rptr. 891, 649 P.2d 224 [when applying the consumer expectations test, the safety expectations of the general public are at issue, not safety regulations of an industry or government agency].)

We should read the authority quoted below, in *Buell–Wilson, supra,* 141 Cal.App.4th 525, 545, 46 Cal.Rptr.3d 147, as distinguishable on its facts, and as limited to a discussion of the consumer expectations standard. There, we said: "A manufacturer cannot defend a product liability action with evidence it met its ***425** industry's customs or standards on safety. [Citations, including *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 174 Cal.Rptr. 348.] In fact, admission of such evidence is reversible error. [Citation.] This is because in strict liability actions, 'the issue is not whether defendant exercised reasonable care.' [Citation.] Rather, *the issue is whether the product fails to perform as the ordinary consumer would expect.*' " (*Buell–Wilson, supra,* at p. 545, 46 Cal.Rptr.3d 147; see *Soule, supra,* 8 Cal.4th at p. 566, fn. 2, 34 Cal.Rptr.2d 607, 882 P.2d 298, noting that the authority of *Grimshaw* is somewhat limited because it mainly utilized the consumer expectations test for products liability.)[4]

[10] Here, however, Howard has brought not only the "*issue of whether the product failed to perform as the ordinary* ****756** *consumer would expect* " before the court, but also design defect and due care issues, since his expert discussed them and all theories were pursued against Kohler. (*Buell–Wilson, supra,* 141 Cal.App.4th 525, 545, 46 Cal.Rptr.3d 147.) Thus, Kohler's reliance on industry standards is a factor legitimately to be considered in the summary judgment proceedings. Properly read, the rule that a manufacturer is not entitled to a complete defense that it complied with industry standards applies to negligence cases and also, to some extent, applies to product liability cases. (Compare 50A Cal.Jur.3d, Products Liability, § 90, pp. 676–677, on federal preemption issues ["The California courts of appeal have split on the issue of whether a manufacturer's compliance with federal motor vehicle safety standards, as set by the National Traffic and Motor Vehicle Safety Act, is a defense in a products liability action."].)

2. Defective Design

[11] [12] [13] In the second established test for strict liability for a defective product, the issue is whether the claimed product defect "design embodies 'excessive preventable danger.' [Citation.]" (*Soule, supra,* 8 Cal.4th at p. 567, 34 Cal.Rptr.2d 607, 882 P.2d 298.) "In such a case, the jury considers if 'the benefits of the ... design outweigh the risk of danger inherent in such design' [citation]. But this determination involves technical issues of feasibility, cost, practicality, risk, and benefit [citation] which are 'impossible' to avoid [citation.] In such cases, the jury ***426** must consider the manufacturer's evidence of competing design considerations [citation], and the issue of design defect cannot fairly be resolved by *standardless reference to the 'expectations' of an 'ordinary consumer.'* " (*Ibid.,* italics added; *Barker, supra,* 20 Cal.3d at p. 430, 143 Cal.Rptr. 225, 573 P.2d 443.) In such a case, expert testimony is required to assist the finder of fact. (*Soule, supra,* at pp. 566–567, 34 Cal.Rptr.2d 607, 882 P.2d 298.)

[14] [15] [16] [17] [18] Deviation from an industry norm is not necessarily the test for a defective product. (*Heap v. General Motors Corp.* (1977) 66 Cal.App.3d 824, 829, 136 Cal.Rptr. 304; *Jiminez v. Sears, Roebuck & Co., supra,* 4 Cal.3d at p. 383, 93 Cal.Rptr. 769, 482 P.2d 681.) When the plaintiff alleges strict product liability/design defect, any evidence of compliance with industry standards, while not a complete defense, is not "irrelevant," but instead properly should be taken into account through expert testimony as part of the design defect balancing process. The rule discussed in *Buell–Wilson, supra,* 141 Cal.App.4th 525, 545, 46 Cal.Rptr.3d 147 is not to the contrary (that "[*A*] *manufacturer cannot defend a product liability action with evidence it met its industry's customs or standards on safety* "). In strict liability actions, " 'the issue is not whether defendant exercised reasonable care' " (*ibid.*), but in negligence it is. Also, expert evidence about compliance with industry standards can be considered on the issue of defective design, in light of all other relevant circumstances, even if such compliance is not a complete defense. An action on a design defect theory can be prosecuted and defended through expert testimony that is addressed to the elements of such a claim, including risk-benefit considerations.

In this case, both parties offered expert testimony about the effect of Kohler's compliance with industry standards, and even if such expert testimony was not appropriate or dispositive on a consumer expectation test, it was relevant to identify triable issues on the negligence and design defect theories. We next ask whether that evidence ****757** sufficiently raised triable issues of fact on issues framed by the complaint.

B. Application of Rules: Strict Product Liability

[19] [20] Under *Soule,* expert opinion is admissible for purposes of assessing risks and benefits of the product's design, to avoid resolving unsuitable cases on a "*standardless reference to the 'expectations' of an 'ordinary consumer.'* " (*Soule, supra,* 8 Cal.4th at p. 567, 34 Cal.Rptr.2d 607, 882 P.2d 298; italics added.) First, to the extent Howard has chosen the consumer expectations test, it is arguably an appropriate one to evaluate his claims, since "the product, in the context of the facts and circumstances of its failure, is one about which the ordinary consumers can form minimum safety expectations." (See *McCabe v. American Honda Motor Co.* (2002) 100 Cal.App.4th 1111, 1124, 123 Cal.Rptr.2d 303.) Even assuming that the slipperiness of a bathtub is something that an ***427** ordinary consumer can evaluate, this motion and opposition alternatively addressed design defect issues, with expert opinion. Accordingly, since the record addresses both prongs of *Barker, supra,* 20 Cal.3d 413, 143 Cal.Rptr. 225, 573 P.2d 443, and this is de novo review, we should consider Howard's claim that his pleading and proof raise triable issues about the defectiveness of the product, despite its compliance with industry standards.

[21] Under the risk-benefit prong of *Barker, supra,* 20 Cal.3d 413, 143 Cal.Rptr. 225, 573 P.2d 443, a fact finder may receive expert advice on "reasonable" safety expectations for the product, to assist it to "apply clear guidelines, and decide accordingly whether the product's design is an acceptable compromise of competing considerations." (*Soule, supra,* 8 Cal.4th 548, 567, fn. 4, 34 Cal.Rptr.2d 607, 882 P.2d 298.) Here, the dueling experts opined on the safety and adequacy of both the product and the industry standards. Dr. Solomon drew a distinction between the industry standards used (e.g., ASTM F 462–79), and the principles of forensic safety that he was interpreting with his expert opinions, i.e., that more stringent standards were needed.

[22] The manufacturing methods for bathtubs and the application of nonslip coatings are matters "plainly beyond the common experience of both judges and jurors." (*Stephen, supra,* 134 Cal.App.4th 1363, 1373, 37 Cal.Rptr.3d 9.) Whenever the issue of design defect goes beyond the common experience of the product's users, the rule is that the risks and benefits of a challenged design must be carefully balanced, and expert testimony is proper to assist the finder of fact in deciding if a product is defective. (*Soule, supra,* 8 Cal.4th 548, 566, 34 Cal.Rptr.2d 607, 882 P.2d 298.)

[23] [24] On review of these rulings, the effect of expert testimony is evaluated under these standards: "To the extent the trial court excluded the testimony on the ground that there was no reasonable basis for [the expert's] opinion, we review the ruling for abused discretion; to the extent the trial court's ruling is based on conclusions of law, we review those conclusions de novo. [Citations.]" (*Stephen, supra,* 134 Cal.App.4th 1363, 1370, fn. 5, 37 Cal.Rptr.3d 9; *Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 563–564, 10 Cal.Rptr.3d 34.) An expert's opinions and conclusions must have reasonable bases and reflect more than speculation or conjecture. (*Stephen, supra,* at p. 1371, 37 Cal.Rptr.3d 9.) It is not proper for an expert to base opinions on assumptions that are not supported by the record, or on information that would not be reasonably relied upon by other experts. (*Ibid.*)

****758** Once Howard's expert admitted that the industry standards were met, his further views that higher safety standards were needed, under these circumstances, were

not supported by anything other than his own opinion. Although industry standards alone would not be dispositive, other evidence ***428** was presented about Kohler's testing processes, quality control through factory audits, and consumer preferences.5 Kohler monitors complaints about its products and investigates them. Prior similar accidents in Kohler bathtubs were not shown by Howard to be so similar as to place the manufacturer on notice that its products were unreasonably dangerous.

Howard did not show through admissible evidence that Kohler had or should have had knowledge of any greater dangers that should have been addressed in its design of the nonslip surface, such as the friction coefficient or the amount of surface coverage required, which were not addressed through its successful compliance with industry standards. (*Hasson., supra,* 32 Cal.3d 388, 407, 185 Cal.Rptr. 654, 650 P.2d 1171.) To overcome this summary judgment motion, Howard and his expert were obligated to give a greater factual basis for application of any higher safety standards to be met for this product design, in view of the evidence of its compliance with industry standards, together with the methods that Kohler showed it used for quality control in producing its product. No such triable issues were identified by Howard.

C. Application: Negligence Standards

[25] We have already discussed the scope of the issues properly pled against Kohler, in the summary judgment context, and we determined that both ordinary negligence standards and industry standards were within the scope of the "applicable standards" pled. Howard's effort to prove his allegations depended on his expert's opinions that the bathtub should meet not only industry standards, but also more generalized safety standards, such as could be developed in tort law through "principles of forensic safety."

For his negligence claim, Howard had to show breach of duty, causation, and damages. (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 614, 76 Cal.Rptr.2d 479, 957 P.2d 1313; *Stephen, supra,* 134 Cal.App.4th 1363, 1370–1371, 37 Cal.Rptr.3d 9.) CACI No. 1221 sets forth this basic standard of care for a negligence claim: "A [designer/manufacturer/etc.] is negligent if [it] fails to use the amount of care in [designing/manufacturing/etc.] the product that a reasonably careful [designer/manufacturer/etc.] would use in similar circumstances to avoid exposing others to a foreseeable risk of harm. [¶] In determining whether [defendant] used reasonable care, you should balance what [defendant] knew or should have known about the likelihood and severity of potential harm from the product against the burden of taking safety measures to reduce or avoid the harm."

In addition to arguing his expert was correct in enunciating a higher standard of care, Howard contends that the trial court improperly used the ***429** analysis in *Spann, supra,* 34 Cal.App.4th 644, 40 Cal.Rptr.2d 360, when evaluating his expert testimony about the applicable standards a manufacturer should meet. Howard argues that the reasoning in *Spann* is confined to professional negligence cases, while this is a very different type of claim.

Both *Spann, supra,* 34 Cal.App.4th 644, 40 Cal.Rptr.2d 360 and *Osborn v. Irwin* ****759** *Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 7 Cal.Rptr.2d 101 (*Osborn*), dealt with problems of whether a blood bank had taken appropriate steps to prevent the contamination of blood, and they treated the problem as "a question of professional negligence which had to be decided by looking at the custom and practice of the industry." (*Spann, supra,* at p. 652, 40 Cal.Rptr.2d 360; *Osborn, supra,* at pp. 276–282, 7 Cal.Rptr.2d 101.) Blood banks were not found negligent for failing to perform tests that no other such institutions in the nation were using. (*Id.* at p. 282, 7 Cal.Rptr.2d 101.) These appellate court decisions were based on determinations that competent expert evidence had been presented, showing the defending blood banks had met the industry standard of care. In response, those plaintiffs seeking to prove negligence liability had only produced an expert's personal opinion of what the industry should have done, but they failed to address the applicable customs and practices of the blood banking industry at the relevant time periods.

In *Spann,* the court stated: "We agree with the *Osborn* court that a single expert should not be permitted to 'second-guess an entire profession' when it comes to establishing a professional standard of care. [Citation.] ... Because a professional standard of care is established by the accepted industry practice, *not the opinion of a single expert,* Mr. Spann failed to create a triable issue of fact on this issue. Consequently, the trial court properly granted summary judgment on the cause of action for professional negligence." (*Spann, supra,* 34 Cal.App.4th 644, 655, 40 Cal.Rptr.2d 360; italics added.)

[26] Howard argues that this authority is distinguishable and must be confined to the professional negligence arena. However, although the particular standard of care of a manufacturer is different from the standard of care of a professional, or a health care institution, similar expert

testimony rules are utilized to address either standard. "It is for the trial court to determine, in the exercise of a sound discretion, the competency and qualification of an expert witness to give his opinion in evidence [citation], and its ruling will not be disturbed on appeal unless a manifest abuse of that discretion is shown." (*Osborn, supra,* 5 Cal.App.4th 234, 273–274, 7 Cal.Rptr.2d 101, relying on *Huffman v. Lindquist* (1951) 37 Cal.2d 465, 476, 234 P.2d 34.)

In the case before us, qualified engineers examined the subject bathtub and rendered detailed opinions about the adequacy of it as a product, by applying ***430** and giving opinions about the adequacy of industry standards for manufacturing such products. The type of materials and techniques used for manufacturing products are not matters of "common knowledge," and Howard needed opinions from qualified experts to establish there were triable issues of fact regarding breach of duty and negligence, as well as design defect. The same principles for establishing the proper scope and objectives of expert testimony, as utilized in *Spann, supra,* 34 Cal.App.4th 644, 40 Cal.Rptr.2d 360, and *Osborn, supra,* 5 Cal.App.4th 234, 7 Cal.Rptr.2d 101, can properly be extended to evaluate the persuasiveness of expert testimony on the safety of a product, in light of industry standards. A fair reading of *Spann* and *Osborn* shows that they developed evidence law in a particular professional negligence context, but that those general analytical principles may be extended to other types of negligence, such as alleged here.

Moreover, such expert testimony about the safety of a product, in light of industry standards, can also take into account other applicable and relevant circumstances. ****760** (See *Stephen, supra,* 134 Cal.App.4th at pp. 1370–1372, 37 Cal.Rptr.3d 9.) As framed by CACI No. 1221, the negligence inquiry asks if the manufacturer failed to use the amount of care in designing the product that a reasonably careful designer or manufacturer would have used in similar circumstances. Kohler's qualified engineer described the methods that are used at the factory to ensure that certain standards are met in the production of the anti-slip coating, such as auditing and testing the friction coefficient of a certain number of bathtubs per week, and by having a protocol to replace the grit that is used for sandblasting on a routine basis, to assure that the machinery does everything that it is supposed to do. Kohler receives complaints about its products and investigates them.

In response, Dr. Solomon presented only conclusionary statements of opinion, and could not cite to any evidence in the industry or to the individual circumstances presented here, to show why the procedures used by Kohler to address the problem of slipperiness, or the industry standards that it followed, were somehow inadequate. The trial court was justified in granting summary judgment to Kohler. These conclusions on duty and breach make it unnecessary to discuss any causation issues at this stage of the proceedings.

III

CLAIMS AGAINST OMNI

On appeal of the new trial order, Omni argues that the trial court got it right the first time when it granted Omni's summary judgment, because Howard had failed to bring forward evidence showing Omni was in possession of facts giving it actual or constructive knowledge that this bathtub was dangerously slippery. At the time of the summary judgment ruling, the trial ***431** court determined that not enough was known about the factual circumstances of other accidents at another Omni hotel, or the condition of those bathtubs, to deem them to be substantially similar in nature and to give rise to such notice that required corrective action.

However, the court then granted a new trial, reasoning that on the facts before it, it should instead have concluded that triable issues of fact remained regarding the existence of actual or constructive notice of an unreasonably dangerous condition, based on knowledge available to Omni about two previous bathtub accidents in the New Haven hotel. We next outline principles of premises liability for evaluating the record on this issue of actual or constructive notice of any unreasonable levels of risk posed by the bathtubs.

A. Applicable Standards: Premises Liability/Negligence

[27] [28] [29] [30] Commercial property owners are not insurers of the safety of their patrons, although they owe the patrons duties "to exercise reasonable care in keeping the premises reasonably safe." (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205, 114 Cal.Rptr.2d 470, 36 P.3d 11 (*Ortega*); *Moore v. Wal–Mart Stores, Inc.* (2003) 111 Cal.App.4th 472, 477, 3 Cal.Rptr.3d 813 (*Moore*).) To exercise a degree of care that is commensurate with the risks involved, the owner must make reasonable inspections of the portions of the premises open to customers. (*Ortega, supra,* at p. 1205, 114 Cal.Rptr.2d

470, 36 P.3d 11; *Moore, supra,* at p. 476, 3 Cal.Rptr.3d 813.) An owner is liable for harm caused by a dangerous condition, of which the owner had actual or constructive knowledge. (*Ortega, supra,* p. 1206, 114 Cal.Rptr.2d 470, 36 P.3d 11.) An injured plaintiff has the burden of showing that the owner had notice of the defect in sufficient ****761** time to correct it, but failed to take reasonable steps to do so. (*Moore, supra,* at p. 476, 3 Cal.Rptr.3d 813.) One way to carry that burden is to raise an inference that the hazardous condition existed long enough for the owner to have discovered it, if an owner exercising reasonable care would have learned of it. (*Ortega, supra,* at pp. 1210–1213, 114 Cal.Rptr.2d 470, 36 P.3d 11; *Moore, supra,* at p. 477, 3 Cal.Rptr.3d 813.)6

[31] **[32]** **[33]** Hotel proprietors have a special relationship with their guests that gives rise to a duty "to protect them against unreasonable risk of physical harm." (*Peterson, supra,* 10 Cal.4th 1185, 1206, 43 Cal.Rptr.2d 836, 899 P.2d 905.) " 'The duty in each case [as with common carriers] is only one to exercise reasonable care under the circumstances. The defendant is not liable where he neither knows nor should ***432** know of the unreasonable risk....' " (*Ibid.*) However, hotel guests can reasonably expect that the hotel owner will be reasonably diligent in inspecting its rooms for defects, and correcting them upon discovery. "But the guest cannot reasonably expect that the owner will correct defects of which the owner is unaware and that cannot be discerned by a reasonable inspection." (*Peterson, supra,* 10 Cal.4th 1185, 1206, 43 Cal.Rptr.2d 836, 899 P.2d 905.)

[34] **[35]** The fact that an accident occurred does not give rise to a presumption that it was caused by negligence. (*Buehler, supra,* 224 Cal.App.3d 729, 734, 274 Cal.Rptr. 14.) Instead, the injured plaintiff must establish sufficient facts or circumstances that support an inference of a breach of duty, to defeat a summary judgment motion by a defendant that is asserting due care was exercised. It is not enough for the plaintiff to provide speculation or conjecture that a dangerous condition of property might have been present at the time of the accident. (*Ibid.*)

[36] **[37]** Although no two accidents happen in the same way, to be admissible for showing notice to a landowner of a dangerous condition, evidence of another similar accident must have occurred under substantially the same circumstances. (See 1 Witkin, Cal. Evidence (4th ed. 2000) Circumstantial Evidence, § 104, p. 452; *Stephen, supra,* 134 Cal.App.4th at p. 1371, 37 Cal.Rptr.3d 9; *Simmons v. Southern Pac. Transportation Co.* (1976) 62 Cal.App.3d 341, 363–364, 133 Cal.Rptr. 42; *Goebel v. City of Santa Barbara* (2001) 92 Cal.App.4th 549, 557, 111 Cal.Rptr.2d 901.) This evaluation of similarity is a discretionary determination by the trial court, subject to correction for abuse of discretion, if the record does not support it. (*Stephen, supra,* at p. 1371, 37 Cal.Rptr.3d 9.) To the extent the trial court's ruling on that issue was based on conclusions of law, we review those conclusions de novo. (*Id.* at p. 1370, fn. 5, 37 Cal.Rptr.3d 9.)

We also note that at this point in the litigation, Howard does not appear to be claiming that Omni's maintenance of the bathtub in his hotel room was faulty (such as if it had allowed excessively slippery foreign substances to accumulate there). Instead, he is now arguing that the evidence of other falls in other Omni hotels was enough to create a duty in Omni to take further protective measures.

****762 B. Extent of Notice; Analysis**

[38] **[39]** Omni relies on various out-of-state cases to contend that a property owner may properly rely on industry standards to defeat a claim that its bathroom fixtures are defective or dangerous. (See *Haney v. Marriott International, Inc.* (D.D.C.2007) 2007 WL 2936087, 2007 U.S. Dist. 74872; *Billings v. Starwood Realty* (N.D.Ga.2006) 2006 WL 2639496, 2006 U.S. Dist. LEXIS 65182.) Although evidence of that ***433** condition of the property is in compliance with "industry" standards is relevant, that is not the only inquiry necessary for applying California premises liability standards, as outlined above. The overall question is whether Omni, as an owner, used reasonable care under all the relevant known circumstances, to discover and correct any identifiable dangerous condition of its property. (CACI No. 1011.)

This record shows that Omni's circumstances included knowledge of its director of security, Lars Renteria, that the San Diego hotel had been in operation for 22 months, the tub had been in use and had been cleaned throughout that period, and there had not been any other reports there of bathtub injuries. Omni did not routinely provide bathmats to guests, but Omni staff would have obtained them if they were requested (although they were not). Omni's independent engineering expert tested the coefficient of friction on the bathtub and found that it complied with industry standards (ASTM F 462–79).

Omni's nationwide corporate director of engineering, Dingler, testified in his deposition that when he learned about the San Diego incident, he did an inquiry throughout the company about any problems with similar bathtubs, and learned about the New Haven incidents. Out of the 38 Omni owned/managed hotels, there were six hotels that had Kohler tubs, and one of them had had a slipping incident or two. Howard argues such an inquiry

should have been done earlier, because those reports of two different people slipping in bathtubs at the New Haven Omni hotel were generated in 2004 and 2005, and those injured persons told Omni personnel their tubs were not safe without a rubber bathmat.

Relying on those reports of two bathtub accidents at the New Haven Omni hotel, Howard argued that even though the Kohler bathtub met industry standards for coefficient of friction and surface coverage of the anti-slip coating, the tub was nevertheless unsafe, and/or further protections should have been provided. He also relied on the discovery materials that showed Kohler had institutional knowledge of four other such hotel tub accidents.

Omni objected to such use of the New Haven slip incidents. In connection with the Kohler summary judgment motion, the trial court had considered the New Haven incident reports, as exhibits attached to a deposition, for the purpose of showing that there was some degree of notice to "defendant" of earlier accidents, and it apparently used the same analysis about Omni.
Omni now argues those prior incidents were not shown to be substantially similar and they therefore amounted to an inadequate showing, as a matter of law, to support any grant of a new trial based on the theory that it should ***434** have exercised more reasonable care to discover and correct the condition of the bathtub. (*Peterson, supra,* 10 Cal.4th 1185, 1206, 43 Cal.Rptr.2d 836, 899 P.2d 905.) Such corrective action might have included providing bathmats, grab bars, or an after-market anti-slip treatment The burden was on Howard to show that Omni had notice of undue danger or defective slipperiness of the bathtub, within sufficient time to correct it. (*Moore, supra,* 111 Cal.App.4th 472, 476, 3 Cal.Rptr.3d 813.)
****763** We disagree with the trial court that Howard's evidence raises a triable issue of fact on Omni's actual notice of a dangerous condition of its property. We do not need to rely on any legal conclusions about the Kohler product safety criteria to reach that conclusion, although we do not ignore the commonsense factors that bathtubs can be slippery, or that Omni purchased a widely used brand name tub in furnishing its hotel. First, the incident reports do not show substantially similar accidents, regarding any detail about the conditions of or in the bathtubs, or the circumstances or medical conditions of the guests before they fell in the bathtubs. The reports do not provide such evidence of sufficient facts or circumstances to support an inference of Omni's breach of duty, but support only speculation or conjecture that Omni should have recognized earlier that Kohler tubs presented a dangerous condition of its property, if they did. (*Buehler, supra,* 224 Cal.App.3d 729, 734, 274 Cal.Rptr. 14.)

It is not enough for Howard now to argue that Omni breached a duty to him, as a future guest, when it failed to communicate what it knew among its various hotels, such as the New Haven injured guests' beliefs that their accidents were caused by a lack of bathmats. At argument on the motions, counsel for Omni pointed out that another factor in deciding on whether to supply bathmats is whether they collect mold and create a new problem. That may be an issue of hotel management, which was outside the scope of the expertise of these engineers, or the scope of these pleadings. On this bare record, we cannot base our decision on some alleged inadequacy of Omni's safety policies and/or communication among its hotels.

We further disagree with Howard's contention that when the New Haven slipping incidents occurred, Omni was placed upon a heightened duty of inquiry to find out from Kohler if there had been any further such incidents. Other than saying he could bring in "ample evidence" to allow a jury reasonably to find that Omni had both actual and constructive knowledge that the tubs in its hotel rooms, including those in the San Diego Omni, were dangerously slippery, Howard provides only his own witness testimony and interpretations. He has not shown triable issues of fact exist on whether Omni breached its relevant duties to him, based on what it knew about all the circumstances, including the supply of bathtubs for use by guests.

*435 DISPOSITION

Summary judgment is affirmed as to Kohler; order reversed as to Omni with directions to enter a defense summary judgment. Costs on appeal to be borne by Howard.

WE CONCUR: BENKE, Acting P.J., and IRION, J.

Parallel Citations

203 Cal.App.4th 403, 12 Cal. Daily Op. Serv. 1712, 2012 Daily Journal D.A.R. 1786

Footnotes

1 Although Howard's wife Lisa was also originally a plaintiff (claiming loss of consortium), she dismissed her claim.

2 Originally, the parties debated the issue of whether Howard, a relatively tall person, was standing on or at the very edge of the nonslip coating, as it had been applied to the bathtub. However, it is unclear whether Howard is still pursuing a theory that the nonslip coating was not wide enough, since he mainly argues that the tub as a whole remained too slippery, despite its compliance with industry standards.

3 Howard also relied on other incident reports from non-Omni hotels showing there were slips in Kohler bathtubs. The court sustained Kohler's objections to those documents, but noted that Howard had adequately showed "that defendant[s] may have had notice of a few other incidents of falling in a bathtub." The court stated that those reports did not provide any context of how many such tubs were used in other hotels, which minimized the relevance of the evidence.

4 *Soule, supra,* 8 Cal.4th at page 566, footnote 2, 34 Cal.Rptr.2d 607, 882 P.2d 298, appears to limit the authority of *Grimshaw* as follows: "Under the particular circumstances, use of the consumer expectations test alone was approved in *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 174 Cal.Rptr. 348. There, a 1972 Pinto was instantly engulfed in flames when another vehicle struck it from the rear at 28 to 37 miles per hour. There was evidence that Ford knew placement of the Pinto's fuel tank was unsafe. The theory of trial was consumer expectations. Two weeks before the case went to the jury, we decided *Barker* [, *supra,* 20 Cal.3d 413, 143 Cal.Rptr. 225, 573 P.2d 443]. Ford immediately requested a risk-benefit instruction, which the trial court refused. In a pre-*Campbell* appeal, the Court of Appeal affirmed. Noting both the timing and theory-of-trial problems, the court also observed that a risk-benefit instruction would actually have prejudiced Ford, because under *Barker,* it offered an additional means of recovery for design defect." (Italics omitted.)

5 At argument, Kohler's attorney pointed out that people who are bathing do not want to stand or sit on concrete, which has a higher friction coefficient.

6 Omni cites several out-of-state cases to contend that no evidence of any previous bathtub accidents should have been admissible, because there had never been an accident in this same hotel room. (*Johnson v. Red Roof Inns* (E.D.Mich.1997), 1997 WL 1949178, 1997 U.S. Dist. LEXIS 12069; *Coyle v. Beryl's Motor Hotel* (Ohio.App.1961) 171 N.E.2d 355.) Such cases are not persuasive under the more modern premises liability rules set forth in *Ortega, supra,* 26 Cal.4th 1200, 114 Cal.Rptr.2d 470, 36 P.3d 11.

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194 Cal.App.4th 1102
Court of Appeal, Second District, Division 3, California.

Kelley Angela BELL, Plaintiff and Respondent,
v.
Reginald MASON et al., Defendants and Appellants.

No. B216358. | April 28, 2011. | Certified for Partial Publication.* | As Modified May 5, 2011. | Rehearing Denied May 17, 2011. | Review Denied July 27, 2011.

Synopsis

Background: Through guardian ad litem, vendor of residence in leaseback arrangement brought action against purchaser and broker for fraud and deceit, financial dependent adult abuse, breach of fiduciary duty, intentional infliction of emotional distress, conspiracy, negligence, and common count for monies received. The Superior Court, Los Angeles County, No. BC347869, Kenneth R. Freeman, J., entered judgment on special jury verdict for vendor. Purchaser and broker appealed.

Holdings: The Court of Appeal, Klein, P.J., held that:
[1] defense psychiatrist's expert opinion that vendor did not suffer from mental retardation was supported by sufficient foundation, and
[2] exclusion of psychiatrist's expert testimony was prejudicial.

Reversed and remanded with directions.

West Headnotes (5)

[1] **Protection of Endangered Persons**
Proceedings and prosecution in general

In vendor's action against real estate broker and the purchaser of vendor's residence in a leaseback transaction for claims including financial dependent adult abuse, evidence relating to vendor's godmother's lawsuit against vendor and purchaser seeking to quiet godmother's title to the residence, including the complaint and the settlement agreement, was highly relevant, where vendor's prosecution of the action against broker and purchaser was required by a promise vendor made to godmother's conservator in the settlement of godmother's lawsuit. West's Ann.Cal.Welf. & Inst.Code § 15610.30.

[2] **Appeal and Error**
Particular types of evidence

In determining whether the trial court committed prejudicial evidentiary error in excluding certain defense evidence, the inquiry is whether it appears reasonably probable that, were it not for the trial court's incorrect evidentiary rulings, a result more favorable to the appellant could have been obtained. West's Ann.Cal.Evid.Code § 354.

[3] **Evidence**
Facts relating to human life, health, habits, and acts

Court of Appeal would take judicial notice of the fact that to pass the General Educational Development (GED) high school equivalency examination, one must be able to read, compute, interpret information, and express oneself in writing on a level comparable to that of 60 percent of graduating high school seniors. West's Ann.Cal.Evid.Code §§ 452(h), 459.

1 Cases that cite this headnote

[4] **Protection of Endangered Persons**
Proceedings and prosecution in general

Psychiatrist's expert testimony that vendor of residence in leaseback transaction did not suffer from mental retardation was based on matter "of a type that reasonably may be relied upon by an

expert in forming an opinion upon the subject to which his testimony relates," and thus was supported by a sufficient foundation in vendor's action against broker and purchaser for financial dependent adult abuse, even though psychiatrist did not personally interview vendor, and even if psychiatrist formed his opinion before obtaining vendor's medical records, where psychiatrist read all three volumes of vendor's deposition testimony, viewed more than 15 hours of vendor's videotaped deposition testimony, and read vendor's expert's trial testimony in its entirety. West's Ann.Cal.Evid.Code § 801(a); West's Ann.Cal.Welf. & Inst.Code § 15610.30.

See Cal. Jur. 3d, Evidence, § 621; Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2010) ¶ 8:646 (CACIVEV Ch. 8C-H); 1 Witkin, Cal. Evidence (4th ed. 2000) Opinion Evidence, § 31.

[5] **Appeal and Error**
Particular types of evidence

Trial court's error in excluding psychiatrist's expert testimony that vendor of residence in leaseback transaction did not suffer from mental retardation was prejudicial to broker and purchaser in vendor's action for financial dependent adult abuse, where vendor's theory of the case was that broker and purchaser took advantage of vendor's "disabilities in gaining her trust and inducing her to enter into the transaction which deprived her of her home," and the exclusion of psychiatrist's expert opinion that vendor had normal intelligence eviscerated the defense case and left the jury with uncontroverted expert testimony that vendor was mentally retarded. West's Ann.Cal.Evid.Code §§ 354, 801(a); West's Ann.Cal.Welf. & Inst.Code § 15610.30.

Attorneys and Law Firms

****230** Klapach & Klapach and Joseph S. Klapach for Defendants and Appellants.

Law Offices of Armen M. Tashjian and Armen M. Tashjian, Los Angeles, for Plaintiff and Respondent.

Opinion

KLEIN, P.J.

***1104** Defendants and appellants Reginald Mason (Reginald) and Shante Mason (Shante)[1] (collectively, the Masons) appeal a $700,000 judgment in favor of plaintiff and respondent Kelley Angela Bell (Bell) following a jury trial, as well as a postjudgment order awarding Bell $204,500 in attorney fees.

Bell sold her house to Shante for $130,000. Bell then sued the Masons alleging she "suffers from mental retardation"[2] and that the Masons "took advantage of plaintiff's disabilities in gaining her ****231** trust and inducing her to enter into the transaction which deprived her of her home."

The defense theory is that Bell is of normal intelligence and that she knowingly entered into an arm's length transaction with Shante for the sale of her property. At trial, the defense sought to call Dr. Samuel Black (Black) as an expert psychiatric witness to testify Bell is not mentally retarded and that she in fact has average intelligence. The trial court ruled Black could not testify regarding Bell's mental retardation or lack thereof. Although Black had reviewed, inter alia, Bell's medical records and had viewed in excess of 15 hours of her videotaped deposition, the trial court ruled that because Black had not met or personally examined Bell, the defense had failed to lay a sufficient foundation for Black to testify as to Bell's IQ or mental retardation.

In the published portion of this opinion, we conclude a sufficient foundation was shown for Black's testimony; the mere fact Black had not personally examined Bell did not preclude him from testifying as to her mental capacity. Reversal is required because the trial court's ruling amounted to prejudicial evidentiary error which eviscerated the defense case and left the jury with the plaintiff's uncontroverted expert testimony that Bell is mentally retarded. (Evid.Code, § 354.)

In the unpublished portion of the opinion, we conclude that irrespective of the trial court's erroneous evidentiary rulings which inured to Bell's benefit, Bell failed to present substantial evidence to support her claims of fraud, intentional infliction of emotional distress,

dependent adult abuse and conspiracy. Therefore, the trial court's evidentiary errors do not require this matter to be remanded for a new trial. Instead, we reverse and remand to the trial court with directions to enter judgment in favor of the Masons.

*1105 FACTUAL AND PROCEDURAL BACKGROUND

1. *Overview.*[3]

a. *Bell's acquisition and encumbering of the subject real property.*

John Williams and Asa Williams (the godparents) were an elderly childless couple who frequently took care of Bell when she was a child. Bell went to the library and read about grant deeds and how to transfer real estate. On or about September 2, 2003, title to the Williamses' real property located on 4th Avenue in Los Angeles (the property) purportedly was transferred by grant deed to Bell as a gift. At the time, there were no encumbrances on the property.

On September 16, 2003, two weeks after obtaining title to the property, Bell obtained a $65,000 loan on the property from JMJ Financial Group (JMJ), secured by a deed of trust, at a rate of 12 per cent per annum. The interest rate was high because Bell had poor credit.

In October 2003, Bell moved Asa Williams to a convalescent hospital. John Williams, who was in poor health, died in December 2003.

As will be explained in greater detail below, in November 2003, Bell entered into an agreement to sell the property to Shante for $130,000.

**232 b. *Bell's godmother sues Bell to recover title to the property; Bell enters into a settlement agreement with the godmother's conservator, obligating Bell to prosecute the instant lawsuit.*

On April 19, 2004, Asa Williams filed a complaint (the *Williams* action) against Bell, Shante, Vernon Washington and Wendell Bonville (Bonville), seeking to quiet her title to the property and declaratory relief, and alleging causes of action for fraud, civil conspiracy, negligent and intentional infliction of emotional distress. Asa Williams alleged Bell "caused a transfer of title of the PROPERTY by fraudulent means by signing the name of WILLIAMS on said Grant Deed of September 2, 2003. That BELL made said illegal transfer of the PROPERTY for the sole purpose of obtaining a monetary loan in the amount of $62,000.00 and thereby placing a lien against the PROPERTY for said amount."[4]

*1106 Asa Williams subsequently was placed under a conservatorship.

On July 7, 2005, Asa Williams died intestate, without leaving any heirs at law.

[1] On October 12, 2005, Asa Williams's conservator, Harold Johnson (Johnson), entered into a settlement agreement and mutual release with Bell.[5] The settlement agreement did not require any cash outlay by Bell. The settlement agreement noted the existence of claims by Bell against Shante, Bonville and others regarding the subject real property and the refinancing of the property and stated "*Bell agrees to pursue such claims.* [¶] 4. In the event Bell recovers on the Claims set forth in paragraph 3 above, ... Bell agrees to pay Johnson one half of all amounts recovered or the value of all property recovered, less the sum of ... [$11,500.00]." Thus, Bell's prosecution of the instant lawsuit against the Masons was required by the promise Bell made to the conservator in the *Williams* settlement agreement.

2. *The instant lawsuit.*

On January 9, 2007, Bell, by and through a *guardian ad litem,* Ella Bell Gory, filed the operative first amended complaint against the Masons, Bonville, as well as JMJ, Gateway Loans, Inc. (Gateway), and Horizon Escrow, Inc. (Horizon). The complaint sought, inter alia, to quiet title in Bell as the sole owner in fee simple of the subject real property she obtained from the Williamses. Bell alleged she obtained the property by grant deed in September 2003, and that she borrowed $64,000 against the property one month later.

The complaint alleged two distinct acts of wrongdoing.

First, Bell alleged her former boyfriend, Bonville, forged her signature on the net loan proceeds of $51,971 and converted the money to his own use.

Second, Bell alleged she was defrauded in the transaction wherein she sold the property for $130,000 to Shante. "On or about January 22, 2004, plaintiff purportedly sold the 4th Avenue Property to **233 Shante Mason (the 'Sale') *pursuant to the representation that the sale was a mere sham intended to gain the necessary credit rating to furnish funds to repair the premises.*" (Italics added.) However, *instead of treating the sale as a sham,* as had

been agreed, defendants treated the sale as real and evicted her from the property in 2006.

***1107** Bell pled the various defendants "relied on their knowledge that plaintiff suffers from mental retardation"[6] and "took advantage of plaintiff's disabilities in gaining her trust and inducing her to enter into the transaction which deprived her of her home."

Based on these allegations, Bell asserted claims for fraud and deceit, conversion by Bonville of the $51,971 loan proceeds, financial dependent adult abuse (Welf. & Inst.Code, § 15600 et seq., § 15610.30), breach of fiduciary duty, intentional infliction of emotional distress, conspiracy, negligence and common count for monies received. Bell sought damages, quiet title, imposition of a constructive trust and an accounting.

Prior to trial, JMJ, Gateway and Horizon were dismissed from the case, and the trial court granted summary adjudication in favor of the Masons on Bell's quiet title claim. The trial court struck Bonville's answer as a discovery sanction and entered Bonville's default. Thus, the sole claims in issue are Bell's claims against the Masons arising out of her sale of her property to Shante.

3. *Trial testimony.*

[2] In determining whether the trial court committed prejudicial evidentiary error in excluding certain defense evidence (Evid.Code, § 354), the inquiry is whether "it appears reasonably probable that were it not for the trial court's incorrect evidentiary rulings, a result more favorable to [appellant] could have been obtained. [Citation]." (*Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011, 1040, 81 Cal.Rptr.3d 756.) We summarize the evidence mindful of this standard.

a. *Plaintiff's case.*[7]

Under Bell's theory of the case, the parties had agreed to treat the $130,000 sale of the property to Shante as "a mere sham" and that Bell ***1108** "would continue in reality to own the 4th Avenue Property." However, the Masons breached the agreement by treating the sham sale as a valid conveyance and evicting her from the premises. Thus, under Bell's theory, Shante's payment to her of $130,000, to enable Bell to remain in her home, was essentially a gift from a generous stranger. (Bell and Shante had never met.) If Bell's version of the agreement were believed, ****234** she was entitled to remain in the house rent-free as the purported actual owner.

(1) *Direct examination of plaintiff's expert.*

To establish her mental incapacity, Bell presented the expert testimony of Dr. Catherine Scarf, a practicing psychologist. Scarf testified she had administered various performance and verbal tests to Bell, which disclosed Bell's IQ is 62, placing her in the bottom one percentile. Scarf opined Bell is incapable of entering into contracts.

Scarf explained that in diagnosing mental retardation, according to the DSM Manual, "which is what you use to diagnose mental retardation, mental retardation has to be established prior to the age of 18." Here, Scarf evaluated Bell at *age 37,* at which time Bell was first diagnosed with mental retardation, but Scarf opined Bell's history over the years indicated mental retardation.

(2) *Cross-examination of Scarf.*

Cross-examination disclosed Scarf evaluated Bell at the request of Bell's attorney, Armen Tashjian (Tashjian) (Bell's trial and appellate counsel). Cross-examination revealed the circumstances under which Scarf came to evaluate Bell. The trial court admitted into evidence Exhibit 423, a letter from Tashjian to Germany that went into Bell's file. The letter stated in pertinent part: "*I wish to explain briefly why Kelley Bell has an urgent need for evaluation by a psychiatrist or licensed psychologist who has practiced for at least five years.* Ms. Bell is represented by this law firm in the above-referenced litigation. This lawsuit involves individuals who use deceptive tactics to take away Ms. Bell's residence, effectively rendering her homeless for several months. She seeks compensation for her damages." (Italics added.)

Thus, on August 18, 2006, Tashjian referred Bell to Scarf to obtain a capacity declaration for the court to determine whether a conservator should be appointed for Bell.[8] Bell came to Scarf's office on August 24, 2006, ***1109** accompanied by Donetta Germany, who gave Scarf information regarding Bell's adaptive functioning.

[3] Scarf admitted intelligence tests can be "faked out" by performing below one's ability. However, Scarf asserted "you can't fake me out" because she looks at other data besides test scores. However, Scarf stated she was not familiar with what is tested on a GED examination, and therefore could not address the impact of Bell's completion of a GED on her assessment.[9] Scarf also was unaware that Bell has a driver's license. Scarf did not look at Bell's high school records. She did not inquire about Bell's employment history. She did not look at any

retainer agreement between Bell and Tashjian. She did not ****235** read the transcript of Bell's deposition or view the videotape of Bell's deposition to assess Bell's intellectual capacity. Scarf did not know whether Bell was capable of doing research at the library, and did not inquire of Bell as to her real estate knowledge or experience.

Scarf stated she ordinarily checks different sources to confirm whether what she was being told was accurate. In this case, however, Scarf did not consult with anyone other than Tashjian's office and Donetta Germany, who accompanied Bell to Scarf's office.

b. ***Defense case.***

As will be discussed below, in the Discussion section, the trial court precluded the defense expert, Black, a highly qualified licensed psychiatrist, from testifying "as to IQ or retardation of Ms. Bell," stating "I do not believe there's been a sufficient foundation laid for that," in that Black had not personally evaluated Bell. The trial court limited Black's testimony to depression and personality disorder. As a consequence, the jury was left with Scarf's uncontroverted expert testimony that Bell has an IQ of 62.

The defense theory of the case was that Bell lied about being a helpless person who was taken advantage of, that Bell improperly acquired the property from her godparents, immediately extracted as much equity as she could, given her poor credit, and then sold the property to Shante in order to extract additional money from the property. The defense contended Bell ***1110** knowingly entered into an arms-length transaction with Shante for the sale of the property, and the sale price was fair in light of prevailing market conditions as well as the dilapidated condition of the property. Specifically, there was a gaping hole in the bathroom floor, the subfloor had rotted out, the heating and plumbing systems were inadequate, the garage was falling down, the siding was dilapidated, and the house was slightly off its foundation.

Of the $130,000 purchase price,[10] Bell received a check in the amount of the $21,114 in net proceeds. The remainder was disbursed as follows: $65,000 went to repay Bell's prior loan from JMJ; $8,500 went for repairs to the property; $1,300 went to pay a one-percent broker's commission to Reginald; about $6,500 went to pay closing costs, title charges and escrow fees; and $27,500 went to an entity owned by Reginald to be held back as a security deposit for Bell's tenancy, allegedly representing two years of future rent.

c. ***Verdict.***

The jury returned special verdicts, finding, inter alia: there was a conspiracy between Bonville and the Masons to defraud Bell; Reginald made a false representation of fact to Bell,[11] upon which she reasonably relied; and Bell was a dependent adult at the time of the conduct. As against the Masons, the jury awarded Bell $200,000 for past economic loss, $100,000 for past noneconomic loss, and $100,000 for future noneconomic loss. In addition, Reginald and Shante were ordered to pay Bell punitive damages in the sums of $200,000 and $100,000, respectively. Thus, Bell was awarded a total of $700,000 in damages.

d. ***Motion for new trial.***

The Masons brought a motion for new trial, raising numerous grounds including ****236** abuse of discretion by the trial court in its evidentiary rulings, and juror misconduct, based on concealment by two jurors of their personal experience with mental disabilities.

On May 19, 2009, the trial court denied the motion for new trial.

On May 26, 2009, the Masons filed a timely notice of appeal from the judgment.

1111 e.** ***Attorney fees.

On June 22, 2009, Bell moved for an award of attorney fees in the amount of $409,000, on the ground she had prevailed on her claim under the Elder Abuse and Dependent Adult Civil Protection Act, and therefore was entitled to statutory attorney fees under Welfare and Institutions Code section 15657.5, subdivision (a).

On July 23, 2009, the trial court awarded a total of $204,500 in attorney fees, including $167,100 to Tashjian.

On September 1, 2009, the Masons filed a timely notice of appeal from the postjudgment order for attorney fees.

CONTENTIONS

The Masons contend: the trial court erred in excluding evidence relating to critical issues in the case and thereby prevented the defense from presenting its theory of the case; the trial court erred in admitting certain evidence; Bell failed to present sufficient evidence to support her claims of conspiracy, fraud, dependent person abuse, and intentional infliction of emotional distress; the trial court erred in refusing to grant a new trial based upon juror misconduct; the judgment should be reversed due to cumulative error; and the attorney fee award to Bell should be vacated.

DISCUSSION

1. *Trial court committed prejudicial evidentiary error in precluding defense expert Black from testifying that Bell is not mentally retarded.*

a. *Proceedings.*

At trial, the defense sought to call Black as an expert psychiatric witness to testify Bell does not suffer from mental retardation and that in fact she has average intelligence. The trial court conducted a hearing outside the presence of the jury to determine the admissibility of this testimony.

The record reflects Black has solid credentials. He is a licensed psychiatrist with 38 years of experience. He is on the teaching faculty at UCLA Medical School. Further, Black read Scarf's trial testimony in its entirety and reviewed the records that Scarf produced which Scarf testified were the basis for her opinion. In addition, Black read all three volumes of Bell's deposition testimony and viewed in excess of 15 hours of her videotaped deposition testimony.

***1112** Black explained that psychiatrists commonly offer opinions based on information acquired through means other than personal examination of a patient. Black also explained that IQ testing is just one way to gain information about a patient, but IQ tests are not normally used in litigation because the person being tested is capable of skewing the results. Also, "there's a very strong feeling in psychology that in the minority population, giving the IQ tests that are available [is] not an accurate indication of the IQ of the minority groups" because the tests are culturally biased in favor of the white middle class population.

Black offered examples from his review of Bell's deposition that helped him form his opinion that Bell is not mentally retarded. ****237** Black cited Bell's ability to read rapidly and clearly from the escrow instructions, and that she remembered her credit union account number.
[4] The trial court ruled Black could not testify regarding Bell's mental retardation or lack thereof. The trial court was not concerned with Black's training or qualifications. The trial court's sole concern was that Black had not met or personally examined Bell, and therefore the defense had failed to lay a sufficient foundation for Black to testify as to Bell's IQ or mental retardation.[12]

b. *Exclusion of Black's opinion re mental retardation was erroneous; the fact Black did not personally examine Bell did not affect the admissibility of the evidence but merely went to the weight of his testimony.*

Evidence Code section 801 provides: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and [¶] (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, *that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates,* unless an expert is precluded by law from using such matter as a basis for his opinion." (Italics added.)

The trial court's stated reliance on *People v. Bassett* (1968) 69 Cal.2d 122, 70 Cal.Rptr. 193, 443 P.2d 777, a death penalty case, was misplaced. In *Bassett,* the issue presented was whether the testimony of two prosecution ***1113** experts, neither of whom had examined the defendant in person and who testified on the basis of a lengthy hypothetical question posed by the prosecutor (*id.* at p. 140, 70 Cal.Rptr. 193, 443 P.2d 777), could "be deemed 'substantial' evidence to support the implied finding of defendant's mental capacity on the guilt phase of [the] trial." (*Id.,* at p. 146, 70 Cal.Rptr. 193, 443 P.2d 777.) Although said expert testimony did not constitute substantial evidence, *Bassett* added: "*We do not imply, of course, that the testimony in question was inadmissible. Assuming the necessary minimum acquaintance with the case in which he is called to testify, 'the extent of an expert's knowledge goes to the weight of his testimony,*

rather than to its admissibility' (*Estate of Schluttig* (1950) 36 Cal.2d 416, 424 [224 P.2d 695]). And this rule has recently been applied to the sanity testimony of a psychiatrist who was not permitted to conduct a personal examination of the defendant. (*People v. Brekke* (1967) 250 Cal.App.2d 651, 661–662 [58 Cal.Rptr. 854].)" (*Bassett, supra,* 69 Cal.2d at p. 146, fn. 22, 70 Cal.Rptr. 193, 443 P.2d 777, italics added; accord *People v. Phillips* (1981) 122 Cal.App.3d 69, 85, 175 Cal.Rptr. 703 ["the fact that Dr. Blinder's testimony was based in large measure upon reports by others rather than upon his personal observations of the defendant or of other persons displaying that syndrome *may affect the weight of his testimony but does not render that testimony inadmissible* if those reports meet the standard of reasonable reliability"], italics added.)

****238** Here, Black had more than the "necessary minimum acquaintance with the case in which he [was] called to testify." (*Bassett, supra,* 69 Cal.2d at p. 146, fn. 22, 70 Cal.Rptr. 193, 443 P.2d 777.) As noted, Black read Scarf's trial testimony in its entirety and he reviewed the records that Scarf produced which Scarf testified were the basis for her opinion. In addition, Black read all three volumes of Bell's deposition testimony and viewed in excess of 15 hours of her videotaped deposition testimony. Therefore, Black established a solid foundation for his testimony. The trial court's exclusion of Black's expert opinion that Bell has normal intelligence was clearly erroneous.13

c. *Erroneous exclusion of Black's testimony was prejudicial.*

[5] As pled in the complaint, Bell's theory of the case is that she "suffers from mental retardation" and that the Masons "took advantage of plaintiff's disabilities in gaining her trust and inducing her to enter into the transaction which deprived her of her home." The exclusion of Black's expert opinion that Bell has normal intelligence eviscerated the defense case and left the jury with uncontroverted expert testimony by Scarf that Bell is mentally retarded. This prejudicial evidentiary error requires reversal of the judgment.

[[ ]]**

***1114 DISPOSITION**

The judgment and the postjudgment attorney fee order are reversed and the matter is remanded to the trial court with directions to enter judgment in favor of the Masons. The Masons shall recover their costs on appeal.

We concur: CROSKEY, and ALDRICH, JJ.

Parallel Citations

194 Cal.App.4th 1102, 11 Cal. Daily Op. Serv. 4976

Footnotes

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for partial publication. The portions of this opinion to be deleted from publication are those portions enclosed within double brackets, [[ ]].

1 We refer to the individual appellants by their first names for purposes of clarity.

2 Although "developmentally delayed" is now the preferred term, the term "mentally retarded" was used in the pleadings and in the testimony at trial. We use the latter term in order to accurately reflect the record.

3 The facts are gleaned from the record, including excerpts from Bell's deposition testimony. Those deposition excerpts, although erroneously excluded by the trial court, were presented below in a defense offer of proof and are part of the record on appeal. Defense counsel's written offers of proof below ensured an adequate record for appellate review.

4 The record is inconsistent with respect to the amount Bell borrowed against the property, whether it was $62,000 or $65,000 or some other amount. The amounts set forth in the opinion are drawn from the record.

5 The trial court granted Bell's motion in limine to exclude evidence relating to the *Williams* litigation, on the ground said evidence was irrelevant. However, this evidence, including the *Williams* complaint and the settlement agreement, was highly relevant, was before the trial court by way of a defense offer of proof, and is germane to the issues raised on appeal.

6 With respect to Bell's intellectual capacity, the record reflects Bell attended high school, dropped out at the beginning of the tenth

grade, attended a 90–day GED program and obtained a GED high school equivalency certificate. Thereafter, Bell attended a junior college for one semester, where she studied child development but did not obtain a certificate. Bell's ambition was to become a teacher. She was able to keep up with the college course work. She dropped out because she had to take care of her father, not because the work was too hard. Bell performed research at the library on real estate transfers and grant deeds, and she is a reader of the Los Angeles Times real estate section. Also, Bell interviewed various lawyers to represent her, she tried to get a sense of their knowledge and experience, and she felt she "could fairly judge and decide who [she] wanted" to represent her.

7 We note that respondent's brief is largely devoid of discussion of the evidence which plaintiff presented to the jury. Instead, the respondent's brief, in its summary of the evidence, cites primarily to plaintiff's pleadings.

8 The capacity declaration completed by Scarf diagnosed Bell with mild mental retardation and depressive order and opined the proposed conservatee lacked the capacity to give informed consent to any form of medical treatment.

9 We take judicial notice of the fact that to pass the GED high school equivalency examination, one must be "able to read, compute, interpret information, and express [one]self in writing on a level comparable to that of 60 percent of graduating high school seniors." (http://www.acenet.edu/Content/NavigationMenu/ged/faq/index.htm#do-to-pass, last visited Apr. 26, 2011; Evid.Code, §§ 452, subd. (h), 459.) Scarf did not explain how someone in the bottom one percentile of human intelligence is capable of performing at the level required to pass the GED examination. Despite the weakness of Scarf's expert testimony, the trial court's exclusion of defense expert testimony left the trier of fact with plaintiff's uncontroverted expert testimony that Bell is mentally retarded.

10 Shante's lender appraised the property at $190,000. Two years later, Shante sold the property for $365,000.

11 This finding is contrary to Bell's deposition testimony that Reginald never said anything that led Bell to believe he intended to defraud her, as discussed *infra.*

12 The trial court's ruling was internally inconsistent and illogical. Although the trial court concluded Black's failure to personally examine Bell precluded Black from opining as to mental retardation, the trial court stated "I will allow the psychiatrist to testify about depression and personality disorder."

13 Bell asserts the trial court properly barred Black from testifying she is not mentally retarded because Black admitted he formed an opinion about her lack of retardation beginning with his review of Bell's deposition, *before* he obtained Bell's medical records. The argument is meritless. The manner in which Black evaluated Bell's mental capacity goes to the weight of Black's opinion, not to whether a proper foundation was shown for Black's expert testimony.

** See footnote *, *ante*.

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54 Cal.4th 1
Supreme Court of California

The PEOPLE, Plaintiff and Respondent,
v.
William Alfred JONES, Defendant and Appellant.

No. S076721. | May 7, 2012.

Synopsis

Background: Defendant was convicted in the Superior Court, Riverside County, No. RIF73193, Robert G. Spitzer, J., of first degree murder of his elderly neighbor and arson, and jury also found true the three special circumstance allegations that the murder took place during the commission of rape, sodomy, and burglary, and defendant was sentenced to death.

Holdings: On automatic appeal, the Supreme Court, Cantil-Sakauye, C.J., held that:
[1] potential juror could be excused for cause based on her death penalty views;
[2] defendant who failed to exhaust peremptory challenges failed to preserve for appeal claim that trial court erred in failing to excuse five jurors for cause;
[3] evidence of defendant's sexual assault on 16-year-old girl was admissible;
[4] any error in giving jury instruction on other bad acts evidence was harmless;
[5] expert opinion that murder victim was sexually assaulted prior to murder, rather than after, was not more prejudicial than probative;
[6] any error in excluding testimony of clinical psychologist describing defendant's personality disorder and the effects of alcohol intoxication on him was harmless error; and
[7] victim impact evidence was not so inflammatory as to divert the jury's attention from its proper role and thus was admissible.

Affirmed; abstract corrected.

West Headnotes (93)

[1] **Jury**
Punishment prescribed for offense

A prospective juror's personal views concerning the death penalty do not necessarily afford a basis for excusing the juror for bias in a capital case.

[2] **Jury**
Punishment prescribed for offense

To achieve the constitutional imperative of impartiality, the law permits a prospective juror to be challenged for cause only if his or her views in favor of or against capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with the court's instructions and the juror's oath. U.S.C.A. Const.Amends. 6, 14; West's Ann.Cal. Const. Art. 1, § 16.

[3] **Jury**
Punishment prescribed for offense

A prospective juror is properly excluded in a capital case if he or she is unable to follow the trial court's instructions and conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate.

[4] **Jury**
Punishment prescribed for offense

The analysis regarding the exclusion of a juror in a capital case is the same whether the claim is the failure to exclude prospective jurors who exhibited a pro-death bias, or wrongful exclusion of prospective jurors who exhibited an anti-death bias.

[5] **Jury**
Trial and determination

During voir dire, jurors commonly supply conflicting or equivocal responses to questions directed at their potential bias or incapacity to serve; when such conflicting or equivocal answers are given, the trial court, through its observation of the juror's demeanor as well as through its evaluation of the juror's verbal responses, is best suited to reach a conclusion regarding the juror's actual state of mind.

[6] **Jury**
Punishment prescribed for offense

There is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity; rather, it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror.

[7] **Criminal Law**
Jury selection

The trial court's finding regarding a potential juror's bias regarding the death penalty may be upheld even in the absence of clear statements from the juror that he or she is impaired, because many veniremen simply cannot be asked enough questions to reach the point where their bias has been made unmistakably clear; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings.

[8] **Jury**
Evidence

When there is ambiguity in the prospective juror's statements regarding the death penalty, the trial court, aided as it undoubtedly is by its assessment of the venireman's demeanor, is entitled to resolve it in favor of the State.

[9] **Criminal Law**
Selection and impaneling

A trial court's determination concerning juror bias is reviewed for abuse of discretion.

[10] **Criminal Law**
Jury selection

Appellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person's responses, noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor, gleans valuable information that simply does not appear on the record; as such, the reviewing court generally must defer to the judge who sees and hears the prospective juror, and who has the definite impression that he is biased, despite a failure to express clear views.

[11] **Criminal Law**
Jury selection

Even when the precise wording of the question asked of the venireman, and the answer he gave, do not by themselves compel the conclusion that

he could not under any circumstance recommend the death penalty, the need to defer to the trial court remains because so much may turn on a potential juror's demeanor.

[12] **Jury**
Punishment prescribed for offense

A prospective juror who is firmly opposed to the death penalty is not necessarily disqualified from serving on a capital jury.

[13] **Jury**
Punishment prescribed for offense

Those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

[14] **Jury**
Punishment prescribed for offense

Potential juror could be excused for cause at capital murder trial, based on her death penalty views; while juror stated in questionnaire that she would not automatically refuse to vote in favor of the death penalty, she stated she was strongly against it, and stated during voir dire that it was "hard to say" whether she would automatically reject the death penalty, and that she did not think she could look the defendant in the face and say "I sentence you to death." U.S.C.A. Const.Amends. 6, 14; West's Ann.Cal. Const. Art. 1, § 16.

[15] **Criminal Law**
Jury selection

Where the court and both counsel subject a potential juror to substantial oral examination, and the court is able to observe the juror during this process, a juror's conflicting or ambiguous answers regarding the death penalty may give rise to the court's definite impression about the juror's qualifications, and its decision to excuse the juror deserves deference on appeal.

[16] **Criminal Law**
Impaneling jury in general

Any error by trial court in excusing prospective alternate juror for cause was not prejudicial at capital murder trial, as no alternate jurors were ever substituted in defendant's case.

[17] **Criminal Law**
Competency of jurors and challenges
Criminal Law
Necessity of specific objection

Counsel must make either a timely objection, or the functional equivalent of an objection, such as a statement of opposition or disagreement, to the excusal of a juror for cause, stating specific grounds, in order to preserve the issue for appeal.

[18] **Criminal Law**
Competency of jurors and challenges
Criminal Law
Overruling challenges to jurors

Capital murder defendant failed to preserve for appeal claim that trial court erred in failing to

excuse five jurors for cause, where defendant did not exhaust his peremptory challenges during jury selection, nor did he communicate to the trial court any dissatisfaction with the jury ultimately impaneled.

[19] **Criminal Law**
Overruling challenges to jurors

As a general rule, a party may not complain on appeal of an allegedly erroneous denial of a challenge for cause because the party need not tolerate having the prospective juror serve on the jury; a litigant retains the power to remove the juror by exercising a peremptory challenge.

[20] **Criminal Law**
Competency of jurors and challenges
Criminal Law
Overruling challenges to jurors

To preserve for appeal a claim that a potential juror should have been dismissed for cause, the court requires that a litigant actually exercise a peremptory challenge and remove the prospective juror in question, that the litigant exhaust all of the peremptory challenges allotted by statute and hold none in reserve, and that counsel express to the trial court dissatisfaction with the jury as presently constituted.

[21] **Criminal Law**
Competency of jurors and challenges

Capital murder defendant failed to object to prosecutor's alleged exercise of peremptory jury challenges to remove jurors who had expressed reservations against the death penalty, and thus forfeited any claim of error regarding such use.

[22] **Jury**
Peremptory challenges

Prosecutor's alleged exercise of all peremptory challenges based on the prospective jurors' views concerning capital punishment did not deny capital murder defendant of his constitutional right to a fair and impartial jury. U.S.C.A. Const.Amends. 6, 14; West's Ann.Cal. Const. Art. 1, § 16.

[23] **Criminal Law**
Relevancy

Although evidence of prior criminal acts generally is inadmissible to show bad character, criminal disposition, or probability of guilt, such evidence may be admissible when relevant to prove some material fact other than the defendant's general disposition to commit such an act. West's Ann.Cal.Evid.Code § 1101(b).

[24] **Criminal Law**
Other Misconduct Showing Motive
Criminal Law
Other Misconduct Showing Intent
Criminal Law
Other Misconduct Showing Identity

That a defendant previously committed a similar crime can be circumstantial evidence tending to prove his identity, intent, and motive in the present crime. West's Ann.Cal.Evid.Code § 1101(b).

[25] **Criminal Law**
Factors Affecting Admissibility

Like other circumstantial evidence, admissibility of other bad acts evidence depends on the materiality of the fact sought to be proved, the tendency of the prior crime to prove the material fact, and the existence vel non of some other rule requiring exclusion. West's Ann.Cal.Evid.Code § 1101(b).

[26] **Criminal Law**
Sex offenses, incest, and prostitution

Evidence code provision allowing for the admissibility of evidence of other sexual offenses in the prosecution for a sexual offense is designed to provide the trier of fact in a sex offense case the opportunity to learn of the defendant's possible disposition to commit sex crimes. West's Ann.Cal.Evid.Code § 1108.

[27] **Criminal Law**
Similarity to Crime Charged

To be admissible to show intent, the uncharged prior conduct and the charged offense need only be sufficiently similar to support the inference that defendant probably harbored the same intent in each instance. West's Ann.Cal.Evid.Code § 1101.

[28] **Criminal Law**
Prejudicial effect and probative value

To be admissible bad acts evidence, the probative value of the proffered evidence must not be substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. West's Ann.Cal.Evid.Code §§ 352, 1101.

1 Cases that cite this headnote

[29] **Criminal Law**
Sex offenses, incest, and prostitution

Evidence of defendant's sexual assault on 16-year-old girl was admissible at capital murder trial to show that defendant had a predisposition to commit special circumstances allegations of rape and sodomy. West's Ann.Cal.Evid.Code § 1108(a).

[30] **Criminal Law**
Sex offenses

Admissibility of evidence of other sexual offenses in the prosecution for a sexual offense does not require that the sex offenses be similar; it is enough the charged offense and the prior crimes are sex offenses as defined by the statute. West's Ann.Cal.Evid.Code § 1101.

[31] **Criminal Law**
Sex offenses, incest, and prostitution
Criminal Law
Sex offenses, incest, and prostitution

Substantial probative value of other crimes evidence of defendant's sexual assault of 16-year-old girl was not outweighed by the likelihood it would prejudice the jury in capital murder trial which included special circumstances allegations of rape and sodomy; evidence was probative of defendant's propensity to commit sexual offenses and to refute the claim that he formed the intent to sexually assault victim only after killing her, girl provided independent source of information, assault had resulted in convictions for forcible

oral copulation and assault with intent to commit rape, crimes were not more serious or inflammatory than the charge that defendant raped, sodomized, paralyzed, viciously beat, and strangled victim to death before setting her house on fire, assault offenses were not too remote in time, and evidence was not cumulative. West's Ann.Cal.Evid.Code §§ 352, 1108(a).

[32] **Criminal Law**
Instruction as to evidence

Any error by trial court in giving jury instruction on other bad acts evidence was harmless at capital murder trial, even if instructions failed to distinguish between offenses introduced for the limited purpose of determining defendant's intent to sexually assault victim and those admitted for the purpose of impeaching defendant's credibility; there was direct and circumstantial evidence strongly supporting the conclusion that, contrary to his denials at trial, defendant's intent upon entering victim's residence was to sexually assault her, and, during closing argument, the prosecution was careful to distinguish between the specific limited purposes for which each prior crime had been admitted. CALJIC 2.50.

[33] **Constitutional Law**
Particular issues and applications
Criminal Law
Instruction as to evidence

Jury instructions at capital murder trial, which failed to distinguish between other bad acts offenses introduced for the limited purpose of determining defendant's intent to sexually assault victim and those admitted for the purpose of impeaching defendant's credibility, did not violate defendant's federal constitutional rights to a fair trial, to present a defense, to due process of law, and to reliable determinations of the issues of guilt and penalty, as instructions did not infect the entire trial. U.S.C.A. Const.Amends. 5, 6, 14; CALJIC 2.50.

[34] **Criminal Law**
Bodily and mental condition

Forensic pathologist was qualified to testify as an expert at capital murder trial as to the timing of sexual assault of victim; expert was a veteran forensic pathologist with extensive experience and familiarity with rape murder cases, and question of whether a victim was raped and sodomized prior to or after dying was a relevant circumstance of death for which a qualified forensic pathologist might offer an opinion in an appropriate case. West's Ann.Cal.Evid.Code § 720.

[35] **Criminal Law**
Competency of witness

The trial court's determination that a witness qualifies as an expert is a matter of discretion that will not be disturbed absent a showing of manifest abuse. West's Ann.Cal.Evid.Code § 720.

[36] **Criminal Law**
Knowledge, Experience, and Skill

The Supreme Court will find error regarding a witness's credentials as an expert only if the evidence shows that a witness clearly lacks qualification as an expert. West's Ann.Cal.Evid.Code § 720.

[37] **Criminal Law**
Bodily and mental condition

A forensic pathologist who has performed an autopsy is generally permitted to offer an expert opinion not only as to the cause and time of death but also as to circumstances under which the fatal injury could or could not have been inflicted. West's Ann.Cal.Evid.Code § 720.

[38] **Criminal Law**
Knowledge, Experience, and Skill

Once an expert witness establishes knowledge of a subject sufficient to permit his or her opinion to be considered by a jury, the question of the degree of the witness's knowledge goes to the weight of the evidence and not its admissibility. West's Ann.Cal.Evid.Code § 720.

[39] **Criminal Law**
Medical testimony in general

Forensic pathologist, when testifying at capital murder trial, could rely on "extrinsic" factors, such as the presence of a foreign object in victim's vagina, the presence of sperm in the rectum, the cause of death as blunt force trauma and strangulation, the circumstances of the crime scene including the position of victim's body, and defendant's statements to law enforcement, when forming opinion concerning the timing of victim's sexual assault. West's Ann.Cal.Evid.Code § 801(b).

[40] **Criminal Law**
Bodily condition

Forensic pathologist's opinion as to timing of victim's sexual assault was the proper subject of expert testimony at capital murder trial, as opinion that rape and sodomy had taken place before victim died provided an informed forensic context that went beyond the jurors' common fund of information and could have assisted the jury in determining defendant's intent and timing in sexually assaulting victim, which was relevant to the special circumstance allegations that the murder took place during the commission of rape, sodomy, and burglary. West's Ann.Cal.Evid.Code § 801.

[41] **Criminal Law**
Matters of common knowledge or observation in general

The jury need not be wholly ignorant of the subject matter of the expert opinion in order for it to be admissible; rather, expert opinion testimony will be excluded only when it would add nothing at all to the jury's common fund of information, or when the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness. West's Ann.Cal.Evid.Code § 801.

[42] **Criminal Law**
Opinion evidence

Capital murder defendant's counsel failed to specifically object to forensic pathologist's expert testimony as to timing of victim's sexual assault on grounds the opinion was more prejudicial than probative, and thus forfeited that contention on appeal. West's Ann.Cal.Evid.Code §§ 352, 720, 801.

[43] **Criminal Law**
Scope and questions raised

An objection that an expert is unqualified to render an opinion is not the equivalent of an objection that the opinion is more prejudicial than probative. West's Ann.Cal.Evid.Code §§ 352, 720, 801.

[44] **Criminal Law**
Bodily condition

Forensic pathologist's expert opinion that murder victim was sexually assaulted prior to murder, rather than after, was not more prejudicial than probative at capital murder trial; opinion was highly relevant to defendant's intent and timing in sexually assaulting victim and to the special circumstance allegations that the murder took place during the commission of rape, sodomy, and burglary, and opinion was the clinical conclusion of a medical expert, not the type of evidence uniquely designed to evoke an emotional or irrational response from jurors, who were instructed not to be influenced by passion, sympathy, or prejudice and to conscientiously consider and weigh the evidence in applying the law. West's Ann.Cal.Evid.Code §§ 352, 720, 801.

[45] **Criminal Law**
Evidence calculated to create prejudice against or sympathy for accused

"Undue prejudice" is that which uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues. West's Ann.Cal.Evid.Code § 352.

[46] **Criminal Law**
Evidence calculated to create prejudice against or sympathy for accused

Evidence is not "unduly prejudicial" under the Evidence Code merely because it strongly implicates a defendant and casts him or her in a bad light, or merely because the defendant contests that evidence and points to allegedly contrary evidence. West's Ann.Cal.Evid.Code § 352.

1 Cases that cite this headnote

[47] **Criminal Law**
Opinion evidence

Any error at capital murder trial in admitting expert forensic pathologist's testimony that victim was sexually assaulted before, rather than after, murder was harmless error in light of ample evidence that defendant entered victim's residence to sexually assault her and thus formed the intent to rape prior to victim's death. West's Ann.Cal.Evid.Code §§ 720, 801; West's Ann.Cal.Penal Code § 187.

[48] **Criminal Law**
After party offering evidence has rested

Capital murder defendant was not entitled to reopen case, after prosecution moved to strike evidence of defendant's hospitalization, to admit testimony of clinical psychologist describing defendant's personality disorder and the effects of alcohol intoxication on him, as testimony was available during trial; defense counsel consulted with psychologist "early on" in the representation, communicated with him throughout the trial, and had received psychologist's report before its last witness testified, yet did not attempt to call him as a witness.

[49] **Criminal Law**
Grounds for motion

Court could strike evidence of capital murder defendant's hospitalization, as that evidence had been admitted in anticipation of testimony from clinical psychologist which never materialized.

[50] **Criminal Law**
Reopening Case for Further Evidence

The decision to reopen a criminal matter to permit the introduction of additional evidence is a matter left to the broad discretion of the trial court.

[51] **Criminal Law**
Reopening Case for Further Evidence

There is no abuse of discretion in refusing to reopen to allow additional evidence where the evidence the defense sought to offer at reopening was indisputably available during the trial.

[52] **Criminal Law**
Opinion evidence

Any error in excluding testimony of clinical psychologist describing defendant's personality disorder and the effects of alcohol intoxication on him was harmless error at guilt phase of capital murder trial; jury, although instructed that it could consider defendant's voluntary intoxication in deciding whether he actually formed the required specific intent to rape and murder, nonetheless reasonably rejected defendant's version of the events in light of the substantial evidence defendant acted based on a preconceived intent to sexually assault victim, proposed testimony was not inconsistent with that conclusion and would not have substantially added to or altered the picture of alcohol-fueled anger that was painted by defendant's own testimony, and, although psychologist testified at the penalty phase, not one juror voted for life imprisonment, which suggested they did not find the testimony persuasive.

See Annot., Voluntary intoxication as defense to homicide (1932) 79 A.L.R. 897; Annot., Modern status of the rules as to voluntary intoxication as defense to criminal charge (1966) 8 A.L.R.3d 1236; 1 Witkin & Epstein. Cal. Criminal Law (3d ed. 2000) Defenses, §§ 28, 29; Cal. Jur. 3d, Criminal Law: Trial, § 342; Cal. Jur. 3d, Criminal Law: Defenses, §§ 64, 66; Cal. Jur. 3d, Criminal Law: Crimes Against the Person. § 122.

[53] **Criminal Law**
Rulings on motion to strike out evidence

Any error by trial court in striking evidence of defendant's mental health commitments as a youth was harmless error at guilt phase of capital murder trial, as, in light of the circumstance that the two occasions were mentioned only briefly by witnesses, occurred when defendant was a teenager, and lasted for short periods, they would have shed little light on defendant's intentions on the night of victim's death.

[54] **Sentencing and Punishment**
Victim impact

Victim impact evidence is relevant and admissible during the penalty phase of a capital murder trial as a circumstance of the crime, so long as it is not so unduly prejudicial that it renders the trial fundamentally unfair. West's Ann.Cal.Penal Code § 190.3(a).

offenses are generally admissible as victim impact evidence. West's Ann.Cal.Penal Code § 190.3(a).

[55] **Sentencing and Punishment**
Victim impact

Evidence about a victim's life that was not known or reasonably foreseeable to the defendant at the time of the murder is admissible as victim impact evidence during the penalty phase of a capital murder trial. West's Ann.Cal.Penal Code § 190.3(a).

[56] **Sentencing and Punishment**
Victim impact
Sentencing and Punishment
Documentary evidence

Victim impact evidence, including testimony from family members and photographs, admitted during penalty phase of capital murder trial was not so inflammatory as to divert the jury's attention from its proper role or invite an irrational, purely subjective response, and thus was admissible; testimony involved recollections of past incidents or activities that family members shared with victim and the impact of her murder, photographs of ordinary family events were factual, relevant, and not unduly emotional or sentimental, and served to "humanize" the victim, and evidence was not particularly voluminous and was not emphasized by the prosecutor. West's Ann.Cal.Penal Code § 190.3(a).

[57] **Sentencing and Punishment**
Victim impact
Sentencing and Punishment
Documentary evidence

Although emotion must not reign over reason at the penalty phase of a capital murder trial, photographs of the victims of the charged

[58] **Sentencing and Punishment**
Victim impact

Prior stabbing victim's testimony regarding her mental state following stabbing by capital murder defendant years before murder was admissible as victim impact evidence at penalty phase of murder trial; testimony, which consumed fewer than three pages and indicated simply that victim was unable to continue working as a teacher after the stabbing and remained under psychiatric treatment some 25 years later, was not the type of evidence that would evoke an irrational emotional response from the jury. West's Ann.Cal.Penal Code § 190.3(b).

[59] **Sentencing and Punishment**
Instructions

Proposed jury instruction during penalty phase of capital murder trial, which would have informed the jurors their duty was not merely to find facts, but more importantly was "to render an individualized determination about the penalty appropriate for the particular defendant" regarding "whether he should live or die" was duplicative of given instructions and thus was unnecessary.

[60] **Sentencing and Punishment**
Instructions

Proposed jury instruction at sentencing phase of capital murder trial which would have informed the jurors that "they were free to vote for life

based solely on mercy" was duplicative of given instruction which allowed jury "to consider, take into account, and be guided by any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death," and thus was unnecessary. CALJIC No. 8.85; West's Ann.Cal.Penal Code § 190.3(k).

[61] **Sentencing and Punishment**
Instructions

Proposed special jury instructions at penalty phase of capital murder trial which would have prohibited the jury from considering as aggravating evidence the facts supporting the murder conviction and the special circumstance findings, unless those facts established "something in addition" to the elements of the crime or the special circumstance, were unnecessary and were duplicative of given instructions, including instruction that "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself," and thus were unwarranted. West's Ann.Cal.Penal Code § 190.3(a); CALJIC 8.88.

[62] **Sentencing and Punishment**
Instructions

Trial court should have admonished jury, upon request at sentencing phase of capital murder trial, that it could not "double count" the facts underlying a special circumstance in the course of the penalty weighing process. West's Ann.Cal.Penal Code § 190.3(a); CALJIC 8.85.

[63] **Sentencing and Punishment**
Harmless and reversible error

Trial court's failure to admonish jury, upon request at sentencing phase of capital murder trial, that it could not "double count" the facts underlying a special circumstance in the course of the penalty weighing process did not warrant reversal of death sentence in the absence of any misleading argument by the prosecutor. West's Ann.Cal.Penal Code § 190.3(a); CALJIC 8.85.

[64] **Sentencing and Punishment**
Instructions

Jury instruction at penalty phase of capital murder trial, which informed jurors that "To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without the possibility of parole" adequately highlights the significant burden that must be satisfied before a verdict of death may be returned and conveys that life in prison without the possibility of parole is the appropriate punishment if this burden is not met, and thus is not deficient due to failure to instruct the jury that it is required to return a verdict of life without the possibility of parole if it determines that even a single mitigating factor, standing alone, outweighs any number of aggravating factors. West's Ann.Cal.Penal Code § 190.3; CALCJIC 8.88.

[65] **Sentencing and Punishment**
Instructions

Defendant was not entitled to special instructions during penalty phase of capital murder trial which would have informed jurors that one mitigating factor, standing alone, may be sufficient to support a sentence of life without the possibility of parole, as standard jury instructions, including instruction that a

mitigating factor may be "any fact, condition, or event" and that jurors could assign to each factor any moral or sympathetic value they deem appropriate were adequate to inform the jurors of their sentencing responsibilities. CALJIC 8.88.

[66] Sentencing and Punishment
Instructions

A trial court may properly refuse as argumentative a jury instruction during the penalty phase of a capital murder trial that one mitigating factor may be sufficient for the jury to return a verdict of life imprisonment without possibility of parole.

[67] Sentencing and Punishment
Instructions

Defendant was not entitled to special instructions during penalty phase of capital murder trial which would have advised the jury that death is the most severe penalty the law can impose, as the penalty trial itself and the jury instructions given, including that each juror "must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole," made clear that the state viewed death as the most extreme penalty. CALJIC 8.88.

[68] Sentencing and Punishment
Instructions

Defendant was not entitled to pinpoint jury instruction during penalty phase of capital murder trial which would have informed the jury that it must "weigh, consider, take into account and be guided by" a three-and-one-half page, single-spaced list of some 45 mitigating scenarios; instruction in large part simply recited facts favorable to defendant and encouraged the jury to speculate in areas for which no evidence was presented, and some aspects of the instruction were covered by other instructions given to the jury. CALJIC 8.85.

[69] Sentencing and Punishment
Instructions

Although instructions pinpointing the theory of the defense might be appropriate during the penalty phase of a capital murder trial, a defendant is not entitled to instructions that simply recite facts favorable to him.

[70] Criminal Law
Instructions Already Given

A trial court is not required to give pinpoint jury instructions that merely duplicate other instructions.

[71] Sentencing and Punishment
Instructions

Proposed special jury instruction at penalty phase of capital murder trial which addressed the "unlimited" breadth of mitigating evidence were duplicative of other instructions given and thus were unnecessary. West's Ann.Cal.Penal Code § 190.3(k); CALJIC 8.85(k), 8.88.

[72] Sentencing and Punishment

Instructions

Proposed special jury instructions, at penalty phase of capital murder trial, which would have directed the jury to consider all evidence in mitigation from whatever source, instructed that emotions such as mercy, sympathy, empathy, or compassion were legitimate mitigation factors for the jury's consideration, and directed jury to consider defendant's demeanor at trial, were duplicative of given instructions and thus were unnecessary. West's Ann.Cal.Penal Code § 190.3(k); CALJIC 8.85(k), 8.88.

[73] **Sentencing and Punishment**
Instructions

Defendant was not entitled to special jury instruction during penalty phase of capital murder trial that would have directed the jury that it could consider, as a mitigating factor, any lingering doubt it had concerning the question of defendant's guilt. West's Ann.Cal.Penal Code § 190.3(k); CALJIC 8.85.

[74] **Sentencing and Punishment**
Instructions

Although it is proper for the jury to consider lingering doubt during the penalty phase of a capital trial, there is no requirement, under federal or state law, that the jury specifically be instructed that it may do so, even if such an instruction is requested by the defendant.

[75] **Constitutional Law**
Matters Considered
Sentencing and Punishment
Aggravating or mitigating circumstances

Death penalty statute is not impermissibly overbroad in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, as the various special circumstances are not so numerous as to fail to perform the constitutionally required narrowing function, and the special circumstances are not unduly expansive, either on their face or as interpreted. U.S.C.A. Const.Amends. 5, 6, 8, 14; West's Ann.Cal.Penal Code § 190.2.

[76] **Sentencing and Punishment**
Aggravating or mitigating circumstances

Death penalty sentencing factor regarding the circumstances of the crime does not, on its face or as interpreted and applied, permit the arbitrary and capricious or wanton and freakish imposition of a sentence of death in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. U.S.C.A. Const.Amends. 5, 6, 8, 14; West's Ann.Cal.Penal Code § 190.3(a).

[77] **Sentencing and Punishment**
Degree of proof
Sentencing and Punishment
Unanimity

Neither the federal nor the state Constitution requires that the penalty phase jury make unanimous findings concerning the particular aggravating circumstances, find all aggravating factors beyond a reasonable doubt, or find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors.

[78] **Sentencing and Punishment**
Procedure

The death penalty scheme is not unconstitutional because it fails to allocate the burden of proof, or establish a standard of proof, for finding the existence of an aggravating factor, as, unlike the guilt determination, the sentencing function is inherently moral and normative, not factual, and, hence, not susceptible to a burden-of-proof quantification.

[79] **Sentencing and Punishment**
Instructions

Trial court was not required to instruct the jury at penalty phase of capital murder trial that neither party bears a burden of proof at that phase of the trial.

[80] **Sentencing and Punishment**
Instructions

Except for prior violent crimes evidence and prior felony convictions, the court need not instruct the jury at the penalty phase of a capital murder trial regarding a burden of proof, or instruct the jury that there is no burden of proof at the penalty phase. West's Ann.Cal.Penal Code § 190.3(b, c).

[81] **Sentencing and Punishment**
Necessity and purpose

Written or other specific findings by the jury regarding the aggravating factors are not constitutionally required at the penalty phase of a capital murder trial.

[82] **Sentencing and Punishment**
Review

There is no constitutional requirement that California's death penalty sentencing scheme provide for intercase proportionality review.

[83] **Sentencing and Punishment**
Unadjudicated conduct

Allowing consideration of unadjudicated criminal activity when considering a death sentence is not unconstitutional and does not render a death sentence unreliable. West's Ann.Cal.Penal Code § 190.3(b).

[84] **Sentencing and Punishment**
Aggravating or mitigating circumstances

The use of adjectives such as "extreme" and "substantial" in death penalty statute does not serve as an improper barrier to the consideration of mitigating evidence. West's Ann.Cal.Penal Code § 190.3.

[85] **Sentencing and Punishment**
Instructions

Trial court was not required to instruct the jury at penalty phase of capital murder trial as to which of the listed sentencing factors are aggravating, which are mitigating, and which could be either mitigating or aggravating, depending upon the jury's appraisal of the evidence. West's Ann.Cal.Penal Code § 190.3.

[86] **Sentencing and Punishment**
Instructions

The statutory instruction to the jury at the penalty phase of a capital murder trial to consider 'whether or not' certain mitigating factors were present does not unconstitutionally suggest that the absence of such factors amounts to aggravation. West's Ann.Cal.Penal Code § 190.3.

[87] **Sentencing and Punishment**
Procedure

Because capital defendants are not similarly situated to noncapital defendants, California does not deny capital defendants equal protection by providing certain procedural protections to noncapital defendants that are not provided to capital defendants. U.S.C.A. Const.Amend. 14.

[88] **Sentencing and Punishment**
Scope of review

Supreme Court would decline to consider whether imposition of death penalty in violation of state and federal constitutional and statutory requirements would violate international law, as defendant's death sentence for capital murder did not violate those requirements.

[89] **Sentencing and Punishment**
The Death Penalty

International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements.

[90] **Sentencing and Punishment**
Death penalty as cruel or unusual punishment

The use of capital punishment does not violate international norms of humanity and decency and hence does not violate the Eighth Amendment of the United States Constitution; death penalty is available only for the crime of first degree murder, and only when a special circumstance is found true, and administration of the penalty is governed by constitutional and statutory provisions different from those applying to "regular punishment." U.S.C.A. Const.Amend. 8.

[91] **Criminal Law**
Sentence or Punishment

Correction of abstract of judgment was required to reflect the actual sentence of 25 years to life, plus an additional five years, imposed by the trial court for arson count.

[92] **Criminal Law**
Entry and Record of Judgment
Criminal Law
Contradiction of, or conflict in, record

An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize.

[93] **Criminal Law**

Sentence or Punishment

When an abstract of judgment does not reflect the actual sentence imposed in the trial judge's verbal pronouncement, the appellate court has the inherent power to correct such clerical error on appeal, whether on its own motion or upon application of the parties.

Attorneys and Law Firms

***394** Kimberly J. Grove, under appointment by the Supreme Court, for Defendant and Appellant.

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Opinion

CANTIL–SAKAUYE, C.J.

505 *10 A Riverside County jury convicted defendant William Alfred Jones of the first degree murder of his elderly neighbor Ruth Eddings (Pen.Code, §§ 187, subd. (a), 189),[1] and further **506** found true the three special circumstance allegations that the murder took place during the commission of rape, sodomy, and burglary (§ 190.2, subd. (a) (17)). The jury additionally convicted defendant of the arson of Eddings's home (§ 451, subd. (b)), and also found true various sentencing enhancement allegations—that defendant had two prior "strikes" (§§ 667, subds. (c) & (e), 1170.12, subd. (c)), had two prior serious felony convictions (§ 667, subd. (a)), and had served a prior prison term (§ 677.5, subd. (b)). Following the penalty phase of the ***395** trial, the jury returned a verdict of death. After conducting an automatic review and declining defendant's request to modify the jury's verdict (§ 190.4, subd. (e)), the trial court sentenced defendant to death for the first degree murder count, and also imposed an indeterminate term of 25 years to life, with an additional determinate term of five years, for the arson count. This appeal is automatic. (§ 1239, subd. (b).)

We affirm the judgment in its entirety, and order that the abstract of judgment be corrected to conform to the trial court's oral pronouncement as to the judgment on the arson count.

I. FACTS

A. The Guilt Phase

During the early morning hours of June 19, 1996, a fire was reported at the mobilehome residence of Ruth Eddings. After the fire was extinguished, her nude body was discovered lying facedown on the living room floor. An *11 autopsy revealed that she had died before the fire started as the result of injuries consistent with blunt force trauma and strangulation.

Defendant, who lived with his parents in a mobilehome next door to Eddings, became the focus of the police investigation almost immediately. He was interviewed at home that morning and afternoon, and then interviewed at the police station later that evening and the following day. During the course of the questioning, defendant admitted responsibility for the fire and for Eddings's death. He also admitted to having sexual intercourse with Eddings and to ejaculating between her legs, although he was unsure if actual penetration occurred.

Because defendant admitted that he killed Eddings and set her residence on fire to conceal the death, the central issue for the jury to resolve at trial related to intent. The prosecution's theory of the case was that defendant committed burglary by entering the residence with the intent to sexually assault Eddings, and that he killed Eddings during the commission of rape and sodomy, or during an attempt to commit these crimes. The defense's theory was that defendant went to Eddings's home simply "to make sure she was not hurt, or anything," that he was intoxicated at the time, and that her death resulted from defendant accidentally falling on Eddings. The defense maintained that defendant had no intention of killing or having sexual contact with Eddings when he went to her home, and that if any sexual assault occurred, it occurred postmortem.

1. The prosecution's case-in-chief

(a) The murder and arson

At the time of her death, Ruth Eddings stood four feet 11

inches tall, weighed 90 pounds, and was 81 years of age. She lived in Riverside County in a mobilehome next to defendant's parents, Mina and Bill Jones, with whom she had had a friendly relationship for almost 20 years. By defendant's own account, Eddings was "a nice person" who had treated defendant well, including paying him to do small jobs around her house.

At the time of the murder, defendant stood almost six feet tall, weighed approximately 200 pounds, and was 39 years of age. He had been living with his parents for a year and a half following his release on parole after serving more than four years in prison for two felony convictions for sexual assault on a minor. On the day of Eddings's death, defendant was home alone, as his parents recently had left on their first vacation since defendant moved in with them.

***396** Riverside County Sheriff's Deputy Philip Matheny testified that he was on duty as a patrol officer in the early morning hours of June 19 when, at **12** approximately 4:40 a.m., he ****507** was instructed to assist fire department personnel responding to a structure fire with possible people inside. After the fire was extinguished, investigators inspected the structure—a single-wide mobilehome trailer with attached outbuildings—and determined that the fire, which involved only the rear portion of the residence, had been started using accelerant in the living room and inside the front door. A Camel cigarettes book of matches was found in the driveway, and the label of a Blitz brand gasoline container was lying in defendant's parents' yard near the chain-link fence that ran between the two properties. Eddings's badly burned body was discovered inside the trailer. She was unclothed, lying facedown with her legs spread apart and her head pointing away from the front door.

(b) Defendant's statements to law enforcement officers

Deputy Matheny testified that he made contact with defendant on the morning of the fire. Defendant told Deputy Matheny that he was staying with his parents, although they were in the State of Washington at the time, and that defendant had been sleeping when a young lady pounded on the window of his mobilehome, telling him there was a fire next door and requesting that he call the fire department.

Later that afternoon, defendant was interviewed at his parents' mobilehome by Riverside County Sheriff's Detective Eric Spidle. Donald Jones, defendant's brother, and Deputy District Attorney Patricia Erickson2 were present during the interview, which lasted approximately two and one-half hours and took place while they sat at the kitchen table or walked around outside. Detective Spidle testified that when he asked defendant for matches, defendant handed him a matchbook with advertising for Camel cigarettes on the cover—the same advertising Detective Spidle had seen on the cover of the matches found earlier in Eddings's driveway. Another, similar book of matches later was found in defendant's bedroom closet. Also found on defendant's parents' property was a Blitz brand gasoline container—the same brand as the gasoline container label found earlier in their yard near the fence bordering Eddings's property. Detective Spidle also observed a "fresh" scratch on the side of defendant's face.

At the conclusion of the interview, Detective Spidle asked whether defendant would be willing to accompany him to the police station. Defendant agreed, and Detective Spidle drove him to the Riverside police station, arriving at approximately 4:00 p.m. Defendant waited in the reception area for half an hour until the deputy district attorney arrived, after which defendant was taken into a room with detectives and the deputy district **13** attorney, and was advised of his rights to counsel and to remain silent. Defendant signed a written waiver of those rights, and Detective Spidle began to interview him.3 Over the course of the session, the detectives offered defendant food, and gave him coffee, soda, and cigarettes. Defendant's demeanor varied from cooperative and inquisitive, to confused, nervous, and argumentative, and, in the detectives' opinion, he ***397** exhibited nonverbal signs of deception. Scratches on defendant's face, arms, hands, abdomen, hips, upper thigh, and legs were photographed, and the photographs were introduced as exhibits at trial.

At Detective Spidle's prompting, defendant detailed his activities prior to the fire. He explained that he had arrived home from work at approximately 6:00 p.m., and then went to a neighbor's house for about half an hour. Afterward, he drove to the store and purchased a 12–pack of beer and some groceries. When he returned home, he "cranked up the radio and just sat down and relaxed and drank a couple of beers." At approximately 8:00 or 8:30 p.m., defendant went outside to wash his hands with gasoline in order to remove construction adhesive. He brought the gas can back to the house in ****508** case he needed it for his rototiller the following day.

Detective Spidle suggested defendant might have "drank too much" and "accidentally" started the fire, a claim defendant repeatedly denied, saying, "I would not hurt that woman." He claimed he had "no problem" with

Eddings, that he "liked that lady," and that she had "always been sweet" to him. Defendant at first denied ever going over to Eddings's house the previous night, but when questioned regarding the gasoline, he suddenly "remembered" going over to "check on" Eddings at approximately 9:00 p.m., after noticing she had not taken the newspaper he had left for her on their common fence. Defendant said he knocked on Eddings's door and asked, "Are you alright?" and Eddings "yelled out ... that she was in the tub." Defendant revised this story almost immediately, claiming instead that he walked over with a beer, jumped the fence, knocked on Eddings's door, said, "Ruth, it's me," but failed to get a response, then tried to open the door and found it locked, so he returned home. He insisted, however, that he did not enter Eddings's residence, that he drank only four beers the entire evening, and that he drank only two before going over to check on Eddings. When asked about the scratch on his face, defendant repeatedly claimed it occurred at work.

As the questioning continued, another detective stated that he had talked to defendant's brother Donald. Donald told the detective that he had "a real bad feeling" that with their parents gone and defendant being left home alone, ***14** something bad was going to happen, and that he purposefully had not asked defendant whether he "had done this"—referring to the homicide and arson—because Donald was afraid defendant had. Defendant expressed disbelief concerning Donald's statement, and asked to speak to his brother. The interview continued, however, at which time defendant again changed his story about what had transpired the night before.

This time, defendant said he drank "at least six beers" before going over to check on Eddings at approximately 9:00 p.m. after noticing she had not taken the newspaper from the fence. When there was no response to his knocking, he opened the door, entered the trailer, and found Eddings lying on the floor naked. He "shook her head" and said her name, but Eddings did not respond. Noticing blood on her face and realizing she was dead, defendant "just freaked out." He went home and sat down on the couch: "[E]verything was running through my head ... until ... I got the gas can and I went over there and started the fire ... [b]ecause I was scared ... [bec]ause I don't want to go back to prison ... I just didn't know what else to do ... my fingerprints were all over." Defendant returned to Eddings's home three times, each time spraying lighter fluid or gasoline, before getting the fire to start. He repeatedly insisted, however, *****398** that he did not attack Eddings: "I did not murder this person.... I did not kill her.... I didn't hurt her." He told the detectives that he would "rather shoot myself" than go back to prison and asked for a gun so that he could "get this life over with."

When asked to account more specifically for the hours between 9:00 p.m. and 4:30 a.m., defendant stated that he "remembered" additional details. He said that between 9:00 p.m. and midnight, he "did nothing but just sit at home freaking" before deciding to change his clothes, get in his truck, and "split." As he was driving, however, defendant began to worry about his fingerprints being discovered in Eddings's trailer. He therefore returned to Eddings's trailer at approximately midnight and, after several attempts, finally set it on fire. Defendant then returned to his home and took a shower "to try to clear his head." Later that morning, he washed his clothes and shoes. When asked whether detectives were going to find evidence of bodily fluids on Eddings, such as ejaculate, defendant said he might have dripped sweat on Eddings because sweat "was pouring off" his face when he turned her head, touched her wrist to see if she had a pulse, and put his head on her back to listen for sounds of breathing. He further admitted the scratch on his face had not occurred at work, but probably was from bumping into furniture in the darkness of Eddings's trailer. When asked about a ****509** bruise on his right hand, defendant thought he must have struck it on his way out of Eddings's trailer. But he continued to deny that there had been any kind of struggle or fight with Eddings.

***15** Detective Spidle reviewed defendant's story a final time with him before terminating the interview at approximately 9:00 p.m. Defendant was placed under arrest and processed for booking into county jail, where he was received at approximately 1:40 a.m. The following evening, June 20, 1996, Detective Spidle brought defendant back to the Riverside police station and conducted a second taped interview session after defendant signed another written waiver of his rights. This interview lasted less than two hours.

At the outset, Detective Spidle told defendant he believed something physical had happened between defendant and Eddings, and asked defendant to "consider telling the complete truth," so that defendant's mother would not have to worry about there being "someone else out there." He also told defendant that he had talked to defendant's family and they did not believe his story, but rather thought "[defendant] did this."

After requesting and being allowed to speak to his mother by telephone, defendant admitted that he "hurt" Eddings. He said he went over to Eddings's residence and knocked on the door. Eddings was home and let him in: "Then, she threw her arms up and we got into wrestling match.... It got out of hand and I killed her." Defendant was "surprised" with how much Eddings fought back, and he agreed with the detective that she "put up a good fight." He described how he choked her, while both of them were

in a standing position, until she was unconscious. Defendant further admitted to sexually assaulting Eddings: "Yes, I did attack her. Yes, I killed her, and yes, I had sex with her. Yes." When asked if he had "wanted sex" when he went over to Eddings's trailer, defendant responded: "Yeah, I did at the time." He said Eddings was on her stomach and had ceased struggling when he put his penis "down between her legs" and, although he "couldn't tell if [his penis] was in or not," it "didn't take [him] very long to ejaculate." Defendant claimed Eddings "was alive before ***399** the fire," but that "she wasn't alive during the fire" because he remembered "checking." He thought the choking killed her, and he was convinced that he would be sentenced to death for his actions: "I already know I'm goin' to the death chamber ... because I know the special circumstances in a murder."

(c) The autopsy

Dr. Robert DiTraglia, a forensic pathologist and the Riverside County coroner who conducted Eddings's autopsy, testified concerning the cause of her death—strangulation and blunt force trauma—and the extent of her injuries. Based on the number and severity of the injuries she suffered, the organs involved, and the amount of hemorrhaging associated with the injuries, Dr. DiTraglia estimated that it took two to 20 minutes for Eddings to die after suffering all of her injuries. Although she additionally suffered thermal ***16** damage to over 90 percent of her body, Dr. DiTraglia concluded that Eddings likely died before the fire started, because there was no evidence of soot in her airways, and the level of carbon monoxide in her blood was within normal limits. The density of Eddings's skeletal structure was within the normal limits for a woman of her age and, in Dr. DiTraglia's opinion, any existing osteoporosis had not affected the bodily injuries she suffered. Although Eddings had atherosclerosis, a hardening of the arteries which is common in the elderly, Dr. DiTraglia did not believe this played a role in Eddings's death, confirming "[s]he did not die of a heart attack."

The extensive nature and severity of the thermal injury to Eddings's body caused by the fire—in some places, the skin and subcutaneous tissue were severely burned, in others places, there was no skin or subcutaneous tissue remaining at all—had a "profound effect" on the ability to recover certain types of evidence during the autopsy. As Dr. DiTraglia explained, "it's impossible to evaluate the presence of abrasions, bruises, lacerations when the tissue doesn't even exist." Dr. DiTraglia was able to recover some evidence from Eddings's body cavities. A small square piece of cloth with charred edges was ****510** pulled from her vaginal cavity. The manner in which the cloth was present in the vagina suggested it had been forced inside with a penetrating object. A swab of Eddings's rectal cavity also tested positive for defendant's semen, a circumstance defendant did not contest.

An internal examination of Eddings's chest cavity revealed 23 rib fractures located on all four sides of her ribcage, a series of injuries that Dr. DiTraglia described as "quite extreme" and "quite traumatic." In Dr. DiTraglia's opinion, these rib fractures could not have occurred from one impact, and could not have been caused by falling from a standing position. Rather, the number and location of the breaks to the ribcage evidenced "multiple impacts" from a force that was "significant, severe, and applied in multiple locations at multiple times." Severe hemorrhaging associated with the rib fractures further indicated that Eddings was alive at the time these injuries were inflicted.

Eddings also suffered a "dramatic" and "very severe" spinal fracture that displaced the spine, severed her spinal cord completely, and left her paralyzed, with no voluntary muscle movement, from the waist downward. A "tremendous amount" of force was required to produce this kind of blunt force trauma. As with the rib fractures, extensive bleeding into the surrounding tissue associated with this injury indicated it was inflicted before her death. When asked whether the spinal fracture could have occurred from Eddings falling ***400** from a standing position, Dr. DiTraglia responded, "absolutely not."

***17** Elsewhere, on the cervical spine, Eddings's neck was fractured in four places, as characteristic of strangulation. Dr. DiTraglia explained that while it is not uncommon for just one neckbone to break in a typical strangulation scenario, Eddings's case was extreme, as all four neckbones were fractured. There was hemorrhaging associated with all of the fractures, indicating that Eddings was alive when these injuries were inflicted. The unusual number of fractures indicated that a "compressive force" was applied to Eddings's neck "for some period of time." Dr. DiTraglia further explained that it takes approximately 60 seconds for death from strangulation to occur. Thermal damage to the neck area—the majority of skin and subcutaneous tissue was absent—destroyed any evidence of soft tissue injury caused by the strangulation. Similarly, microscopic examination of the brain for injuries consistent with strangulation, such as brain swelling, was precluded by thermal changes to the cerebral tissue resulting from the heat of the fire.

As part of the autopsy, the vaginal canal and the rectum were removed and dissected. As with other areas of

Eddings's body, severe thermal injury to the skin and subcutaneous tissue surrounding the genitalia prevented an evaluation for the presence of external trauma such as abrasions, bruises, or lacerations. Neither did Dr. DiTraglia observe any internal trauma to the vagina or anal cavity, although visible charring to portions of the internal tissue inhibited his examination. The general absence of trauma to the genital area did not, standing alone, signify to Dr. DiTraglia that Eddings had not been raped or sodomized. He cited studies indicating that of women who survived being raped, only 10 to 30 percent show genital trauma, and that the vast majority display no such indications.

Over defense objection, Dr. DiTraglia was permitted to testify as to his opinion that Eddings was raped and sodomized, and that she was alive at the time she was raped and sodomized. His opinion was based on the totality of the anatomical findings and evidence in this case, as well as Dr. DiTraglia's training and experience in cases of rape murder. This included, among other things, the array of Eddings's injuries consistent with being subdued by force prior to being sexually assaulted, the presence of a foreign object in Eddings's vagina apparently placed there by a penetrating object, the presence of defendant's sperm in her rectum, the prone position of Eddings's body when it was discovered, statements made by defendant, the rarity of necrophilia in Dr. DiTraglia's experience, and the circumstance that strangulation and blunt force trauma are "by far" the leading cause of death in rape murder cases. Dr. DiTraglia explained that because rape is both "a very intimate event" and an "inherently violent act," the cause of death typically ****511** is very intimate (choking versus gunshot wounds) and "the trauma, when it is present, is often severe and brutal, like it was in this case."

18** ***(d) Evidence of other crimes

Over defense objection, the prosecution introduced evidence relating to an incident in 1990 in which defendant sexually assaulted minor Toni P. This evidence was admitted at the guilt phase for the limited purpose of evaluating defendant's state of mind and any specific intent he might have harbored on the evening Eddings was killed.

Toni P. testified that in March 1990, she was 16 years of age and had been living in Riverside County for almost a year in the residence of her uncle, John Seneff, and *****401** her aunt, Sandra Seneff, who was defendant's sister. The Seneffs' two young children also were living in the house, as was Donald Jones, defendant's brother.

On the morning of March 16, after Sandra and John had left for work and the children had left for school, defendant arrived at the residence and spoke to Donald briefly. Donald then left for a job interview, leaving Toni P. alone with defendant for the first time since they had been acquainted. As she was preparing to leave the house, defendant asked Toni P. where she was going, and she replied that she was going to school. Defendant said, "No, you're not," put his hands on her shoulders, and pushed her through the hallway into a back bedroom. Once in the room, defendant pushed Toni P. to the floor, forcibly removed her clothes, pulled his own pants down, and put his penis in her mouth until he ejaculated, all the while holding her down on the floor as she cried and said "no" and "stop." Afterwards, he attempted to put his penis in her vagina, though Toni P. was not sure if penetration occurred. Defendant then stood up looking disoriented, pulled Toni P. to her feet, walked her into the bathroom, locked the door behind them, and handed her a wet washcloth for her face. After warning her not to say anything or she "would regret it," he left Toni P. crying in the bathroom. She immediately called a friend, who told her to report the incident to the police. Toni P. then changed her clothes and ran to the home of neighbors who were sheriff's deputies, and the neighbors called the police. Toni P. stated that she did not notice any indication that defendant was intoxicated during this incident.

2. The defense's case

(a) Defendant's testimony

Defendant briefly took the stand in his own defense. He testified that on the evening of Eddings's murder, he consumed two beers on his way home from work at approximately 4:30 p.m. on June 18, 1996, four or five more beers once at home, and then went to the store to buy another six-pack of beer, which he consumed at home before going over "just to check up on" Eddings ***19** at approximately 9:00 p.m. He explained that he went to Eddings's home despite knowing she sometimes went to bed early and despite thinking that she might be in bed already. Holding an open can of beer, he knocked on Eddings's door. Eddings let him in, but then "went off" on defendant because he was drinking, knocked the beer can out of his hand, and began swinging at him. According to defendant, "It got out of hand and I killed her."

On cross-examination, over defense objection, the prosecution questioned defendant concerning his activities on June 18 and 19, in and around Eddings's residence, and his prior statements to law enforcement officers concerning those events. Also over defense objection, the prosecution impeached defendant with his prior felony convictions in the Toni P. case, and with certain prior incidents of assault.

Defendant admitted that he lied to Detective Spidle about several things during the course of his interviews. For example, he told Detective Spidle that he had not set the fire that night, and that he had not hurt Eddings and did not kill her, but none of this was true. He told Detective Spidle, as well as his brother Donald, that he went to Eddings's house and found her dead, but that was not true. Defendant also admitted he lied to Detective Spidle when he told him he was not drunk that night, and that he understated the amount of beer he had consumed.

****512** Defendant further admitted to grabbing Eddings in the hallway and putting both *****402** his hands around her throat. He stated that he choked her, she went limp, and they fell. Defendant also admitted to having "sex" with Eddings, disrobing her, sticking his penis "down there," and ejaculating, but claimed he did not know whether vaginal or anal penetration occurred. When asked whether he strangled Eddings to death, defendant responded, "I guess so."

With respect to the Toni P. incident, defendant denied assaulting her. He recalled telling the arresting law enforcement officer in 1990 that he had not touched "that little girl" and that the last sexual encounter he had had was oral copulation by a prostitute. Defendant admitted, however, that he had been convicted of felony sexual assault with the intent to commit rape, and of felony forced oral copulation of Toni P.

Defendant also admitted that in September 1972, while he was in high school, he walked into a classroom and stabbed a teacher, Norma Knight, whom he did not know, several times in the back with a knife. He also admitted that in 1975, he went to the home of Barbara C., who was the mother of his girlfriend at the time, and "jumped on her," although he did not remember anything else about the incident because he was "on drugs real heavy" at the time.

***20** On redirect examination, defendant admitted that he killed Eddings, but claimed that he had not gone to her house intending to kill her, nor did he go there intending to have sexual contact with her. Defendant said he had both hands on Eddings's neck when they began to fall, and used one hand to try to prevent the fall, but was unable to prevent his body from landing on top of hers. Eddings stopped breathing after they landed on the floor, and she was not breathing or moving when he put his penis between her legs. Defendant presumed the choking killed her because he "had her by the neck." When defendant spoke to Detective Spidle on June 20, he had not slept for three days, and had not eaten for 48 hours. He was "scared" and "hurting" over what had happened, and did not remember making all of the statements he made during the interview.

Defendant further testified that he had not intended to rape Barbara C., the mother of his girlfriend. He said he had a drug problem at that time, and had been using drugs on the day of the incident.

(b) Forensic evidence

Dr. Barry Silverman, a medical expert in anatomic and clinical pathology, testified concerning his review of the coroner's report of Eddings's autopsy, Dr. DiTraglia's trial testimony, photographs taken at the scene and at the coroner's office, and the police reports in the case. Dr. Silverman concurred that Eddings died of blunt force trauma and strangulation. His testimony focused on two issues: the amount of force required to cause Eddings's injuries, and whether or not penetration of her vaginal and rectal cavities had occurred prior to death.

Dr. Silverman testified that menopausal and postmenopausal women do not produce the hormone estrogen. Additionally, because Eddings had undergone a radical hysterectomy, she was not producing androgens, which in menopausal and postmenopausal women normally are converted into estrogen-like compounds. Her estrogen levels around the time of her death, therefore, would have been zero. The lack of estrogen in elderly women "causes profound changes in [their] bone structure." In this regard, in Dr. Silverman's opinion, Eddings showed signs of "severe" osteoporosis. Osteoporosis weakens the structure of the bones and makes them "much more" *****403** prone to fracture. Eddings further displayed symptoms of kyphosis or a hump in the spine, a condition that renders the vertebral column more prominent and, therefore, more prone to fracture.

In light of Eddings's bone structure, and considering that she was 81 years of age and weighed 90 pounds, and that defendant was over six feet tall and weighed 180 to 200 pounds, Dr. Silverman agreed with defense counsel that ***21** Eddings's traumatic injuries could have been caused

by a single " tackling blow" in which defendant fell on her in a forceful manner. The injuries also were consistent with the application of a "bear hug" or " squeeze," followed by "a fall with weight **513 on top of the fall." If Eddings's injuries had been caused by multiple blows, Dr. Silverman would have expected to see other evidence of blunt force trauma. For example, punching or kicking blows " telescope into the body," such that organs deep in the rib cage, the spinal cord, the skin, and the muscles would be injured. Eddings's autopsy protocol, however, did not show any deep injury to her brain, lungs, heart, kidneys, liver, spleen, large intestine, small intestine, or stomach. Dr. Silverman would have expected those organs to display injury if Eddings had been subjected to "a savage beating." Additionally, although 90 percent of Eddings's body had been burned, thermal injury would not have affected the ability to detect subdural hematoma or deep organ injury, because house fires do not generate the degree of heat necessary to destroy all soft tissue. He conceded on cross-examination, however, that the fire would have destroyed any evidence of external bruising.

Dr. Silverman also explained how the cessation of estrogen production in menopausal and postmenopausal women affects the skin, causing it to become thinner and affecting its elasticity. In particular, the skin of the female genitalia "becomes cellophane thin in elderly females lacking estrogen" and "highly susceptible to trauma." Secretion of mucus in the female tract, which acts as a lubricant, also is negatively affected. Consequently, in the case of forcible rape that occurs before death, Dr. Silverman opined there should be "more significant injury" in a postmenopausal woman than in a woman of childbearing years. As noted earlier, during Eddings's autopsy, the female genitalia were removed and examined for signs of injury; no injury was observed. Dr. Silverman also indicated that if the cloth found in Eddings's vaginal cavity had been inserted prior to death, he would expect to see evidence of injury, such as blood on the cloth; none was reported. Similarly, if forcible sodomy had occurred prior to death, he would have expected to observe injury to the rectal cavity; none was found. He opined that thermal injury would not have affected the finding of such trauma, had it existed. Dr. Silverman further disputed the relevance of studies cited by Dr. DiTraglia indicating that only between 10 and 30 percent of women in cases of rape sustain genital injuries. He opined that (1) the percentages referred to women who had survived rapes, and that rape murders are "much more brutal" and result "in more significant and severe injury," and (2) the characteristics of postmenopausal woman are different—Eddings's age and physical condition made her bones "very fragile" and her skin "paper thin." Given the brutal nature of the crime alleged in this case, Dr. Silverman expected "that there *22 would be peroneal, vaginal and anal, rectal injuries." Consequently, he concluded that penetration of those areas in Eddings must have occurred after death.

(c) Disputing the Toni P. incident

Riverside County Sheriff's Deputy Albert Ewens testified concerning his interview ***404 of Toni P. in response to the police call regarding defendant's sexual assault. Toni P. told Deputy Ewens that defendant had ejaculated in her mouth and that she had spit out the ejaculate. In an attempt to locate evidence to corroborate her story, Deputy Ewens went to the bedroom in the residence where Toni P. said the assault had taken place and, using his hands and eyes, carefully looked for, but did not find, any evidence of semen on the carpet. He admitted, however, that he did not use ultraviolet illumination to fluoresce any ejaculate.

Defendant's sister, Sandra Seneff, testified that she also visually searched for evidence of semen on the bedroom carpet but did not find any. Seneff stated that she did not trust Toni P. because Toni P. had admitted to falsely accusing another family member of molesting her.

(d) Eddings's attitude toward alcohol

Helen Harrington, Eddings's daughter, testified that her mother did not keep alcohol in the house and did not drink alcohol. According to Harrington, "drunks" upset Eddings and she avoided them if possible.

3. The prosecution's rebuttal

On rebuttal, the prosecution presented additional evidence related to the Toni P. and Barbara C. incidents. Riverside County **514 Sheriff's Deputy Brett Johnson testified concerning his arrest of defendant for sexually assaulting Toni P. After arriving at defendant's residence, but before Deputy Johnson had the opportunity to explain the charges to defendant, defendant said to him: "I didn't touch that little girl. I want to turn myself in and clear this up." Deputy Johnson then took defendant into custody and transported him to jail.

Following waiver of his *Miranda* rights, defendant told Deputy Johnson that because he had "partied pretty hard"

the night before and felt "real wasted," instead of driving all the way to his home in Mead Valley, he had decided to stop at his sister's house in the Pedley area. According to defendant, he spoke to his brother Donald outside the house, then went inside to sleep. Deputy Johnson asked defendant when was the last time he had had ***23** sex, and defendant told him he had "picked up a hooker" earlier that morning and paid her $20 for oral sex. Upon hearing from other officers that a washcloth was being retrieved as evidence in the case, Deputy Johnson asked defendant why law enforcement would want to inspect the washcloth, and defendant replied that he did not know, but then said he had had a washcloth on his head like a cold compress while sleeping. Following a few moments of silence, defendant "blurted out, 'There was come on my shirt.' " Deputy Johnson asked how it got there, and defendant explained the prostitute had gotten semen on his shirt. Deputy Johnson asked where the shirt was, but defendant told him, " 'That's not going to do you any good. It's already been washed.' "

When Deputy Johnson told defendant that a rape kit sample would be collected, defendant asked to have a doctor present to confirm the existence of some scars on his penis, which defendant thought would assist in his defense on the theory that anyone who had had contact with his penis should have noticed the scars. Deputy Johnson was present when the rape kit sample was taken. He observed a pink substance on defendant's penis; defendant explained this was calamine lotion he had applied that morning to try to heal the scars. Deputy Johnson also observed a "fresh" abrasion on one side of defendant's penis that was consistent with teeth marks. As part of the rape kit, the *****405** nurse swabbed defendant's penis. When defendant asked the purpose of the cotton swab, the nurse told him it was to collect evidence of vaginal secretions. Defendant then volunteered that he had touched the prostitute's vagina with his finger. Deputy Johnson asked what relevance this information had to possible presence of secretions on his penis, and defendant replied, "Yeah, I guess you're right."

Kathy White, a Riverside County Superior Court clerk, testified concerning a statement she heard defendant make during the Toni P. trial. During a lunch break following Toni P.'s testimony in that case, White overheard defendant talking to his brother David Jones outside of the courtroom. Defendant's brother asked him if Toni P. "was crying and carrying on." Defendant replied that she was not, that "it looked pretty good," and that he thought he was "going to beat this one too."

Finally, the prosecution played for the jury previously redacted sections of defendant's interviews with Detective Spidle. When Detective Spidle asked defendant about the incident with Toni P., he replied: "I don't know what it was. You know, all these years, you know, I had to live in that lie.... I don't know, then I was drinkin' a lot.... And ... I was throwing money on hookers left and right.... Which, I thought, was better than gettin' in trouble, you know." When asked if "gettin' in trouble" meant "forcing yourself on some gal," defendant said, "Yeah. That and plus, you know, it ***24** was illegal for hookers." When asked what had happened with Barbara C., defendant replied, "Same thing, dope and beer and stuff and—." Detective Spidle then asked, "But, I mean, what did you try to do, rape her?" Defendant replied, "Yeah." Detective Spidle also asked, "[T]he sexual urge that you have that ... causes you to wanna ... force sex on somebody like this ..., it doesn't differentiate between younger women and older women, does it?" Defendant responded, "I guess, I guess not. It don't look like it."

B. The Penalty Phase

1. The prosecution's case in aggravation

During the penalty phase, the prosecution presented evidence of defendant's history of ****515** violent offenses against women. Eddings's daughter, two of her nieces, and a grandniece also testified concerning the impact of Eddings's death on her family, and, over defense objection, several family photographs were shown to the jury.

(a) Evidence of other crimes

(1) Norma Knight

In 1972, when defendant was 15 years of age, he stabbed Norma Knight, a high school teacher, in the back with a hunting knife. Robert Packer, the former principal at defendant's high school, testified that at the time of the attack, which took place the week before school was to begin, Knight was in her classroom alone when defendant, who had not been one of her students and whom she did not know, approached her desk and asked her the time. After she directed his attention to the clock on the wall, defendant continued to approach her desk and "the next thing she knew he had plunged a knife into her back and left the room." Thomas Lindley, the former vice-principal at the high school, testified that a week after the incident, Knight was shown a photographic

lineup and identified defendant as the student who had stabbed her.

Defendant was charged with the stabbing as a juvenile. He was treated at a mental health facility for two years until his repeated escapes resulted in his placement ***406** in juvenile hall. Defendant remained in juvenile hall until he was released from custody at the age of 18. Terry Garrison, a former girlfriend of defendant's and the mother of his three children, testified that defendant "laughed" when describing his attack on Knight.

Over a defense objection, victim impact evidence concerning Knight's stabbing was admitted. Lindley testified that Knight took time off from work **25** following the incident and then returned for a period of time, but was " very frightened, very nervous, extremely apprehensive ... in the context of her daily business," traits she previously had not exhibited on the job. She quit teaching later that same year and never returned to work. Tracy Knight—Norma's son—testified that following the incident, his mother had "a breakdown" one day while driving to school, thereafter was institutionalized in a mental health facility for one to two weeks, and had been under psychiatric care since that time.

(2) Barbara C.

In 1975, when defendant was 19 years of age, he assaulted Barbara C. in her bedroom. Barbara C., who had lived in the same neighborhood as defendant's family for 13 years and was the mother of defendant's girlfriend at the time, testified that she awoke one night in her bed to find defendant sitting on her chest with his hands around her throat "trying to strangle me." Struggling to breathe, Barbara C. managed to say, "Billy," at which time defendant stopped choking her and started to cry, saying he was on drugs or alcohol and needed help. Barbara C., who had not had a problem with defendant before this incident, said she would help him.

After defendant walked out of the bedroom, Barbara C. dressed and went into the living room to find him, but defendant had left. When she returned to her bedroom, she found a knife on her bed pillow that did not belong to her and had not been there when she went to sleep. Following this incident, defendant committed himself for a few days to Patton State Hospital, a psychiatric hospital, and then checked himself out.

(3) Terry Garrison

Terry Garrison testified concerning her four-year relationship with defendant.[4] Garrison met defendant in 1975 when he was 19 years of age, had recently moved from California to St. Louis, Missouri, and was living with his uncle across the street from the restaurant where Garrison worked. They began dating, eventually moving in and living together until January 1979. Over the **516** course of their relationship, defendant and Garrison had three **26** children together, two girls and a boy, in addition to the two daughters Garrison had from a prior relationship.[5]

Sometime in 1977, the relationship between defendant and Garrison deteriorated, and defendant became physically and verbally abusive. The mistreatment began with pushing and slapping, and eventually escalated to punching and kicking. The violent encounters between defendant and Garrison were often, but not always, alcohol ***407** related, and appeared to occur whenever defendant "had had a bad day." On one occasion, defendant hit Garrison in the head with an ax handle. During another argument, defendant grabbed Garrison by the neck and threw her across the bed, asking, "Why don't you understand that I love you?" Following a separate incident, Garrison had to go to the hospital for treatment for injuries to her head, an eye, and ribs inflicted by defendant.

In addition to the physical abuse, defendant also threatened Garrison, telling her that if she ever left him, "he would come and kill [her]." Defendant told Garrison of other acts of violence he had committed, such as when he was in the ninth grade and one of his teachers "made him mad so he stabbed her 21 times in the back with a paperweight," and also that he had been accused of trying to strangle a former girlfriend's mother.

Defendant and Garrison finally ended their relationship in January 1979. Defendant moved out of their residence and told Garrison he was moving back to California. He returned a month later to stay with Garrison for two or three weeks while she was five months pregnant with their son. One night during his stay, defendant shoved Garrison, face first, into a wall in the bedroom, then followed her into the bathroom and pushed her into the bathtub. He did not appear to Garrison to be using drugs or alcohol at the time, but rather was just "in one of his moods." Garrison went into labor and was taken to the hospital, where she prematurely gave birth to their son, who then remained in the hospital for several months. Garrison delivered their third child, a daughter, after she and defendant had separated.

After the relationship ended, Garrison received information from the department of family services that

defendant might have molested her oldest daughter, Angela C. She called defendant and confronted him about these allegations. Defendant asked Garrison if she "really thought he was capable of something like that," to which she replied, "yes," and he laughed. Prior to this time, Garrison had never suspected defendant of abusing any of her children, because in her view, he was always a good father in her presence.

*27 *(4) Angela C.*

Terry Garrison's daughter from a prior relationship, Angela C., testified as to the conditions in her household during the four years Garrison lived "on and off" with defendant. During this time, defendant and Garrison both drank alcohol and frequently would fight. Angela C. witnessed defendant slap Garrison, and she herself was physically beaten by both Garrison and defendant.

Angela C. described an incident in which she and her younger sister crossed the street against defendant's instructions. Defendant ordered the sisters into the house and forced them to disrobe and lay facedown on the floor with their arms and legs spread apart while defendant sat behind them for a period of time. Angela C. further testified that defendant started to molest her when she was four or five years of age. The first time, defendant was lying down on the couch and he called Angela C. over to him. He placed her on top of his groin and started rotating his hips. When she began crying, defendant told her "not to be a baby, that he knew [her] dad taught [her] how to do that, and he wanted [her] to take off [her] pants." Angela C. refused and asked to call her mother. Defendant telephoned Garrison at work, telling Garrison that she needed to come home. Garrison returned from work angry, and when Angela C. told her that defendant had wanted her to take off her pants, Garrison slapped her in the face ***408** and sent her to bed. **517 Defendant and Garrison then had an argument.

On another occasion, when Angela C. was six or seven years of age, defendant was home alone with Angela C. and her sister when he instructed Angela C. to take her nightgown off and give it to her sister. Angela C. complied, but immediately put on another nightgown. Defendant ordered her to remove that nightgown as well and to come over to him. Angela did so, at which time defendant put her on his lap and raped her. When she screamed, defendant told her that he was punishing her "for being so curious." (Angela C. explained that the "so curious" comment referred to a prior evening when she had walked in on her mom and defendant: "I heard some noises in the bedroom. I thought he was hitting her again, so I walked in there and they were having sex, and he made me sit on the chair [and watch] until they were done.") Defendant then put his finger in Angela C.'s vagina "to see if [she] was pregnant." She began bleeding from her genital area and defendant put her in the bathtub. Garrison returned home shortly thereafter and noticed blood in the bath water. Defendant told Garrison that Angela C. had cut her foot, and thereafter Garrison and defendant had "a big fight."

*28 *(5) Tina Kidwell*

Tina Kidwell, formerly Perfater, testified concerning her two-year relationship with defendant. Kidwell met defendant in St. Louis in 1980, when she was 18 years of age and defendant was working with Kidwell's brothers. They dated for about six months before Kidwell and her baby son moved in with defendant. She moved out three months later, but they continued to see each other.

During the course of their relationship, Kidwell and defendant often drank alcohol together. Some incidents of violence occurred while they were intoxicated, but others occurred when defendant simply "had a bad day at work." During their relationship, Kidwell estimated that defendant hit her with his closed fists approximately five times. On one occasion, Kidwell and defendant had an argument, and defendant wanted her to leave the house, but Kidwell first wanted to get a bottle of milk for her son. Defendant shoved her outside and "slammed" the door behind her. He refused to let Kidwell back in, threatening to "beat [her] ass" and telling her to "get out" of there. During another incident, defendant, apparently dissatisfied with a meal Kidwell had prepared, overturned the kitchen table and pushed Kidwell across the room. Another time, defendant became angry because Kidwell served chili that was not homemade. He threw the pot across the kitchen, shoved Kidwell, overturned the table, and then physically removed Kidwell from the house. A final incident occurred on Christmas Eve in 1982, while Kidwell was living in an apartment with her son and defendant was staying with them for a few nights. That evening, they had some neighbors over for a party. Defendant became jealous, put his fist through a window, and then left the house. Kidwell had no further contact with him after that incident.

After Kidwell stopped dating defendant, another woman, Elsie S., accused her of having a relationship with him. A fight ensued between the women, during which Kidwell cut Elsie S.'s face with a box cutter.

(6) Elsie S.

Elsie S. testified concerning her "on and off" relationship with defendant between 1982 and 1988. They met when Elsie S. was 21 years of age and living across the ***409** street from defendant's grandfather in St. Louis. The first time they were alone together, defendant took Elsie S. for a ride in his truck. Once parked, defendant tried to remove Elsie S.'s clothing, pulling her pants down, but she told him "no, stop." He stopped and then drove her home.

Two or three months later, defendant appeared at Elsie S.'s house, saying he wanted to talk to her and asking to take her for a ride. She complied but ***29** when they got out of the car, defendant grabbed her by the neck and pushed her into the backseat. As she struggled, defendant pulled her pants down, got on top of her, and raped her while saying, "you know you like it." Afterward, he drove her home. Elsie S. told her sister ****518** about the incident a week later, but did not tell anyone else because she "felt ashamed."

Elsie S. did not see defendant again for several months, after which she was with him at various times over the years and had sexual relations with him, sometimes voluntarily and sometimes not. She explained that she "was young and naïve" and "felt like a little bit of affection was better than none." Toward the middle of their relationship, Elsie S. began to feel "used" by defendant and "hurt" that he did not feel the same way about her that she felt about him. They both dated other people at times during their relationship, which ultimately ended in 1988.

Although Elsie S. admitted to having consensual sex with defendant after they resumed a more regular relationship, she also recounted five or six other occasions when the intercourse with defendant explicitly was against her will. At various times, defendant tied her to the bed with masking or duct tape, put a knife to her throat, put his hands around her neck, inserted a foreign object in her vagina, gave her an unknown pill which caused her to become unconscious, and choked her with a pair of underwear until she could not breathe and had to tell defendant to stop. Elsie S. also called the police in 1986 when, during an argument, defendant punched her in the eye and held a knife to her blouse while threatening to "cut her beyond recognition." Police found a three-inch pocketknife in defendant's possession when he was arrested for this 1986 incident.

On cross-examination, Elsie S. testified that she instigated a fistfight with Tina Kidwell concerning defendant in 1988. The fight ended when Kidwell cut Elsie S.'s face with a box cutter.

(7) Cathy D.

In 1983, while living in St. Louis, defendant raped the girlfriend of an acquaintance. Cathy D. testified that on the night in question, she and her boyfriend, Harvey Temple, encountered defendant at a bar. Defendant was with another woman and the two couples decided to go to a restaurant for breakfast and then to defendant's residence. At some point the other woman left and Temple's wife arrived at the residence with their daughter. Temple left to drive his family home, and Cathy D. agreed to wait for him to return.

Defendant, who had been drinking, joined Cathy D. in the living room and told her that, in order to be alone with her, he had called Temple's wife. ***30** When Cathy D. rejected defendant's advances, he forcibly pulled her into the bedroom and threw her down on the bed, holding her arms down with one hand and unfastening and pulling down her pants with his other hand. Cathy D. struggled to get away from defendant, yelling at him to "let me go" and to " stop," but he told her to "shut up," pulled her underwear down, and raped her. Afterward, defendant said words to the effect of "that was good for me, was it for you?"

****410** Cathy D. had to unlock the door to get out of the bedroom. As she was leaving defendant's residence, Temple called and Cathy D. told him to pick her up at a nearby parking lot. She told Temple what had happened but did not tell her family and did not report the incident to police. Cathy D. next saw defendant approximately eight months later when she and Temple were at a bar. When defendant saw Temple, he immediately left the bar, and Cathy D. never saw defendant again after that encounter.

(8) Frances Stuckinschneider

Also in 1983 in St. Louis, defendant assaulted and attempted to rape 62–year–old Frances Stuckinschneider.6 At the time of the attack, Frances lived at the top of a two-unit duplex; her granddaughter, Sherry Melson, and Sherry's husband, James, lived below. Defendant's uncle, "Bill," who lived in the same neighborhood and did odd jobs for Frances, had arranged for defendant, known to

Frances as "Willy," to do some work for her as well.

****519** Sherry testified that on the evening in question, she was at home alone when she heard someone enter the building and go upstairs to her grandmother's residence, after which she heard Frances talking to someone in the hallway. A short time later, she heard a loud "boom, boom, boom, boom, like someone was falling or running downstairs," and opened her door to see the screen door of the shared entryway closing behind the figure of a man.

Sherry went upstairs and found her grandmother with the top of her blouse unbuttoned and otherwise disheveled, nervous, upset, and angry. She asked her what had happened and Frances replied, "Willy tried to rape me." The two then went inside, where Frances, crying and shaking, told Sherry that defendant had asked for a glass of water, gone into her kitchen, returned with a knife in his hand, and told Frances that "he was going to fuck her." As defendant grabbed her breast and groped her between the legs, Frances told him that her granddaughter was downstairs and that her grandson was ***31** expected home at any minute. She also mentioned defendant's uncle Bill. As she was talking, Frances managed to work defendant toward, and finally out, her front door, after which he fled.

When James arrived home, Sherry informed him about what had happened. Later that evening, James went to confront defendant at his uncle's house, but was unable to locate him. Defendant's aunt called defendant's mother and told her that defendant had made sexual advances on Frances. Shortly thereafter, defendant left St. Louis and returned to his parents' residence in California.

Sherry further testified that Frances did not like to talk about the incident—for example, Frances did not mention to Sherry that she had been interviewed by Wesley Daw, an investigator for the prosecution, concerning the sexual assault in connection with defendant's trial. At the time of that interview, Sherry stated Frances was on medication that sometimes made her feel confused.

(b) Victim impact evidence

Over defense objection, four of Eddings's family members testified at the penalty phase: Eddings's daughter, Helen *****411** Harrington; two of Eddings's nieces, Donna Velasquez and Ernestine Pierson; and Eddings's grandniece, Shirley Grimmett. Additionally, 34 photographs of Eddings spending time with her immediate and extended family at birthday parties and other gatherings, were introduced through the testimony of these relatives. The trial court sustained defendant's objection as to two of the photographs, admitting the remaining 32 into evidence.

(9) Helen Harrington

Helen Harrington, one of Eddings's two daughters, testified that her mother was "everything" to her, and described Eddings as a "passionate" person who loved to garden, cook, bake, and do little things for her family and neighbors. Eddings remained generous as she aged, even sharing her own Social Security benefits. Harrington visited her mother frequently, and they remained close until the time of Eddings's death. Eddings also was very attentive to her grandchildren and great-grandchildren. Harrington recounted telling Eddings's great-grandchildren about her death, and testified that the great-grandchildren missed Eddings and spoke of her frequently.

Harrington last saw her mother approximately 10 days before Eddings died, when she spent three days and two nights at Eddings's home. Harrington described this as the "absolute best" time they had ever spent together. ***32** Eddings finally was feeling "like her old self" after hip surgeries she had undergone, and the two shopped, dined out, reminisced about their childhoods, and sang hymns together.

On the morning of Eddings's death, Harrington received a telephone call from a neighbor that there had been a fire and her mother was deceased. She wondered why the Joneses had not called her, in light of the circumstance that they lived directly next door to Eddings. At the time of the trial, Harrington still suffered from depression for which she took Prozac, and still experienced recurring nightmares about her mother's ****520** murder from which she would wake crying and in a cold sweat. Harrington also described calling Eddings's phone number for more than one year after it had been disconnected, and beginning to talk to her mother before the recording announced the number was no longer in service.

Harrington and her sister were responsible for retrieving Eddings's belongings from the trailer after the fire, although "[t]here really wasn't too much to recover," because "[i]t was all pretty well burned." She described crying and her feelings of sadness as she went through the remains of her mother's belongings. Asked what she missed most about her mother, Harrington she replied, "Being able to confide in her, being able to know that she loved me without reservation. She just—I could depend

on her loving me. I could depend on her being interested in what happened [in] my life, and the li[ves] of my children and grandchildren." Harrington stated that there was no one in her life that could fill that role after her mother's death.

(10) Donna Velasquez

Donna Velasquez, Eddings's niece, testified that Eddings was "a mother figure" to her. She spoke of Eddings's generous nature: "[W]e were very poor ... and when I was seven my dad left, so then it was even worse. And my aunt would also bring things over because we couldn't afford the milk or whatever. [¶] I remember once when I was ten she bought me a beautiful red coat with gold-colored buttons. That was very precious to me because she bought it." Velasquez described how Eddings had always been there for ***412** Velasquez's family, particularly after Velasquez's mother died when Velasquez was 16 years of age. Having spent considerable time with Eddings while growing up, Velasquez was "devastated" to learn of her death, which left an unfilled void in Velasquez's life. Velasquez still thought often of Eddings—on birthdays, Christmas, or any occasion at all. She carried on a soothing practice that Eddings did with her, rubbing her grandchildren's earlobes while they sat in her lap. Velasquez described a collage she made of photos retrieved from Eddings's home—"burned edges and all"—and stated that she did not go out as frequently following Eddings's murder, because she worried that what had happened to Eddings could happen to her.

*(11) *33 Ernestine Pierson*

Another niece, Ernestine Pierson, testified concerning Eddings's loving and considerate nature. Pierson and her husband visited Eddings approximately every two weeks, and sometimes more often. Because Eddings loved to bake, they rarely left Eddings's home without a piece of pie. Recalling a time when she visited Eddings in the hospital during Eddings's hip replacement procedure, Pierson stated of Eddings that the hospital staff "all loved her." She spoke of her feelings of shock and denial at the news of her aunt's death, and of emptiness in viewing the scene of the fire. Pierson "constantly" thought about the way Eddings died, and still found it "very difficult" to sleep imagining what Eddings went through. Both Pierson and her husband were close to Eddings, cried over her death, and still missed her and felt the pain of her loss.

(12) Shirley Grimmett

The last family member to testify was Shirley Grimmett, Eddings's grandniece. She described Eddings as a "very sweet," "independent," and "funny lady," and confirmed that Eddings had "been there" when anyone needed her. Grimmett typically spoke with Eddings daily and Eddings always was very interested in Grimmett's family. Grimmett described how Eddings's death affected Grimmett's children. Her son Larry was "real upset," had trouble sleeping, and missed Eddings "deeply." Grimmett's other son Steve was "very angry" and refused to talk about what happened to Eddings. Her daughter Karen and Karen's husband had marital problems for a month afterward because they would think about "all the torment and everything that [Eddings] had gone through" as a result of being raped. At the time of the trial, Karen still could not drive by Eddings's former home without "fall[ing] apart."

**521 Grimmett learned about the homicide the day it occurred and drove to Eddings's home immediately. She recounted how devastated she was when she saw the burned ruins of the trailer—she sat and cried. Grimmett thought about Eddings's death "constantly." Whenever she heard or saw anything about a girl or woman being raped, she thought about what Eddings must have experienced.

2. The defense's case in mitigation

Defendant presented evidence at the penalty phase that attempted to discredit the other-crimes evidence. Family members also testified concerning his father's physical abuse of defendant and his brothers. Michael Kania, Ph.D., testified that defendant had a personality disorder and that his behavior *34 changed when he drank or was under the influence of alcohol. Finally, evidence was presented concerning defendant's good behavior during his prior prison term.

****413** *(a) Disputing other crimes*

(1) Terry Garrison, Tina Kidwell, and Cathy D.

Danny Davis, a defense investigator, testified concerning his interviews with Terry Garrison, Tina Kidwell, and Cathy D., in St. Louis. According to Davis, Garrison told him that she thought defendant was a good father to the children and did not mention anything about defendant molesting her daughter, Angela C. Garrison said that she and Jones regularly drank alcohol and smoked marijuana, that the majority of their physical confrontations occurred while they were under the influence, and that defendant regularly beat her.

Tina Kidwell told Davis she met defendant in 1981 and that they had been "boyfriend and girlfriend on and off" for two years, living together for three months during that time. Kidwell said defendant was "a very good father" and that he never acted inappropriately with her child or his daughter. The longer she and defendant were together, however, the more problems they had. Defendant liked to be in control of all aspects of their relationship. When defendant was sober, he was a very nice person, but when he drank alcohol, he changed. He sometimes would hit Kidwell, usually when he was drunk. Kidwell expressed surprise at the charges defendant faced in this case.

Cathy D. told Davis that she and defendant had been "drinking buddies" in 1982. She said defendant was a "very nice guy" when he was sober, but when he drank alcohol, which he did frequently, or used drugs, he was short-tempered and could be violent. She characterized the 1983 rape that occurred in defendant's residence as one in which defendant merely became "sexually aggressive" after her boyfriend left. Davis acknowledged on cross-examination that "a woman could be uncomfortable discussing rape with a man she did not know."

(2) Elsie S.

Mina Lee Jones, defendant's mother, testified that after Elsie S. and defendant ended their relationship, Elsie S. called her house several times looking for defendant. Mrs. Jones eventually told Elsie S. that defendant did not want to speak to her, and the calls ceased.

35 (3) Frances Stuckinschneider

Wesley Daw, a prosecution investigator, testified concerning his interview with Frances in St. Louis in 1996, approximately six months before she died.7 Her son and 16–year–old grandson were present during the interview. When Daw asked Frances about the prior "problem" she had with defendant, Frances told Daw that defendant had forcefully grabbed her by the legs and "got fresh" with her. Her son asked her whether defendant touched her "private parts," to which Frances replied: "Oh no-no-no-no, he didn't do nothing like that." Daw asked Frances if defendant's actions "seemed to you like a sexual advance," to which Frances replied, "I would think so, yes."

****522 (b) Family history***

Defendant's older sister, Sandra Seneff, his mother, Mina Lee Jones, and two of his brothers, Richard and Donald Jones, testified concerning defendant's family history. Defendant's parents had five children in the following order, with eight years between the oldest and youngest: Sandra, ****414** Richard, defendant, Donald, and David. Mr. and Mrs. Jones each completed only eight years of education, and both of them worked while the children were growing up, Mr. Jones during the day and Mrs. Jones during the evening. Mr. Jones did not attend the children's school or sports activities. He drank alcohol excessively and was physically abusive to the boys, at times severely beating them with his hands and a belt when he had been drinking. Defendant and Donald received the worst of the abuse. Their father, who was 6 feet two inches tall and weighed approximately 225 pounds, sometimes picked the boys up by their shirt collars and threw them against a wall or down the hallway. After the children reached their 18th birthdays, Mr. Jones often would get angry and order them out of the house—Sandra and Donald were expelled from the family home soon after turning 18 years of age. When he was 18 or 19 years of age, Richard was told to get a job immediately or leave the house.

After the Norma Knight stabbing incident, defendant was hospitalized at Ingleside Hospital in Rosemead, California. The doctors there told Mrs. Jones that defendant "could be dangerous to young girls and women." Defendant later was sent to juvenile hall because he kept "running away" from the hospital, and he remained in custody there until he turned 18. He received some counseling through the probation department after his release from custody. When he was 19, Mrs. Jones arranged for defendant to stay with ***36** relatives in Missouri because he was "unhappy" and "wanted a new start." Defendant thereafter lived in St. Louis, "off and on," for the next 20 years of his life.

Defendant, although "mischievous" and "hyperactive,"

was not violent as a young child and had never been abusive or aggressive toward family members. When he was sober, defendant was "congenial, loving, fun to be around." However, under the influence of alcohol or illicit drugs, defendant became "agitated," "nervous," "argumentative," and "generally that's when he ha[d] problems." Until the Norma Knight incident, defendant had never behaved in a violent manner to his family's knowledge. Barbara C. personally informed defendant's mother, Mrs. Jones, that defendant had assaulted her, and told her that defendant said he needed help, but Mrs. Jones was not able to provide him with help at that time. She did, however, warn her sister in St. Louis (defendant's aunt) about defendant's "problems" with women and when defendant came to live with her in California after serving his prison sentence for the Toni P. convictions, she also warned Eddings that defendant became aggressive when he drank alcohol.

Defendant's sister, Sandra Seneff, expressed disbelief about Toni P.'s allegations, although she had not expressed any doubt when she testified at the trial of the Toni P. charges. By comparison, Donald, who was the closest to defendant out of all the siblings, testified that the morning he left defendant home alone with Toni P., he felt so uncomfortable that, rather than attend his job interview, Donald returned home because he was concerned that defendant "would do something" to Toni P. Additionally, upon arriving at his parents' residence on the morning of Eddings's death and seeing defendant, Donald "knew just by looking at him that he was responsible" for what had happened, even though defendant at first denied any involvement.

Knowing defendant as he did, Donald never would have left defendant alone with Donald's ex-wife, girlfriend, or daughter, nor did Sandra Seneff want defendant to be around her children. Mrs. Jones confirmed that, prior to being arrested for Eddings's homicide, defendant was not allowed ***415** to be left alone with children in the family, in order "to protect him and to protect them."

(c) Psychological evidence

Clinical psychologist Michael Kania, Ph.D., testified concerning his evaluation of defendant. Kania met with defendant 10 times over the course of two years, administering a **523** battery of psychological tests that included the Wechsler Adult Intelligence Scale, the Minnesota Multiphasic Personality Inventory, the Rorschach inkblot technique, and the Thematic Apperception *37 Test. He also spoke to defendant's mother, sister, and brother, David. In evaluating defendant, Kania found it was "very difficult" to gain information from defendant, describing him as "distrustful" and afraid "that if he disclose [d] and open[ed] up to other people, then that [would] just be used and turned on him, and he [would] be punished for it." Defendant generally "couldn't bring himself to tell [Kania] those things that he had done that were wrong or anything that would kind of reflect badly on his family."

Defendant's overall score on the intelligence test, 85, was in the "low average to borderline" range. Based upon the interviews and other test results, Kania concluded that defendant suffered from "a severe personality disorder with paranoid and dependent features," and an episodic "alcohol abuse or dependence problem," with alcohol constituting "a significant factor" in defendant's impairment. There was no indication, however, of organic or gross psychoneurological impairment in defendant's test results or in his medical or work history. There additionally was no evidence that defendant had a psychiatric disorder, and at no time was defendant required to be transferred to a mental hospital during the pendency of the case.

Kania found that defendant harbored significant anger and resentment, particularly toward his mother because she did not protect him from his physically abusive father. He had "high dependency needs" and "want[ed] to be close to people," but at the same time feared he would "be rejected or harmed in some way" by them. He dealt with anger, stress, frustration, and hostility by "putting a lid on it," but when he drank alcohol, defendant lost his "controls" and was unable to contain his anger—"that's when he [did] something that [was] either injurious to other people or to himself." Defendant therefore functioned best in situations that were free from alcohol, drugs, and conflicted relationships with women or his family, such as the structured setting of work or prison, where defendant's controls functioned well and he was able to meet clear behavioral expectations.

Kania explained that defendant generally expected women to reject him—"that they will see how inferior he is"—and interpreted their actions according to this preconception, even if it was incorrect. His abuse of women with whom he had relationships was consistent with this character trait, and drinking alcohol magnified defendant's problems with women. Based on defendant's statements that he had consumed approximately 15 beers before his confrontation with Eddings, Kania concluded defendant was under the influence of alcohol when he attacked Eddings, and opined that defendant, in the face of what he perceived was an attack from Eddings, "lashed out angrily." He further understood defendant to have

raped and sodomized Eddings "after she was dead as an expression of rage." Defendant expressed regret for what he had done to Eddings, and in Kania's opinion, did not show ***38** signs of being a person who was hardened to "the effect of his behavior on [others] and *****416** who actively goes out trying to hurt people."

(d) Prior prison adjustment

Mary Rector, a corrections case records manager with the Department of Corrections and Rehabilitation, testified concerning defendant's documented behavior during his prior prison term. According to the department's records, defendant received only a few informal "writeups"—one for sitting in class with his shoes on the desk, one for wearing sunglasses in class, and two for smoking in class. Notations in his file relating to his work performance generally were positive.

Spencer Stadler, a parole agent with the Department of Corrections and Rehabilitation, testified that after defendant's release from prison in September 1994, he was supervised on parole for a period of 21 months. During this time, defendant complied with his conditions of parole and committed no technical violations or new offenses.

Over objection by the defense, the People questioned Stadler regarding statements defendant made to him regarding Eddings's ****524** homicide. Defendant admitted to Stadler that he burned Eddings's residence, but said he had not harmed her and denied any sexual misconduct or physical violence. Defendant explained to Stadler that he had gone over "to check on" Eddings when he became concerned she had not picked up the newspaper he normally left for her on their neighboring fence. Stadler stated that defendant told him he knocked on Eddings's door and, when no one responded, he entered the house only to find her nude body lying facedown on the floor. According to Stadler, defendant told him that he checked to see whether she was alive, then panicked and left the residence, driving away in his truck because he thought he would be returned to prison due to the nature of his prior incarceration. Defendant then decided to return to destroy any evidence of his having been in the trailer.

3. The prosecution's rebuttal

Wesley Daw testified concerning additional telephone interviews he conducted with Sherry and James Melson, Frances's granddaughter and grandson-in-law, in 1997, after Frances had passed away.[8] In his interview, James recounted that on the day of the incident between Frances and defendant, he had come home from work to find his wife, Sherry, frantic and ***39** very upset outside of the residence they shared with Frances. Sherry told him "someone tried to rape her grandma." They then both talked to Frances, who told them that "Will[y]" had entered her flat for a glass of water. James recounted that Frances stated that defendant "started talking kind of weird to her, you know, hey, I've always liked old ladies and you're kind of good looking ... and then at one point he went into her kitchen and took out a butcher knife and told her he was going to fuck her and I think he grabbed her breast a couple of times" before Frances was able to maneuver him out of the door. Sherry, for her part, told James that she heard sounds of "clump ... clump ... clump down the stairs" and opened the door to see someone leaving. When she called upstairs to her grandmother, Sherry said that Frances immediately told her that defendant had been "trying to rape me."

In her interview with Daw, Sherry said that on the day in question, she had been *****417** sitting on the couch in the living room of her home when she heard a loud noise on the entryway steps leading up to her grandmother's flat. She went out into the hallway and called up to Frances, who was at the top of the stairs, "Grandma, what's going on?" and Frances said, "He tried to rape me." Sherry said, "Who are you talking about?" Frances responded, "Will[y]." Sherry went upstairs to comfort her grandmother, at which time Frances recounted what had happened just "seconds" before—that defendant had been in her kitchen to get a drink when "he started to come at her with a knife and told her that he was going to F her and that he had always had a thing for her." She also told Sherry that defendant grabbed her breast and groped her between the legs before she was able to direct him out the door.

Additionally, the prosecution played a brief portion of defendant's police interview that had previously been redacted. In it, defendant was asked about the incident in which Barbara C. woke up in her bedroom to find defendant, then 19 years of age, sitting on top of her. Defendant stated that he was "on dope ... pot and drugs and all that shit" at the time and did not remember what happened. Regarding "that lady in St. Louis," defendant stated that Frances owed him "something like a hundred dollars" for work he had done on her house, and "that's when the accusation came out on that one ... sexual something." Defendant further denied having attacked Frances.

II. DISCUSSION

A. Jury Selection Issues

Defendant makes several claims of error related to jury selection and the trial court's application of the standard for excusal set forth in ****525** *Wainwright v. Witt* (1985) 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (*Witt*) and *Witherspoon v. Illinois* (1968) 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 ***40** (*Witherspoon*). Specifically, defendant challenges the trial court's excusal for cause of two prospective jurors—one during selection of the sitting jurors and one during selection of the alternate jurors—who expressed reservations concerning their ability to impose the death penalty. He also challenges the trial court's refusal to excuse for cause five prospective jurors who, he claims, stated they would automatically vote to impose the death penalty if the charged crimes and special circumstance allegations were proved. Defendant additionally contends that the prosecution improperly exercised peremptory challenges to remove any remaining potential jurors who had expressed misgivings about capital punishment, which he argues resulted in the exclusion of all prospective jurors who had expressed "strong opposition to, or conscientious scruples against, the death penalty." Defendant alleges the cumulative effect of these alleged jury selection errors violated his right to a fair and impartial jury drawn from a representative cross-section of the community, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and article I, section 16 of the California Constitution. For the reasons discussed below, we conclude defendant's claims are without merit.

1. Excusal of two prospective jurors for cause

The prosecution challenged four prospective jurors for cause on the basis of their views concerning capital punishment, and the trial court, over defendant's objection, excused one, Prospective Juror C.B. Without objection, the prosecution also successfully challenged two alternate jurors for cause, including Prospective Juror *****418** L.L. Defendant asserts the excusal of Prospective Jurors C.B. and L.L. for cause, based on their alleged bias against the death penalty, was reversible error. We disagree.

(a) Legal principles

[1] **[2]** **[3]** **[4]** A prospective juror's personal views concerning the death penalty do not necessarily afford a basis for excusing the juror for bias in a capital case. (*Uttecht v. Brown* (2007) 551 U.S. 1, 6, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (*Uttecht*) [" '[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State,' [citation] ..."].) Rather, "[t]o achieve the constitutional imperative of impartiality, the law permits a prospective juror to be challenged for cause only if his or her views in favor of or against capital punishment 'would "prevent or substantially impair the performance of his ... duties as a juror" ' in accordance with the court's instructions and the juror's oath." (*People v. Blair* (2005) 36 Cal.4th 686, 741, 31 Cal.Rptr.3d 485, 115 P.3d 1145, quoting *Witt, supra,* 469 U.S. at p. 424, 105 S.Ct. 844.) Under this standard, a prospective juror is properly excluded in a capital case if he or she is unable to follow the ***41** trial court's instructions and "conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. [Citations.]" (*People v. McWhorter* (2009) 47 Cal.4th 318, 340, 97 Cal.Rptr.3d 412, 212 P.3d 692; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 987, 95 Cal.Rptr.2d 377, 997 P.2d 1044 (*Jenkins*).) The analysis is the same whether the claim is the failure to exclude prospective jurors who exhibited a pro-death bias, or wrongful exclusion of prospective jurors who exhibited an anti-death bias. (See *People v. Hoyos* (2007) 41 Cal.4th 872, 906, 63 Cal.Rptr.3d 1, 162 P.3d 528.)

[5] **[6]** **[7]** **[8]** During voir dire, jurors commonly supply conflicting or equivocal responses to questions directed at their potential bias or incapacity to serve. When such conflicting or equivocal answers are given, the trial court, through its observation of the juror's demeanor as well as through its evaluation of the juror's verbal responses, is best suited to reach a conclusion regarding the juror's actual state of mind. (*People v. Hamilton* (2009) 45 Cal.4th 863, 890, 89 Cal.Rptr.3d 286, 200 P.3d 898 (*Hamilton*).) " ' "There is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity. [Citations.] Rather, it is sufficient that the trial judge is left with the definite impression that a prospective ****526** juror would be unable to faithfully and impartially apply the law in the case before the juror." ' " (*People v. Abilez* (2007) 41 Cal.4th 472, 497–498, 61 Cal.Rptr.3d 526, 161 P.3d 58.) "[T]he [trial court's] finding may be upheld even in the absence of clear statements from the juror that he or she is impaired because 'many veniremen simply cannot be asked enough questions to reach the point where their bias has been made " unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings.' [Citation.] Thus, when there is ambiguity in the

prospective juror's statements, 'the trial court, aided as it undoubtedly [is] by its assessment of [the venireman's] demeanor, [is] entitled to resolve it in favor of the State.' " (*Uttecht, supra,* 551 U.S. at p. 7, 127 S.Ct. 2218.)

[9] [10] [11] A trial court's determination concerning juror bias is reviewed for abuse of discretion. (*People v. Abilez, supra,* 41 Cal.4th at pp. 497–498, 61 Cal.Rptr.3d 526, 161 P.3d 58.) "[A]ppellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears ***419** that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor) gleans valuable information that simply does not appear on the record." (*People v. Stewart* (2004) 33 Cal.4th 425, 451, 15 Cal.Rptr.3d 656, 93 P.3d 271 (*Stewart*).). As such, "the reviewing court generally must defer to the judge who sees and hears the prospective juror, and who has the 'definite impression' that he is biased, despite a failure to express clear views." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1007, 47 Cal.Rptr.3d 467, 140 P.3d 775 (*Lewis and Oliver*); see also *Uttecht, supra,* 551 U.S. at p. 9, 127 S.Ct. 2218 ["Deference to *42 the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors."].) Even when " '[t]he precise wording of the question asked of [the venireman], and the answer he gave, do not by themselves compel the conclusion that he could not under any circumstance recommend the death penalty,' the need to defer to the trial court remains because so much may turn on a potential juror's demeanor." (*Uttecht, supra,* 551 U.S. at p. 8, 127 S.Ct. 2218.)

[12] [13] In applying these principles, however, we must keep in mind that a prospective juror who is firmly opposed to the death penalty is not necessarily disqualified from serving on a capital jury. "[T]hose who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they *state clearly* that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176, 106 S.Ct. 1758, 90 L.Ed.2d 137, italics added; see also *People v. Kaurish* (1990) 52 Cal.3d 648, 699, 276 Cal.Rptr. 788, 802 P.2d 278 ["A juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict."]; see *Stewart, supra,* 33 Cal.4th at p. 446, 15 Cal.Rptr.3d 656, 93 P.3d 271.)

(b) Analysis

(1) Prospective Juror C.B.

[14] In her questionnaire, Prospective Juror C.B. rated herself as "strongly against the death penalty" based on religious considerations related to her Christian background. She described her general feelings about the death penalty as follows: "I don't feel the death penalty is the appropriate action to take against a person. I do believe in punishment when the individual lives with the consequences of their actions. For example prison term [*sic*]." She also indicated in her questionnaire, however, that she would *not* "*automatically refuse* to vote in favor of the penalty of death and *automatically vote* for the penalty of life imprisonment without the possibility of parole, without considering any of the evidence, or any of the aggravating and/or mitigating factors." She further confirmed she could not think of any reason she could not be a fair and impartial juror.

****527** During voir dire for the selection of sitting jurors, the court asked Prospective Juror C.B. whether, in light of her feelings about the death penalty, she would "automatically tend to reject the penalty of death [and] automatically vote for life imprisonment regardless of the evidence." She *43 twice responded that it was "hard to say." After several other prospective jurors were questioned by the court and ***420** counsel, during which time the duties and obligations of jurors in determining a penalty were explained to the panel in some detail, Prospective Juror C.B. told the prosecutor, "now I've heard the judge speak, I have a better understanding of it now. I would be fair. I would keep my own beliefs to myself." The prosecutor followed up by asking Prospective Juror C.B. whether she would be able to "walk into this courtroom, look at the defendant and say 'I sentence you to die. I sentence you to death.' " She responded, "I don't really know. It's tough.... I'm not very comfortable with it, but I would respect the law." The prosecutor again asked Prospective Juror C.B. whether she could "come back, look the defendant in the face, and say 'I sentence you to death,' " to which she replied, "Personally, I don't think I could do it just because of my beliefs." Asked more specifically whether she could impose a death sentence if she found the aggravating circumstances outweighed the mitigating circumstances, Prospective Juror C.B. indicated she was "[n]ot sure."

The prosecutor challenged Prospective Juror C.B. for cause, and over defense counsel's objection the court granted the challenge stating: "The Court's evaluation of

[Prospective Juror C.B.'s] responses is that although saying ultimately at the end she didn't know what she would do, everything else about her answers and her body language made it unmistakably clear that she had a position in this case with regard to the ultimate punishment. And she did not appear to the court to be open to the possibility of considering equally, based on the evidence, the two possible alternative punishments in this matter."

As the above discussion demonstrates, Prospective Juror C.B.'s answers to questions directed at her potential bias concerning the death penalty were equivocal and conflicting, and indicated that she harbored very serious doubts concerning whether, if seated on a capital jury, she could ever personally vote to impose the death penalty. She repeatedly and candidly admitted that she did not know or was not sure whether she could follow the law and consider all of the sentencing alternatives in light of her "strong" opposition to capital punishment based on her religious beliefs. Those answers, in combination with the trial court's firsthand observations of her body language and demeanor, could give rise to a definite impression that C.B.'s views concerning the death penalty would substantially impair the performance of her duties as a juror. At best, her equivocation in response to questioning requires that we defer to the trial court's assessment of her initial and ultimate state of mind. We therefore conclude that the court acted within its discretion in excusing Prospective Juror C.B. (Cf. *People v. Salcido* (2008) 44 Cal.4th 93, 134, 79 Cal.Rptr.3d 54, 186 P.3d 437 [upholding dismissal of prospective juror for cause]; *People v. Roldan* (2005) 35 Cal.4th 646, 705, 27 Cal.Rptr.3d 360, 110 P.3d 289 (*Roldan*) [same].)

[15] ***44** Defendant argues that Prospective Juror C.B.'s answers suggested, at most, that she would have extreme difficulty imposing the death penalty, and contends that mere difficulty in this regard is insufficient to justify a *Witherspoon/Witt* excusal. His citation to, and lengthy quotation from, *Stewart, supra,* 33 Cal.4th 425, 15 Cal.Rptr.3d 656, 93 P.3d 271, in support of this premise, is inapposite. There we confirmed that, when the court chooses to rely solely on a prospective juror's written questionnaire answers to justify excusal, the answers themselves must clearly indicate the juror's unwillingness or inability to determine the appropriate penalty under the instructions. We indicated that a ***421** brief written response to a question whether the juror's death penalty views would " 'prevent or make it very difficult' " to do so would not suffice. (*Id.* at pp. 446–447 & fn. 12, 15 Cal.Rptr.3d 656, 93 P.3d 271.) Here, however, the court and both counsel subjected C.B. to substantial oral examination, and the court was able to observe C.B. during this process. Under such circumstances, a **528 juror's conflicting or ambiguous answers may indeed give rise to the court's definite impression about the juror's qualifications, and its decision to excuse the juror deserves deference on appeal.

(2) Prospective Alternate Juror L.L.

[16] **[17]** Defendant also challenges the trial court's excusal for cause of Prospective Alternate Juror L.L. The People contend that defendant forfeited any objection to the trial court's ruling on the basis of alleged *Witherspoon/Witt* error because in response to the prosecution's motion to dismiss Prospective Alternate Juror L.L. for cause, defense counsel submitted the matter to the trial court. " 'Hence, as a practical matter, he "did not object to the court's excusing the juror, but ... also refused to stipulate to it." ' [Citation.]" (*People v. Lynch* (2010) 50 Cal.4th 693, 733, 114 Cal.Rptr.3d 63, 237 P.3d 416.) As we recently held in *People v. McKinnon* (2011) 52 Cal.4th 610, 643, 130 Cal.Rptr.3d 590, 259 P.3d 1186, "counsel (or defendant, if proceeding pro se) must make either a timely objection, or the functional equivalent of an objection, such as a statement of opposition or disagreement, to the excusal stating specific grounds under *Witherspoon/ Witt* in order to preserve the issue for appeal. Nevertheless, ... because at the time of this trial we had not expressly held that an objection is necessary to preserve *Witherspoon/Witt* excusal error on appeal, we do not apply this rule here. [Citation.]"

In any event, we need not reach the merits of defendant's claim because Prospective Alternate Juror L.L. was under consideration solely as an alternate juror and no alternate jurors were ever substituted in defendant's case. In *People v. Bandhauer* (1970) 1 Cal.3d 609, 617–618, 83 Cal.Rptr. 184, 463 P.2d 408, we held that the error, if any, in excluding a venireman by reason of his views on capital punishment was harmless beyond a reasonable ***45** doubt where, at the time of the ruling, the regular panel of 12 jurors had been chosen, the prospective juror was under consideration solely as an alternate juror, and, as matters turned out, no alternate juror was called upon to participate in the deliberations of the jury. (See also *People v. Terry* (1969) 70 Cal.2d 410, 416, fn. 1, 77 Cal.Rptr. 460, 454 P.2d 36 [noting that although there were prospective alternate jurors who were excused on the ground of their opposition to the death penalty, no alternates were substituted for any member of the trial jury]; *People v. Risenhoover* (1968) 70 Cal.2d 39, 56, fn. 6, 73 Cal.Rptr. 533, 447 P.2d 925 [same]; cf. *In re Hill* (1969) 71 Cal.2d 997, 1017, fn. 6, 80 Cal.Rptr. 537, 458 P.2d 449 [defendants were prejudiced by dismissal of prospective alternate veniremen in violation *Witherspoon/*

Witt because one alternate juror participated in the deliberations in the penalty phase].) Similarly here, any error in excusing Prospective Alternate Juror L.L. could not possibly have prejudiced defendant.9

***422 *2. Denial of challenges to five prospective jurors for cause*

[18] [19] [20] Defendant challenged 10 prospective jurors on the basis of their views concerning the death penalty. The trial court granted five challenges, but denied the challenges as to Prospective Jurors E.R., P.P., P.N., B.D., and M.B. Defendant now contends the trial court erred in denying his motions to excuse for cause the five "death **529 inclined" prospective jurors and forcing him to use peremptory challenges to excuse these jurors. However, defendant, without objection, accepted the jury as finally constituted with five peremptory challenges remaining. "As a general rule, a party may not complain on appeal of an allegedly erroneous denial of a challenge for cause because the party need not tolerate having the prospective juror serve on the jury; a litigant retains the power to remove the juror by exercising a peremptory challenge. Thus, to preserve this claim for appeal we require, first, that a litigant actually exercise a peremptory challenge and remove the prospective juror in question. Next, the litigant must exhaust all of the peremptory challenges allotted by statute and hold none in reserve. Finally, *46 counsel (or defendant, if proceeding pro se) must express to the trial court dissatisfaction with the jury as presently constituted." (*People v. Mills* (2010) 48 Cal.4th 158, 186, 106 Cal.Rptr.3d 153, 226 P.3d 276; see also *People v. Davis* (2009) 46 Cal.4th 539, 581, 94 Cal.Rptr.3d 322, 208 P.3d 78 (*Davis*) ["the existence of unused peremptory challenges strongly indicates defendant's recognition that the selected jury was fair and impartial"]; *Hamilton, supra,* 45 Cal.4th at p. 892, 89 Cal.Rptr.3d 286, 200 P.3d 898 ["it is possible that, despite counsel's initial misgivings about the composition of the jury, he ultimately was satisfied with the jury as sworn, and, had he expressed dissatisfaction, the trial court may have allowed him to exercise additional peremptory challenges"].) Here, although defendant used peremptory challenges to excuse Prospective Jurors E.R., P.P., P.N., B.D., and M.B., he did not exhaust his peremptory challenges during jury selection, nor did he communicate to the trial court any dissatisfaction with the jury ultimately impaneled. Defendant's claims of error as to these five prospective jurors, therefore, were not preserved for appeal.

3. The prosecution's exercise of peremptory challenges

[21] Of the 22 peremptory challenges exercised by the prosecution, defendant contends that "most, if not all," were exercised against prospective jurors who had expressed reservations against the death penalty, and that this violated his right to a fair and impartial jury because it "purged" the panel of the life-inclined jurors that remained after the trial court's rulings on the challenges for cause. In order to preserve this claim for appeal, ***423 defendant was required at trial to object to the prosecutor's use of peremptory challenges. (*People v. Champion* (1995) 9 Cal.4th 879, 907, 39 Cal.Rptr.2d 547, 891 P.2d 93; *People v. Hill* (1992) 3 Cal.4th 959, 1005, 13 Cal.Rptr.2d 475, 839 P.2d 984.) He failed to do so and thus forfeited any claim of error regarding such use.

[22] Even assuming it were not forfeited, and that the prosecution in fact exercised all its peremptory challenges based on the prospective jurors' views concerning capital punishment, this claim still would fail on the merits. As defendant acknowledges, "we have repeatedly rejected any claim of constitutional infirmity in a prosecutor's use of peremptory challenges to remove jurors with reservations about the death penalty." (*People v. Morris* (1991) 53 Cal.3d 152, 186, 279 Cal.Rptr. 720, 807 P.2d 949; see, e.g., *People v. Ochoa* (2001) 26 Cal.4th 398, 432, 110 Cal.Rptr.2d 324, 28 P.3d 78 ["Because both parties may exercise peremptory challenges to remove jurors with unfavorable attitudes, the practice does not produce a jury biased toward death."].)

***47 B. Guilt Phase Issues**

1. Admission of evidence of other crimes and related jury instructions

Defendant claims that the trial court erred in admitting evidence related to the sexual assault of Toni P. because it constituted improper character evidence and additionally should have been excluded as more prejudicial than probative under Evidence Code section 352. He further argues that this asserted error was compounded because the jury instructions improperly permitted the jurors to consider the attacks on Norma Knight and Barbara C. for purposes of determining defendant's intent upon entering Eddings's residence. Such errors, defendant alleges, violated his federal constitutional rights and **530 resulted in prejudice. These contentions are without merit.

(a) Background

Before trial, defendant filed a motion in limine to exclude evidence of any "uncharged acts" on the grounds that this would constitute improper character evidence under Evidence Code section 1101, subdivision (a), and would be more prejudicial than probative under Evidence Code section 352. In response, the prosecution moved to introduce testimony related to the Toni P. case and the Frances incident, arguing that the evidence was admissible under Evidence Code sections 1101, subdivision (b), and 1108, because it tended to show defendant's intent and common scheme or plan when he entered Eddings's home, as well as his propensity to commit sexual offenses. The trial court ultimately ruled that evidence relating to the Toni P. case (but not defendant's resulting conviction) would be admissible at the guilt phase on the limited issue of intent with respect to the burglary special circumstance allegation, and that Evidence Code section 352 did not otherwise limit the admissibility of this evidence. In so ruling, the court observed that the Eddings and Toni P. offenses both involved sexual assaults accomplished within a short period of time after gaining access to the victim. In particular, the trial court found the rapidity with which defendant acted to accomplish his sexual assault once alone with Eddings and Toni P. was corroborative of his intent to sexually assault Eddings while she was alive. Evidence relating to the Frances incident, however, was ruled inadmissible on the grounds that, in the absence of a contemporaneous account by Frances of the incident, the evidence was, at best, ambiguous concerning the issue of intent.

***424** As discussed more fully at the outset of the opinion, Toni P. testified during the prosecution's case-in-chief that when she was 16 years of age, she was alone with defendant one morning in his sister's house when defendant pushed her into a bedroom and forced her to perform an act of oral **48** copulation. Pursuant to the trial court's pretrial ruling, the jury was not informed of defendant's prior conviction. Additionally, the prosecution did not present evidence regarding any uncharged act of misconduct, and the statements defendant made to law enforcement officers regarding the Frances and Barbara C. incidents were redacted from the audiotapes played for, and transcript provided to, the jury.

However, the situation changed when defendant exercised his right to testify. The prosecution argued that the other incidents of misconduct involved "acts of moral turpitude" and therefore were admissible for impeachment purposes under *People v. Wheeler* (1992) 4 Cal.4th 284, 14 Cal.Rptr.2d 418, 841 P.2d 938. The trial court ruled that defendant could be impeached with evidence of his prior conviction related to Toni P., as well as with evidence of the attacks on Norma Knight, Barbara C., and Cathy D.[10] In so ruling, the court determined that the evidence was not more prejudicial than probative under Evidence Code section 352, and that the sentencing enhancement allegations related to the prior convictions would no longer be bifurcated.

When cross-examined by the prosecution regarding these matters and as described above, defendant admitted that in 1972, he walked into a classroom of a teacher whom he did not know and stabbed her in the back. He also admitted that in 1975, he went to Barbara C.'s house at night, found her asleep, and "jumped on her," but claimed he was under the influence of drugs at the time and denied he intended to rape her. With respect to Toni P., defendant admitted that he had been convicted of felony assault with intent to commit rape and of forced oral copulation; he denied, however, committing those two crimes.

The prosecution further introduced documents relating to defendant's prior prison commitment pursuant to Penal Code section 969b. The court overruled defendant's Evidence Code section 352 objection, reasoning that the prior prison term was admissible under article 1, section 28 of the California **531** Constitution on the issue of defendant's credibility, involved a crime of moral turpitude and a felony as to which defendant explicitly denied responsibility, and was related to the testimony of a witness who was offered by the prosecution under Evidence Code section 1101, subdivision (b).

On rebuttal, the prosecution was permitted to call the Riverside County Sheriff's Department deputy who arrested defendant in connection with the Toni P. case. As described above, the deputy testified concerning various **49** statements defendant made as he was arrested and as the rape kit sample was collected. Also called to the stand was a Riverside County superior court clerk who testified concerning the statement she heard defendant make to his brother while outside of the courtroom during the Toni P. case—that he thought he was "going to beat this one too." The prosecution further was permitted to play previously redacted portions of defendant's taped interview with Detective Spidle. When asked about the incident with Toni P., defendant stated: "[A]ll these years, ***425** you know, I had to live in that lie." Defendant further admitted to Detective Spidle that he tried to rape Barbara C., and that the sexual urges he had that caused him to want to force sex on someone did not differentiate between younger women and older women.

(b) Analysis

(1) Evidence related to the Toni P. case

[23] [24] [25] [26] The rules governing the admissibility of evidence of other crimes are well settled. Although evidence of prior criminal acts generally is inadmissible to show bad character, criminal disposition, or probability of guilt, such evidence may be admissible when relevant to prove some material fact other than the defendant's general disposition to commit such an act. (Evid.Code, § 1101, subd. (b).) "As Evidence Code section 1101, subdivision (b) recognizes, that a defendant previously committed a similar crime can be circumstantial evidence tending to prove his identity, intent, and motive in the present crime. Like other circumstantial evidence, admissibility depends on the materiality of the fact sought to be proved, the tendency of the prior crime to prove the material fact, and the existence *vel non* of some other rule requiring exclusion." (*Roldan, supra,* 35 Cal.4th at p. 705, 27 Cal.Rptr.3d 360, 110 P.3d 289.) An exception to the general rule against admitting propensity evidence is Evidence Code section 1108, subdivision (a), which provides for the admissibility of evidence of other sexual offenses in the prosecution for a sexual offense, subject to Evidence Code section 352. "[T]he Legislature's principal justification for adopting section 1108 was a practical one: By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations. Section 1108 provides the trier of fact in a sex offense case the opportunity to learn of the defendant's possible disposition to commit sex crimes." (*People v. Falsetta* (1999) 21 Cal.4th 903, 915, 89 Cal.Rptr.2d 847, 986 P.2d 182 (*Falsetta*).)

[27] [28] *50 In this case, evidence related to the defendant's sexual assault on Toni P. was admitted under Evidence Code section 1101 during the prosecution's case-in-chief to show defendant's intent in the present case.[11] "To be admissible to show intent, 'the prior conduct and the charged offense need only be sufficiently similar to support the inference that defendant probably harbored the same intent in each instance.' [Citations.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1194, 17 Cal.Rptr.3d 532, 95 P.3d 811.) Additionally, the probative value of the proffered evidence must not be substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid.Code, § 352.) At the time of defendant's trial, the constitutionality of ****532** Evidence Code section 1108 was pending review before this court in *Falsetta, supra,* 21 Cal.4th 903, 89 Cal.Rptr.2d 847, 986 P.2d 182. In light of the circumstance that the trial court found the Toni P. evidence admissible under Evidence Code section 1101, subdivision (b), it declined to admit the evidence under *****426** section 1108 so as to "avoid issues on appeal." Subsequent to defendant's trial, we upheld the constitutionality of Evidence Code section 1108. (*Falsetta, supra,* 21 Cal.4th at pp. 907–908, 910–922, 89 Cal.Rptr.2d 847, 986 P.2d 182.)

[29] [30] Regardless of the admissibility of the challenged evidence under Evidence Code section 1101, subdivision (b), there was no error in the Toni P. evidence being considered by the jury because it was admissible under Evidence Code section 1108 to show that defendant had a predisposition to commit the sexual offenses in this case. (See *Davis, supra,* 46 Cal.4th at p. 603, fn. 6, 94 Cal.Rptr.3d 322, 208 P.3d 78; see also *People v. Smithey* (1999) 20 Cal.4th 936, 972, 86 Cal.Rptr.2d 243, 978 P.2d 1171 (*Smithey*) [" ' " '[A] ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' [Citation.]" [Citation.]' "].) Admissibility under Evidence Code section 1108 does not require that the sex offenses be similar; it is enough the charged offense and the prior crimes are sex offenses as defined by the statute. (*People v. Frazier* (2001) 89 Cal.App.4th 30, 41, 107 Cal.Rptr.2d 100.) That criterion is clearly met here.

[31] With respect to Evidence Code section 352, we agree with the trial court that the substantial probative value of the evidence from the Toni P. case was not outweighed by the likelihood it would prejudice the jury. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404–407, 27 Cal.Rptr.2d 646, 867 P.2d 757.) Evidence ***51** from the Toni P. case was probative of defendant's propensity to commit sexual offenses, and to refute the claim that he formed the intent to sexually assault Eddings only after killing her. (*Falsetta, supra,* 21 Cal.4th at p. 915, 89 Cal.Rptr.2d 847, 986 P.2d 182 ["evidence that [the defendant] committed other sex offenses is at least circumstantially *relevant* to the issue of his disposition or propensity to commit these offenses"].) The source of information—Toni P. herself—was independent from the Eddings case. The attack resulted in defendant's convictions for forcible oral copulation and assault with intent to commit rape. Although serious crimes, they certainly were not more serious or inflammatory than the charge that defendant raped, sodomized, paralyzed, viciously beat, and strangled Eddings to death before setting her house on fire. (See *People v. Lewis* (2009) 46 Cal.4th 1255, 1287, 96

Cal.Rptr.3d 512, 210 P.3d 1119 (*Lewis*).) Nor were the Toni P. offenses too remote in time—there was only a six year gap between defendant's attacks on Toni P. and Eddings, and defendant was incarcerated for the Toni P. convictions for all but 18 months of that time. (See, e.g., *People v. Foster* (2010) 50 Cal.4th 1301, 1330, 117 Cal.Rptr.3d 658, 242 P.3d 105 (*Foster*); *Davis, supra,* 46 Cal.4th at p. 603, 94 Cal.Rptr.3d 322, 208 P.3d 78; *People v. Turner* (1994) 8 Cal.4th 137, 200, 32 Cal.Rptr.2d 762, 878 P.2d 521; *People v. Daniels* (2009) 176 Cal.App.4th 304, 97 Cal.Rptr.3d 659.) Finally, because the Toni P. offenses constituted the only "other crimes" evidence admitted in the prosecution's case-in-chief before defendant elected to testify and put his credibility at issue, they were clearly not cumulative. Accordingly, the trial court acted within its discretion in finding the evidence of the Toni P. offenses substantially more probative than prejudicial.[12]

***427 *(2) Jury instructions concerning evidence of other crimes*

As noted, evidence related to defendant's sexual assault of Toni P. was admitted initially **533 to show intent. When defendant elected to testify, the trial court further ruled that his credibility could be impeached with the Toni P. conviction, as well as with his stabbing of Norma Knight and attempted rape of Barbara C. The trial court's instructions to the jury, however, were not entirely consistent with its rulings on the scope of admissibility of these prior crimes.

At the time the prosecution cross-examined defendant about the three incidents, the trial court instructed the jury as follows: "There was testimony *52 early on, a couple weeks ago from [Toni P.], and then again today there has been testimony from [defendant] about incidents that occurred before June 19th or 18th, 1996. You may consider those incidents for a limited purpose. [¶] At this point in time, with regard to the incidents that [defendant] has testified to, you may consider those incidents insofar as they may weigh on your determination of the witness's credibility. The fact that an individual, for example, has been convicted of a felony offense or has committed a criminal act evidencing dishonesty or moral turpitude may be considered by you in weighing the credibility of such a witness. [¶] ... [¶] *In addition to that,* you may consider such evidence if it has a tendency to show the existence or nonexistence of the required specific intent or mental state which is an element of the crime or special circumstance which is charged in this particular case. At least at this point in time, and for no other purpose, you may consider such evidence." (Italics added.) Defense counsel made no objection to this instruction.

At the conclusion of the guilt phase, at the request of both parties, the trial court instructed the jury pursuant to CALJIC No. 2.50 as follows: "Evidence has been introduced for the purpose of showing that the defendant committed crimes other than those for which he is currently on trial. Such evidence, if believed, was not received and may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining, if it tends to show, the existence on or about June 19th, 1996, of the specific intent or mental state which is a necessary element of the crime or special circumstance charged. For these limited purposes and as I previously instructed you with regard to the credibility of witnesses, you must weigh such evidence in the same manner as you do all other evidence in the case. You are not permitted to consider such evidence for any other purpose."[13]

***428** Defendant now claims these instructions were erroneous because they failed to distinguish between the offenses introduced for the limited purpose of determining defendant's intent—the Toni P. assault—and the evidence admitted for the limited purpose of impeaching defendant's credibility as a witness—the Norma Knight, Barbara C., and Toni P. assaults. As a result, defendant asserts, the jury was allowed to consider evidence of his stabbing *53 of Norma Knight and his attempted rape of Barbara C. for purposes of assessing his intent to sexually assault Eddings, when that evidence was admitted only for impeachment purposes.

[32] As a general matter, CALJIC No. 2.50 does not misstate the law, and the evidence supported the giving of the instruction. Defendant moreover not only failed to object to the instructions he now complains of, but also affirmatively requested that CALJIC No. 2.50 be given, without seeking any clarification concerning which prior crime had been introduced for what purpose. In any event, setting aside the questions of whether the trial court erred and whether defendant invited the error by requesting the instruction without modification, any error was harmless. **534 It is not reasonably probable that defendant would have obtained a more favorable result if the jury had been instructed in a clearer manner concerning which prior crimes were admitted for the limited purpose of determining defendant's intent in committing the charged offenses and the special circumstances, and which prior crimes could be considered for the limited purpose of assessing defendant's credibility as a witness. (*People v. Green* (1980) 27 Cal.3d 1, 44, 164 Cal.Rptr. 1, 609 P.2d 468 [evaluating the trial court's error in failing to reopen the case under the "reasonable probability" standard

articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243].)

First, there is no dispute that Norma Knight's stabbing and Barbara C.'s attempted rape were admissible as past criminal conduct indicating dishonesty or moral turpitude that the jury could consider for the purpose of determining defendant's credibility. The Barbara C. incident furthermore was admissible under Evidence Code section 1108 as evidence of a prior sexual offense that demonstrated defendant's propensity to commit sexual offenses. Second, there was direct and circumstantial evidence strongly supporting the conclusion that, contrary to his denials at trial, defendant's intent upon entering Eddings's residence was to sexually assault her. This included defendant's admission to law enforcement officers that he went to Eddings's home for the purpose of forcing sex on her, the expert opinion of the forensic pathologist who conducted Eddings's autopsy that Eddings was raped and sodomized before she died, and defendant's previous sexual assault of Toni P. Third, during closing argument, the prosecution was careful to distinguish between the specific limited purposes for which each prior crime had been admitted.14 Defense ***429** counsel in his closing argument highlighted the distinction **54** as well.15 It therefore is not reasonably probable that, in the absence of any lack of clarity in the jury instructions as to which prior crimes were admitted on the issue of intent, defendant would have obtained a more favorable result.

[33] Defendant alternatively argues that the assertedly erroneous jury instructions violated his federal constitutional rights. This claim also is without merit. As noted, there was no error in the admission of the Norma Knight and Barbara C. assaults. Any mistake in the related instructions concerning the purpose for which the jury could consider this evidence, would not constitute a violation of defendant's due process rights, because the instructions did not "infect[ ] the entire trial." (*Estelle v. McGuire* (1991) 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 ["It is well established that the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record."].) The **535** strong evidence of intent and the arguments of counsel, which advised jurors to consider defendant's assaults of Norma Knight and Barbara C. for the limited purpose of assessing his credibility, lead us to conclude that the instruction did not corrupt the factfinding process. On this record, any error in the jury instruction did not affect defendant's federal constitutional rights to a fair trial, to present a defense, to due process of law, and to reliable determinations of the issues of guilt and penalty. (*Foster, supra,* 50 Cal.4th at p. 1335, 117 Cal.Rptr.3d 658, 242 P.3d 105.)

2. Admission of expert opinion that the victim had been raped and sodomized before death

Defendant claims that we must reverse the guilt phase judgment because the trial court erred in permitting Dr. Robert DiTraglia, the forensic pathologist and Riverside County coroner who conducted Eddings's autopsy, to **55** testify concerning his opinion that Eddings was raped and sodomized, and that this occurred "before death." Defendant contends that Dr. DiTraglia did not have any specialized education, training, or experience qualifying him as an expert "in this particular area"; his testimony lacked foundation and exceeded the scope of his expertise as a forensic pathologist because it was based on "extrinsic" factors instead of anatomical findings; the opinion was not the proper subject of expert testimony because it was not helpful to the jury; the opinion was more prejudicial than probative under Evidence Code section 352; and that defendant suffered prejudice as a result of the admitted testimony. Finally, defendant ***430** claims the error in admitting Dr. DiTraglia's opinion also violated defendant's federal constitutional rights. We conclude that each of defendant's arguments is without merit, as discussed below.

(a) Background

When the prosecutor first asked Dr. DiTraglia for his opinion concerning whether Eddings had been raped and sodomized, defense counsel objected that such testimony was "outside the scope of this expert's opinion" in light of Dr. DiTraglia's testimony "about other indicators being absent," and that the question therefore called for speculation. The trial court did not sustain the objection, but suggested that there was a lack of foundation for the question, after which Dr. DiTraglia clarified, under questioning by the prosecution, that over the course of his career, he had seen "a number of cases" involving homicide victims who had been raped and sodomized.

The prosecutor next asked Dr. DiTraglia for his opinion concerning whether Eddings was alive at the time she was raped and sodomized. Defense counsel objected that, "based on the status of the evidence as we have it on the record, there's insufficient data for this expert to render an opinion." The court did not sustain this objection either, but opined that the question "assume[d] facts not in evidence at this point in time." The prosecutor rephrased the question, asking Dr. DiTraglia for his basis in forming an opinion concerning whether or not Eddings was raped or sodomized, to which Dr. DiTraglia responded as

follows: "Everything that I know about this case, some of it we've talked about today, some of it we haven't talked about directly—for example, DNA evidence and sexual assault evidence—my training and experience in cases of rape-murder, the sorts of things that happen when people are raped and murdered, the cause of death, the circumstances of death, my experience in rape-murder versus if I understand your question correctly, you're asking me to evaluate necrophilia, which would be sex with a dead person, which is exceedingly uncommon. So I would say my training and experience, textbooks and literature, all of the evidence that I know about what happened in this particular case is what I would use to formulate an answer to your question."

***56** The court then instructed the jury pursuant to CALJIC No. 2.80 regarding expert testimony,16 and asked Dr. DiTraglia additional ****536** questions relating to his qualifications. Under the court's questioning, Dr. DiTraglia reiterated that one of his responsibilities as a forensic pathologistwas *****431** to express an opinion on the cause of death, that he had testified approximately 150 times in court, and that on several previous occasions, he had been asked to express an opinion in court as to whether or not the individual upon whom he had performed an autopsy had been the victim of a sexual assault.

Following this exchange, the prosecutor resumed questioning, and she again asked Dr. DiTraglia whether he had an opinion concerning whether Eddings was raped. Defense counsel objected on the grounds that the question called for an opinion that was outside the scope of the witness's expertise, "especially given his recent testimony about necrophilia. There's been no evidence introduced at this time that he has any training in psychiatric or psychological anomalies upon which he would have to base that opinion, to wit, that sex with a dead person is exceedingly uncommon."

The trial court then permitted defense counsel to question Dr. DiTraglia extensively on his qualifications in "this specific area." Dr. DiTraglia testified that although he had not had any "formal training" or "special on-the-job training" concerning necrophilia outside general reading in forensic literature, in his experience as a forensic pathologist—which included personally performing 3,000 to 3,500 autopsies over the course of a 10–plus–year career—necrophilia was uncommon, such that he had never had the opportunity to conduct an autopsy on a corpse that had been the victim of necrophilia. He also reiterated the multifaceted approach to formulating an opinion concerning whether a corpse had been the victim of a rape murder, including talking to law enforcement personnel, visiting or viewing photographs of the crime scene, the results of the autopsy, the presence or absence of trauma, foreign ***57** objects in the body cavities, and sexual assault evidence such as sperm, proteins, and DNA, understanding the connection between rape and murder, and the circumstance that the most common cause of death in rape murder cases is strangulation, often coupled with blunt force trauma.

When direct examination resumed, Dr. DiTraglia was asked for and testified concerning the opinions that are at issue here—that Eddings was raped and sodomized, and that she was raped and sodomized "before death."

(b) Analysis

(1) Expert's qualifications

[34] Defendant contends that Dr. DiTraglia's opinion was inadmissible because he had no specialized education, training, and experience qualifying him as an expert in determining whether a sexual assault on a deceased victim was committed prior to or after death. To support this claim, he points to Dr. DiTraglia's lack of background in psychology, psychiatry, necrophilia, criminology, and crime scene reconstruction. This contention lacks merit.
[35] [36] Evidence Code section 720 provides that a person may testify as an expert "if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates," and that "[a] witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony." The trial court's determination that a witness qualifies as an expert is a matter of discretion that will not be disturbed absent a showing of manifest abuse. ****537** (*People v. Bolin* (1998) 18 Cal.4th 297, 321–322, 75 Cal.Rptr.2d 412, 956 P.2d 374 (*Bolin*).) We will find error regarding a witness's *****432** credentials as an expert only if " ' "the evidence shows that a witness *clearly lacks* qualification as an expert...." ' (Italics in original, [citations.])" (*People v. Chavez* (1985) 39 Cal.3d 823, 828, 218 Cal.Rptr. 49, 705 P.2d 372.)

[37] There is no dispute that Dr. DiTraglia was qualified as a forensic pathologist. Defendant suggests, however, that an opinion concerning the timing of Eddings's sexual assault could have been given only by a psychologist or psychiatrist specializing in necrophilia, or one qualified as a criminologist or crime scene reconstructionist. We disagree. "A forensic pathologist who has performed an

autopsy is generally permitted to offer an expert opinion not only as to the cause and time of death but also as to circumstances under which the fatal injury could or could not have been inflicted." (*People v. Mayfield* (1997) 14 Cal.4th 668, 766, 60 Cal.Rptr.2d 1, 928 P.2d 485 [experienced forensic pathologist was qualified to give an opinion on ***58** regarding whether victim's fatal wound could have been inflicted in the manner described by the defendant without leaving tattooing or stippling around the wound]; *People v. Robinson* (2005) 37 Cal.4th 592, 631, 36 Cal.Rptr.3d 760, 124 P.3d 363 (*Robinson*) [rejecting argument that only a crime scene reconstructionist could opine about the position of gunshot victims, where testifying forensic pathologist possessed extensive familiarity with gunshot wounds].) The question of whether a victim was raped and sodomized prior to or after dying is a relevant circumstance of death for which a qualified forensic pathologist might offer an opinion in an appropriate case. We further note that defendant's rebuttal witness on this issue, Dr. Barry Silverman, a medical expert in anatomic and clinical pathology who opined that penetration of Eddings's vaginal and rectal cavities occurred postmortem, also appears to lack the particular expertise that defendant claims was lacking to support Dr. DiTraglia's contrary opinion.

The record moreover establishes that the challenged opinion fell within the ambit of Dr. DiTraglia's particular education, training, and experience. In his 10–plus–year career, Dr. DiTraglia had performed 3,000 to 3,500 forensic autopsies, including a number in cases involving homicide victims who had been raped or sodomized prior to being murdered, and had testified in approximately 150 court cases, including several in which he had been asked to express an opinion concerning whether the individual upon whom he had performed an autopsy had been the victim of a sexual assault. He additionally had the particular experience of personally performing Eddings's autopsy, and conducting a contemporaneous review of studies regarding rape and trauma, in formulating his opinion concerning the cause, manner, and circumstances of her death, including whether she had been raped and sodomized prior to dying.

The two cases cited by defendant, *People v. Hogan* (1982) 31 Cal.3d 815, 183 Cal.Rptr. 817, 647 P.2d 93 and *People v. Williams* (1992) 3 Cal.App.4th 1326, 5 Cal.Rptr.2d 130, are distinguishable from the present case. In *Hogan*, a criminalist, although qualified to give an opinion concerning the source of various bloodstains, was erroneously allowed to offer additional "blood spatter" testimony, when the criminalist had no education or training regarding blood spatters and had never performed any laboratory analysis to make blood spatter determinations. Rather, he merely had observed bloodstains at certain crime scenes and determined in his own mind whether they were "spatters" or "wipes" without ever verifying his conclusions in any way. (*Hogan, supra,* at pp. 852–853, 183 Cal.Rptr. 817, 647 P.2d 93.) *****433** Similarly, in *Williams,* an arresting officer in a driving-under-the-influence case, although having sufficient expertise to recognize nystagmus (involuntary rapid movement of the eyeball), was not qualified to express an opinion regarding the cause of nystagmus, because he had no training in chemistry, physiology, or any other subject related to how ***59** alcohol affected the human body or how nystagmus occurs after the ingestion of alcohol. (*Williams, supra,* at pp. 1330–1331, 5 Cal.Rptr.2d 130.)

****538 [38]** By contrast, the opinion at issue did not require Dr. DiTraglia to have expertise beyond that which was shown—that he was a veteran forensic pathologist with extensive experience and familiarity with rape murder cases. Once an expert witness establishes knowledge of a subject sufficient to permit his or her opinion to be considered by a jury, the question of the degree of the witness's knowledge goes to the weight of the evidence and not its admissibility. (*Bolin, supra,* 18 Cal.4th at p. 322, 75 Cal.Rptr.2d 412, 956 P.2d 374.) The criticism that Dr. DiTraglia lacked more specific or in-depth knowledge of necrophilia, therefore, goes to the weight of his opinion, not its admissibility. But the trial court did not abuse its discretion in overruling defense counsel's objection and finding Dr. DiTraglia qualified to opine that Eddings was raped and sodomized before death.

(2) Foundation for expert opinion and scope of expertise

[39] Defendant alternatively claims that Dr. DiTraglia's opinion concerning the timing of Eddings's sexual assault lacked foundation and exceeded the scope of his expertise as a forensic pathologist because it was based not upon findings of physical injury to Eddings's genital area, but rather upon other "extrinsic" factors, such as the presence of a foreign object in the vagina, the presence of sperm in the rectum, the cause of death as blunt force trauma and strangulation, the circumstances of the crime scene including the position of Eddings's body, and defendant's statements to law enforcement. This contention also fails.

To the extent defendant argues that the so-called extrinsic information that Dr. DiTraglia relied upon was not "of a type that reasonably may be relied upon by an expert in forming an opinion" (Evid.Code, § 801, subd. (b)) concerning whether a victim was raped and sodomized

before dying, he does so without citation to any authority supporting this assertion. This contention moreover is contradicted by Dr. DiTraglia's uncontested testimony that examining *all* of the evidence—physical, anatomical, extrinsic, or otherwise—is precisely what a forensic pathologist does in forming an opinion regarding the cause, manner, and circumstances of a victim's death. To the extent defendant argues that the evidence did not support Dr. DiTraglia's conclusion that Eddings was murdered during the commission of rape and sodomy, he was free to explore any perceived weaknesses in the factual foundation for the opinion during cross-examination, which defense counsel did. But there is no basis for holding that the trial court abused its discretion in admitting the challenged opinion.

60 *(3) Propriety of subject matter for expert testimony

[40] Defendant alleges that Dr. DiTraglia's challenged opinion was not the proper subject of expert testimony because it was not helpful to the jury. He argues that Dr. DiTraglia was no more qualified than the jurors to examine the "extrinsic" evidence considered, and that he simply drew a conclusion that amounted to nothing more than his "personal opinion" that ***434** the jurors equally were equipped to draw. Having rejected defendant's claim that Dr. DiTraglia was unqualified to render the challenged opinion, we further reject the claim that Dr. DiTraglia's opinion was not the proper subject of expert testimony.

[41] Evidence Code section 801 qualifies a matter as the proper subject for expert testimony if it is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." That is not to say, however, that the jury need be wholly ignorant of the subject matter of the expert opinion in order for it to be admissible. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1121, 31 Cal.Rptr.2d 321, 875 P.2d 36 [rejecting claim that expert's opinion was not a proper subject for expert testimony because the jurors could have decided for themselves whether the victims were trapped between a fence and parked cars].) Rather, expert opinion testimony " 'will be excluded only when it would add *nothing at all* to the jury's common fund of information, i.e., when "the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness" ' [citation]." **539 (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300, 283 Cal.Rptr. 382, 812 P.2d 563.)

For example, in *People v. Farnam* (2002) 28 Cal.4th 107, 121 Cal.Rptr.2d 106, 47 P.3d 988, we held that it was proper for the criminalist to testify about the sequence of events even if "common sense" supported his conclusion that the victim was strangled where her body was found, because it could not be said that the expert's testimony would not have assisted the jury. (*Id.* at p. 163, 121 Cal.Rptr.2d 106, 47 P.3d 988.) Similarly, in *Robinson, supra,* 37 Cal.4th 592, 36 Cal.Rptr.3d 760, 124 P.3d 363, we held that expert testimony of the forensic pathologist—his opinion that although the shooter might have assumed any number of positions when placing the gun perpendicular to the crown of the victim's head, it was most likely that the shooter was standing next to a kneeling victim because that was the least awkward position—would have assisted the jury in determining whether the killing was premeditated and deliberate, and in assessing the credibility of corroborating witnesses. (*Id.* at pp. 630–631, 36 Cal.Rptr.3d 760, 124 P.3d 363.)

As the medical examiner who performed Eddings's autopsy, Dr. DiTraglia recovered the cloth from Eddings's vagina and defendant's DNA from her rectal cavity. The circumstances of death were consistent with a struggle, ***61** overwhelming the victim either by force or otherwise, and subduing the victim prior to subjecting her to rape and sodomy. Based on his own professional experience, Dr. DiTraglia further connected the intimate manner of Eddings's death—strangulation and savage blunt force trauma—to the most common scenario for a murder committed during the commission of rape. He also knew from experience that necrophilia was "exceedingly uncommon." He understood that the substantial thermal damage which destroyed nearly all of Eddings's skin and subcutaneous tissue, additionally could have destroyed evidence of injury to Eddings's genitals. Moreover, his contemporaneous review of sexual assault studies revealed that of women who survived being raped, only 10 to 30 percent show genital trauma, and conversely, the vast majority of rape victims do not. Dr. DiTraglia also took into consideration the manner in which Eddings's body was found—on the floor, unclothed and lying facedown with her legs spread apart—and defendant's incriminating statements to law enforcement officers.

Applying his knowledge, skill, experience, training, and education to all the ***435** evidence presented, Dr. DiTraglia reached the conclusion that Eddings had been raped and sodomized, and that these acts had taken place before she died. This opinion provided an informed forensic context that went beyond the jurors' common fund of information and could have assisted the jury in determining defendant's intent and timing in sexually assaulting Eddings, which was relevant to the special circumstance allegations that the murder took place during the commission of rape, sodomy, and burglary. Accordingly, the opinion was the proper subject for

expert testimony, and the trial court's decision to admit Dr. DiTraglia's testimony was not error.

(4) Challenging the expert opinion under Evidence Code section 352

[42] [43] Finally, defendant contends that Dr. DiTraglia's opinion should have been excluded under Evidence Code section 352 as more prejudicial than probative. This claim has been forfeited, however, by defense counsel's failure to make this specific objection at trial. (Evid.Code, § 353, subd. (a); see also *Bolin, supra,* 18 Cal.4th at p. 321, 75 Cal.Rptr.2d 412, 956 P.2d 374.) Contrary to defendant's assertions, an objection that an expert is unqualified to render an opinion is not the equivalent of an objection that the opinion is more prejudicial than probative.

[44] [45] [46] Even assuming the claim was preserved for appellate review, we would reject it on the merits. "[U]ndue prejudice is that which 'uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues.' [Citations.]" (*Robinson, supra,* 37 Cal.4th at p. 632, 36 Cal.Rptr.3d 760, 124 P.3d 363.) "Evidence is not 'unduly prejudicial' under the Evidence Code merely because it strongly implicates a defendant ***62** and casts him or her in a bad light, or merely because the defendant contests ****540** that evidence and points to allegedly contrary evidence." (*Ibid.*) As noted, Dr. DiTraglia's opinion that Eddings was raped and sodomized before she died was highly relevant to defendant's intent and timing in sexually assaulting Eddings and to the special circumstance allegations that the murder took place during the commission of rape, sodomy, and burglary. Although disturbing, this was the clinical conclusion of a medical expert, not the type of evidence uniquely designed to evoke an emotional or irrational response from jurors. The jury, moreover, was instructed not to be influenced by passion, sympathy, or prejudice and to conscientiously consider and weigh the evidence in applying the law. If presented with an objection to Dr. DiTraglia's opinion based on Evidence Code section 352, the trial court would have acted within its discretion in finding that the probative value of the testimony outweighed the risk of prejudice.[17]

(5) Alleged prejudice in the admission of expert's opinion

[47] Finally, even assuming error in the admission of Dr. DiTraglia's testimony concerning the timing of defendant's sexual assault of Eddings, such error was harmless under any standard. We have stated that "[i]ntercourse after death does not necessarily negate the felony-murder rule or the rape-murder special-circumstance finding, as postmortem intercourse could constitute an attempt to commit *****436** rape, provided it was part of a continuous transaction and the intent to commit rape was formed prior to the murder." (*People v. Booker* (2011) 51 Cal.4th 141, 175, 119 Cal.Rptr.3d 722, 245 P.3d 366.) It therefore does not matter if actual penetration did not occur until after death as long as the defendant had the required specific intent before the victim's death. Here, there was ample evidence that defendant entered Eddings's residence to sexually assault her and thus formed the intent to rape Eddings before her death. This included defendant's own admission to law enforcement officers that he went to Eddings's home for the purpose of forcing sex on her, his prior sexual assaults of Toni P. and Barbara C., and the evidence that Eddings left scratches on defendant's abdomen and thigh (most likely while he had his pants off and she was resisting his sexual assault). The only evidence to the contrary is defendant's highly dubious testimony, which was directly contradicted by his own statement to the police. As such, the admission of Dr. DiTraglia's testimony, even if erroneous, was harmless beyond a reasonable doubt. (See, e.g., *Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (*Chapman*).)

**63 3. Exclusion of evidence related to defendant's mental health*

Defendant claims the trial court erred in excluding, at the guilt phase, the proposed testimony of clinical psychologist Michael Kania describing defendant's personality disorder and the effects of alcohol intoxication on him, and in striking testimony related to defendant's prior mental health hospital commitments. He asserts that these rulings were based upon an improper interpretation of section 29 as prohibiting evidence relating to "diminished actuality or intent." Defendant contends this evidence was critical to his defense because it would have provided the jury with insight into his thought processes, and would have explained why he might have reacted violently to Eddings with little or no provocation, even though he did not harbor any preexisting intent to harm her.

Defense counsel sought to introduce Kania's testimony *after* the defense rested its case. As discussed further below, we conclude that the trial court did not abuse its discretion in declining to reopen the guilt phase of the trial. And because evidence of defendant's hospitalization

had been admitted in anticipation of Kania's testimony, which never materialized, the trial court furthermore did not abuse its discretion in striking such evidence. Even assuming to the contrary, it is not reasonably probable that **541 any claimed error in this regard affected the outcome of the trial.

(a) Background

At a hearing on pretrial evidentiary and procedural matters, defense counsel advised the trial court that he had consulted with Kania "early on" in the case, but had not decided whether to call him as a witness. The trial court, noting that defendant was not raising any psychiatric defense, suggested Kania testify in the penalty phase, "not for the purpose of justifying [defendant's] conduct but explaining and mitigating his behavior." In response to the prosecutor's concern about timely discovery, the court further admonished the defense to disclose any relevant discovery in order to avoid substantial continuances. Later during the trial, on the day before the defense was to start its case, counsel confirmed that Kania remained a possible witness, but that Kania had not completed his report.

The next day, defense counsel advised the trial court that he intended to call Kania as a defense witness but still had not received a report from him. When ***437 asked whether Kania was prepared to testify that defendant suffered from some mental disease, defect, or disorder at the time of Eddings's death, defense counsel answered "no," explaining, "I'm making a distinction ... between mental disease, defect, or disorder from diminished actuality, which doesn't fall within these parameters." The court found the offer of proof *64 concerning Kania to be "totally lacking in any substance relevant to the guilt phase proceedings." It cited section 2918 as prohibiting Kania from testifying about "diminished actuality or intent, knowledge, malice aforethought, or anything of that sort," and stated that if Kania did not have an opinion concerning any mental diseases or defect on the part of defendant, then his testimony was irrelevant—"That is my intended ruling at this point in time." The defense thereafter called its first witness.

The issue was revisited at the end of the day when defense counsel was permitted to make an offer of proof and provide further argument. Counsel argued that testimony of "diminished actuality" was not prohibited under section 29, and further argued that under *People v. Saille* (1991) 54 Cal.3d 1103, 2 Cal.Rptr.2d 364, 820 P.2d 588 (*Saille*), Kania could testify concerning whether defendant's condition, due to voluntary intoxication, affected defendant's ability to form the specific intent required for the charged offenses. The trial court agreed to review *Saille* and reconsider its ruling in this regard, but noted that evidence of defendant's voluntary intoxication already had been admitted and that the jury would be instructed pursuant to section 22, subdivision (a), concerning voluntary intoxication as it related to specific intent and issues of mental state. The court further explained: "Voluntary intoxication is one thing, mental disease or defect is another. Normally, what I would expect from a forensic alienist is for that person to testify, for example, ... defendant Smith was examined on such and such a day ... and upon my examination I determined that he suffered from the following mental disease or defect, paranoid schizophrenia[,] and I have an opinion as to whether or not he was suffering from that disease on June 19th, 1996. My opinion is that, yes, he was suffering from that disease on that day, in my opinion. And the effect of that disease on a person and his ability to think is X, Y, and Z. [¶] That's the extent to which the expert witness under [section 28[9]] is allowed to testify. But Penal Code Section 29 says they **542 can't go that leap further and say I have an opinion that on the ... 19th of June, 1996, based on the mental disease or defect, paranoid schizophrenia or voluntary intoxication, the defendant did not actually form the specific intent *65 to burgle or rape or sodomize or premeditate ...—he could not have premeditated and deliberated at that point in time."

When court reconvened two days later, defense counsel advised that there still was ***438 no report from Kania. The court reiterated its position that Kania's proposed testimony was irrelevant to the guilt phase, and cautioned against further delay, stating, "there is no justification that I am currently aware of why a report has not been prepared." Several days later, counsel finally provided Kania's report, and the prosecutor promptly filed a motion in limine to exclude Kania's testimony. Before the scheduled hearing on that motion could take place, however, the defense rested without calling Kania as a witness. In light of these developments, the prosecution moved to strike the evidence that had been admitted concerning defendant's hospitalization as a teenager. The trial court agreed that this evidence, which had been admitted in anticipation of Kania's testimony, was no longer relevant. At the request of defense counsel, the court deferred final consideration of the motion to strike until the following day.

The next morning, defense counsel requested to reopen the case so that he could call Kania to testify on the issue of "diminished actuality," arguing it was related to evidence that had been admitted concerning defendant's

voluntary intoxication on the evening of Eddings's murder: "Voluntary intoxication is recognized as one of those items that can create the issue or the state of diminished actuality." The trial court, noting its decision to admit evidence regarding defendant's use of alcohol and Eddings's attitudes toward alcohol consumption, agreed that the issue of voluntary intoxication was "still before the jury, may be argued to the jury, and the jury under the instructions requested by both counsel will be instructed on that area insofar as it relates to voluntary intoxication."[20] It quoted from Kania's recently produced report as offering the following conclusions: "[Defendant] suffers from a severe ***66** personality disorder and a significant drinking problem that results in a sudden change in his personality. This change is primarily the result of a weakening of his already weak controls. He lacks adequate psychological resources to deal with stressful situations, and alcohol only serves to weaken these taxed resources. Underlying this control is considerable anger and a dependency on other people. He has a feeling that his affectional needs have never been met, a profound sense of loneliness, and very low appraisal of himself and his abilities." The court then reiterated its opinion that insofar as Kania did not offer a differential diagnosis of a *****439** mental disease or disorder that might be found in the *Diagnostic and Statistical Manual of Mental Disorders* (4th ed.) of the American Psychiatric Association and which was operating on defendant at the time of Eddings's death, his testimony was irrelevant at the guilt phase of the proceedings. The trial court therefore denied defense counsel's ****543** motion to reopen and call Kania. It also struck the evidence pertaining to defendant's hospitalization, which had been admitted in anticipation of Kania's testimony. As described at the outset of this opinion, Kania was permitted to testify during the penalty phase.

(b) Analysis

[48] [49] [50] [51] As noted, defense counsel sought to introduce Kania's testimony only *after* the defense had rested its case. The decision to reopen a criminal matter to permit the introduction of additional evidence is a matter left to the broad discretion of the trial court. (*People v. Monterroso* (2004) 34 Cal.4th 743, 779, 22 Cal.Rptr.3d 1, 101 P.3d 956 (*Monterroso*); *People v. Marshall* (1996) 13 Cal.4th 799, 836, 55 Cal.Rptr.2d 347, 919 P.2d 1280 (*Marshall*); see also §§ 1093, 1094.) In this case, we find no abuse of discretion in the trial court's denial of the motion to reopen defendant's case. The court had agreed to reconsider its prior ruling excluding Kania's testimony, and there was a prosecution in limine motion pertaining to Kania's testimony pending when the defense chose to rest its guilt phase case without obtaining a ruling. There is nothing otherwise excusing the defense's failure to call Kania before resting. This is not a case where the defense, through no fault of its own, discovered highly relevant new evidence late in the proceedings. To the contrary, defense counsel consulted with Kania "early on" in the representation, communicated with him throughout the trial, and had received Kania's report before its last witness testified, yet defense counsel did not attempt to call Kania as a witness until the prosecution moved to strike evidence of the defendant's hospitalization, after the defense rested. There is no abuse of discretion in refusing to reopen where "the evidence the defense sought to offer at reopening was indisputably available *during* the trial." (*Monterroso, supra,* 34 Cal.4th at p. 779, 22 Cal.Rptr.3d 1, 101 P.3d 956 ["The trial court was entitled to rely on defendant's lack of diligence ***67** in denying the motion to reopen."]; see also *People v. Funes* (1994) 23 Cal.App.4th 1506, 1521, 28 Cal.Rptr.2d 758 [no abuse of discretion in denying motion to reopen where defense had pretrial access to all of the medical reports that indicated that the overlooked evidence might be relevant].) Nor did the trial court abuse its discretion in striking evidence of defendant's hospitalization, where such evidence had been admitted in anticipation of Kania's testimony, which never materialized.

[52] Even assuming error in the exclusion of Kania's testimony at the guilt phase of trial, we would conclude such error was not prejudicial. (See, e.g., *People v. Breaux* (1991) 1 Cal.4th 281, 303, 3 Cal.Rptr.2d 81, 821 P.2d 585.) The jury was instructed that it could consider defendant's voluntary intoxication in deciding whether he actually formed the required specific intent at the time of the commission of the alleged crimes. It nonetheless reasonably rejected defendant's version of the events in light of the substantial evidence from which jurors could infer that defendant acted based on a preconceived intent to sexually assault Eddings. This evidence included defendant's recorded statements to the police, his own admissions at trial, the autopsy findings, and defendant's history of violent sexual assaults. Furthermore, Kania's proposed *****440** guilt phase testimony was not inconsistent with this conclusion. For example, that defendant tended to act in anger or on impulse without reflecting upon the possible consequences, particularly when intoxicated, is consistent with defendant's having formed the requisite mental state for first degree felony-murder burglary and the related special circumstance—namely, intent to commit a felony, in this case rape or sodomy (see § 459)—when he argued with Eddings at her front door or when he forced his way inside Eddings's home. (See *People v. Markus* (1978) 82

Cal.App.3d 477, 481, 147 Cal.Rptr. 151 ["It is the intent which exists in the mind of the perpetrator at the moment of entry which defines burglary."].) To the extent Kania's testimony was relevant to the "main line of defense"—that defendant did not go to Eddings's residence intending to harm her but rather that he killed Eddings in an intoxicated state in the face of what he perceived was an attack and afterward sexually assaulted her dead body as an "expression of rage"—any "insight" into defendant's thought processes Kania might have provided **544 would not have substantially added to or altered the picture of alcohol-fueled anger that was painted by defendant's own testimony, his earlier statements to law enforcement officers, the testimony of Dr. Silverman, the defense's medical expert in anatomic and clinical pathology, and defense counsel's arguments. Finally, we note that Kania did testify at the penalty phase and yet not one juror was swayed to vote for life imprisonment, suggesting the jury did not find the witness's testimony persuasive.

[53] Nor was defendant prejudiced by the trial court's striking evidence of his mental health commitments as a youth. In light of the circumstance that the two occasions were mentioned only briefly by witnesses, occurred when *68 defendant was a teenager, and lasted for short periods, they would have shed little light on defendant's intentions on the night of Eddings's death.
It therefore is not reasonably probable that defendant would have obtained a more favorable result had Kania testified during the guilt phase. (See *People v. McNeal* (2009) 46 Cal.4th 1183, 1203, 96 Cal.Rptr.3d 261, 210 P.3d 420 ["Because the trial court merely rejected some evidence concerning a defense, and did not preclude defendant from presenting a defense, any error is one of state law and is properly reviewed under *People v. Watson, supra,* 46 Cal.2d at page 836 [299 P.2d 243]."].) For the same reasons, with regard to defendant's federal constitutional claims, we conclude that even if there was error, it was harmless beyond a reasonable doubt. (*Chapman, supra,* 386 U.S. at p. 24, 87 S.Ct. 824.)

C. Penalty Phase Issues

1. Victim impact evidence

Defendant claims the trial court erred in admitting victim impact evidence under section 190.3, factor (a) (circumstances of the crime) and factor (b) (other violent criminal activity), arguing that admission of this evidence violated Evidence Code section 352, as well as his Fifth, Fourteenth and Eighth Amendment rights to reliable sentencing under the United States Constitution. At issue are the admission, over defense objection, of 32 photographs of Eddings with various family members; testimony from Eddings's daughter, two nieces, and a grandniece describing Eddings's unique characteristics and the impact of her loss on their family; and testimony concerning the impact of defendant's 1972 attack on Norma Knight. We conclude the trial court did not err in admitting any of this victim impact evidence.

***441 *(a) Photographs of victim with family members and victim impact testimony admitted under section 190.3, factor (a)*

[54] Factor (a) of section 190.3 provides for consideration of "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding." Victim impact evidence is relevant and admissible as a circumstance of the crime "so long as it is not 'so unduly prejudicial' that it renders the trial 'fundamentally unfair.' [Citations.]" (*People v. Russell* (2010) 50 Cal.4th 1228, 1264, 117 Cal.Rptr.3d 615, 242 P.3d 68; see also *Lewis and Oliver, supra,* 39 Cal.4th at pp. 1056–1057, 47 Cal.Rptr.3d 467, 140 P.3d 775 ["Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is ... admissible ... under section 190.3, factor (a)"].) "Admission of testimony presented by a few close friends or *69 relatives of each victim, as well as images of the victim while he or she was alive, has repeatedly been held constitutionally permissible." (*Russell, supra,* at p. 1265, 117 Cal.Rptr.3d 615, 242 P.3d 68.)

At trial, the prosecution sought to introduce various forms of victim impact evidence, including a seven-minute videotape photo montage consisting of 42 separate photographs, set to music, of Eddings with various family members taken at birthday parties and other gatherings, and testimony from family members concerning Eddings's life and the impact of her loss on their lives. Prior to the beginning of the penalty phase, defendant moved to limit the use of such evidence.

With regard to the proposed victim impact testimony concerning Eddings, the trial court ruled that "individuals who are familiar with the victim ... can come and testify about the **545 impact that her loss had on them and members of the family with whom they are familiar, within certain limits." The court described these limits as follows: "the opinions of family members about the crime, about the defendant, or the appropriate punishment have little or no relevance and should be excluded. I think this should be extended also to the witness's exposure to

facts of the crime during the trial or to the impact that the trial proceedings have had on the family members themselves." Pursuant to this ruling and as summarized at the outset of this opinion, the prosecution called four family members to testify: Eddings's daughter, Helen Harrington, two of Eddings's nieces, Donna Velasquez and Ernestine Pierson, and her grandniece, Shirley Grimmett.

The trial court sustained defense objections, however, and granted defendant's motion to limit the use of the videotape, holding that although each individual photograph may be relevant and admissible, their combination as a montage set to music pushed the document "over the line from evidence into argument," and noting that "the Court must guard against ... a situation where the effect is so overwhelming that the jurors are unable to follow the instructions of the Court, where they are unable to set and put in perspective their emotional response and the emotional response of the family in light of the other evidence that is presented." This ruling did not, however, preclude the prosecution from introducing the individual photographs through the testimony of one or more live witnesses. The prosecution thereafter introduced 34 of the photographs through the testimony of Eddings's relatives. Harrington authenticated a majority of the photographs, describing them in brief, matter-of-fact terms. Additional photographs were introduced through the ***442** testimony of Velasquez and Grimmett. Defendant objected to the receipt of the photographs into evidence. The court excluded two of the photographs, one of a child who was distantly related to Eddings and one of Eddings's headstone. Thus, 32 photographs of Eddings with her family ultimately were introduced into evidence.

[55] ***70** As a preliminary matter, defendant claims that this court's construction of section 190.3, factor (a), as allowing evidence about a victim's life that was not known or reasonably foreseeable to the defendant at the time of the murder, has rendered the statute unconstitutionally vague. We consistently have rejected this argument (e.g., *People v. Carrington* (2009) 47 Cal.4th 145, 196–197, 97 Cal.Rptr.3d 117, 211 P.3d 617 (*Carrington*); *Lewis and Oliver, supra,* 39 Cal.4th at p. 1057, 47 Cal.Rptr.3d 467, 140 P.3d 775; *Roldan, supra,* 35 Cal.4th at p. 732, 27 Cal.Rptr.3d 360, 110 P.3d 289; *People v. Pollock* (2004) 32 Cal.4th 1153, 1183, 13 Cal.Rptr.3d 34, 89 P.3d 353), and do so again. As the United States Supreme Court held in *Payne v. Tennessee* (1991) 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720, "a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. '[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.' [Citation.]" (*Id.* at p. 825, 111 S.Ct. 2597.) Moreover, the nature of murder is such that the tragic consequences should always be foreseeable to the defendant: "The fact that the defendant may not know the details of a victim's life and characteristics, or the exact identities and needs of those who may survive, should not in any way obscure the further facts that death is always to a 'unique' individual, and harm to some group of survivors is a consequence of a successful homicidal act so foreseeable as to be virtually inevitable." (*Id.* at p. 838, 111 S.Ct. 2597 [conc. opn. of Souter, J.].) California law is consistent with these principles. (*Lewis and Oliver, supra,* at pp. 1056–1057, 47 Cal.Rptr.3d 467, 140 P.3d 775.)

[56] We have reviewed the victim impact evidence admitted under section 190.3, factor (a), and conclude that the evidence was not so inflammatory as " 'to divert[ ] the jury's attention from its proper role or invite[ ] an ****546** irrational, purely subjective response....' [Citation.]" (*People v. Edwards* (1991) 54 Cal.3d 787, 836, 1 Cal.Rptr.2d 696, 819 P.2d 436.) The testimony from Eddings's daughter, her two nieces, and a grandniece, all of whom were very close to Eddings, "concerned the kinds of loss that loved ones commonly express in capital cases." (*Lewis and Oliver, supra,* 39 Cal.4th at p. 1057, 47 Cal.Rptr.3d 467, 140 P.3d 775.) In addition to recounting basic facts about Eddings, such as that she was a loving and attentive mother, grandmother and aunt, liked to garden, cook and bake, and was very generous with her time and money, the witnesses spoke of their love of Eddings, special moments they shared with her, their feelings upon learning of her death and seeing her burned home, and how the manner in which she died affected them and various family members. These recollections of past incidents or activities that family members shared with Eddings, and of the immediate and lasting impact of her murder, all fell well within the ambit of permissible victim impact evidence. (E.g., ***443** ***71** *People v. Brown* (2004) 33 Cal.4th 382, 397–398, 15 Cal.Rptr.3d 624, 93 P.3d 244 (*Brown*) [upholding admission of victim impact testimony that "concerned either the immediate effects of the murder," the "residual and lasting impact" that the victim's family continued to experience, and testimony that served "to explain why [the family members] continued to be affected by his loss and to show the 'victim's "uniqueness as an individual human being" ' "].)

In arguing that the victim impact evidence was excessively emotional and prejudicial, defendant

specifically references portions of Harrington's testimony when she spoke of her unconscious habit of calling her mother on the phone for the first year following Eddings's murder, and to the testimony of Grimmett, Eddings's grandniece, that her daughter and son-in-law had marital problems for a month after the murder because they "thought of all the torment and everything that [Eddings] had gone through, just in that simple act." "This testimony was not dissimilar from, or significantly more emotion-laden than, other victim impact testimony that has been held admissible." (*People v. Jurado* (2006) 38 Cal.4th 72, 133, 41 Cal.Rptr.3d 319, 131 P.3d 400 [the victim's father testified that he suppressed his emotions concerning her death and as a result, his " 'drinking got out of hand,' " and he " 'had to finally go to a treatment center' " to address that problem]; see also *People v. Wilson* (2005) 36 Cal.4th 309, 356, 30 Cal.Rptr.3d 513, 114 P.3d 758 [the victim's sister testified concerning her daughter's attempted suicide, other difficulties her family faced after the victim's daughters moved in with them, and the victim's young daughter's fear that defendant would " 'do something to them' "]; *Brown, supra,* 33 Cal.4th at p. 398, 15 Cal.Rptr.3d 624, 93 P.3d 244 [the victim's brother described his custom of saluting the victim's grave every time he drove past the cemetery, and the victim's father testified that he had not gone fishing since his son's death].) Rejecting defendant's challenge to the admission of this evidence is consistent with our prior decisions. The challenged testimony simply reflects "manifestations of the psychological impact experienced by the victims" and "understandable human reactions" to the nature and circumstances of Eddings's murder. (*Brown, supra,* at p. 398, 15 Cal.Rptr.3d 624, 93 P.3d 244.)

[57] The witnesses also were asked to identify several photographs of Eddings with various family members taken at different gatherings at different times throughout her life, and to describe the subjects and the settings. "Although emotion must not 'reign over reason' at the penalty phase [citations], photographs of the victims of the charged offenses are generally admissible." (*People v. Carpenter* (1997) 15 Cal.4th 312, 400–401, 63 Cal.Rptr.2d 1, 935 P.2d 708.) Here, the photographs of ordinary family events were factual, relevant, and not unduly emotional or sentimental. They served simply to "humanize[ ]" the victim, "as victim impact evidence is designed to do." (*People v. Kelly* (2007) 42 Cal.4th 763, 797, 68 Cal.Rptr.3d 531, 171 P.3d 548.) As such, the photographs were within the court's discretion to admit into evidence. The trial court moreover carefully exercised ***72** that discretion. Although it admitted the majority of the photographs, it excluded two as irrelevant, and it also excluded the video montage as "over the line" and argumentative. ****547** (See *People v. Prince* (2007) 40 Cal.4th 1179, 1289, 57 Cal.Rptr.3d 543, 156 P.3d 1015 ["Courts must exercise great caution in permitting ... victim-impact evidence in the form of a lengthy videotaped or filmed tribute to the victim," because it "may assist in creating an emotional *****444** impact upon the jury that goes beyond what the jury might experience by viewing still photographs of the victim or listening to the victim's bereaved parents."].)

Finally, we note that the victim impact evidence at issue here was not particularly voluminous. The testimony of Eddings's family constituted only a total of 58 pages of the roughly 700 pages of transcript from the penalty phase, as the bulk of the prosecution's evidence in aggravation related to defendant's numerous prior violent acts against other women. By comparison, defendant's mitigating evidence constituted approximately 300 pages. Moreover, it was the brutality of Eddings's murder, and not victim impact, that the prosecutor emphasized to the jury in arguing why the death penalty was appropriate for defendant and a life sentence was not. The prosecutor's references to the impact of the crime on the lives of Eddings's family members were brief—for example, the prosecutor argued that jurors could "consider the effects on the lives of these women who have survived Billy Jones and the effects on the family members of Ruth Eddings who have to live with what he did to Ruth Eddings"—and were not statements designed to evoke an irrational emotional response.

(b) Testimony of impact of prior crime on stabbing victim admitted under section 190.3, factor (b)

[58] Factor (b) of section 190.3 provides for consideration of "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." With regard to the prosecution's proposed victim impact evidence concerning the 1972 stabbing of Norma Knight, the trial court ruled such evidence was admissible under section 190.3, factor (b), citing *People v. Mickle* (1991) 54 Cal.3d 140, 186–187, 284 Cal.Rptr. 511, 814 P.2d 290 (*Mickle*), and *People v. Garceau* (1993) 6 Cal.4th 140, 200–202, 24 Cal.Rptr.2d 664, 862 P.2d 664 (*Garceau*). Pursuant to this ruling and as described above, the prosecution introduced evidence of the lasting effect of the assault upon Knight.

Defendant contends that the trial court erred in determining that section 190.3, factor (b), allowed for victim impact evidence related to other violent criminal activity, and in its reliance on ***73** *Mickle, supra,* 54 Cal.3d at pages 186–187, 284 Cal.Rptr. 511, 814 P.2d

290, and *Garceau, supra,* 6 Cal.4th at pages 200–202, 24 Cal.Rptr.2d 664, 862 P.2d 664. We disagree. In *Mickle,* we expressly held that "[t]he foreseeable effects of defendant's prior violent sexual assaults upon the victims—ongoing pain, depression, and fear—were ... admissible as circumstances of the prior crimes bearing on defendant's culpability." (*Mickle, supra,* at p. 187, 284 Cal.Rptr. 511, 814 P.2d 290.) In *Garceau,* we upheld the trial court's admission of a prior violent crime victim's testimony, rejecting the claim that her testimony constituted impermissible victim impact evidence. (*Garceau, supra,* at pp. 201–202, 24 Cal.Rptr.2d 664, 862 P.2d 664.)

Even assuming, as defendant argues, that other state courts have excluded prior-crimes-victim-impact evidence as irrelevant and inappropriate, we repeatedly have rejected this argument, and defendant presents no compelling reason to reconsider those decisions. (E.g., *People v. Demetrulias* (2006) 39 Cal.4th 1, 39, 45 Cal.Rptr.3d 407, 137 P.3d 229 (*Demetrulias*) ["the circumstances of the uncharged violent criminal conduct, including its direct impact on the victim or victims of that conduct, are admissible under factor (b)"]; ***445** *People v. Holloway* (2004) 33 Cal.4th 96, 143, 14 Cal.Rptr.3d 212, 91 P.3d 164 (*Holloway*) [same]; *People v. Mendoza* (2000) 24 Cal.4th 130, 185–186, 99 Cal.Rptr.2d 485, 6 P.3d 150 [same].)

Defendant does not identify any specific aspect of the testimony concerning the impact of defendant's stabbing on Knight that he contends was unduly prejudicial, arguing only generally that this type of evidence is inadmissible. We conclude that the testimony regarding Knight's mental state following **548 the stabbing—which consumed fewer than three pages and indicated simply that Knight was unable to continue working as a teacher after the stabbing and remained under psychiatric treatment some 25 years later—was not the type of evidence that would evoke an irrational emotional response from the jury, but rather fell well within the ambit of permissible victim impact evidence. (See, e.g., *Holloway, supra,* 33 Cal.4th 96, 143, 14 Cal.Rptr.3d 212, 91 P.3d 164 [upholding § 190.3, factor (b), testimony concerning emotional trauma that resulted from a violent assault by the defendant that occurred several years before the charged murders].)

2. Refusal to instruct the jury pursuant to defendant's proposed special instructions

The jury was instructed pursuant to standard CALJIC penalty phase instructions that we repeatedly have held constitute correct statements of the law. Defendant nevertheless claims his death sentence must be reversed because the trial court rejected a number of "more detailed," "comprehensive," and "carefully tailored" special instructions he proposed. He argues that the refusal to give these instructions was erroneous and violated several rights guaranteed by the federal and state Constitutions—his right to present a *74 defense, to a fair and reliable capital trial, to a trial by a properly instructed jury, and to due process—and that he suffered prejudice as a result. As discussed further below, we conclude each of defendant's claims of instructional deficiency is without merit.

(a) Refusal to instruct the jury concerning its "normative and moral" function during the penalty phase

[59] Defendant argues that it was error for the trial court to give the CALJIC penalty phase instructions, which he contends emphasized the jury's factfinding duties by, for example, instructing jurors to "determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise" (CALJIC No. 8.84.1), without also "reminding" jurors of the normative and moral nature of their task. Defendant's special instruction No. 1 would have provided, in relevant part, as follows: "Your duty in this phase of the case is different from your duty in the first part of the trial, where you were required to determine the facts and apply the law. Your responsibility in the penalty phase is not merely to find facts, but also—and most important—to render an individualized determination about the penalty appropriate for the particular defendant—that is, whether he should live or die." Defendant contends this instruction was necessary for the jury to competently perform its function at the penalty phase, and that without it, the jury may have been misled into believing that its only or primary role was to find facts, leading it to misunderstand and neglect its roles as the voice and conscience of the community. To the contrary, the trial court properly rejected special instruction No. 1 because it was duplicative of other instructions given to the jury. (*People v. Ramirez* (2006) 39 Cal.4th 398, 470, 46 Cal.Rptr.3d 677, 139 P.3d 64 (*Ramirez*).)

[60] This court has held repeatedly that the CALJIC penalty phase instructions ***446** " ' "are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards." [Citation.]' " (*People v. Brown* (2003) 31

Cal.4th 518, 569, 3 Cal.Rptr.3d 145, 73 P.3d 1137.)21 To the extent defendant claims that **549 special instruction No. 1 *75 would have informed the jurors that "they were free to vote for life based solely on mercy," it was duplicative of CALJIC No. 8.85, which incorporates section 190.3, factor (k), and instructed the jury "to consider, take into account, and be guided by ... any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death." "[W]e have held that ' "a jury told it may sympathetically consider all mitigating evidence need not also be expressly instructed it may exercise mercy." [Citations.]' [Citation.] Because defendant's jury had been instructed in the language of section 190.3, factor (k), we must assume the jury already understood it could consider mercy and compassion...." (*People v. Brown, supra,* 31 Cal.4th at p. 570, 3 Cal.Rptr.3d 145, 73 P.3d 1137; see also *People v. Brasure* (2008) 42 Cal.4th 1037, 1069–1070, 71 Cal.Rptr.3d 675, 175 P.3d 632 (*Brasure*) [same].) No additional instruction was required.

Even if the language of special instruction No. 1 was taken from *People v. Brown* (1988) 46 Cal.3d 432, 250 Cal.Rptr. 604, 758 P.2d 1135, this would not assist defendant's argument. (*Id.* at p. 448, 250 Cal.Rptr. 604, 758 P.2d 1135 ["A capital penalty jury ... is charged with a responsibility different in kind from such guilt phase decisions: its role is not merely to find facts, but also—and most important—to render an individualized, *normative* determination about the penalty appropriate for the particular defendant—i.e., whether he should live or die."].) In that case, the court had occasion to address not jury instructions but the harmless error standard applicable to errors at the penalty phase of a capital case, concluding that the "reasonable-possibility" test, rather than the less exacting "reasonable-probability" test, applied. (*Ibid.* ["When the 'result' under review is such a normative conclusion based on guided, individualized discretion, the [reasonable-probability] standard of review is simply insufficient to ensure 'reliability in the determination that death is the appropriate punishment in a specific case.' [Citations.]"].)

(b)Refusal to instruct the jury not to rely solely on the facts supporting the murder verdict or special circumstance finding as aggravating factors, and not to consider the same aggravating factor more than once

61 Defendant's special instructions Nos. 7 and 8 would have prohibited the ***447 jury from considering as aggravating evidence the facts supporting the murder conviction and the special circumstance findings, unless those facts established "something in addition" to the elements of the crime or the *76 special circumstance.22 Defendant claims that without these special instructions, the penalty phase instructions failed to adequately guide the jury's discretion because there was no instruction that precluded jurors from "double counting" the guilt phase facts and imposing a sentence of death based solely on the circumstances underlying defendant's capital murder conviction.

We rejected an analogous claim in *People v. Earp* (1999) 20 Cal.4th 826, 900–901, 85 Cal.Rptr.2d 857, 978 P.2d 15 (*Earp*), and more recently in **550 *People v. Moon* (2005) 37 Cal.4th 1, 40, 32 Cal.Rptr.3d 894, 117 P.3d 591 (*Moon*). In both instances, we reiterated that section 190.3, factor (a)—which expressly permits the penalty jury to consider, as a factor in either aggravation or mitigation, "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true"—does not require a " clarifying gloss" instructing the jury that its penalty phase determination must not be based on facts that are "common to all homicides." (*Earp, supra,* 20 Cal.4th at p. 900, 85 Cal.Rptr.2d 857, 978 P.2d 15; see *Moon, supra,* 37 Cal.4th at p. 40, 32 Cal.Rptr.3d 894, 117 P.3d 591.) We further noted that there is no constitutional mandate that the penalty phase jury, when considering the factors in aggravation of a capital crime, must "factor out" those constituent parts common to all first degree murders or establishing the special circumstances. To the contrary, " ' "in order to perform its moral evaluation of whether death was the appropriate penalty, the facts of the murder 'cannot comprehensively be withdrawn from the jury's consideration....' " ' " (*Earp, supra,* at pp. 900–901, 85 Cal.Rptr.2d 857, 978 P.2d 15; see also *Moon, supra,* 37 Cal.4th at pp. 40–41, 32 Cal.Rptr.3d 894, 117 P.3d 591.)

The trial court moreover instructed pursuant to CALJIC No. 8.88, which provided in relevant part that "[a]n aggravating factor is any fact, condition or *77 event attending the commission of a crime *which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (Italics added.) Special instructions Nos. 7 and 8 thus "would have been duplicative of this instruction." (*Earp, supra,* 20 Cal.4th at p. 901, 85 Cal.Rptr.2d 857, 978 P.2d 15.)

62 **63** In a related argument, defendant claims the trial court erred in refusing his special instruction No. 9, which ***448 would have advised the jury that it could not "double count" the facts underlying a special circumstance in the course of the penalty weighing process.23 Although the trial court should have admonished the jury as requested, the failure to do so

does not warrant reversal. As noted, the trial court instructed the jury concerning the consideration of aggravating and mitigating circumstances pursuant to CALJIC No. 8.85, which incorporates section 190.3, factor (a).[24] In *People v. Melton* (1988) 44 Cal.3d 713, 244 Cal.Rptr. 867, 750 P.2d 741, this court recognized a "theoretical problem" (*id.* at p. 768, 244 Cal.Rptr. 867, 750 P.2d 741) with the literal language of factor (a), in that it instructs the jury to consider both the " 'circumstances of the crime' " and " 'the existence of any special circumstances.' " (*Melton,* at p. 763, 244 Cal.Rptr. 867, 750 P.2d 741.) "Since the latter are a subset of the former, a jury given no clarifying instructions might conceivably double-count any 'circumstances' which were also 'special circumstances.' On defendant's request, the trial court should admonish the jury not to do so." (*Id.* at p. 768, 244 Cal.Rptr. 867, 750 P.2d 741.) In this context, however, " '[w]e have ... recognized repeatedly that the absence of an instruction cautioning against double counting does not warrant reversal in the absence of any misleading argument by the prosecutor.' [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1225–1226, 24 Cal.Rptr.3d 112, 105 P.3d 487.) Defendant does not suggest that the prosecutor in this case did anything to mislead ****551** the jury in this respect. Consequently, "there is no reasonable likelihood that the jury unconstitutionally applied CALJIC No. 8.85." (*Id.* at p. 1226, 24 Cal.Rptr.3d 112, 105 P.3d 487.)

78 (c) Refusal to instruct the jury that it is required to return a verdict of life imprisonment without the possibility of parole if it determined that the mitigating factors outweigh the aggravating factors

[64] Defendant's special instruction No. 35 would have provided, in relevant part, as follows: "If you find that the existence of a mitigating circumstance alone outweighs any number of aggravating circumstances, you shall return a verdict of confinement in the state prison for life without the possibility of parole." The trial court rejected special instruction No. 35 on the ground that it was duplicative of CALJIC No. 8.88, which instructed the jury, in relevant part, as follows: "To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without the possibility of parole."

Defendant claims that CALJIC No. 8.88 is constitutionally deficient because it fails *****449** to instruct the jury that it is required to return a verdict of life without the possibility of parole if it determines that even a single mitigating factor, standing alone, outweighs any number of aggravating factors. He derives such a requirement from section 190.3, which states in part: "If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole." Defendant further contends that CALJIC No. 8.88's use of the phrase "so substantial" would permit imposition of the death penalty in cases in which the aggravating circumstances are merely "of substance" or "considerable," even if they are outweighed by mitigating circumstances. He argues that reasonable jurors might not understand that if the mitigating circumstances outweighed the aggravating circumstances, they were required to return a verdict of life without possibility of parole.

We repeatedly have rejected these arguments. (E.g., *Carrington, supra,* 47 Cal.4th at p. 199, 97 Cal.Rptr.3d 117, 211 P.3d 617; *People v. Rogers* (2006) 39 Cal.4th 826, 900, 48 Cal.Rptr.3d 1, 141 P.3d 135; *People v. Duncan* (1991) 53 Cal.3d 955, 978, 281 Cal.Rptr. 273, 810 P.2d 131.) "Contrary to defendant's characterization of the instruction, CALJIC [No.] 8.88 highlights the significant burden that must be satisfied before a verdict of death may be returned, and thereby conveys that life in prison without the possibility of parole is the appropriate punishment if this burden is not met." (*People v. Page* (2008) 44 Cal.4th 1, 57, 79 Cal.Rptr.3d 4, 186 P.3d 395; see also *People v. Stanley* (2006) 39 Cal.4th 913, 963, 47 Cal.Rptr.3d 420, 140 P.3d 736 [rejecting claim that CALJIC No. 8.88 is " 'death oriented' " for failing to convey that one mitigating factor, standing alone, may be sufficient to outweigh all other aggravating factors]; *People v.* ***79** *Ray* (1996) 13 Cal.4th 313, 356, 52 Cal.Rptr.2d 296, 914 P.2d 846 [by limiting the circumstances in which death can be imposed, CALJIC No. 8.88 " clearly implies that a sentence less than death *may* be imposed in all other circumstances"].) "We do not think that there is a reasonable likelihood that any of the jurors would have concluded that, even if the mitigating factors outweighed those in aggravation, the 'so substantial in comparison with' language nevertheless might demand imposition of the higher punishment." (*Duncan, supra,* at p. 978, 281 Cal.Rptr. 273, 810 P.2d 131; see also *People v. Cook* (2007) 40 Cal.4th 1334, 1367–1368, 58 Cal.Rptr.3d 340, 157 P.3d 950 (*Cook*) [the term "substantial" in this context provides adequate guidance to the jurors]; *People v. Smith* (2005) 35 Cal.4th 334, 370, 25 Cal.Rptr.3d 554, 107 P.3d 229 [CALJIC No. 8.88 "permits a death penalty only if aggravation is so substantial in comparison with mitigation that death is warranted; if aggravation failed even to outweigh mitigation, it could not reach this level"]; *People v.*

Boyette (2002) 29 Cal.4th 381, 465, 127 Cal.Rptr.2d 544, 58 P.3d 391 [the phase "so substantial" in this context is not unconstitutionally vague]; ****552** *Bolin, supra,* 18 Cal.4th at p. 343, 75 Cal.Rptr.2d 412, 956 P.2d 374 ["[T]he 'so substantial' instruction 'clearly admonishes the jury to determine whether the balance of aggravation and mitigation makes death the appropriate penalty.' "].) Defendant does not persuade us to reconsider our view that CALJIC No. 8.88 is constitutionally sufficient.

(d) Refusal to instruct the jury that one mitigating factor is sufficient to support a decision that a sentence of death is unwarranted

[65] Defendant's special instructions Nos. 11, 18, 34 and 35 would have informed the jurors that one mitigating factor, *****450** standing alone, may be sufficient to support a sentence of life without the possibility of parole.25 Defendant argues that without these special instructions, the standard instructions did not adequately inform the jurors of the nature and scope of their determination, and risked the jurors' misapprehending their role.

[66] We previously have rejected the claim that a trial court is required to instruct the jury that one mitigating factor could outweigh multiple aggravating factors, explaining that "the standard jury instructions ... 'are adequate to inform the jurors of their sentencing responsibilities in compliance with ***80** federal and state constitutional standards.' [Citations.]" (*People v. Kelly, supra,* 42 Cal.4th at p. 799, 68 Cal.Rptr.3d 531, 171 P.3d 548; see also *Lewis, supra,* 46 Cal.4th at p. 1316, 96 Cal.Rptr.3d 512, 210 P.3d 1119 [same].) As in our prior cases, the other standard instructions that were given—including CALJIC No. 8.88, which instructed the jury that a mitigating factor may be "any fact, condition, or event" and that jurors could assign to each factor any moral or sympathetic value they deem appropriate—"amply covered the point." (*Cook, supra,* 40 Cal.4th at p. 1364, 58 Cal.Rptr.3d 340, 157 P.3d 950.) Moreover, a "trial court may properly refuse as argumentative an instruction that one mitigating factor may be sufficient for the jury to return a verdict of life imprisonment without possibility of parole." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1150, 40 Cal.Rptr.3d 118, 129 P.3d 321.)

People v. Sanders (1995) 11 Cal.4th 475, 46 Cal.Rptr.2d 751, 905 P.2d 420, does not assist defendant's argument. In *Sanders,* we expressed approval of an instruction advising the jury, in part, that one mitigating factor may be sufficient to determine that life without the possibility of parole is the appropriate punishment, finding that the instruction, as a whole, reduced the risk that the jury would misapprehend "the nature of the penalty determination process or the scope of their discretion to determine through the weighing process whether death or life imprisonment without possibility of parole was the appropriate punishment." (*Id.* at p. 557, 46 Cal.Rptr.2d 751, 905 P.2d 420.) We neither imposed nor contemplated, however, an *obligation* to instruct the jury that a single mitigating factor could outweigh all other aggravating factors. To the contrary and as noted above, we have repeatedly held that the standard jury instructions, specifically CALJIC No. 8.88, adequately instruct the penalty phase jurors as to the nature and scope of their determination. (See also *People v. Smith* (2005) 35 Cal.4th 334, 371, 25 Cal.Rptr.3d 554, 107 P.3d 229; *People v. Taylor* (2001) 26 Cal.4th 1155, 1181, 113 Cal.Rptr.2d 827, 34 P.3d 937.) We decline to revisit these decisions.

(e) Refusal to instruct the jury that death is the most severe penalty the law can impose

[67] Defendant's special instruction No. 3A would have advised the jury that *****451** death is ****553** the most severe penalty the law can impose.26 DEFENDANT CLAIMS THat special instructioN no. 3a was necessaRy because during voir dire, several *prospective* jurors expressed the opinion that a sentence of life without the possibility of parole constituted a punishment more severe than a death ***81** sentence. We repeatedly have held that " there is no legal requirement that penalty phase jurors be instructed that death is the greater punishment, because the penalty trial itself and the jury instructions given, particularly CALJIC No. 8.88, make clear that the state views death as the most extreme penalty. [Citations.]" (*People v. Cowan* (2010) 50 Cal.4th 401, 501, 113 Cal.Rptr.3d 850, 236 P.3d 1074.) As noted, the jury was instructed that before a judgment of death can be returned, each juror "must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC No. 8.88.) The instruction makes clear that "death is considered to be a more severe punishment than life is explicit in California law...." (*People v. Harris* (2005) 37 Cal.4th 310, 361, 33 Cal.Rptr.3d 509, 118 P.3d 545.)

People v. Hernandez (1988) 47 Cal.3d 315, 253 Cal.Rptr. 199, 763 P.2d 1289 and *People v. Murtishaw* (1989) 48 Cal.3d 1001, 258 Cal.Rptr. 821, 773 P.2d 172 do not assist defendant's argument. In *Hernandez,* we noted that "[o]bviously death is qualitatively different from all other

punishments and is the 'ultimate penalty' in the sense of the most severe penalty the law can impose." (*Hernandez, supra,* at p. 362, 253 Cal.Rptr. 199, 763 P.2d 1289.) In *Murtishaw,* we stated that to impose a death sentence, "each juror ... must believe aggravation is so relatively great, and mitigation so comparatively minor, that the defendant deserves death rather than society's next most serious punishment, life in prison without parole." (*Murtishaw, supra,* at p. 1027, 258 Cal.Rptr. 821, 773 P.2d 172.) These statements neither imposed nor contemplated an obligation to instruct a capital jury concerning the relative severity of the death penalty, and we decline to revisit our holdings to the contrary.

(f) Refusal to instruct the jury concerning the scope of mitigating evidence

[68] Defendant contends the trial court erred by rejecting his special instructions Nos. 10, 11, 13 through 17, and 23, regarding the scope of mitigating evidence. Defendant argues that the proposed special instructions "pinpointed" the crux of his defense, and the trial court therefore was required to give these pinpoint instructions upon request. (See, e.g., *Saille, supra,* 54 Cal.3d at p. 1119, 2 Cal.Rptr.2d 364, 820 P.2d 588.) We do not find any error in the refusal to give these instructions.

[69] **[70]** Special instruction No. 10 would have informed the jury that it must "weigh, consider, take into account and be guided by" a three-and-one-half page, single-spaced list of some 45 mitigating scenarios. Defendant's special instruction No. 11 pinpointed specific mitigating evidence consistent with the defense theory: ***452** "defendant's childhood experiences, including incidents of ***82** physical abuse; prior confinement in juvenile facilities or prison; the treatment or lack of treatment for identified problems concerning aggression or sexual misconduct, and the defendant's voluntary admissions to the police or expressions of remorse." These instructions were properly rejected for several reasons. "Although instructions pinpointing the *theory* of the defense might be appropriate, a defendant is not entitled to instructions that simply recite facts favorable to him." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1159, 124 Cal.Rptr.2d 373, 52 P.3d 572.) Special instruction No. 10 additionally encouraged the jury to speculate in areas for which no evidence ***554** was presented, such as "defendant's artistic potential," or whether defendant would "assist prison staff in reducing tension and conflict within the prison." It also improperly precluded the jury from considering defendant's age as an aggravating factor. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 77–79, 14 Cal.Rptr.2d 133, 841 P.2d 118 (*Hawthorne*); see also *People v. Verdugo* (2010) 50 Cal.4th 263, 304, 113 Cal.Rptr.3d 803, 236 P.3d 1035.) Finally, some aspects of special instruction No. 10 were covered by other instructions given to the jury, and "[a] trial court is not required to give pinpoint instructions that merely duplicate other instructions." (*People v. Panah* (2005) 35 Cal.4th 395, 486, 25 Cal.Rptr.3d 672, 107 P.3d 790.) CALJIC No. 8.85, factor (i), for example, instructed the jury to consider, if applicable, as a factor in aggravation *or* mitigation, the age of the defendant. (*Cook, supra,* 40 Cal.4th at p. 1364, 58 Cal.Rptr.3d 340, 157 P.3d 950 [the standard penalty phase instructions, including CALJIC No. 8.85, factor (i), adequately conveyed the full range of mitigating evidence to be considered by the jury].)

[71] Special instructions Nos. 11, 14, and 15, addressing the "unlimited" breadth of mitigating evidence,[27] were duplicative of other instructions given, particularly CALJIC Nos. 8.85(k) and 8.88. (E.g., *People v. Avila* (2009) 46 Cal.4th 680, 722, 94 Cal.Rptr.3d 699, 208 P.3d 634; *People v. San Nicolas* (2004) 34 Cal.4th 614, 673, 21 Cal.Rptr.3d 612, 101 P.3d 509.) CALJIC No. 8.88 defined a mitigating circumstance as "any fact, condition, or event which, as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." CALJIC No. 8.85 instructed on section 190.3, factor (k), identifying as a possible mitigating factor "any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and any sympathetic or ***83** other aspect of the defendant's character or record that the defendant offers as basis for a sentence less than death, whether or not related to the offense for which he is on trial." Although we have mentioned with approval an instruction stating that mitigating factors are unlimited, "we also have stated that the catchall section 190.3, factor (k) instruction 'allows the jury to consider a virtually unlimited range of mitigating circumstances.' ***453** [Citation.]" (*Smithey, supra,* 20 Cal.4th at p. 1007, 86 Cal.Rptr.2d 243, 978 P.2d 1171.)

[72] Finally, special instructions Nos. 13, 16, 17, and 23, elaborating on the concepts of sympathy, compassion, and mercy,[28] also were duplicative of CALJIC Nos. 8.85 and 8.88. We previously have held that in instructing on section 190.3, factor (k), "CALJIC No 8.85 adequately instructs the jury concerning the circumstances that may be considered in mitigation, including sympathy and mercy. [Citation.]" (*People v. Burney* ***555** (2009) 47 Cal.4th 203, 261, 97 Cal.Rptr.3d 348, 212 P.3d 639.) Specifically, CALJIC No. 8.85 factor (k) directed the jury to "consider, take into account and be guided by ... any sympathetic or other aspect of the defendant's character or record." In addition, CALJIC No. 8.88 instructed the

jurors that a "mitigating circumstance is any fact, condition or event which ... may be considered as an extenuating circumstance in determining the appropriateness of the death penalty" and that they were "free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." Thus, to the extent special instructions Nos. 13, 16, 17, and 23 would have directed the jury to consider all evidence in mitigation from whatever source, or instructed that emotions such as mercy, sympathy, empathy, or compassion were legitimate mitigation factors for its consideration, they were duplicative of instructions that were given. (See, e.g., *Monterroso, supra,* 34 Cal.4th at p. 791, 22 Cal.Rptr.3d 1, 101 P.3d 956; *People v. Leonard* (2007) 40 Cal.4th 1370, 1420, 58 Cal.Rptr.3d 368, 157 P.3d 973; *Ramirez, supra,* 39 Cal.4th at p. 470, 46 Cal.Rptr.3d 677, 139 P.3d 64; *People v. Hinton* (2006) 37 Cal.4th 839, 911–912, 38 Cal.Rptr.3d 149, 126 P.3d 981.) To the extent special instruction No. 16 would have directed the jury to consider defendant's demeanor at trial, it was duplicative of the section 190.3, factor (k) instruction (CALJIC No. 8.85(k)), which, ***84** combined with the other instructions regarding mitigation, "was broad enough to encompass jurors' observations of defendant in the courtroom." (*Monterroso, supra,* at p. 792, 22 Cal.Rptr.3d 1, 101 P.3d 956; see also *Leonard, supra,* at p. 1420, 58 Cal.Rptr.3d 368, 157 P.3d 973 [there is no need for an instruction expressly telling the jury it may base sympathetic feelings on its observations of defendant in court].)

(g) Refusal to instruct the jury concerning lingering doubt

[73] [74] Defendant claims that the trial court erred in refusing his special instruction No. 27, which would have directed the jury that it could consider, as a mitigating factor, any lingering doubt it had concerning *****454** the question of defendant's guilt.[29] We consistently have rejected this claim. (E.g., *Lewis and Oliver, supra,* 39 Cal.4th at p. 1067, 47 Cal.Rptr.3d 467, 140 P.3d 775; *People v. Lawley* (2002) 27 Cal.4th 102, 166, 115 Cal.Rptr.2d 614, 38 P.3d 461; *People v. Staten* (2000) 24 Cal.4th 434, 464, 101 Cal.Rptr.2d 213, 11 P.3d 968.) Although it is proper for the jury to consider lingering doubt, there is no requirement, under federal or state law, that the jury specifically be instructed that it may do so, even if such an instruction is requested by the defendant. (*People v. Gray* (2005) 37 Cal.4th 168, 231–232, 33 Cal.Rptr.3d 451, 118 P.3d 496; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219, 120 Cal.Rptr.2d 477, 47 P.3d 262; *People v. Sanchez* (1995) 12 Cal.4th 1, 77, 47 Cal.Rptr.2d 843, 906 P.2d 1129; see also *Abdul–Kabir v. Quarterman* (2007) 550 U.S. 233, 250–251, 127 S.Ct. 1654, 167 L.Ed.2d 585 ["we have never held that capital defendants have an Eighth Amendment right to present 'residual doubt' evidence at sentencing"].) "Instructions to consider the circumstances of the crime (§ 190.3, factor (a)) and any other circumstance extenuating the gravity of the crime (*id.,* factor (k)), together with defense argument highlighting the question of lingering or residual doubt, suffice to properly put the question before the penalty jury. [Citation.]" (*Demetrulias, supra,* 39 Cal.4th at p. 42, 45 Cal.Rptr.3d 407, 137 P.3d 229; see also *People v. Avila* (2006) 38 Cal.4th 491, 615, 43 Cal.Rptr.3d 1, 133 P.3d 1076; *People v. Brown, supra,* 31 Cal.4th at pp. 567–568, 3 Cal.Rptr.3d 145, 73 P.3d 1137; CALJIC No. 8.85.)

Defendant attempts to distinguish special instruction No. 27 from other lingering-doubt instructions previously rejected by this court, arguing that his proposed special instruction ****556** did not "invit[e] readjudication of matters resolved at the guilt phase" (*People v. Thompson* (1988) 45 Cal.3d 86, 135, 246 Cal.Rptr. 245, 753 P.2d 37), and did not "erroneously prescribe [ ] that the jury evaluate this factor in a particular manner" ***85** (*People v. Cox* (1991) 53 Cal.3d 618, 678, fn. 20, 280 Cal.Rptr. 692, 809 P.2d 351), but rather simply would have allowed the jury to consider lingering doubt. Even assuming defendant's characterizations are accurate, we recently upheld the rejection of a proposed special instruction on lingering doubt nearly identical to special instruction No. 27, reaffirming that "[a]lthough a defendant may assert his or her possible innocence in mitigation, and the jury may consider lingering doubt in determining the appropriate penalty, there is no requirement that the court specifically instruct the jury to consider lingering doubt. [Citations.]" (*Lewis, supra,* 46 Cal.4th at p. 1314, 96 Cal.Rptr.3d 512, 210 P.3d 1119.)

3. Challenges to California's death penalty scheme

Defendant raises a number of challenges to the constitutionality of California's death penalty scheme, based upon the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. As he acknowledges, we previously have considered and consistently rejected these contentions in prior cases. Presented with no reason that compels reconsideration, we therefore adhere to those decisions as follows.

*****455 [75]** Section 190.2 is not impermissibly overbroad in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

Specifically, the various special circumstances are not so numerous as to fail to perform the constitutionally required narrowing function, and the special circumstances are not unduly expansive, either on their face or as interpreted by this court. (E.g., *Jenkins, supra,* 22 Cal.4th at p. 1050, 95 Cal.Rptr.2d 377, 997 P.2d 1044; see also *Brown v. Sanders* (2006) 546 U.S. 212, 221, 126 S.Ct. 884, 163 L.Ed.2d 723 [recognizing that the special circumstances listed in section 190.2 are designed to satisfy the narrowing requirement].) Nor did the 1978 death penalty law—enacted by the voters by way of initiative in November 1978—have the intended or practical effect of making all murderers death eligible. (E.g., *People v. Gray, supra,* 37 Cal.4th at p. 237, fn. 23, 33 Cal.Rptr.3d 451, 118 P.3d 496.)

[76] Section 190.3, factor (a), does not, on its face or as interpreted and applied, permit the "arbitrary and capricious" or "wanton and freakish" imposition of a sentence of death in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. (E.g., *Brasure, supra,* 42 Cal.4th at p. 1066, 71 Cal.Rptr.3d 675, 175 P.3d 632; see also *Tuilaepa v. California* (1994) 512 U.S. 967, 976, 114 S.Ct. 2630, 129 L.Ed.2d 750 (*Tuilaepa*) ["The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence."].) "Defendant's argument that a seemingly inconsistent range of circumstances can be culled from death penalty decisions proves too much. What this reflects is that each case is judged on its facts, each defendant on the particulars of his offense. ***86** Contrary to defendant's position, a statutory scheme would violate constitutional limits if it did not allow such individualized assessment of the crimes but instead mandated death in specified circumstances." (*Brown, supra,* 33 Cal.4th at p. 401, 15 Cal.Rptr.3d 624, 93 P.3d 244.)

[77] Neither the federal nor the state Constitution requires that the penalty phase jury make *unanimous* findings concerning the particular aggravating circumstances, find all aggravating factors *beyond a reasonable doubt,* or find beyond a reasonable doubt that the aggravating factors *outweigh* the mitigating factors. (E.g., *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, 69 Cal.Rptr.2d 784, 947 P.2d 1321.) The United States Supreme Court's more recent decisions interpreting the Sixth Amendment's jury trial guarantee (see *Cunningham v. California* (2007) 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856; *United States v. Booker* (2005) 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621; ****557** *Blakely v. Washington* (2004) 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403; *Ring v. Arizona* (2002) 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435) do not alter these conclusions. (E.g., *People v. Bramit* (2009) 46 Cal.4th 1221, 1249, 1250, fn. 22, 96 Cal.Rptr.3d 574, 210 P.3d 1171.)

[78] **[79]** **[80]** "The death penalty scheme is not unconstitutional because it fails to allocate the burden of proof—or establish a standard of proof—for finding the existence of an aggravating factor.... [Citations.]" (*People v. Friend* (2009) 47 Cal.4th 1, 89, 97 Cal.Rptr.3d 1, 211 P.3d 520 (*Friend*).) "Unlike the guilt determination, 'the sentencing function is inherently moral and normative, not factual' [citation] and, hence, not susceptible to a burden-of-proof quantification." (*Hawthorne,* *****456** *supra,* 4 Cal.4th at p. 79, 14 Cal.Rptr.2d 133, 841 P.2d 118.) We additionally reject defendant's alternative argument that even if it is permissible not to impose any burden of proof at the penalty phase of a capital trial, it nevertheless was prejudicial error for the trial court to fail to instruct the jury that neither party bears a burden of proof at that phase of the trial. "[E]xcept for prior violent crimes evidence and prior felony convictions under section 190.3, factors (b) and (c), the court need not instruct regarding a burden of proof, or instruct the jury that there is no burden of proof at the penalty phase." (*People v. Cruz* (2008) 44 Cal.4th 636, 681, 80 Cal.Rptr.3d 126, 187 P.3d 970 (*Cruz*); see also *Tuilaepa, supra,* 512 U.S. at p. 979, 114 S.Ct. 2630 [jury "need not be instructed how to weigh any particular fact in the capital sentencing decision"].)

[81] Written or other specific findings by the jury regarding the aggravating factors are not constitutionally required. (E.g., *Friend, supra,* 47 Cal.4th at p. 90, 97 Cal.Rptr.3d 1, 211 P.3d 520.)

[82] ***87** There is no constitutional requirement that California's death penalty sentencing scheme provide for intercase proportionality review. (*Moon, supra,* 37 Cal.4th at p. 48, 32 Cal.Rptr.3d 894, 117 P.3d 591; see also *Pulley v. Harris* (1984) 465 U.S. 37, 50–51, 104 S.Ct. 871, 79 L.Ed.2d 29 [federal Constitution does not require state courts to conduct intercase proportionality review in the administration of the death penalty].)

[83] "Allowing consideration of unadjudicated criminal activity under [§ 190.3] factor (b) is not unconstitutional and does not render a death sentence unreliable. [Citations.]" (*People v. Morrison* (2004) 34 Cal.4th 698, 729, 21 Cal.Rptr.3d 682, 101 P.3d 568.)

[84] The use of adjectives such as "extreme" in section 190.3, factors (d) and (g), or "substantial" in section 190.3, factor (g), does not serve as an improper barrier to the consideration of mitigating evidence. (E.g., *Cruz, supra,* 44 Cal.4th at p. 681, 80 Cal.Rptr.3d 126, 187 P.3d 970.)

[85] **[86]** The trial court was not required to instruct the

jury as to which of the listed sentencing factors are aggravating, which are mitigating, and which could be either mitigating or aggravating, depending upon the jury's appraisal of the evidence. (E.g., *People v. Manriquez* (2005) 37 Cal.4th 547, 590, 36 Cal.Rptr.3d 340, 123 P.3d 614; see also *People v. Hillhouse* (2002) 27 Cal.4th 469, 509, 117 Cal.Rptr.2d 45, 40 P.3d 754 (*Hillhouse*) ["The aggravating or mitigating nature of the factors is self-evident within the context of each case."].) Additionally, "the statutory instruction to the jury to consider 'whether or not' certain mitigating factors were present did not unconstitutionally suggest that the absence of such factors amounted to aggravation." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 228, 79 Cal.Rptr.3d 125, 186 P.3d 496.) Rather, we repeatedly have held that "CALJIC No. 8.85 is both correct and adequate." (*People v. Valencia* (2008) 43 Cal.4th 268, 309, 74 Cal.Rptr.3d 605, 180 P.3d 351.)

[87] Because capital defendants are not similarly situated to noncapital defendants, California does not deny capital defendants equal protection by providing certain procedural protections to noncapital defendants that are not provided to capital defendants. (E.g., *Cruz, supra,* 44 Cal.4th at p. 681, 80 Cal.Rptr.3d 126, 187 P.3d 970.)

[88] **[89]** **[90]** We again reject the argument that California's death penalty scheme is contrary ****558** to international norms of humanity and decency, and therefore violates the *****457** Eighth and Fourteenth Amendments of the United States Constitution. (*People v. Avila, supra,* 46 Cal.4th at p. 725, 94 Cal.Rptr.3d 699, 208 P.3d 634.) "International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements." (*Hillhouse, supra,* 27 Cal.4th at p. 511, 117 Cal.Rptr.2d 45, 40 P.3d 754.) Because we conclude that defendant's sentence was rendered in ***88** accordance with those requirements, we need not consider whether alleged violations of such requirements also would violate international law. (*Brown, supra,* 33 Cal.4th at pp. 403–404, 15 Cal.Rptr.3d 624, 93 P.3d 244; *People v. Bolden* (2002) 29 Cal.4th 515, 567, 127 Cal.Rptr.2d 802, 58 P.3d 931.) We also reject the argument that the use of capital punishment "as regular punishment" violates international norms of humanity and decency and hence violates the Eighth Amendment of the United States Constitution. " ... California does not employ capital punishment in such a manner. The death penalty is available only for the crime of first degree murder, and only when a special circumstance is found true; furthermore, administration of the penalty is governed by constitutional and statutory provisions different from those applying to 'regular punishment' for felonies. [Citations.]" (*Demetrulias, supra,* 39 Cal.4th at pp. 43–44, 45 Cal.Rptr.3d 407, 137 P.3d 229.)

D. Correcting the Abstract of Judgment

[91] Defendant claims, and the People agree, that the abstract of judgment must be corrected, because it does not accurately reflect the actual sentence of 25 years to life, plus an additional five years, imposed by the trial court for the arson count. A review of the record confirms that defendant's claim has merit.

As noted, the jury found defendant guilty of count II, the arson of Eddings's home, and also found true various sentencing enhancement allegations—that defendant had two prior "strikes" within the meaning of sections 667, subdivisions (c) and (e), and 1170.12, subdivision (c), had two prior serious felony convictions within the meaning of section 667, subdivision (a), and had served a prior prison term within the meaning of section 677.5, subdivision (b). At the sentencing hearing, the trial court imposed the sentence on count II as follows: "In this matter, certain prior offenses were alleged and proven. In particular, a first and second special prior offense was alleged pursuant to Penal Code Section 667(c) and (e) and 1170.12(c). Both of these convictions related to the assault with intent to commit rape and the forcible oral copulation on Toni [P.], a conviction which you suffered back in 1990. [¶] Because those prior offenses have [been] found to be true, the Court imposes under Count II the sentence of 25 years to life imprisonment. [¶] For the first, second, and third prior convictions which were alleged in this case, the Court would note that they are convictions for the same offense as under the first and second special prior, and under the provisions of Penal Code Section 667.5(b), the Court imposes a sentence of one year, and I order that stayed pending the completion of the term. [¶] With regard to the first and second prior offenses which are alleged pursuant to 667(a), insofar as they involve the same offense, the Court imposes the mandatory term of five years on each of those, but I order the second five-year term stayed insofar as it arises out of the same facts and circumstances. [¶] The indeterminate term, therefore, under Count II is 25 years to life with an additional determinate ***89** term of five years pursuant to 667(a)." The various abstracts of judgment, however, including the amended *****458** abstract of judgment, incorrectly reflect a sentence of an indeterminate term of 25 years to life, plus an *eight*-year determinate term, for count II.

[92] **[93]** It is well settled that "[a]n abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize. [Citation.]" (*People v. Mitchell* (2001) 26 Cal.4th 181, 185, 109 Cal.Rptr.2d 303, 26 P.3d 1040.)

When an abstract of judgment does not reflect the actual sentence imposed in the trial judge's verbal pronouncement, this court has the inherent ****559** power to correct such clerical error on appeal, whether on our own motion or upon application of the parties. (See *ibid.*) We therefore order that the abstract of judgment be corrected to conform to the actual sentence imposed by the trial court on count II, namely, an indeterminate term of 25 years to life, with an additional determinate term of *five* years. (See, e.g., *People v. Boyde* (1988) 46 Cal.3d 212, 256, 250 Cal.Rptr. 83, 758 P.2d 25.)

III. DISPOSITION

For the reasons discussed above, we affirm the judgment in its entirety. With respect to the abstract of judgment, however, we order that it be corrected to conform to the trial court's oral judgment pronounced as to count II (arson) of an indeterminate term of 25 years to life, with an additional determinate term of five years.

WE CONCUR: BAXTER, WERDEGAR, CHIN, CORRIGAN and LIU, JJ.

Parallel Citations

54 Cal.4th 1, 275 P.3d 496, 12 Cal. Daily Op. Serv. 4966, 2012 Daily Journal D.A.R. 5934

Footnotes

1 All further statutory references are to the Penal Code, unless otherwise indicated.

2 Deputy District Attorney Erickson was also the prosecutor at defendant's trial.

3 Redacted tape recordings of the interrogation sessions were played for the jury during trial. The jury additionally was provided transcripts of the redacted recordings, which were entered into evidence as exhibits.

4 On cross-examination, Garrison testified that she knew defendant was facing the death penalty and admitted that she was biased against him. She said she "despised" defendant and, when asked to rate the intensity of this feeling on a scale of 1 to 10, she rated it an 11. She also confirmed, however, that she would not testify falsely about defendant in order to ensure that he received the death penalty.

5 In 1981, all of Garrison's children were removed from her custody, and thereafter her three children with defendant were adopted by three different families.

6 Because Frances Stuckinschneider died prior to defendant's trial, evidence relating to this incident was presented, over a defense objection, by her granddaughter, Sherry Melson, and Sherry's husband, James Melson.
Hereafter, all references to Frances are to Frances Stuckinschneider.

7 The interview was tape-recorded, and the audiotape was played for the jury during the trial. The jury additionally was provided a transcript of the recording, which was entered as an exhibit.

8 The interviews were tape-recorded, and the audiotapes were played for the jury during the trial. The jury additionally was provided transcripts of the recordings, which were entered as exhibits.

9 Defendant's citation at oral argument to *Gray v. Mississippi* (1987) 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 is inapposite. In that case, the Court declined to adopt a harmless error analysis for the exclusion of a prospective *actual* juror in violation of *Witherspoon/ Witt* even if the state retained unexercised peremptory challenges at the end of jury selection. (*Gray, supra,* at p. 664, 107 S.Ct. 2045.) In so holding, it noted that the relevant inquiry in the harmless error analysis is " 'whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error' " and concluded that the nature of the trial counsel's on-the-spot decisionmaking with respect to the use of peremptory challenges during jury selection "defies any attempt to establish that an erroneous *Witherspoon–Witt* exclusion of a juror is harmless." (*Gray, supra,* at p. 665, 107 S.Ct. 2045.) By contrast, in the situation presented here, the alleged improper exclusion of a prospective *alternate* juror in a trial where *no* alternate juror sat on the jury, we can say with confidence that the composition of the relevant jury panel—the one from which the sitting jurors were selected—could not possibly have been affected by the trial court's alleged error.

10 Although the trial court ruled defendant could be cross-examined regarding his rape of Cathy D., the prosecution did not introduce such evidence during the guilt phase.

11 When Toni P. testified during the prosecution's case-in-chief, the trial court instructed the jury that her testimony could be considered only for the limited purpose of "evaluating the state of mind of [defendant] on June 19th, 1996, including the state of mind and the existence or nonexistence of the specific intent which may be an element of the crime charged or of the special circumstances which are alleged in this case."

12 Defendant also argues that the assertedly erroneous admission of the Toni P. offenses denied him various rights guaranteed by the Fourteenth Amendment of the United States Constitution, such as the right to due process, as well as his right to a reliable adjudication at all stages of a death penalty case, and that he suffered prejudice. Because we find no error concerning the admission of the Toni P. offenses, these claims necessarily fail.

13 Prior to giving CALJIC No. 2.50, the trial court instructed the jury pursuant to CALJIC No. 2.23.1 as follows: "Evidence has been introduced for the purpose of showing that a witness, [defendant], engaged in past criminal conduct indicating dishonesty or moral turpitude. This evidence may be considered by you only for the purpose of determining the believability of that witness. The fact that the witness engaged in such past criminal conduct, if it is established, does not necessarily destroy or impair the witness' credibility or believability. It is, however, one of the circumstances that you may take into consideration in weighing the testimony of that witness." Defense counsel made an unspecified objection to this instruction.

14 For example, the prosecution argued: "In determining whether [defendant] is truthful and credible, you can consider what he did to the teacher Norma Knight when the defendant was in high school.... [¶] In determining whether or not defendant was truthful when he said 'I only went over to check on Ruth Eddings like a good neighbor,' you can consider what he did to Barbara C[.].... [¶] When you consider what defendant's intent was when he went over to Ruth Eddings'[s] house, you can consider what he did to Toni P[.] and appreciate the parallels between what happened to Toni P[.] and what happened to Ruth Eddings...." During its rebuttal argument, the prosecution further stated: "[D]efendant admitted what he did to Norma Knight, stabbing her in the back. He admitted what he did to Barbara C [.], attempted to rape her. You can consider that for the believability of the witness in everything he said when he was on the stand, including his testimony in court that he didn't go over to Ruth Eddings'[s] house to have sex. [¶] You can consider the incident involving Toni P[.] and all the evidence relating to Toni P[.]'s assault in considering the defendant's intent when he went over to Ruth Eddings'[s] house."

15 For example, the defense argued: "Well, you're going to get some instructions on prior felony allegations in this case.... [Y]ou heard Toni P[.], you heard about Norma Knight, Barbara C[.] [¶] And, ladies and gentlemen, resist, resist, resist—because it's against the law for you to take the easy way out and to say, my word, if he did those acts before, sure is easy for me to believe that he did it this time too. Well, ladies and gentlemen, the judge is going to instruct you that that ... is not evidence that he did the crime as alleged by the prosecution this time. It may demonstrate that my client has serious mental problems, emotional problems, character problems, but it's not evidence that he came in and did what the prosecution is alleging, that is, intended to enter Miss Eddings' [s] residence to rape her, to sodomize her."

16 The court instructed the jury pursuant to CALJIC No. 2.80 as follows: "Ladies and gentlemen, let me remind you of something that ... I know I instructed you on during the jury selection process but have not reiterated since we've been listening to the testimony of witnesses, that is, that a witness who has special knowledge, skill, experience, training, or education in a particular subject has testified already and is now in the person of Dr. DiTraglia testifying today, and there may be other individuals of a similar ilk. They may testify concerning opinions. Any such witness may be referred to as an expert witness. [¶] In determining what weight to give an opinion expressed by an expert witness, you should consider the qualifications and the believability of the witness, the facts or materials upon which each opinion is based, and the reasons for each opinion. [¶] An opinion is only as good as the facts and reasons on which it is based. If you find that any fact has not been proved or has been disproved, you must consider that in determining the value of the opinion. Likewise, you must consider the strengths and weaknesses upon the reasons it is based. [¶] You are not bound to accept the opinion expressed by any such witness. You should give the opinion whatever weight you think it deserves. If you find it to be an unreasonable opinion, not founded upon facts, you may disregard it."

17 Because we find no error in the admission of Dr. DiTraglia's opinion, defendant's claims that he was denied various rights guaranteed by the Fourteenth Amendment of the United States Constitution, and that he suffered prejudice due to the erroneous admission of this evidence, necessarily fail.

18 Section 29 provides, in part: "In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged."

19 Section 28, subdivision (a) provides: "Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged."

20 The jury later was instructed pursuant to CALJIC No. 4.21.1: "Under the law it is the general rule that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of being in such condition.... However, there is an exception to this general rule, namely, where a specific intent is an essential element of a crime or special circumstance allegation. In such event, you should consider the defendant's voluntary intoxication in your determination of whether the defendant possessed the required specific intent at the time of the commission of the alleged crime. [¶] Thus in the crime of first-degree murder and the three alleged special circumstances, a necessary element is the existence in the mind of the defendant of a certain specific intent which is included in the definition of the crime and the special circumstances set forth elsewhere in these instructions. [¶] If the evidence shows that a defendant was intoxicated at the time of the alleged crime, you should consider that fact in determining whether or not the defendant had the required specific intent. [¶] If from all of the evidence you have a reasonable doubt whether the defendant had such specific intent, you must find that the defendant did not have such specific intent. [¶] Intoxication of a person is voluntary if it results from the willing use of any intoxicating liquor, drug, or other substance knowing that it is capable of an intoxicating effect or when he willingly assumes the risk of that effect. [¶] Voluntary intoxication includes the voluntary ingestion, injecting or taking by any other means of any intoxicating liquor, drug, or other substance."

21 For example, CALJIC No. 8.84, given at the beginning of the penalty phase and at the conclusion of the evidence, instructed the jury concerning its specific sentencing responsibility—"to determine which ... penalty, life imprisonment without the possibility of parole or death, shall be imposed." CALJIC No. 8.88 repeated this instruction, and added that the jury was "to consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances," and that jurors were "free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." CALJIC No. 8.84.1 instructed jurors neither to be influenced by bias or prejudice against the defendant, nor swayed by public opinion or public feeling, and further to consider all of the evidence, follow the law, and exercise their discretion conscientiously, in order to reach a "just verdict." Additionally, the trial court gave special instructions Nos. 24 and 41, which directed each juror to "make his or her own individual assessment of the weight to be given" to mitigating evidence, because "the People and the defendant are entitled to the individual opinion of each juror."

22 Special instructions Nos. 7 and 8 would have provided as follows: "You may not treat the verdict and finding of first degree murder committed under [a] special circumstance, in and of themselves, as constituting an aggravating factor. For, under the law, first degree murder committed with a special circumstance may be punished by either death or life imprisonment without the possibility of parole. [¶] Thus, the verdict and finding which qualifies a particular crime for either of these punishments may not be taken, in and of themselves, as justifying one penalty over the other. You may, however, examine the evidence presented in the guilt and penalty phases of this trial to determine how the underlying facts of the crime bear on aggravation or mitigation. [¶] In deciding whether you should sentence the defendant to life imprisonment without the possibility of parole, or to death, you cannot consider as an aggravating factor any fact which was used by you in finding him guilty of murder in the first degree unless that fact establishes something in addition to an element of the crime of murder in the first degree. The fact that you have found Mr. Jones guilty beyond a reasonable doubt of the crime of murder in the first degree is not itself an aggravating circumstance."

23 Special instruction No. 9 would have provided as follows: "You must not consider as an aggravating factor the existence of any special circumstance if you have already considered the facts of the special circumstance as a circumstance of the crimes for which the defendant has been convicted. In other words, do not consider the same factors more than once in determining the presence of aggravating factors."

24 As is relevant here, the jury was instructed pursuant to CALJIC No. 8.85 as follows: "In determining which penalty is to be imposed on the defendant you shall consider all of the evidence which has been received during any part of the trial in this case.... In determining which penalty is to be imposed on the defendant, you shall consider and take into account and be guided by the following factors if applicable. Here there are a number of factors and they are lettered A through K: A, as a factor in either aggravation or mitigation, the circumstances of the crime of which the defendant has been convicted in the present proceedings and the existence of any special circumstance found to be true...."

25 Like special instruction No. 35, discussed *ante*, special instruction No. 11 would have provided, in relevant part, that "[a]ny one mitigating factor, standing alone, may support a decision that death is not the appropriate punishment in this case." Special instruction No. 18 would have provided as follows: "Since you, as jurors, decide what weight is to be given the evidence in aggravation and the evidence in mitigation, you are instructed that any mitigating evidence standing alone may be the basis for deciding that life without the possibility of parole is the appropriate punishment." Finally, special instruction No. 34 would have provided, in relevant part, that "[o]ne mitigating circumstance may be sufficient to support the decision that death is not appropriate punishment in this case."

26 Special instruction No. 3A would have provided as follows: "Some of you expressed the view during jury selection that the punishment of life in prison without the possibility of parole was actually worse than the death penalty. [¶] You are instructed that death is qualitatively different from all other punishments and is the ultimate penalty in the sense of the most severe penalty the law can impose. Society's next most serious punishment is life in prison without that possibility of parole. [¶] It would be a

violation of your duty, as jurors, if you were to fix the penalty at death with a view that you were thereby imposing the less severe of the two available penalties."

27 Special instruction No. 11 would have instructed the jury that the mitigating factors provided by the court were "merely examples" and should not limit the jurors' consideration of additional mitigating factors. Special instruction No. 14 would have provided that "[m]itigating factors are unlimited and anything mitigating should be considered and may be taken into account in deciding to impose a sentence of life without possibility of parole." Special instruction No. 15 would have instructed that "[a]ny aspect of the offense or of the defendant's character or background that you consider mitigating can be the basis for rejecting the death penalty even though it does not lessen legal culpability for the present crime."

28 Special instruction No. 13 would instructed the jury that a mitigating circumstance is not an excuse for the commission of the offense, but rather is a fact "which, in fairness, sympathy, compassion, or mercy, may be considered in" reducing a defendant's culpability. Special instruction No. 16 would have instructed that mitigating factors are not "limited to those adduced from specific evidence offered at the sentencing hearing," and may include "other factors, such as a humane perception of the defendant developed during trial." Special instruction No. 17 provided as follows: "If a mitigating circumstance or an aspect of the defendant's background or his character called to the attention of the jury by the evidence or its observation of the defendant arouses mercy, sympathy, empathy, or compassion such as to persuade you that death is not the appropriate penalty, you may act in response thereto and impose a sentence of life without possibility of parole." Special instruction No. 23 further would have instructed that jurors properly could be influenced by a "sympathetic response" to mitigating evidence.

29 Special instruction No. 27 would have provided as follows: "Although proof of guilt beyond a reasonable doubt has been found, you may demand a greater degree of certainty for imposition of the death penalty. The adjudication of guilt is not infallible, and any lingering doubts you entertain on the question of guilt may be considered by you in determining the appropriate penalty, including the possibility that at some time in the future, facts may come to light which have not been discovered."

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204 Cal.App.4th 126
Court of Appeal, Second District, Division 4, California.

Lydia SANCHEZ, Plaintiff and Appellant,
v.
Darrell G. BROOKE et al., as Trustees, etc., Defendants and Appellants.

No. B224835. | March 8, 2012.

Synopsis

Background: Home health care worker brought action against the trustees of the estate of the client for whom worker had provided care, for negligence. The Superior Court, Los Angeles County, No. GC041017, Jan A. Pluim, J., entered judgment on special jury verdict awarding damages but apportioning the fault 50 percent to client and 50 percent to worker's employer, and denied worker's motion for judgment notwithstanding the verdict (JNOV). Worker appealed from the denial of JNOV and trustees appealed from the judgment.

Holdings: The Court of Appeal, Suzukawa, J., held that:
[1] no expert testimony on standard of care was necessary to determine comparative negligence of worker's employer, and
[2] employee could not recover medical fees not payable to providers as economic damages.

Affirmed in part, reversed in part, and remanded.

West Headnotes (11)

[1] **Negligence**
Joint and several liability
Negligence
Whose acts or fault may be considered: non-parties

A finding of employer negligence eliminates a third party defendant's joint and several liability for noneconomic damages attributable to the fault of the employer. West's Ann.Cal.Civ.Code § 1431.2.

[2] **Workers' Compensation**
Action by employee, dependents, or personal representative

An employee's economic damages award, in an action against a third party, is properly reduced by the amount of any workers' compensation benefits received from a concurrently negligent employer that properly are attributable to economic damages.

[3] **Workers' Compensation**
Action by employee, dependents, or personal representative

To calculate the amount of any workers' compensation benefits received from a concurrently negligent employer that properly are attributable to economic damages, which is used to offset the employee's economic damages award in an action against a third party, the workers' compensation benefits are multiplied by the percentage of the jury verdict attributable to economic damages.

[4] **Appeal and Error**
Extent of Review Dependent on Nature of Decision Appealed from
Appeal and Error
Cases Triable in Appellate Court

The denial of a motion for judgment notwithstanding the verdict is reviewed for substantial evidence to support the verdict, but if the ruling involves a purely legal question it is reviewed de novo.

judgment. West's Ann.Cal.C.C.P. §§ 629, 659.

[5] **Appeal and Error**
⇐On appeal from order made after judgment

Home health care worker's act of appealing only from trial court's denial of her motion for judgment notwithstanding the verdict (JNOV) in her negligence action against trustees of the estate of the client for whom worker had provided care, rather than appealing from the judgment, forfeited any claim of error as to the denial of her motion in limine seeking to establish the necessity of expert testimony concerning the standard of care applicable to worker's employer to support trustees' defense of comparative fault.

[6] **Appeal and Error**
⇐On appeal from order made after judgment

Home health care worker's act of appealing only from trial court's denial of her motion for judgment notwithstanding the verdict (JNOV) in her negligence action against trustees of the estate of the client for whom worker had provided care, rather than appealing from the judgment, forfeited any claim of error as to the jury instructions, or lack thereof, concerning trustees' comparative negligence defense and the standard of care owed by a home health services provider to its employee.

[7] **Appeal and Error**
⇐Time for filing

Home health care worker's motion for judgment notwithstanding the verdict (JNOV) did not extend the time to file notice of appeal from the judgment in her negligence action, since the motion for JNOV was not valid, where the motion for JNOV was not timely filed within 15 days of the date of service of notice of entry of

[8] **Negligence**
⇐Trades, special skills and professions

Generally, expert testimony is required to establish the standard of care that applies to a professional, except where the circumstances fall within the realm of common knowledge.

[9] **Negligence**
⇐Fires

No expert testimony was necessary to establish the standard of care of home health care worker's employer to avoid the risk of fire from client smoking in bed, for trustees of client's estate to establish the affirmative defense of comparative negligence for injuries that worker sustained in attempting to rescue client from fire, since lay jurors were as capable as experts in assessing the adequacy of employer's lack of response to the obvious risk of fire. West's Ann.Cal.Evid.Code § 801(a).

[10] **Workers' Compensation**
⇐Extent of Right

Under California workers' compensation law, once employment and industrial causation are determined, the employer is responsible for all medical expenses incurred.

[11] **Workers' Compensation**
⇐Action by employee, dependents, or personal representative

Where an employer is required under the workers' compensation laws to pay in full an injured employee's medical expenses, the injured employee may not recover, as economic damages from a third party tortfeasor, medical fees that the provider is precluded from collecting from the employer either by agreement or by law, including the statutory fee schedule. West's Ann.Cal.Labor Code §§ 4600, 4603.2, 5307.1.

See Annot., Collateral source rule: injured person's hospitalization or medical insurance as affecting damages recoverable (1977) 77 A.L.R.3d 415; Cal. Jur. 3d, Damages. §§ 63, 139; Flahavan et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2011) ¶ 3:34.1 (CAPI Ch. 3-C); Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2011) ¶ 8:2875 (CACIVEV Ch. 8E-D); 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1670.

Attorneys and Law Firms

****509** Steven B. Stevens and M. Lawrence Lallande for Plaintiff and Appellant.

Calendo, Puckett, Sheedy & Dicorrado, Christopher M. Sheedy; Pollak, Vida & Fisher and Daniel P. Barer for Defendants and Appellants.

Opinion

SUZUKAWA, J.

***130** An injured employee (plaintiff Lydia Sanchez, a home health care worker) filed a personal injury action against the trustees of the estate of a third party tortfeasor (the late Dorothea B. Kavanaugh, the elderly woman for whom Sanchez had provided care). The trustees (defendants Darrell G. Brooke and Darryl Denning) asserted as an affirmative defense the comparative negligence of Sanchez and her employer (Glendale Adventist Health, also known as Western Health Resources (Western or employer)). Western, which is not a party to this action, filed a workers' compensation lien against Sanchez's potential recovery.[1]

The jury found that Kavanaugh, Western, and Sanchez all were negligent, but that Sanchez's negligence was not a substantial factor in causing her own injuries. The jury apportioned 50 percent of the fault to Kavanaugh and 50 percent to Western. Based on the jury's finding that Sanchez had sustained total damages of $903,000, the trial court calculated Kavanaugh's share and entered a judgment against defendants for $570,949.87.

Sanchez and defendants filed separate appeals, which we consolidated. In Sanchez's appeal from the order denying her motion for judgment notwithstanding the verdict, she challenges the sufficiency of the evidence to support the finding of employer negligence. We conclude that because the finding was supported by substantial evidence, the motion was properly denied.

****510** In defendants' appeal from the judgment, they contend that the judgment should be further reduced to reflect the fact that, under the workers' compensation law, an injured employee's medical expenses must be paid in full by the employer, and the employee is not liable for any unpaid balance. ***131** We conclude that defendants are correct. This case is analogous to and is therefore governed by the California Supreme Court's recent decision in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 129 Cal.Rptr.3d 325, 257 P.3d 1130 (*Howell*), which was issued while this appeal was pending. The court in *Howell* held that an injured person's recovery of past medical expenses as economic damages was limited to the discounted amount that the medical providers accepted as payment in full from the injured person's private health insurance carrier.

We conclude that the same result applies where an injured employee's medical provider accepts a discounted amount as payment in full from the employer under the workers' compensation law. In both situations, because the injured person/employee is not liable for the undiscounted sum stated in the provider's bill, the unpaid balance does not represent an economic loss to the plaintiff and is not recoverable as damages. We therefore reverse the judgment in part as to the amount of damages only and remand for a limited rehearing and recalculation of damages.

BACKGROUND

Sanchez, a home health aide employed by Western, was working as Kavanaugh's live-in caregiver when a fire broke out in Kavanaugh's bedroom at around midnight on

September 20, 2006. The evidence at trial showed that the fire was caused by Kavanaugh's negligent smoking in bed, and that Sanchez was injured while attempting to rescue Kavanaugh, who died in the fire.2

The jury found that Sanchez suffered total damages of $903,000, which included $300,000 in noneconomic damages and $603,000 in economic damages. The jury also found that the economic damages consisted of $575,000 in past medical expenses and $28,000 in lost earnings.

Given that Western was apportioned 50 percent of the liability and had paid $272,622.38 in workers' compensation benefits to Sanchez, the trial ***132** court had to determine defendants' share of the total damages of $903,000. Based on the following calculations, the trial court entered a judgment against defendants for $570,949.87.

[1] The first calculation addressed the effect of the employer's (Western's) concurrent negligence on a third party defendant's (Kavanaugh's) liability for noneconomic ****511** damages. Under Proposition 51 (as codified in Civ.Code, § 1431.2), a finding of employer negligence eliminates a third party defendant's joint and several liability for noneconomic damages attributable to the fault of the employer. (*DaFonte v. Up–Right, Inc.* (1992) 2 Cal.4th 593, 596, 7 Cal.Rptr.2d 238, 828 P.2d 140; *C.J.L. Construction, Inc. v. Universal Plumbing* (1993) 18 Cal.App.4th 376, 387, 22 Cal.Rptr.2d 360.) In light of the jury's apportionment of 50 percent of the liability to Western, the trial court concluded that under Civil Code section 1431.2, defendants are responsible for only 50 percent of the $300,000 noneconomic damages award, or $150,000. Although Sanchez challenges the finding of employer negligence, neither party disputes the mathematical computation of the $150,000 noneconomic damages award.

[2] [3] The second calculation addressed the effect of a concurrently negligent employer's (Western's) payment of workers' compensation benefits on a third party defendant's (Kavanaugh's) liability for economic damages. The relevant rule is that because "the injured employee may not be allowed double recovery, his [or her economic] damages must be reduced by the amount of workmen's compensation he [or she] received." (*Witt v. Jackson* (1961) 57 Cal.2d 57, 73, 17 Cal.Rptr. 369, 366 P.2d 641.) Under *Witt v. Jackson* and its progeny, an employee's economic damages award is properly reduced by the amount of any workers' compensation benefits received from a concurrently negligent employer that properly are attributable to economic damages.3 (*Engle v. Endlich* (1992) 9 Cal.App.4th 1152, 1156, 12 Cal.Rptr.2d 145; *C.J.L. Construction, Inc. v. Universal Plumbing, supra,* 18 Cal.App.4th at p. 387, 22 Cal.Rptr.2d 360.) This reduction is commonly referred to as the *Witt v. Jackson* offset. It is calculated by multiplying the workers' compensation benefits by the percentage of the jury verdict attributable to economic damages. The product of that equation (the *Witt v. Jackson* offset) is the amount of the workers' compensation benefits presumptively attributable to economic damages, and is subtracted from the jury's award of economic damages to prevent the injured employee's double recovery. (See *Scalice v. Performance Cleaning* ***133** *Systems* (1996) 50 Cal.App.4th 221, 225–238, 57 Cal.Rptr.2d 711 [*Witt v. Jackson* offset calculation explained].)

Before calculating the *Witt v. Jackson* offset, the trial court had to resolve the parties' disagreement over the amount of past medical expenses that were recoverable by Sanchez as economic damages. Defendants contended that the jury's award of $575,000 in medical expenses was excessive because it included amounts that were billed but not paid by Western. Defendants argued that because the medical providers had accepted $241,818.38 from Western (the amount of Western's medical lien) as payment in full, Sanchez's recovery of past medical expenses must be capped at that amount under *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 640, 246 Cal.Rptr. 192 (*Hanif*) and ****512** *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 306–307, 112 Cal.Rptr.2d 861 (*Nishihama*).

In *Hanif,* the injured plaintiff's recovery of past medical expenses from the defendant tortfeasor was capped at the amount the provider had accepted from Medi–Cal as payment in full. (*Hanif, supra,* 200 Cal.App.3d at pp. 643–644, 246 Cal.Rptr. 192.) In *Nishihama,* the injured plaintiff's recovery of past medical expenses from the defendant tortfeasor was capped at the amount the provider had accepted from the private health insurer as payment in full. (*Nishihama, supra,* 93 Cal.App.4th at pp. 306–309, 112 Cal.Rptr.2d 861.)

Based on their view that a *Hanif–Nishihama* reduction is required in this case, defendants argued that Sanchez could recover only $269,818.38 of the $603,000 economic damages award, consisting of $241,818.38 in past medical expenses (the amount of Western's medical lien) and $28,000 in lost earnings, reduced by a *Witt v. Jackson* offset of $129,091.16. Using these reduced figures, defendants calculated a proposed judgment of $290,727.22.4

***134** Based on her view that a *Hanif–Nishihama* reduction is not required in this case, Sanchez argued that she was entitled to the full award of $603,000 in economic damages, consisting of $575,000 in past medical expenses and $28,000 in lost earnings. Using those unreduced figures, Sanchez calculated a proposed

Witt v. Jackson offset of $182,050.13 and a proposed judgment of $570,949.87.[5]
The trial court adopted Sanchez's calculations and entered a final judgment against defendants for $570,949.87. In rejecting defendants' contention that a *Hanif–Nishihama* reduction is required in this case, the trial court relied on an appellate decision that was reversed while this appeal was pending (*Howell, supra,* 52 Cal.4th 541, 129 Cal.Rptr.3d 325, 257 P.3d 1130).

After judgment was entered, Sanchez moved for judgment notwithstanding the verdict, seeking to overturn the apportionment of fault to Western on the ground that the finding of employer negligence was not supported by substantial evidence. In support of her motion, Sanchez cited the lack of any expert testimony setting forth the standard of care applicable to home health care providers such as Western. ****513** In opposition to the motion, defendants argued that expert testimony is not required on matters that are within the common experience of lay jurors. The trial court denied the motion based on its determination that lay jurors are as qualified as any expert to assess whether Western was negligent in allowing Sanchez to work in a home where Kavanaugh was permitted to smoke in bed while unsupervised.

DISCUSSION

I. Judgment Notwithstanding the Verdict Was Properly Denied

[4] The denial of a motion for judgment notwithstanding the verdict is reviewed for substantial evidence to support the verdict. (*Dell'Oca v. Bank of* ***135** *New York Trust Co., N.A.* (2008) 159 Cal.App.4th 531, 554–555, 71 Cal.Rptr.3d 737.) If the ruling involves a purely legal question, however, it is reviewed de novo. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 284, 73 Cal.Rptr.2d 596.)

Sanchez contends that her motion for judgment notwithstanding the verdict should have been granted because the jury's finding of employer negligence was not supported by substantial evidence. Sanchez cites the following grounds for reversal: (1) the lack of evidence of a breach of a duty of care owed by Western to Sanchez; (2) the failure to instruct the jury on the duty of care owed by Western to Sanchez; (3) Western's conduct (advising Kavanaugh about the hazards of smoking and recommending the purchase of air purifiers)[6] did not establish a violation of a duty of care to Sanchez, given that her injuries were caused by a fire and there was no expert testimony that an air purifier would have prevented the fire, assisted in Kavanaugh's rescue, or protected Sanchez from burns and smoke inhalation; (4) the lack of evidence that cigarettes or lighters were provided to Kavanaugh by Sanchez (or any other Western employee); (5) the jury's finding that Sanchez's negligence was not a substantial factor in causing her own injuries; and (6) the lack of expert testimony to establish the standard of care owed by a home health care provider to its employees.

A. Sanchez Did Not Appeal From the Judgment

[5] **[6]** Sanchez filed a motion in limine[7] seeking to establish, as a prerequisite to the defense of employer negligence, the necessity of expert testimony to define the standard of care applicable to home health care providers. After the motion in limine was denied, defendants presented their defense of employer negligence without producing any expert testimony to establish the duty of care owed by a home health services provider to its employees.

The jury received ordinary negligence instructions as to Sanchez's claim of negligence against Kavanaugh and defendants' defense of comparative fault ***136** against Sanchez and Western.[8] The jury received no ****514** specific instruction on standard of care and the record does not reveal whether any was requested.

[7] After the time to appeal from the judgment had expired, Sanchez appealed from the order denying her motion for judgment notwithstanding the verdict.[9] As a result of her failure to appeal from the judgment, Sanchez has forfeited any claim of error as to: (1) the denial of her motion in limine seeking to establish the necessity of expert testimony concerning the standard of care ***137** applicable to Western; and (2) the jury instructions (or lack thereof) concerning the comparative negligence defense and the standard of care owed by a home health services provider to its employee.

B. The Case Was Tried on the Theory That Whether Western Satisfied the Standard of Care Involved a Question of Fact Arising Under the "Common Knowledge" Exception

At the hearing on plaintiff's motion for judgment notwithstanding the verdict, the trial court found the evidence reasonably supported the jury's finding that Western was negligent in allowing Sanchez to work ****515** in a home where Kavanaugh was permitted to smoke in bed while unsupervised and without imposing any rules or restrictions on her smoking in order to reduce the risk of fire. The trial court pointed out that Western

could "have put in place rules and regulations ... telling Lydia Sanchez what she could or could not do in regards to allowing Mrs. Kavana[u]gh to smoke and to smoke in bed without any precautions taken." In the trial court's opinion, expert testimony was not required to establish a standard of care because "a lay person could certainly understand and recognize and come to grips with" the ordinary hazards of smoking in bed.

In response, Sanchez's counsel stated: "I think the Court is absolutely correct when you say that the issue is, could they, for example, implement rules? Could—what should they have done in supervising, for example, Lydia Sanchez, and telling Lydia Sanchez, here's what you should or shouldn't do? What should they have done in terms of preparing policies and procedures and protocol? [¶] THE COURT: Independent of what she [Sanchez] does. [¶] MR. LALLANDE [Sanchez's counsel]: The problem is, Your Honor, that you're now saying that a lay jury that is not in the business of providing health care is now going to sit there and say, we think without any—without any evidence to guide them whatever, nothing. I mean, there's no testimony to guide them whatever—in terms of expert testimony—that they are supposed to now come up with a standard of care as to what regulations should exist. Perhaps one juror thinks that the regulation should be that she shouldn't be allowed to smoke at all in the house, because, by the way, she's an infirm[ ] little old lady. Perhaps another juror thinks, hey, it's her house. She can smoke anywhere she wants. [¶] THE COURT: Could they not say, if we're going to give care, you can't smoke?"

Sanchez's counsel replied that it was unclear whether a licensed medical care provider such as Western could simply deny care based on a client's refusal to stop smoking. Counsel argued there was "a question of whether that is an appropriate policy and procedure." "[T]he issue of whether—how—what policies and procedures they create is an issue for an expert."

***138** The trial court inquired: "Well, why does that require expert testimony to say, well, Mrs. Kavana[u]gh we're not going to provide you any type of care as long as you continue to smoke?" "And if we do provide you care, there's going to be a fire extinguisher here, there, whatever. I mean, just common sense would tell you that." The trial court concluded it was within the realm of common knowledge whether Western had an independent duty " [t]o set some sort of rules and regulations about allowing [Mrs. Kavanaugh] to smoke," such as "she can or cannot, or she can't have cigarettes next to her bed, or, you know, something."

[8] Generally, expert testimony is required to establish the standard of care that applies to a professional. However, an exception exists where the circumstances fall within the realm of common knowledge. "In negligence cases arising from the rendering of professional services, ... the standard of care against which the professional's acts are measured remains a matter peculiarly within the knowledge of experts. Only their testimony can prove it, unless the lay person's common knowledge includes the conduct required by the particular circumstances. (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001 [35 Cal.Rptr.2d 685, 884 P.2d 142].)" (*Unigard Ins. Group v. O'Flaherty & Belgum* ****516** (1995) 38 Cal.App.4th 1229, 1239, 45 Cal.Rptr.2d 565.)

[9] The trial court found that the risk of causing a fire by smoking in bed is well within the realm of common knowledge. The trial court held that because common sense is sufficient to ascertain the protective actions that are reasonably required when an elderly person with impaired vision and mobility wishes to smoke in bed, the conduct required under the circumstances may be established without expert testimony. The trial court concluded that expert testimony was unnecessary because the particular circumstances were not "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid.Code, § 801, subd. (a).)

We conclude the trial court was correct. No special knowledge or skills are required to "supply the 'common sense' [needed] to prevent harm from everyday hazards." (*Marshall v. McMahon* (1993) 17 Cal.App.4th 1841, 1849, 22 Cal.Rptr.2d 220.) Given that the risk of fire posed by smoking in bed is commonly understood, no professional skills were necessary to determine an appropriate response under the circumstances. Lay jurors are as capable as experts in assessing the adequacy of Western's lack of response to the obvious risk of fire in this case.

We distinguish cases such as *Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 106, 11 Cal.Rptr.2d 468, where expert testimony was required to establish the applicable standard of care. In that case, expert ***139** testimony on the standard of care was necessary because the " [d]iagnosis, treatment and care of a schizophrenic and suicidal psychiatric patient, and the standard of care prevailing in the medical community for such patients," were outside the scope of common knowledge.

Our case is analogous to *Ewing v. Northridge Hospital Medical Center* (2004) 120 Cal.App.4th 1289, 16 Cal.Rptr.3d 591, which held that expert testimony was not required to establish a psychotherapist's liability for failure to warn a third person of a patient's violent propensities under Civil Code section 43.92. Even though

Ewing involved a negligence claim against a licensed medical professional, expert testimony on the standard of care was not necessary because, as the court explained: "A psychotherapist may be held liable for failure to warn under section 43.92 only if the jury is persuaded the therapist actually believed or predicted his or her patient posed a serious risk of inflicting grave bodily injury upon an identifiable victim. Applied here, this rule means simply that, because there is no need for expert guidance on the 'standard of care' for psychotherapists' statutory duty to warn, the court erred when it found, as a matter of law, that plaintiffs could not establish their claim without presenting expert testimony. If resort to expertise is unnecessary, so is the expert. [Citations.] Under section 43.92, liability is not premised on a breach of the standard of care. [Fn. omitted.] Instead, it rests entirely on the fact finder's determination that each factual predicate is satisfied: the existence of a psychotherapist-patient relationship; the psychotherapist's actual belief or prediction that the patient poses a serious risk of inflicting grave bodily injury; a reasonably identifiable victim; and the failure to undertake reasonable efforts to warn the victim and a law enforcement agency. [Citations.]" (120 Cal.App.4th at pp. 1301–1302, 16 Cal.Rptr.3d 591.)

Similarly, in this case, the jury was instructed that in order to establish their comparative negligence defense, defendants "must prove both of the following: One: That Western Health Resources was negligent. And two: That the negligence ****517** of Western Health Resources was a substantial factor in causing Lydia Sanchez' harm." The comparative negligence defense rested entirely on the jury's determination that the elements of negligence and causation were proven, not in terms of a standard of care applicable to medical professionals, but in terms applicable to ordinary persons. Negligence was defined simply as "the failure to use reasonable care to prevent harm to oneself or to others. A person can be negligent by acting or by failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation."

Given the manner in which the case was tried, the standard of care for medical professionals was not at issue. The issue was whether Western had ***140** behaved in a manner consistent with that of a reasonably careful person under the same circumstances. Given that an expert's opinion would not have assisted the jury to measure Western's conduct against that of reasonably careful person, we conclude that "[i]t would be improper to reverse a jury's verdict on the ground of a refusal to admit expert testimony on a subject of common experience." (*Westbrooks v. State of California* (1985) 173 Cal.App.3d 1203, 1210, 219 Cal.Rptr. 674 [upheld the exclusion of expert testimony that a collapsed bridge did not constitute a dangerous condition of property in light of efforts taken to divert traffic away from the collapsed bridge].)

As the hazards of smoking in bed are well understood, lay jurors are capable of assessing Western's lack of response to those hazards without the benefit of expert testimony. Given the lack of evidence that any fire-preventative measures were taken by Western (such as offering a second caregiver who would stay awake during the night, or removing all matches and cigarettes from Kavanaugh's bedroom at night), the record contains substantial evidence to support the finding of employer negligence.

II. The Judgment Is Reversed in Part as to Damages

Defendants contend that because Sanchez's medical bills of $575,000 were paid by Western at the reduced amount of $241,818.38, Sanchez's award for past medical expenses must be capped at $241,818.38. (Citing *Hanif, supra,* 200 Cal.App.3d at p. 640, 246 Cal.Rptr. 192, and *Nishihama, supra,* 93 Cal.App.4th at pp. 306–307, 112 Cal.Rptr.2d 861.)

A. Under Workers' Compensation Law, the Employer Must Pay in Full the Employee's Medical Expenses for Job-related Injuries

[10] Defendants point out that under the workers' compensation law, employees are not liable for medical bills incurred as a result of injuries sustained in the course and scope of employment. As the court explained in *Boehm & Associates v. Workers' Comp. Appeals Bd.* (2003) 108 Cal.App.4th 137, 142, 133 Cal.Rptr.2d 396: "Workers' compensation was introduced into California law in 1911, with the passage of the Roseberry Act (Stats.1911, ch. 399, § 3, pp. 796–797). (*Mathews v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 719, 729 [100 Cal.Rptr. 301, 493 P.2d 1165].) Later, the Legislature enacted the Workmen's Compensation Insurance and Safety Act of 1917 (Stats.1917, ch. 586, p. 831), which was codified in 1937 (Lab.Code, § 3200 et seq.) and is essentially the current workers' compensation law. (1 Cal. Workers' Compensation Practice (Cont.Ed.Bar 4th ed. 2002) § 1.2, p. 4.) California workers' compensation law provides ****518** a compulsory and exclusive scheme for compensating injured workers without regard to fault. (*Id.* at § 1.3, p. 5.) Once employment and industrial causation are determined, the ***141** employer is responsible for *all* medical expenses incurred. (*Granado v. Workmen's Comp.App. Bd.* (1968) 69 Cal.2d 399, 405–406 [71 Cal.Rptr. 678, 445 P.2d

294].) 'The fundamental policy underlying the workers' compensation laws is that those hiring others to perform services should bear the risk of injuries incurred in the undertakings.' (*State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 5, 13 [219 Cal.Rptr. 13, 706 P.2d 1146].)"

Defendants state that "the workers' compensation laws limit a healthcare provider's ability to balance-bill an injured employee for charges the employer does not pay. Absent an agreement with an employer or an employer's insurer, the official medical fee schedule establishes the reasonable maximum medical expenses allowable for work-related injuries. (Lab.Code, §§ 4603.2, 5307.1.) And Labor Code § 4600 prohibits attempts to seek payment from the injured worker for medical treatment above the reasonable fee established by the fee schedule."

B. The Howell Decision

[11] While this appeal was pending, the California Supreme Court issued its opinion in *Howell, supra,* 52 Cal.4th 541, 129 Cal.Rptr.3d 325, 257 P.3d 1130. The court held in *Howell* that where a private medical insurance carrier pays an injured person's medical expenses at a reduced rate pursuant to a preexisting contract with the provider, the injured person may not recover from the tortfeasor, as economic damages for past medical expenses, the unpaid balance stated in the provider's bill. Although *Howell* involved private medical insurance rather than workers' compensation benefits, the situations are sufficiently similar and the language in *Howell* sufficiently broad to compel the conclusion that this case is governed by *Howell.*

According to *Howell:* "When a tortiously injured person receives medical care for his or her injuries, the provider of that care often accepts as full payment, pursuant to a preexisting contract with the injured person's health insurer, an amount less than that stated in the provider's bill. In that circumstance, may the injured person recover from the tortfeasor, as economic damages for past medical expenses, the undiscounted sum stated in the provider's bill but never paid by or on behalf of the injured person? We hold no such recovery is allowed, for the simple reason that the injured plaintiff did not suffer any economic loss in that amount. (See Civ.Code, §§ 3281 [damages are awarded to compensate for detriment suffered], 3282 [detriment is a loss or harm to person or property].)

"The collateral source rule, which precludes deduction of compensation the plaintiff has received from sources independent of the tortfeasor from ***142** damages the plaintiff 'would otherwise collect from the tortfeasor' (*Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 6 [84 Cal.Rptr. 173, 465 P.2d 61] (*Helfend*)), ensures that plaintiff here may recover in damages the amounts her insurer paid for her medical care. The rule, however, has no bearing on amounts that were included in a provider's bill but for which the plaintiff never incurred liability because the provider, by prior agreement, accepted a lesser amount as full payment. Such sums are not damages the plaintiff would otherwise have collected from the defendant. They are neither paid to the providers on the plaintiff's behalf nor paid to the plaintiff in indemnity of his or her expenses. ****519** Because they do not represent an economic loss for the plaintiff, they are not recoverable in the first instance. The collateral source rule precludes certain deductions against otherwise recoverable damages, but does not expand the scope of economic damages to include expenses the plaintiff never incurred." (*Howell, supra,* 52 Cal.4th at pp. 548–549, 129 Cal.Rptr.3d 325, 257 P.3d 1130.)

C. Applying Howell to This Case

Applying the court's reasoning in *Howell* to this case, we conclude that where an employer is required under the workers' compensation laws to pay in full an injured employee's medical expenses, the injured employee may not recover, as economic damages from a third party tortfeasor, medical fees that the provider is precluded, either by agreement or by law (including the statutory fee schedule), from collecting from the employer. Because fees that the provider may not collect from the employer under the workers' compensation law do not represent an economic loss for the employee, they are not recoverable in the first instance. (*Howell, supra,* 52 Cal.4th at p. 548, 129 Cal.Rptr.3d 325, 257 P.3d 1130.)

Defendants contend that because Western paid Sanchez's medical bills, presumably at the rate set forth in the statutory fee schedule, the judgment must be modified to reflect a correct damages award of $290,727.22. Sanchez argues, however, that the record is silent as to the statutory fee schedule and does not disclose whether Western's payment of $241,818.38 in medical expenses was based on the statutory fee schedule. Sanchez contends that there is no evidence to support a finding that the providers were paid the full amount due under the workers' compensation law.

Given that the decision in *Howell* was issued while this appeal was pending, it is understandable that neither the parties nor the trial court anticipated the type of workers' compensation payment evidence that would be relevant to calculate Sanchez's permissible recovery of past medical expenses from a third party. We therefore find it appropriate to remand the matter to the trial court for the limited purpose of determining the full amount owed by

Western to the medical care providers under the workers' compensation law. That amount will establish the past medical expenses that are ***143** recoverable by Sanchez as economic damages from defendants, and will be used in the calculation of the *Witt v. Jackson* offset and revised damages award.

DISPOSITION

As to Sanchez's appeal, the order denying judgment notwithstanding the verdict is affirmed. As to defendants' appeal, the judgment is reversed in part as to damages only and the matter is remanded for a limited hearing and recalculation of damages in accordance with the views set forth in this opinion. Defendants are entitled to their costs on appeal.

We concur: EPSTEIN, P.J., and MANELLA, J.

Parallel Citations

204 Cal.App.4th 126, 77 Cal. Comp. Cases 261, 12 Cal. Daily Op. Serv. 2828, 2012 Daily Journal D.A.R. 3160

Footnotes

1 "When an employer claims reimbursement rights because it has paid benefits to an injured worker, it may proceed against a third party tortfeasor by bringing a direct action, by intervening in an action brought by the employee or by filing a lien in an action brought by the employee. (Lab.Code, §§ 3852, 3853, 3856, subd. (b), 3857.)" (*Aetna Casualty & Surety Co. v. Superior Court* (1993) 20 Cal.App.4th 1502, 1506–1507, 25 Cal.Rptr.2d 301.) In this case, the employer chose the third option and elected to file a lien without becoming a party to this action.

2 On the night of the fire, Sanchez woke up and saw a flickering light in the hallway. She went to investigate and discovered a "big fire on top of" Kavanaugh's bed. Kavanaugh, who was 92 years old, was sitting on the side of the bed. Sanchez tried to pull Kavanaugh from the bedroom, but Kavanaugh, who had limited mobility under normal circumstances, would not cooperate and appeared to be in shock. After being overcome by smoke, Sanchez went to the kitchen to call 911. Sanchez unlocked the front door and went back to the burning bedroom to try to save Kavanaugh. However, Sanchez could not breathe and could not see Kavanaugh through the thick, dark smoke. When firefighters arrived, Sanchez kicked out a window screen and escaped outside.

Sanchez suffered burns on her hands and feet and injuries from smoke inhalation. After surgery, she spent three weeks on a ventilator in intensive care. She then spent two more weeks in a rehabilitation unit where she received speech, occupational, and physical therapies.

3 "In *Witt v. Jackson, supra,* 57 Cal.2d 57 [17 Cal.Rptr. 369, 366 P.2d 641], the California Supreme Court held that an employer could not recover workers' compensation benefits paid if the employer's negligence contributed to the employee's injury. The Supreme Court reconciled this rule with comparative negligence in *Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 829 [150 Cal.Rptr. 888, 587 P.2d 684]." (*Aetna Casualty & Surety Co. v. Superior Court, supra,* 20 Cal.App.4th at p. 1508, fn. 4, 25 Cal.Rptr.2d 301.)

4 According to defendants:

(1) The $603,000 economic damages award must be reduced to $269,818.38 ($241,818.38 medical lien + $28,000 lost earnings = $269,818.38 economic damages).

(2) The $903,000, total damages award must be reduced to $569,818.38 ($269,818.38 economic damages + $300,000 noneconomic damages = $569,818.38).

(3) The $269,818.38 economic damages award is 47.35164 percent of the total verdict ($269,818.38 / $569,818.38 = .4735164).

(4) Multiplying the workers' compensation benefits of $272,622.38 by .4735164 (the percentage of the total verdict attributable to economic damages) produces a *Witt v. Jackson* offset of $129,091.16 ($272,622.38 x .4735164 = $129,091.16).

(5) Adding the (reduced) noneconomic damages award of $150,000 to the economic damages award of $269,818.38, and subtracting the *Witt v. Jackson* offset of $129,091.16, results in a final judgment of $290,727.22 ($150,000 + $269,818.38—$129,091.16 = $290,727.22).

5 According to Sanchez:

(1) The $603,000 economic damages award is 66.7774 percent of the total damages award of $903,000 ($603,000 / $903,000 = .667774).

(2) Multiplying the workers' compensation benefits of $272,622.38 by .667774, produces a *Witt v. Jackson* offset of $182,050.13 ($272,622.38 x .667774 = $182,050.13).

(3) Adding the (reduced) noneconomic damages award of $150,000 to the economic damages award of $603,000, and subtracting the *Witt v. Jackson* offset of $182,050.13, results in a final judgment of $570,949.87 ($150,000 +

$603,000—$182,050.13 = $570,949.87).

6 The evidence showed that, in response to Kavanaugh's smoking, Sanchez's supervisor had recommended and purchased air purifiers for the house. Sanchez's contention, as we understand it, is that the jury could not assess the adequacy or inadequacy of this response (providing air purifiers) without the assistance of an expert witness.

7 We note that neither the motion nor the opposition to the motion was included in the record on appeal.

8 "Negligence" was defined for the jury as "the failure to use reasonable care to prevent harm to oneself or to others. A person can be negligent by acting or by failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation."

As to defendants' defense of Western's comparative negligence, the jury was instructed: "Defendant Dorothea B. Kavana[u]gh claims that the negligence of Western Health Resources was also a substantial factor in causing Lydia Sanchez' harm.

"To succeed on this claim, defendant Dorothea B. Kavana[u]gh must prove both of the following:

"One: That Western Health Resources was negligent.

"And two: That the negligence of Western Health Resources was a substantial factor in causing Lydia Sanchez' harm."

The jury received the following instruction on causation:

"A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

"Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct. A person's negligence may combine with another factor to cause harm.

"If you find that Dorothea Kavana[u]gh's negligence was a substantial factor in causing Lydia Sanchez' harm, then Dorothea Kavana[u]gh is responsible for the harm. Dorothea Kavana[u]gh cannot avoid responsibility just because some other person, condition or event was also a substantial factor in causing Lydia Sanchez' harm."

9 An order denying a motion for judgment notwithstanding the verdict is directly appealable. (Code Civ. Proc., § 904.1, subd. (a)(4).) On September 23, 2010, Sanchez timely appealed the July 23, 2010 order denying her motion for judgment notwithstanding the verdict.

Even if we were to liberally construe Sanchez's notice of appeal to encompass an appeal from the judgment, the purported appeal from the judgment would be untimely. By the time Sanchez filed her notice of appeal on September 23, 2010, the time to appeal from the May 20, 2010 judgment had already expired. None of the extensions provided by California Rules of Court, rule 8.108 alter this fact. The extension provided by California Rules of Court, rule. 8.108(d) applies only where a *valid* motion for judgment notwithstanding the verdict is filed and denied. In this case, Sanchez's motion for judgment notwithstanding the verdict was *not* valid because it was *not* timely filed within 15 days of the date of service of notice of entry of judgment. (Code Civ. Proc., §§ 629, 659.) Notice of entry of judgment was served on May 28, 2010, but Sanchez did not file her motion for judgment notwithstanding the verdict until June 17, 2010, more than 15 days later. Moreover, the 20–day extension provided by California Rules of Court, rule 8.108(g)(1) for the filing of a cross-appeal had expired on June 23, 2010 (20 days after the superior court clerk served notification of defendants' appeal on June 3, 2010), well before the notice of appeal was filed on September 23, 2010.

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205 Cal.App.4th 749
Court of Appeal, Sixth District, California.

Sara COLE et al., Plaintiffs and Appellants,
v.
TOWN OF LOS GATOS et al., Defendant and Respondent.

No. H035444. | April 27, 2012.

Synopsis

Background: Park attendee brought action against motorist and town following accident sustained while returning to her vehicle, which was parked on gravel strip between road and park's northern edge. The Superior Court, Santa Clara County, No. CV109033, James P. Kleinberg, J., granted town's motion for summary judgment, and attendee appealed.

Holdings: The Court of Appeal, Rushing, P.J., held that:
[1] town abandoned objection to expert's opinion testimony based on its admissibility;
[2] expert's statements concerning hazards posed by gravel strip were relevant and admissible;
[3] expert's opinion that motorist "was attempting to pass a line of stopped cars at the time of the accident" was relevant;
[4] Any lack of foundation for statement that motorist "was attempting to pass a line of stopped cars at the time of the accident" did not require exclusion of the testimony;
[5] town failed to carry its burden of negating, as a matter of law, that attendee could not establish a dangerous condition;
[6] genuine issue of material fact as to causal relationship between alleged dangerous condition and accident precluded summary judgment; and
[7] genuine issue of material fact as to whether town had notice of dangerous condition precluded summary judgment.

Reversed.

West Headnotes (34)

[1] **Judgment**
⇐Existence or non-existence of fact issue
Judgment
⇐Showing to be made on supporting affidavit

A party can obtain summary judgment only by establishing the merit of his case "as a matter of law," which is another way of saying that the evidence available to the parties, and placed before the court in support of and opposition to the motion, raises no material issue that a trier of fact could resolve in favor of the party opposing the motion. West's Ann.Cal.C.C.P. § 437c(c).

[2] **Judgment**
⇐Nature of summary judgment

The function of the summary judgment motion is to provide a mechanism, short of trial, for cutting through the parties' pleadings in order to determine whether trial is in fact necessary to resolve their dispute. West's Ann.Cal.C.C.P. § 437c.

[3] **Judgment**
⇐Existence or non-existence of fact issue
Judgment
⇐Showing to be made on supporting affidavit

Every meritorious summary judgment motion rests on establishing two propositions: the opposing party is unable to present evidence in support of a specified fact, and that fact is essential to establish his cause of action or to overcome a defense. West's Ann.Cal.C.C.P. § 437c.

[4] **Judgment**
⇐Existence or non-existence of fact issue
Judgment

Showing to be made on supporting affidavit

The summary judgment proposition that the opposing party is unable to present evidence in support of a specified fact may be established by uncontroverted affirmative proof that the specified fact does not exist, but it may also be established by showing that the opposing party bears the burden of proof with respect to the specified fact and that he has no evidence with which to carry that burden. West's Ann.Cal.C.C.P. § 437c.

[5] **Judgment**
Existence or non-existence of fact issue
Judgment
Hearing and determination

Once the unprovability of a specified fact is established, the only question presented by a summary judgment motion is whether that fact is indeed vital to the opponent's case, which is a question of law for the court; if the answer is affirmative, or if there is no way for the opposing party to prevail without the specified fact, the movant is entitled to judgment as a matter of law. West's Ann.Cal.C.C.P. § 437c.

[6] **Judgment**
Showing to be made on opposing affidavit

The plaintiff can defeat a defense motion for summary judgment by showing either that the defense evidence itself permits conflicting inferences as to the existence of the specified fact, or by presenting additional evidence of its existence. West's Ann.Cal.C.C.P. § 437c.

[7] **Judgment**
Existence or non-existence of fact issue

The dispositive question in all summary judgment cases is whether the evidence before the court, viewed as a whole, permits only a finding favorable to the defendant with respect to one or more necessary elements of the plaintiff's claims-that is, whether it negates an element of the claim as a matter of law. West's Ann.Cal.C.C.P. § 437c(c).

[8] **Appeal and Error**
Extent of Review Dependent on Nature of Decision Appealed from

Because summary judgment can raise only questions of law, the appellate court reviews the trial court's ruling without deference. West's Ann.Cal.C.C.P. § 437c.

[9] **Judgment**
Presumptions and burden of proof
Judgment
Hearing and determination

Because summary judgment presents a risk of infringing on the opponent's rights, particularly the right to jury trial, the court must strictly scrutinize the moving party's proofs while liberally construing those of the opposing party. West's Ann.Cal.C.C.P. § 437c.

[10] **Judgment**
Presumptions and burden of proof

All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment. West's Ann.Cal.C.C.P. § 437c.

[11] **Judgment**
Existence of defense
Judgment
Tort cases in general

Town's assertion of the absence of a "special relationship" between it and park attendee injured while returning to her vehicle could be disregarded as a distinct basis for summary judgment, as assertion was not an independent defense, sufficient in its own right to defeat attendee's claims for immunity exception based on dangerous condition, but rather was an anticipatory rebuttal to any claim that town owed her a heightened duty due to a special relationship. West's Ann.Cal.C.C.P. § 437c; West's Ann.Cal.Gov.Code § 835.

[12] **Municipal Corporations**
Actions for injuries

The existence of a dangerous condition on public property ordinarily is a question of fact, but the issue may be resolved as a matter of law if reasonable minds can come to only one conclusion. West's Ann.Cal.Gov.Code § 830(a).

[13] **Municipal Corporations**
Nature and grounds of liability of municipality as proprietor

To establish a qualifying condition, the plaintiff claiming a dangerous condition on public property must point to at least one physical characteristic of the property; the location of property may constitute a qualifying characteristic. West's Ann.Cal.Gov.Code § 830.

[14] **Municipal Corporations**
Nature and grounds of liability of municipality as proprietor

A risk qualifying as a dangerous condition of public property need not be one posed to users of the public property; it may be a hazard presented to users of adjacent property. West's Ann.Cal.Gov.Code § 830.

[15] **Appeal and Error**
Objections to evidence and witnesses

Town failed to make any coherent argument on appeal in support of objection to expert's opinion testimony based on its admissibility under relevant rule of evidence, which town failed to cite in its objections to evidence, and thus abandoned that contention. West's Ann.Cal.Evid.Code § 801.

[16] **Appeal and Error**
Objections to evidence and witnesses
Judgment
Defects and objections

Where a trial court is confronted on summary judgment with a large number of nebulous evidentiary objections, a fair sample of which appear to be meritless, the court can properly overrule, and a reviewing court ignore, all of the objections on the ground that they constitute oppression of the opposing party and an imposition on the resources of the court.

[17] **Evidence**
Nature, condition, and relation of objects

Expert's statements concerning hazards posed by gravel strip between park and road, insofar as they concerned fact that road lanes merged, the length of the merge, the location of the merge, and the calculation of the proper merge distance, were relevant and admissible in park attendee's action against town based on alleged dangerous condition; statements rebutted averments of town's own expert traffic engineer, and statements were probative of allegation that configuration of road created hazards to park users. West's Ann.Cal.Evid.Code § 801; West's Ann.Cal.Gov.Code §§ 830, 835.

[18] **Evidence**
⇐Relevancy in general
Evidence
⇐Importance in general

A question of relevancy involves two subsidiary inquiries: whether the fact sought to be shown by the evidence is material, or within the issues properly tendered by a party, and whether the proffered evidence actually tends to prove that fact. West's Ann.Cal.Evid.Code § 210.

[19] **Evidence**
⇐Importance in general

In considering the materiality of allegedly relevant evidence, the primary considerations are the pleadings, the rules of pleading, and the substantive law relating to the particular kind of case. West's Ann.Cal.Evid.Code § 210.

[20] **Evidence**
⇐Nature, condition, and relation of objects
Evidence
⇐Cause

Expert traffic engineer's opinion that motorist "was attempting to pass a line of stopped cars at the time of the accident" in which motorist struck town park attendee as she was returning to her parked vehicle was relevant and admissible in attendee's personal injury action against town; motorist's reasons for driving off the road were highly relevant, not only to the outcome of the action but also to expert's opinion that the dangerous condition of the road and roadside area was a cause of attendee's injuries.

[21] **Evidence**
⇐Automobile Cases

Any lack of foundation for expert traffic engineer's statement that motorist "was attempting to pass a line of stopped cars at the time of the accident" in which motorist struck town park attendee as she was returning to her parked vehicle, did not require exclusion of the testimony in attendee's court-tried personal injury action against town, but rather only required confirmation from court that it was accepting the statements only as foundation for expert's accompanying opinions concerning the hazards posed by road and by park's parking area. West's Ann.Cal.Evid.Code § 801; West's Ann.Cal.Gov.Code §§ 830, 835.

[22] **Evidence**
⇐Necessity and sufficiency

An objection to expert opinion based on a lack of foundation goes only to the purpose for which the challenged statements may be received. West's Ann.Cal.Evid.Code § 801.

[23] **Municipal Corporations**

Actions for injuries

Town, having presented no cogent argument on the question of whether park attendee could establish a dangerous condition of public property, failed to carry its burden of negating, as a matter of law, that element of attendee's cause of action for damages stemming from a dangerous condition of public property. West's Ann.Cal.Gov.Code §§ 830, 835.

See Annot., Liability of municipal corporations for injuries due to conditions in parks (1943) 142 A.L.R. 1340; Cal. Jur. 3d, Government Tort Liability, § 34; Cal. Civil Practice (Thomson Reuters 2011) Torts, §§ 29:10, 31:18; 8 Miller & Starr, Cal. Real Estate (3d ed. 2001) §§ 22:44, 22:72; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, §§ 258, 260.

[24] **Municipal Corporations**
Nature and grounds of liability of municipality as proprietor

The status of a condition as "dangerous," for purposes of the statutory definition of a dangerous condition on public property, does not depend on whether the plaintiff or other persons were actually exercising due care but on whether the condition of the property posed a substantial risk of injury to persons who were exercising due care. West's Ann.Cal.Gov.Code § 830.

[25] **Judgment**
Tort cases in general

Genuine issue of material fact as to causal relationship between alleged dangerous condition of combination of road and gravel shoulder strip where park visitors frequently parked and accident in which park attendee was hit by intoxicated motorist while standing near her parked vehicle precluded summary judgment for town in attendee's personal injury action.

[26] **Negligence**
Possibility of multiple causes
Negligence
Effect of other causes on liability
Torts
Proximate cause

It is entirely possible for an injury to result from multiple tortious acts or omissions, in which case all authors of the injurious conduct may be liable, provided the conduct of each satisfies the test of proximate or legal cause as that concept has evolved over the centuries.

[27] **Negligence**
In general; foreseeability of other cause
Torts
Proximate cause

Under traditional tort principles, once a defendant's conduct is found to have been a cause in fact of the plaintiff's injuries, the conduct of a third party will not bar liability unless it operated as a superseding or supervening cause, so as to break the chain of legal causation between the defendant's conduct and the plaintiff's injuries.

[28] **Negligence**
In general; foreseeability of other cause
Torts
Proximate cause

The misconduct of a third party will not ordinarily have the effect of operating as a superseding or supervening cause breaking the chain of causation if the misconduct itself was

foreseeable to the defendant.

[29] **Negligence**
In general; foreseeability of other cause
Torts
Proximate cause

Even when a third party's intervening act is unforeseeable, the defendant's conduct may continue to be operate as a legal cause if the defendant could reasonably foresee the injury resulting from his own conduct.

[30] **Negligence**
In general; foreseeability of other cause
Torts
Proximate cause

Where an injury was brought about by a later cause of independent origin, the question of proximate cause revolves around a determination of whether the later cause of independent origin, commonly referred to as an intervening cause, was foreseeable by the defendant or, if not foreseeable, whether it caused the injury of a type which was foreseeable; if either of these questions is answered in the affirmative, then the defendant is not relieved from liability towards the plaintiff, but if it is determined that the intervening cause was not foreseeable and that the results which it caused were not foreseeable, then the intervening cause becomes a supervening cause and the defendant is relieved from liability for the plaintiff's injuries.

[31] **Negligence**
Necessity of causation
Negligence
Foreseeability

The touchstones of proximate cause analysis are causation in fact and foreseeability of harm.

[32] **Evidence**
Circumstantial evidence

A fact can be proven by inference from circumstantial evidence, as well as by direct testimony.

[33] **Judgment**
Tort cases in general

Genuine issue of material fact as to whether town had notice of dangerous condition of combination of road and gravel shoulder strip where park visitors frequently parked precluded summary judgment for town in park attendee's personal injury action following accident in which she was hit by a motorist while standing near her parked vehicle. West's Ann.Cal.Gov.Code §§ 835(b), 835.2.

[34] **Negligence**
Foreseeability

A particular type of accident may be reasonably anticipated even if such an accident had not occurred before.

Attorneys and Law Firms

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Opinion

RUSHING, P.J.

***754** After attending a baseball game at Blossom Hill Park in Los Gatos, plaintiff Sara Cole returned to her vehicle, which she had parked between the north edge of the park and Blossom Hill Road. While standing near the back of her vehicle she was hit by a car driven by defendant Lucio Rodriguez, who would eventually plead guilty to driving while intoxicated. Plaintiff brought suit against Rodriguez and the Town of Los Gatos (Town), alleging as to the latter that the road and the area where ****727** she had parked—both of which were Town property—were in a dangerous condition because their configurations, coupled with their relative locations, induced park visitors to park where she had parked while inducing eastbound drivers on Blossom Hill Road to drive through that area in order to bypass stalled traffic on the road. The trial court granted Town's motion for summary judgment, finding no evidence that any dangerous condition of Town's property was a proximate cause of plaintiff's injuries. We hold that, on the contrary, the evidence before the trial court raised numerous issues of fact concerning the existence of a dangerous condition and a causal relationship between the characteristics of the property and plaintiff's injuries. We will therefore reverse the judgment.

BACKGROUND

The accident occurred on the afternoon of September 9, 2007.1 Plaintiff had diagonally parked her GMC Tahoe, a sport utility vehicle over 18 feet long, in a graveled strip running between the north edge of the park and Blossom Hill Road. The road, the park, and the graveled strip all belong to Town. At the moment of impact plaintiff was loading a bicycle into the rear of the vehicle. As she did so, Rodriguez, who had been driving eastbound on Blossom Hill Road after consuming either whiskey or a wine-like beverage mixed with juice, left the road and entered the graveled area, where he collided with plaintiff, inflicting serious injuries. After stopping briefly, Rodriguez drove home to see his wife because he expected to be arrested and imprisoned as a repeat drunk driver.

Plaintiff presented evidence that just before the accident, eastbound traffic on Blossom Hill Road had been brought to a stop next to the graveled area to wait for another eastbound driver, Carrie Cummings, to make a left turn into her driveway across the road from where plaintiff was parked. Plaintiff ***755** theorized that Rodriguez had left the road in an attempt to bypass these cars. No witness actually saw him do so, but plaintiff presented evidence, discussed in more detail below, that such maneuvers were common at that location, as was the practice of diagonal parking in the graveled area, and that Town had notice of these facts. Plaintiff also presented the lay opinion of Cummings, to which no objection was lodged, that her perception of events was most consistent with Rodriguez's having left the road to bypass stalled traffic.

Cole filed a complaint for damages against Rodriguez and Town, alleging that her injuries were the proximate result of both Rodriguez's negligent driving and a dangerous condition of public property. Town was alleged to have created or maintained a dangerous condition by, among other things, "fail[ing] to provide adequate time and distance for safe merging of the lanes of traffic," "fail[ing] to provide a reasonable and effective barrier between the roadway travel surface and the parking area" or, alternatively, to "prohibit or limit parking in the area," "fail[ing] to properly construct, maintain, and isolate the parking area from the roadway consistent with reasonable traffic engineering principles," failing to provide "reasonably required protective barriers, curbs, or bollards," "fail[ing] to safely design, construct, and maintain the area for parking," ****728** "fail[ing] to sign, warn, or notify Claimants and other foreseeable users of the danger existing at the site of the injury," "fail[ing] to provide and/or maintain adequate lane channelization, signals, devices, and pavement striping so as to create a trap," "fail[ing] to ensure that the roadway merge was not visually confusing, misleading, and dangerous," and "fail[ing] to remedy the hazardous condition prior to Claimants' injuries in light of: pre-collision complaints, accident history, and traffic volume." These factors, plaintiff alleged, "individually and in combination, constituted a dangerous condition that should have been, but was not, remedied or warned of" by Town's agents.

Town moved for summary judgment on several stated grounds.2 As will appear, nearly all of its arguments fall back on the premise that that plaintiff is unable to establish that any characteristic of the property was a proximate cause of her injuries. Plaintiff countered with, among other things, the declaration of a traffic expert

opining upon various deficiencies in the configuration of the road and graveled area and their causal role in the accident. Town objected to much of this declaration on grounds of relevancy and lack of foundation. The trial court sustained many of Town's objections and granted summary judgment, ruling that plaintiff had not presented "any admissible evidence ***756** that demonstrates ... the existence of a physical deficiency in the subject public property, or [that] such defect actually caused or contributed to the third party conduct that injured Cole."

Plaintiff brought a motion for new trial, which the trial court denied. This timely appeal followed.

DISCUSSION

I. *Introduction*

[1] [2] [3] [4] [5] A party can obtain summary judgment only by establishing the merit of his case "as a matter of law." (Code of Civ. Proc., § 437c, subd. (c).) The phrase "as a matter of law" is another way of saying that the evidence available to the parties, and placed before the court in support of and opposition to the motion, raises no material issue that a trier of fact could resolve in favor of the party opposing the motion. The function of the motion is thus to provide a mechanism, short of trial, for "cut [ting] through the parties' pleadings in order to determine whether ... trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843, 107 Cal.Rptr.2d 841, 24 P.3d 493; see *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203, 48 Cal.Rptr.2d 448.) A moving defendant establishes a right to summary judgment by showing that the plaintiff lacks the evidence to sustain one or more elements of the cause of action pleaded by him or to overcome some defense the defendant is prepared to prove. (Code of Civ. Proc., § 437c, subd. (*o*) (2).) Every meritorious motion thus rests on establishing two propositions: The opposing party is unable to present evidence in support of a specified fact, and that fact is essential to establish his cause of action or to overcome a defense. The first proposition may of course be established by uncontroverted affirmative proof that the specified fact does not exist, but it may also be established by showing that ****729** the opposing party bears the burden of proof with respect to the specified fact and that he has no evidence with which to carry that burden. In either case, once the first proposition is established—the unprovability of the specified fact—the only question presented is whether that fact is indeed vital to the opponent's case. This is a question of law for the court. If the answer is affirmative—if there is no way for the opposing party to prevail without the specified fact—the movant is entitled to judgment "as a matter of law."

[6] [7] The plaintiff can defeat a defense motion for summary judgment by showing either that the defense evidence itself permits conflicting inferences ***757** as to the existence of the specified fact, or by presenting additional evidence of its existence. (See Code of Civ. Proc., § 437c, subds. (c), (p)(1).) The dispositive question in all cases is whether the evidence before the court, viewed as a whole, permits only a finding favorable to the defendant with respect to one or more necessary elements of the plaintiff's claims—that is, whether it negates an element of the claim "as a matter of law." (§ 437c, subd. (c).)

[8] [9] [10] Because summary judgment can raise only questions of law, we review the trial court's ruling without deference. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 60, 65 Cal.Rptr.2d 366, 939 P.2d 766; *Orrick Herrington & Sutcliffe v. Superior Court* (2003) 107 Cal.App.4th 1052, 1056, 132 Cal.Rptr.2d 658; *Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222, 38 Cal.Rptr.2d 35; *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878, 116 Cal.Rptr.2d 158.) And because summary judgment presents a risk of infringing on the opponent's rights—particularly the right to jury trial—we must strictly scrutinize the moving party's proofs while liberally construing those of the opposing party. "All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment." (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562, 42 Cal.Rptr.2d 697.)

The first step in analyzing any motion for summary judgment is to identify the elements of the challenged cause of action or defense in order to isolate those targeted by the motion. Plaintiff's cause of action against Town is defined by statute, specifically the portion of the Government Claims Act entitled Liability of Public Entities and Public Employees. (Gov.Code, §§ 814–895.8, added by Stats.1963, ch. 1681, pp. 3267–3284; see *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 741–742, 68 Cal.Rptr.3d 295, 171 P.3d 20.) These statutes declare a general rule of immunity (Gov.Code, § 815) and then set out exceptions to that rule. Plaintiff invokes the exception for a dangerous condition of public property, as set out in Government Code section 835 (§ 835).3 As there laid out the cause of ***758** action consists of the following elements: (1) a dangerous condition of public property; (2) a foreseeable risk, arising from the dangerous condition, ****730** of the kind of injury the plaintiff suffered; (3) actionable conduct in connection with the condition, i.e., either

negligence on the part of a public employee in creating it, or failure by the entity to correct it after notice of its existence and dangerousness; (4) a causal relationship between the dangerous condition and the plaintiff's injuries; and (5) compensable damage sustained by the plaintiff.

Town was entitled to summary judgment if it demonstrated either that plaintiff was unable to prove one of these elements or that Town possessed "a complete defense to [plaintiff's] cause of action." (Code Civ. Proc., § 437c, subd. (p)(2), see subd. (n).) The only defense argued in support of the motion was the general statutory immunity of public entities against liability for torts.4 (See Gov.Code, § 815, subd. (a).) This assertion added nothing of substance to the motion; it was simply another way of stating that plaintiff could not establish all of the statutorily defined elements of liability.

[11] Another of the grounds Town asserted for the motion—the absence of a "special relationship" between Town and plaintiff—may also be disregarded as a distinct basis for summary judgment. It is not an independent defense, sufficient in its own right to defeat plaintiff's claims, but an anticipatory rebuttal to certain claims plaintiff might make—specifically, that Town owed her a heightened duty under cases predicating such a duty on a "special relationship." (See *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1129, 119 Cal.Rptr.2d 709, 45 P.3d 1171 (*Zelig*); *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 158, 41 Cal.Rptr.3d 299, 131 P.3d 383; *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 788–791, 221 Cal.Rptr. 840, 710 P.2d 907; *Constantinescu v. Conejo Valley Unified School Dist.* (1993) 16 Cal.App.4th 1466, 1472–1473, 20 Cal.Rptr.2d 734.) Since plaintiff placed no reliance on such a relationship, Town's denial of that premise cannot provide a sufficient basis for the judgment under review.

It thus appears that the only colorable grounds for the motion were that plaintiff was unable to establish two elements of her cause of action: a dangerous condition of public property, and a causal relationship between that condition and plaintiff's injuries. The question on appeal is whether the ***759** evidence before the trial court established the absence of a triable issue of fact with respect to either of these elements.

II. *Dangerous Condition of Public Property*

A. *Plaintiff's Theory*

[12] [13] [14] A " 'dangerous condition' " for present purposes is "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." (Gov.Code, § 830, subd. (a) (§ 830(a)).) "The existence of a dangerous condition ordinarily is a question of fact, but the issue may be resolved as a matter of law if reasonable minds can come to only one conclusion." ****731** (*Zelig, supra,* 27 Cal.4th 1112, 1133, 119 Cal.Rptr.2d 709, 45 P.3d 1171; accord, *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 148, 132 Cal.Rptr.2d 341, 65 P.3d 807 (*Bonanno*).) To establish a qualifying condition, the plaintiff must point to at least one " 'physical characteristic' " of the property. (*Song X. Sun v. City of Oakland* (2008) 166 Cal.App.4th 1177, 1187, 83 Cal.Rptr.3d 372.) However the *location* of property may constitute a qualifying characteristic. (*Bonanno, supra,* 30 Cal.4th at pp. 154, 132 Cal.Rptr.2d 341, 65 P.3d 807; see *id.* at pp. 144, 146, 149–151, 132 Cal.Rptr.2d 341, 65 P.3d 807.) Further, as the statutory language makes clear, a qualifying risk need not be one posed to users of the public property; it may be a hazard presented to users of "adjacent property." (§ 830(a).) It follows that, since all of the property involved here belonged to Town, a dangerous condition might consist of any characteristic of any part of that property that foreseeably endangered users of any other part.

Plaintiff's theory is essentially that the configuration of Blossom Hill Road and the adjacent gravel area created a danger to users of the latter in that eastbound drivers on Blossom Hill Road were often induced to leave the road (as Rodriguez did) and enter the graveled area, where they posed an obvious hazard to persons who had parked there (as plaintiff did), and particularly those standing near the rear of a vehicle parked diagonally, as was the custom. Of course there is always a risk that a vehicle operated on a highway may leave the road *by accident.* But according to plaintiff's theory, it was a common practice for drivers to do so here, quite deliberately, in order to bypass stopped traffic.

This premise was amply supported by evidence. Carrie Cummings, the local resident who had just turned left into her driveway when the accident here occurred, declared that "[n]early every time" she executed such a turn with cars behind her, someone would pass on the right. Sharon Perry, a regular user of the park who often parked in the graveled area, declared that ***760** eastbound drivers frequently turned left or executed U-turns in this area, and that three-quarters of the times this happened, "another driver passe[d] the turning driver on the right." Debbie Fumia, another frequent user of the park, estimated that she witnessed such a maneuver "at least 1 time each week during the baseball season." William Cole declared that

"[e]very one or two weeks," he "would see an eastbound vehicle on Blossom Hill Road pass ... [a] left-hand turning driver[ ], and the cars stacked up behind, on the right by driving at least part of the way through the gravel area near where [plaintiff] was injured."

Plaintiff also presented ample evidence that the graveled area was located and configured in a manner that encouraged its use for parking by visitors to the park. Plaintiff's husband declared that over a period of seven years he had visited Blossom Hill Park at least 500 times, including some four times a week during baseball season; that the graveled area was "by far the most convenient location for parking for little league games"; and that cars were "always" parked there during such games. Dave Burt declared that he had visited Blossom Hill Park at least 450 times in connection with games at the baseball field there; that the area where plaintiff was injured provided much more convenient access to the baseball field than a parking area on the south side of the park; and that he parked in the northern area about half the times he visited the park. Five other park users made declarations to similar effect.

The evidence also supported a finding that the hazard posed by these two potentially ****732** conflicting uses was exacerbated by the fact that—again with tacit official approval—persons parking in the area customarily did so on the diagonal. Carrie Cummings testified that when cars were parked there for little league games, they "always" parked diagonally. Plaintiff presented similar averments from herself, her husband, and seven other local witnesses.

The foregoing evidence would seem to amply support a finding that a danger existed at the site of the accident of just the kind of injury plaintiff sustained. It would also support the attribution of this danger to the *physical characteristics* of the property. At least three such characteristics could be found to constitute an inducement or temptation for drivers to act as Rodriguez did: the presence of driveways across the street from the graveled area, which provided an occasion for some drivers to turn left, which in turn required them to stop and wait for oncoming traffic to clear; the absence of a second eastbound lane, which resulted in the formation of obstructions or stalls behind left-turning drivers; and the narrowness of the pavement, which made it impossible to pass such an obstruction on the right without entering the graveled area. In addition, plaintiff relied heavily on the holding of *Bonanno,* that a dangerous condition may arise from the *location* of public property or "its relationship to its surroundings" ***761** (*Bonanno, supra,* 30 Cal.4th at p. 149, 132 Cal.Rptr.2d 341, 65 P.3d 807; see *id.* at pp. 144, 146, 149–151, 154, 132 Cal.Rptr.2d 341, 65 P.3d 807) including its " adjacency" to property on which an injury-producing condition exists (*id.* at p. 154, 132 Cal.Rptr.2d 341, 65 P.3d 807, citing *Holmes v. City of Oakland* (1968) 260 Cal.App.2d 378, 67 Cal.Rptr. 197; see Cal. Law Revision Com. com., reprinted at 32 West's Ann. Gov.Code (1995 ed.) foll. § 830, p. 299; 2 Van Alstyne et al., Cal. Government Tort Liability Practice (Cont.Ed.Bar 4th ed. 2002) Dangerous Condition of Public Property, § 12.18, p. 769).5

Plaintiff pointed to several other physical features that, according to her, contributed to the danger. A barrier fence at the west end of the graveled area was too short to prevent or discourage eastbound drivers from entering that area. At the same time, according to plaintiff, at least three characteristics of the graveled area induced park visitors to use it for parking. One was its proximity to the park. In addition, although Town had caused a fence to be constructed between the parking area and the park, it placed gaps in the fence at 50–foot intervals for the acknowledged purpose of providing direct entry into the park for people parking in the graveled area. Town also placed "No Parking" signs at two specific points in the parking area—near a fire hydrant and a vehicle access gate—and nowhere else. These signs reinforced the implication that parking in the graveled area was officially sanctioned.

B. *Expert Opinion Testimony*

Plaintiff presented a declaration setting forth the opinions of traffic engineer Robert Shanteau concerning the hazards posed by the above characteristics as well as other more technical aspects of the road and graveled area. We are far from certain that this evidence was necessary to raise a triable issue of fact, but in the absence of a meritorious objection it was certainly *sufficient* to have that effect. The trial court sustained Town's objections ****733** to virtually the entire declaration, but this ruling appears insupportable.

At the heart of Shanteau's declaration was his opinion that "on the day of the collision, Blossom Hill Road at the place of this injury constituted a dangerous condition of public property" as the result of multiple factors, i.e., "the physical characteristics of the roadway, the traffic volumes, lane and shoulder widths, size and proximity of the merge leading into the one eastbound lane, the permitted angle parking adjacent to the park, the typical speeds on the roadway, and the permitted left turns into residential driveways on the north side of Blossom Hill Road at the point of the impact. The combination of these factors made just this type of collision more than simply foreseeable—it made such a collision likely."

***762** Shanteau explained the basis for this opinion in some detail. First he observed that as an arterial street, Blossom Hill Road should have been, in the words of Town's own engineering design standards, " 'designed to facilitate *two* or more lanes of moving traffic in each direction.' " Next he pointed to the fact that the second eastbound lane disappeared "just west of (i.e. before) the accident location," where "eastbound Blossom Hill Road transitions from two lanes with curb and gutter to one lane with an unpaved shoulder." Citing Vehicle Code section 21754, subdivision (b), he asserted that where this transition commenced, the paved portion of the road was wide enough to permit eastbound drivers to pass lawfully on the right. At the point of transition from pavement to gravel, however, there was nothing to prevent or deter drivers from continuing into the gravel strip where, in this instance, plaintiff's vehicle was parked. Shanteau acknowledged the existence of a barricade at the western end of this area, but observed that it did not extend "far enough to prevent an eastbound driver such as Mr. Rodriguez from driving between it and the eastbound travel lane to complete a pass or merge, including one that was started legally." Nothing told the driver who had commenced such a maneuver "that where he was intending to drive would stop being a paved merging lane and become an unpaved shoulder."

Shanteau further opined that the distance provided for the merge on Blossom Hill Road from two eastbound lanes did not satisfy the formula set forth in the state manual on traffic control devices. Town's engineer, Pu, had reached a contrary conclusion in a declaration supporting the motion for summary judgment, but Shanteau now took issue with nearly every component of Pu's calculation, including not only the correct method for applying the formula but the actual distances involved and the correct method for deriving them.

With respect to the graveled area, Shanteau opined that the openings in the fence and the placement of no parking signs in two select locations created a "de facto parking area," which failed in numerous respects to conform to governing laws and standards. State law required parallel parking by default in the absence of a resolution or ordinance expressly providing otherwise, but Town had neither adopted such an ordinance nor taken steps to prevent or discourage angle parking. (See Veh.Code, §§ 22502, 22503.) He also interpreted Town's engineering guide to require parallel parking, and he also discussed the issue from a perspective of general engineering principles, noting that angle parking presents "[s]pecial problems," "well know[n] to traffic engineers," due to "the varying length of vehicles and sight distance problems associated with vans and recreational vehicles." Thus, while "angle parking may be considered in ****734** special cases on collector streets," it "is not considered at all on arterial streets." Further, he opined, good traffic engineering principles require that parking spaces on arterials be paved in order to "encourage orderly and efficient use where parking turnover is substantial." ***763** Under Town's own engineering standards, parking spaces should be marked, "which in turn requires that any angle parking area be paved." Those standards also require that an angle parking stall measure 28.4 to 33.0 feet in depth, depending on angle. "Both of these dimensions exceed the actual distance at the location of the accident, which, according to the *Collision Report,* was 23′ 1″. Therefore, the angle parking ... in the unpaved shoulder area did not meet the Town's own standards." He then noted that "cars parked at an angle in the unpaved shoulder area had to use the roadway of Blossom Hill Road as an access aisle. But since Blossom Hill Road is an arterial, use of the roadway as an access aisle to angle parking spaces is undesirable." Had the road been widened as planned in 1966, he declared, the graveled area would have been paved, and could have been marked for parallel parking. Had that been done, plaintiff "would have been out of the path of Mr. Rodriguez's vehicle and would not have been struck."

According to Shanteau there were "at least half a dozen ways the Town might have eliminated this dangerous condition," including by prohibiting angle parking, requiring parallel parking, prohibiting all parking, extending the existing barricade at the west end of the problem area "to a point where drivers will recognize there is no additional room to pass," extending the merge distance to comply with state guidelines "including a sign at the beginning of the tapered edge line saying DO NOT PASS," or "[c]onstructing a curb, gutter and sidewalk along Blossom Hill Road" as called for in the Town's own standards and plans. All of these measures, he declared, "have long been well known in the traffic engineering field, would have required little time or expense to implement, and would have eliminated this dangerous condition." In his opinion, "a reasonable traffic engineer for the Town of Los Gatos should have realized that the conditions present at the accident location created a dangerous condition where an accident was likely and remedial action or warning was necessary long before Sara Cole's injury to remedy that situation."

C. *Objections*

Town managed to neutralize the probative potential of Shanteau's declaration by lodging a host of objections, several of which the trial court sustained. Insofar as these rulings have any bearing on the outcome, they were erroneous.

[15] **[16]** Town first objected to Shanteau's statements insofar as they concerned "[t]he facts 1) that the lanes merge; 2) the length of the merge; 3) the location where the merge begins and ends; and 4) the calculation of the proper merge distance." The grounds of objection were relevance, "speculation," and ***764** "conclusor[iness]."[6] The latter two characterizations ****735** state a cognizable ground for exclusion, if at all, on the ground of *improper opinion.* The admissibility of expert opinion is governed primarily by Evidence Code section 801. That statute is cited nowhere in Town's objections to evidence. Insofar as Town asserted the opinion rule, its failure to make a coherent argument in support of the objection should be viewed as an abandonment of that objection.

[17] More importantly, however, it is simply baffling that Town would object to these averments on any ground—and no such objection should even have been entertained—since Town had unmistakably opened the door to this evidence by offering averments in its moving papers from its traffic engineer, Jessy Pu, of exactly the same tenor, on exactly the same subject. Pu averred among other things that "[j]ust east of the stop light at Los Gatos Blvd. and Cherry Blossom Lane, Blossom Hill Road merges from two lanes to one eastbound lane." He then put forth a formula by which the proper merge distance should be calculated, and opined that "the merge from two lanes to one lane on Blossom Hill Road ... met the suggested guideline." The challenged opinions by Shanteau were in the form of a direct rebuttal of these averments. Town can hardly be heard to question their relevance or propriety as expert opinion.

[18] **[19]** Indeed the relevance of these averments seems obvious even apart from their tendency to rebut Town's evidence. Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid.Code, § 210.) A question of relevancy involves two subsidiary inquiries: whether the *fact sought to be shown* by the evidence is "material," i.e., within the issues properly tendered by a party; and whether the proffered evidence actually *tends to prove* that fact. (See *People v. Hill* (1992) 3 Cal.App.4th 16, 29, 4 Cal.Rptr.2d 258, disapproved on another point in *People v. Nesler* (1997) 16 Cal.4th 561, 582, fn. 5, 66 Cal.Rptr.2d 454, 941 P.2d 87.) There seems no basis to doubt the *probative value* of Shanteau's averments. The question, if any, is their materiality. In answering that question, the primary considerations are "the pleadings, the rules [of] pleading and the substantive ***765** law relating to the particular kind of case.' " (1 Witkin, Cal. Evidence (4th ed. 2000) Circumstantial Evidence, § 3, p. 324; *People v. Steele* (2002) 27 Cal.4th 1230, 1264, 120 Cal.Rptr.2d 432, 47 P.3d 225.)

Here the evidence was offered to prove a dangerous condition of public property. The averments concerning the merger of lanes plainly had some bearing on that issue by supporting a finding that the configuration of Blossom Hill Road created hazards to users of the adjoining land. Town offers no intelligible basis to suppose otherwise. Nor did it offer any authority or argument concerning the law of evidence, the contents of the pleadings, or the law governing their interpretation. Instead it rested its relevance objection on the assertion that "[t]here is absolutely no evidence that the change from 2 lanes to 1 lane ... played any part in *the cause of this accident.*" The real gist of the objection, then, is not that the evidence failed to establish a dangerous condition, but that evidence of a dangerous condition was itself rendered immaterial by plaintiff's supposed inability to establish *another element* of the cause of action, i.e., proximate cause.

****736** It might indeed be argued, as a matter of abstract logic, that when a party cannot prove one necessary element of his cause of action, evidence of other elements ceases to be "of consequence to the determination of the action." (Evid.Code, § 210.) But this is only because once the stated condition is established, the entire matter should be concluded against the party asserting that cause of action. At that point *all* further evidence, no matter who offers it, becomes inconsequential. The court should enter judgment forthwith; it certainly need not trouble itself with disputes over evidence. Here, if plaintiff was unable to establish causation there was no occasion to consider the relevance of its expert's opinions, or any other question, concerning the existence of a dangerous condition. Under the stated premise, Town was entitled to judgment without so much as a glance at the Evidence Code.

Town's relevance objection thus appears to constitute a peculiar kind of rhetorical periphrasis or circumlocution in which one argument (inadmissibility of evidence) is used as a kind of Trojan horse for another, quite different argument (lack of causation). Since Town elsewhere asserted the real point without any such disguise (see pt. III, *post*), the only effect of its assertion in a different guise—and the only apparent purpose—is to weigh down Town's presentation with additional verbiage. From the perspective of judicial efficiency, not to mention logical parsimony, this objection should have been disregarded as redundant and superfluous.[7]

***766** The pleadings clearly tendered the question whether a dangerous condition of public property existed at the location of plaintiff's injury. Evidence on that subject was plainly material and relevant. Town's suggestion to the contrary is at best a distraction from the real issues in the case.

[20] In its second objection, also sustained, Town took exception to what it described as "unsupported speculation" by Shanteau "that Rodriguez was attempting to pass a line of stopped cars at the time of the accident." The grounds of objection, apparently, were "speculation," lack of foundation, and relevance. The first ground may be dismissed for reasons already stated. The third need not detain us either; Rodriguez's reasons for driving off the road were of course highly relevant, not only to the outcome of the action but more immediately to Shanteau's opinion that the dangerous condition of the road and roadside area was a cause of plaintiff's injuries.

[21] The foundational objection requires a more nuanced analysis. An expert is entitled to base his opinion upon inadmissible matter, including factual propositions outside his personal knowledge, provided such matter is "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." (Evid.Code, § 801, subd. (b).) However, to the extent Shanteau relied on facts not personally known to him, those facts were necessarily *hypothetical,* i.e., his opinions *assumed* their existence. Much of the language targeted by the present objection was not couched in terms of assumptions or premises, nor attributed to any source ****737** outside Shanteau's personal knowledge, but took the form of absolute assertions of fact, e.g., that the collision occurred when Rodriguez "was passing several vehicles stopped behind a vehicle waiting to make a legal left turn...." Assertions of matter outside Shanteau's personal knowledge, in such an unconditional, unattributed form, were indeed objectionable, if only to ensure that they were not inadvertently allowed to become proof of the stated facts. (See 3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 393, pp. 484–485.)

[22] But an objection on this ground goes only to the *purpose* for which the challenged statements may be received. The correct ruling is not to exclude them, but to admit them subject to appropriate limitations. In a jury trial of course the jury is instructed about these limitations; in the present setting the trial court need only confirm that it is not accepting the challenged statements as proof of the matters asserted, but only as a foundation for the accompanying opinions. But Town sought no such limited relief. Instead it set ***767** out a highly fact-laden discussion of the testimony of Rodriguez and Carrie Cummings, the driver whose left turn into her driveway, according to plaintiff, furnished the occasion for Rodriguez to leave the roadway in an attempt to pass stopped cars. The objection eventually disclosed itself as merely an occasion to assert, yet again, that plaintiff had failed to establish "a causal connection between the alleged dangerous condition and Cole's injury." Town never addressed the question whether, setting this substantive question aside, Shanteau was entitled to rely on the stated factual premises in forming his opinion. Insofar as the objection was consequential, therefore, it should have been overruled.

We will not consume additional paper addressing the other objections sustained by the trial court, which were unsound for the same or similar reasons. They consist almost entirely of arguments about the merits of the controversy, not the admissibility of evidence.[8]

D. *Merits*

[23] Town's argument on the merits with respect to the existence of a dangerous condition is obscure at best. In a heading in its *statement of facts* Town asserts, "The Condition of Blossom Hill Road and the Gravel Shoulder Were [*sic*] Not Dangerous." But under this heading Town merely recites a number of facts—some of them controverted—concerning the configuration of the road and adjacent graveled area. Later Town falls back on the same periphrastic Trojan horse already noted. Time and again it seems on the verge of addressing the dangerous-condition element in a syllogistic manner, only to retreat instead into a claim that plaintiff cannot establish the element of *causation.* Thus immediately after a statement that the judgment is sound "because no reasonable person would conclude" that a substantial risk of injury was presented, we find the sentence, "No defect in the roadway/shoulder *caused Cole's injury.*" (Italics added.)

Nor does Town direct us to any cogent argument on this point in its papers below. Immediately after the foregoing passage it ****738** cites points in the record where it supposedly "addresses, in detail why elements ... of Government Code section 835," including a dangerous condition of public property, "are not established." But in its original moving papers Town's discussion of the ***768** dangerous-condition element consisted largely of summarizing a few cases with no attempt to explain their application to the facts here. This discussion culminated in a passage substantially identical to the one described above, in which Town explicitly abandons the dangerous-condition argument in favor of an assertion about causation.[9]

The nearest thing we find in Town's moving papers to a coherent argument on the subject of a dangerous condition is its allusion to the statutory requirement that the condition create a substantial risk of injury when "used with due care." (Gov.Code, § 830.) This is followed several pages later by the assertion that neither Rodriguez nor plaintiff was using the property with due care when the accident occurred—Rodriguez because he was driving

while intoxicated, and plaintiff because she was parked diagonally, in supposed violation of state law. Town reprises these assertions in its brief on appeal, but neither here nor in the trial court is any attempt made to construct a syllogistic argument around them.

[24] Nor does Town cite any authority for the implied premise that a failure to exercise due care by the plaintiff or a third person may preclude a finding of a dangerous condition of public property. This omission is understandable, because the governing law is exactly the opposite. The status of a condition as "dangerous" for purposes of the statutory definition does *not* depend on whether the plaintiff or other persons were actually exercising due care but on whether the condition of the property posed a substantial risk of injury to persons who *were* exercising due care. (*Morris v. State of California* (1979) 89 Cal.App.3d 962, 966, 153 Cal.Rptr. 117, fn. omitted ["a condition of public property is dangerous if it creates a substantial risk of harm when used with due care by the public generally, as distinguished from [a] particular person charged as a concurrent tortfeasor"]; *Swaner v. City of Santa Monica* (1984) 150 Cal.App.3d 789, 799, 198 Cal.Rptr. 208 [plaintiff's negligence "is a defense which may be asserted by a public entity; it has no bearing upon the determination of a 'dangerous condition' in the first instance"]; *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 719–720, 159 Cal.Rptr. 835, 602 P.2d 755 ["if the condition of its property creates a substantial risk of injury even when the property is used with due care, the state gains no immunity from liability simply because, in a particular case, the dangerous condition of its property combines with a third party's negligent conduct to inflict injury"]; 4 Cal.L.Rev.Comm. Reports (1963), p. 849, reprinted at 32 West's Ann. Gov.Code (1995 ed.) foll. § 830, p. 299, italics added ["Although the condition will not be considered dangerous ... unless it creates a hazard to those who foreseeably will use the property or adjacent ***769** property *with due care,* this does not require that the injured person prove that he was free from contributory negligence. Contributory negligence is a matter of defense under subdivision (b) of Section 815."].)

We conclude that, having presented no cogent argument on the question whether plaintiff could establish a dangerous condition of public property, Town failed to ****739** carry its burden of negating, as a matter of law, that element of plaintiff's cause of action.

III. *Causation*

[25] Town's argument concerning causation is also less than pellucid, but we can identify four recurring factual themes: Rodriguez's intoxication, the supposed absence of any evidence that he left the road for the purpose of bypassing stopped traffic, his professed familiarity with Blossom Hill Road at the location in question, and the premise that an alternative configuration would have placed plaintiff at least as close to traffic as the existing configuration did. None of these themes furnishes a sound basis for the judgment under review.

[26] Town repeatedly alludes to Rodriguez's inebriation, using the word "drunk" at least 20 times in the brief, and "intoxicated," or a form of that word, another 21 times. Indeed Town opens its brief with the sentence, "Summary judgment was granted to the Town of Los Gatos because the accident was caused by a drunk driver who left the roadway due to intoxication." Given that Rodriguez pled guilty to drunk driving, there is little doubt that a jury would find he was indeed intoxicated. However the role of that fact in Town's motion—and the trial court's ruling—is far from clear. Concealed in the just-quoted assertion is a supposition contrary to first-year tort law, i.e., that an injury can have only one cause, or that only one tortfeasor can be held liable for it. In fact, of course, it is entirely possible for an injury to result from multiple tortious acts or omissions, in which case all authors of the injurious conduct may be liable, provided the conduct of each satisfies the test of proximate or legal cause as that concept has evolved over the centuries. (See 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1193, p. 568 et seq.; Rest.2d, Torts, § 430 [referring to requirement as "legal cause"].) Thus Town could not establish an entitlement to summary judgment merely by showing that Rodriguez's inebriation was *a* cause of plaintiff's injuries. Rather it had to establish *as a matter of law* that plaintiff would be unable to present evidence that any condition of the public property where the accident occurred was *also* a substantial causative factor in bringing about her injuries.

The trial court's order seems to contemplate a rule of law under which Town cannot be liable for a dangerous condition of its property unless that ***770** condition *caused Rodriguez's conduct.* Thus the court found no evidence to the effect that a defect in the property "actually caused or contributed to *the third party conduct that injured Cole.*" (Italics added.) The phrase "third party conduct" might refer either to Rodriguez's driving while intoxicated or his driving off the road. In neither case, however, does the court's formula accurately state the governing principles.

[27] [28] Under traditional tort principles, once a defendant's conduct is found to have been a cause in fact of the plaintiff's injuries, the conduct of a third party will not bar liability unless it operated as a superseding or supervening cause, so as to break the chain of legal

causation between the defendant's conduct and the plaintiff's injuries. (See 6 Witkin, Summary of Cal. Law, *supra,* Torts, §§ 1197–1219, pp. 574–597.) The misconduct of a third party will not ordinarily have this effect if the misconduct itself was foreseeable to the defendant. (*Rosencrans v. Dover Images, Ltd.* (2011) 192 Cal.App.4th 1072, 1087, 122 Cal.Rptr.3d 22.) Cases have held that the risk posed by intoxicated drivers to persons near a roadway may be foreseeable in itself, so as to present a question of fact for the jury. (See *Bloomberg v. Interinsurance* ****740** *Exchange* (1984) 162 Cal.App.3d 571, 576–577, 207 Cal.Rptr. 853 [risk could be found foreseeable where stranded motorist was struck by intoxicated driver]; *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 58–59, 192 Cal.Rptr. 857, 665 P.2d 947 [same, plaintiff struck while inside telephone booth adjacent to roadway].)[10]

[29] [30] Even when a third party's intervening act is unforeseeable, the defendant's conduct may continue to be operate as a legal cause if the defendant could reasonably foresee the *injury* resulting from his own conduct. " '[W]here [an] injury was brought about by a later cause of independent origin ... [the question of proximate cause] revolves around a determination of whether the later cause of independent origin, commonly referred to as an intervening cause, was foreseeable by the defendant or, if not foreseeable, whether it caused the injury of a type which was foreseeable. If *either* of these questions is answered in the affirmative, then the defendant is not relieved from liability towards the plaintiff; if however, it is determined that the intervening cause was not foreseeable *and* that the results which it caused were not foreseeable, then the intervening cause becomes a supervening cause and the defendant is relieved from liability for the plaintiff's injuries.' " (*Pappert v. San Diego Gas & Electric Co.* (1982) 137 Cal.App.3d 205, 210, 186 Cal.Rptr. 847, quoting ***771** *Akins v. County of Sonoma* (1967) 67 Cal.2d 185, 199, 60 Cal.Rptr. 499, 430 P.2d 57; accord, *Hardison v. Bushnell* (1993) 18 Cal.App.4th 22, 27, 22 Cal.Rptr.2d 106.)

If these principles govern here, then the trial court clearly erred, for nothing in this record would permit a conclusion that Rodriguez's conduct—either in driving after drinking, or in driving off the road—was, as a matter of law, a superseding cause relieving Town of any liability that might otherwise be imposed. The hazard posed by intoxicated drivers at the site of the accident might itself have been foreseeable, and even if it were not, nothing in this record would preclude a jury from concluding that both the nature of plaintiff's injury and the manner in which it was sustained were foreseeable. Even if it were shown to be unforeseeable that a *drunk* driver would collide with a person in plaintiff's position, it could be found foreseeable that a *sober* driver would do so, and many if not all of the measures necessary to protect against that risk would also have protected against the risk of injury from a drunk driver.

The trial court apparently considered none of these principles but instead applied a rule under which Rodriguez's conduct operated to supersede the effects of the posited dangerous condition of property unless that conduct was itself a direct product of the condition. Although such a requirement might be extracted from a handful of recent decisions, we believe the language supporting it should be viewed as a dictum—one which may have been understandable in its original context, but which does not represent an accurate statement of law when lifted from that context, and which does not overturn the traditional principles discussed above.

****741** The language in question originated in *Zelig, supra,* 27 Cal.4th 1112, 1136, 119 Cal.Rptr.2d 709, 45 P.3d 1171, which arose from the fatal shooting of a litigant by her ex-husband inside a courthouse while awaiting a hearing on child and spousal support. In discussing the limits of public entity liability in such cases, the court wrote, "Other courts have pointed out that the defect in the physical condition of the property must have some *causal relationship* to the third party conduct that actually injures the plaintiff." (*Id.* at p. 1136, 119 Cal.Rptr.2d 709, 45 P.3d 1171.) The court attributed the quoted language to two other decisions, *Constance B. v. State of California* (1986) 178 Cal.App.3d 200, 223 Cal.Rptr. 645 (*Constance B.*), and *Moncur v. City of Los Angeles* (1977) 68 Cal.App.3d 118, 137 Cal.Rptr. 239 (*Moncur*). (*Ibid.*) Neither of them contains such language, however, and neither supports a rule requiring a direct causal link between a dangerous condition and the conduct of the third party, as distinct from the harm to the plaintiff.

The plaintiff in *Constance B.* alleged that visual obstructions and inadequate lighting at a roadside rest area constituted a dangerous condition that led to her being sexually assaulted there. The court characterized the claim as ***772** resting on "the notion that the state provided an opportunity for misconduct by a third party." (*Constance B., supra,* 178 Cal.App.3d at p. 205, 223 Cal.Rptr. 645.) As such it belonged to a class of cases " 'where a defendant is liable for providing or not removing the opportunity for another to do harm or for a natural event to cause it.' " (*Ibid.*, quoting Hart and Honoré, Causation in the Law (1959) p. 179.) In such cases, the court observed, " 'The "causal connexion [*sic*]" between a defendant's act and the harm may be succinctly described by saying that he has "occasioned" it.' " (*Ibid.*) A public entity may be liable under section 835, the court continued, for " '[o]ccasioning' harm by maintaining public property in a manner, which increases the risk of a

criminal assault." (*Ibid.*) But far from requiring that the intervening third party conduct itself flow from the dangerous condition, the court went out of its way to acknowledge the potential for "concurrent causes, including third party intervention." (*Id.* at p. 208, 223 Cal.Rptr. 645.) It then stated, "[T]he predicate for liability is a causal relation between *injuries of the kind which did occur* and the claimed dangerous condition." (*Ibid.*, italics added.) The court concluded that none of the physical characteristics cited by the plaintiff had actually contributed to her injuries. In particular, the assault could not be ascribed to inadequate lighting because, as the court in *Zelig* put it, "the plaintiff's assailant did not take advantage of the shadows but stood in the light." (*Zelig, supra,* 27 Cal.4th at p. 1136, 119 Cal.Rptr.2d 709, 45 P.3d 1171; *Constance B., supra,* 178 Cal.App.3d at p. 211, 223 Cal.Rptr. 645.)

The plaintiffs in *Moncur, supra,* 68 Cal.App.3d 118, 137 Cal.Rptr. 239, sought to impose liability on a city for failing to adequately guard against the planting of a bomb in airport lockers. The trial court entered judgments on demurrer. After commenting at some length on the unpredictability of "deranged person[s]" and "fanatic[s]" and the threat to privacy rights posed by airport searches, the court affirmed the judgment in two paragraphs. (*Id.* pp. 125, 126, 137 Cal.Rptr. 239.) As relevant here, the court wrote that the complaints failed to allege facts "from which it could even be inferred that the condition of the terminal was the 'cause' of the explosion." (*Id.* at p. 126, 137 Cal.Rptr. 239.) The court then declared, "This tragic event was solely the result of the criminal conduct of a third person unaided ****742** by any act or omission on the part of the City." (*Ibid.*) The case was described in *Zelig, supra,* 27 Cal.4th at p. 1136, 119 Cal.Rptr.2d 709, 45 P.3d 1171, as resting on the plaintiff's failure to "allege facts from which it could be inferred that the physical condition of the airport terminal was the cause of the bombing."

[31] Both of these cases are consistent with the general principles we described above, most particularly that the touchstones of proximate cause analysis are causation in fact and foreseeability of harm. They are best understood as emphasizing a need to establish, in a case of this kind, that the harm resulted from a *physical characteristic* of the property and not from some other act or omission by a public entity. Thus in *Constance B.* the plaintiff failed to establish causation in fact because the dangerous conditions she posited had ***773** played no role in her being attacked. In *Moncur* the court found the facts alleged by the plaintiffs insufficient to link their injuries to any physical condition of the airport. It also bears noting that in both of those cases an essential force in bringing about the plaintiffs' harm was a deliberate act of violence by a third party. In such a case it may well be that unless the condition of the property somehow induced, facilitated, or "occasioned" the violent conduct, it could not be viewed as a cause of the plaintiff's injuries. But this hardly means that in every case of intervening third-party conduct, whether deliberate or not, a public entity is excused from liability for a dangerous condition of its property unless the plaintiff shows that the dangerous condition caused the third party's conduct.

Several courts have quoted *Zelig*'s description of *Constance B.* and *Moncur* as if it were an independent rule of law, but we have found only one published case in which it actually formed a basis for a holding, and there it was one of several alternative holdings. In *City of San Diego v. Superior Court* (2006) 137 Cal.App.4th 21, 29, 40 Cal.Rptr.3d 26, the plaintiffs' decedent was struck by a vehicle that was engaged in unlawful street racing. The plaintiffs argued that the condition of the street was dangerous in that its configuration "was an invitation to street racing," and "poor lighting at the scene made it difficult for drivers [such as the plaintiff's decedent] to see or gauge the closing speed of cars racing on the street." (*Id.* at p. 24, 40 Cal.Rptr.3d 26.) The reviewing court issued a writ directing the trial court to grant the city's motion for summary judgment. The court first concluded that neither the configuration of the street nor the absence of lighting constituted a dangerous condition. (*Id.* at p. 31, 40 Cal.Rptr.3d 26.) The court then offered three alternative rationales for its result. The first was that "it is not possible to say how much, if any, lighting is necessary to protect all drivers from speeding vehicles." (*Id.* at p. 31, 40 Cal.Rptr.3d 26.) The second was that "[o]ne can postulate" situations in which "a prudent driver, even with significant lighting in place, still might not see oncoming cars or be able to gauge their speed." (*Ibid.*) Only after these observations did the court invoke the language from *Zelig*, writing, "[E]ven if we were to conclude a defective physical condition exists for failure to install lighting, there is no evidence the racers were influenced by the absence of street lights." (*City of San Diego v. Superior Court, supra,* at p. 31; see 29, 40 Cal.Rptr.3d 26.)

Other published decisions have quoted the subject language from *Zelig*, but in none of them did it appear to play any role in the outcome. In *Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1360, 75 Cal.Rptr.3d 168, the only holding on the subject of causation was that a school district's ****743** failure to place a crossing guard at the crosswalk "was not a proximate cause of injuries suffered" because the plaintiffs knew there was no guard there and presented no evidence "that a crossing guard could have averted the accident." In *Song X. Sun v. City of Oakland, supra,* 166 Cal.App.4th 1177, 1187, 83 Cal.Rptr.3d 372, the entire basis for the holding was that

the evidence did not raise a triable issue ***774** with respect to a dangerous condition of public property. Given that conclusion, the court declared, "we do not reach the causation issue raised by City." (*Id.* at p. 1193, 83 Cal.Rptr.3d 372, fn. omitted.) Similarly, the decision in *Salas v. California Dept. of Transp.* (2011) 198 Cal.App.4th 1058, 1070, 129 Cal.Rptr.3d 690, appears to rest entirely on the rationale that the plaintiffs were unable to establish a dangerous condition of public property.

We decline to follow *City of San Diego v. Superior Court, supra,* 137 Cal.App.4th 21, 40 Cal.Rptr.3d 26, insofar as it adopts a new and extremely restrictive rule for determining when the conduct of a third party will operate as a superseding cause excusing a public entity from liability for a dangerous condition of its property. We do not believe the Supreme Court had any intention of adopting such a rule in *Zelig,* with the possible exception of situations where the plaintiff's injuries could not have occurred but for an intervening act of deliberate violence. The Supreme Court has since described *Zelig* as holding that "public liability lies under section 835 only when a feature of the public property has 'increased or intensified' the danger to users from third party conduct." (*Bonanno, supra,* 30 Cal.4th 139, 155, 132 Cal.Rptr.2d 341, 65 P.3d 807.) We have little doubt that this test could be found to have been satisfied by the evidence in the present case. Indeed there is evidence here from which a trier of fact could conclude that the third party conduct—at least the immediately injurious conduct, which was the act of driving off the road—was "caused" by the characteristics plaintiff cites as dangerous conditions.

Town also suggests that plaintiff is unable to establish proximate cause because Rodriguez testified that he often drove on Blossom Hill Road and was "thoroughly familiar" with its features at the location in question. This testimony, if credited, may indeed prevent plaintiff from substantiating some factual hypotheses on which liability might otherwise be predicated. For example, if jurors believe that Rodriguez never drove in the right lane on the two-lane portion of Blossom Hill Road, plaintiff will have a hard time persuading them that his entry into the graveled area where plaintiff had parked was the result of an unsuccessful attempt to merge from the right-hand lane into the single lane portion of the road. Similarly, if jurors believe that Rodriguez knew cars were frequently parked in the gravel area on the diagonal, it may be difficult to persuade them that he was surprised to find plaintiff parked there. So far as we can tell, however, plaintiff's case does not depend on the hypotheses that Rodriguez was surprised by the configuration of the road or left it due to a failure to negotiate the merger from two lanes to one. Plaintiff's basic theory is that the configuration of the road and the graveled area beside it induced Rodriguez to drive off the one while inducing plaintiff to park in the other. Insofar as Town's arguments do not address that theory, they cannot sustain the judgment under review.

***775** Town also seems to be addressing cause-in-fact when it asserts that there is "no admissible evidence" that Rodriguez was "trying to pass stopped cars" when he hit plaintiff. Town cites Rodriguez's professed inability to recall any of the events leading up to plaintiff's injuries and asserts ****744** that plaintiff has no evidence to fill this gap. The record, however, contains evidence from which a jury could infer that Rodriguez was attempting to bypass stalled traffic when he drove into the area where he hit plaintiff.

First, contrary to Town's assertion, there was ample evidence that cars were stopped when Rodriguez "veered" off the road.[11] Carrie Cummings testified in deposition that "a few moments before the collision," she had stopped on Blossom Hill Road to turn left into her driveway. "[A]t that time," three to five cars "came to be waiting" behind her. These following cars were "just sitting there waiting," the most obvious meaning of which is that they had come to a complete stop. She then heard a squealing of tires from behind the following cars. She expected a rear-end collision. When that did not occur, she completed her left turn. After she came to a stop in her driveway, as she was opening her car door, she saw "dirt" in the rear-view mirror. As her foot stepped onto the driveway, she heard Rodriguez's car hit plaintiff.

[32] This testimony, if credited, virtually compels a finding that cars behind Cummings came to a stop at some point. Town cites Rodriguez's testimony that he "did not see any cars" in front of him before the collision, but this only contributes to a conflict in the evidence, including a conflict with his own testimony that he did not recall events preceding the collision. Town attempts to avoid this conflict by denying any evidentiary basis to suppose that cars were "*still* in the roadway when Rodriguez approached," because Cummings "had only observed the slowed [*sic*] vehicles '*prior* ' to turning into her driveway." (First italics added.) But this argument overlooks the elementary principle that a fact can be proven by inference from circumstantial evidence, as well as by direct testimony. (*Ajaxo Inc. v. E*Trade Group, Inc.* (2005) 135 Cal.App.4th 21, 50–51, 37 Cal.Rptr.3d 221.) Town disregards this principle in critiquing the sufficiency of plaintiff's proofs, even though it repeatedly resorts to inferences—some highly doubtful—in its own favor. Thus it suggests that there must *not* have been any vehicles stopped in the road at the time of the collision because "[c]ommon sense dictates" that "at least one of

the vehicles" so stopped "would have remained in place after observing or hearing the collision and Cole's screams." This is an argument for a jury, not a basis for summary judgment.

*776 Indeed this characterization applies more broadly to Town's arguments concerning the presence *vel non* of an obstruction before Rodriguez. To prevail on summary judgment, Town had to demonstrate that a jury *could not find* on the available evidence that the impediment that formed behind Cummings remained in place, or more precisely, had not fully cleared, when Rodriguez arrived at the scene. The evidence of record is subject to multiple interpretations on that question. Our own sense of the probabilities may not conform to Town's argument, but that is beside the point, for this is not a question for us—or the trial judge—to decide. It is a classic issue of fact, entrusted by our Constitution, in the absence of waiver, to the sovereign power of a jury. Town's assertion that there was "no admissible evidence" from which a trier of fact could find in favor of plaintiff is simply incorrect.

**745 Town also questions plaintiff's ability to establish Rodriguez's "motive[ ]" for leaving the road, i.e., that he did so in order to bypass stopped or slowed cars, and thus as a result of the configuration of the road. At his deposition—apparently conducted in prison—Rodriguez professed an inability to account for his actions, saying that he remembered nothing from the time he left the gas station where he had been drinking until the time he felt the impact of his collision with plaintiff. He attributed the lack of memory to "the alcohol." These are apparently the "facts" on which Town relied when it asserted, in its reply papers, that "Rodriguez traveled off the eastbound lane because he passed out, fell asleep or was otherwise inattentive to his driving due to his intoxication." But this suggestion itself depends on a highly debatable surmise about the explanation for Rodriguez's professed lack of memory. The record suggests grounds on which a jury could view that profession with skepticism. Rodriguez testified that he had only consumed two polystyrene cups of an alcoholic beverage he twice described as "like wine." He had earlier told an officer that the beverage was Canadian whiskey, but this contradiction presented an issue of fact which the trial court was powerless to resolve. Whatever form the alcohol took, Rodriguez stated consistently that it had been diluted "half-and-half" with juice. A trier of fact would hardly be compelled to conclude that he had drunk enough to pass out, fall asleep, or black out.

A trier of fact could also find that Rodriguez's professed lack of memory was not consistent with the cognitive state he testified to having immediately after the collision. He testified that upon realizing what had happened he stopped briefly to consider his options: "[T]he only thing that came to my mind is to go—to leave right away and go and be with my wife because I thought they were going to give me a long time." By the last clause he meant "that [he] knew that the police would send [him] to jail for a long time." This was an astute judgment for a man supposedly too drunk to know whether he was on or off the road. It reflected a recognition both that he had previously been convicted of drunk driving, and that his recidivist status would probably *777 result in a lengthy incarceration. In anticipation of this outcome he elected to spend his last minutes of freedom with his wife. That intention was apparently thwarted by his being arrested while parking at his home. But the fact that he could form such a plan, for such a reason, suggests a level of post-impact ratiocination that a jury could find irreconcilable with the pre-impact stupefaction posited by Town.

Finally, a jury might conclude that Rodriguez, who was represented by counsel, had a reason to testify less than candidly. To attribute his actions entirely to inebriation might have appeared consistent with his best interests because, having already pled guilty to driving under the influence, nothing he said on that subject was likely to do him any further harm. In contrast, he might compound his difficulties by admitting that he made a conscious decision to drive off the road, in violation of his own professed understanding that he "had to keep [his] car between the double yellow line and the white line."

Quite apart from the testimony of Rodriguez and the conflicting inferences that might be drawn from it, the trial court had before it the declaration of Carrie Cummings, in which she stated her "belief" that the accident occurred when "Lucio Rodriguez passed the few cars that had slowed behind me prior to my turn." She went on to state the basis for this opinion: "Though I was not witness to the accident, the only way I deem it feasible for Mr. Rodriguez to have struck Sara Cole was **746 for him to have passed the slowed cars on their right. Given my observations of the location of Sara Cole's vehicle, and of the vehicles that had slowed prior to my turn, Mr. Rodriguez could not have struck Ms. Cole had he not pulled out and around the slowed cars in the manner I have described. Cars passing on the right in this section of Blossom Hill Road is a common occurrence."

Although Town filed 38 pages of objections, we find none directed to the averment just quoted. Nor is it obvious that an objection, if made, could properly have been sustained. A lay witness may give opinion testimony if it is "[r]ationally based on the perception of the witness" (Evid.Code, § 800, subd. (a)) and "[h]elpful to a clear

understanding of his testimony" (*id.*, subd. (b)). Here the witness possessed special firsthand knowledge of the relevant times, distances, and locations as well as the prevailing driving customs at the site of the collision. Her belief that Rodriguez must have pulled out from behind her to pass other cars that had slowed during her turn supported an inference that the times and distances involved, of which she was a percipient witness, were consistent with this hypothesis.

In sum, the record supports two competing hypotheses, a choice between which could only be made by a trier of fact—not by a judge hearing a motion ***778** for summary judgment. According to plaintiff, Rodriguez left the road for the same reason any other impatient driver might have done so under the circumstances: to bypass an obstruction in the road. Town suggests that Rodriguez may have just happened to "veer" off the road, in a drunken stupor, at the location where plaintiff was standing. It is emphatically a jury question whether the latter possibility, or any other consideration, prevents plaintiff from establishing the elements of her claim by a preponderance of the evidence. So far as this record shows, a jury could reasonably find a substantial causal relation between the dangerous condition posited by plaintiff and the injuries suffered by her.[12]

IV. *Notice*

[33] Under section 835, plaintiff must establish that Town had "actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."[13] (§ 835, subd. (b).) Government Code section 835.2 elaborates on this requirement.[14] ****747** Town asserts that, as a matter of law, it lacked the requisite notice.

***779** Town acknowledges that it received a complaint to the effect that impatient eastbound drivers frequently drove off Blossom Hill Road to bypass traffic that had stopped or slowed while another driver executed a left turn. On July 1, 2004—more than three years before the accident here—Town traffic engineer Pu logged a "Traffic Service Request" from one of the residents along the north side of the road, who reported that "[w]hen she went eastbound on BHR waiting to make LT into [her] driveway, cars behind her honk, bypass on the right, tail gate, spinning tires. Said it was unsafe." She requested installation of a "[D]o [N]not [P]ass" sign. Pu reported telling her that such a solution "won't resolve behavior issues. No bypassing on the right in a single lane direction is a driving rule that drivers should already know. We shouldn't install a sign for a particular driveway. Told her will check with PD the enforcement issue." This amply establishes that Town had been notified of the driving behavior in question, and had been apprised of the opinion of one percipient observer that it presented a safety hazard.

A trier of fact could also find that Town had actual notice of the frequent presence of pedestrians in the area through which these impatient drivers drove. The evidence supports a finding that parking in this area was so common that town officers must have known of it; that indeed, Town had configured the area to accommodate and implicitly encourage this use; and that several town employees or officials acknowledged being actually aware of it. Town traffic engineer Pu testified in deposition that he himself had parked there, and that at times he had seen "many" cars parked there, though at others it appeared "not much" used. Interim city engineer and director of public works Kevin Rohani testified that he too had parked there. Former traffic sergeant Dave Gravel testified that he had parked there more than a dozen times. Former traffic coordinator Layne Davis recalled a complaint from a citizen on the south side of Blossom Hill Road that his driveway had been "blocked by somebody parking in the accident location."

The evidence would also support a finding that responsible Town officers knew that park visitors making such use of the area commonly parked on the diagonal. Pu testified that he knew cars parked there diagonally, and that "diagonal parking was permitted." He and Rohani both testified that they themselves had angle-parked there, and did not consider their doing so to be illegal. Sergeant Gravel testified that he had parked there in both diagonal and parallel orientations and that no one would get a ticket for either unless they blocked a hydrant.

Town asserts that "[t]he absence of any prior accidents or injuries on the gravel shoulder is evidence of lack of notice." ****748** Assuming this to be true, at ***780** most it establishes grounds for a finding in Town's favor, which is hardly enough to sustain a summary judgment. Nor is plaintiff required to prove that Town knew for a fact that accidents of this kind would occur. The test for actual notice was satisfied if Town had "actual knowledge of the existence of the condition and knew or should have known of its dangerous character." (Gov.Code, § 835.2, subd. (a).) The above proofs would certainly sustain a finding that Town had actual knowledge of the configurations, distances, and other physical characteristics of the road and roadside graveled area that often induced two groups of users to make disparate uses of the latter. A jury could also find that Town "knew or should have known" of the danger posed by these simultaneous uses. (*Ibid.*) Needless to say, if a jury could find these facts it could also find that Town had

constructive notice, i.e., that the condition and its dangerousness were sufficiently obvious that Town, "in the exercise of due care, should have discovered" them. (Gov.Code, § 835.2, subd. (b).)

[34] Although we do not believe the point is necessary to our decision, we also observe that there is some evidence of at least one prior accident due to the conflicting uses in question, knowledge of which was conveyed at least to police officers. Plaintiff's husband declared that in 2003, while he was present to coach a baseball game, "a collision took place in the gravel area near where [plaintiff] was injured. In the collision, a diagonally parked vehicle attempted to back out of the gravel area, and was rear-ended by a vehicle approaching on eastbound Blossom Hill Road. I heard the sound of the impact, and saw the police arrive thereafter." Knowledge of this occurrence is not rendered irrelevant by the possibility that the collision did not produce bodily injuries. "A particular type of accident may be reasonably anticipated even if such an accident had not occurred before. [Citations.]" (*Maupin v. Widling* (1987) 192 Cal.App.3d 568, 576, 237 Cal.Rptr. 521.)

After ineffectually denying the sufficiency of the evidence to establish the requisite notice, Town reverts yet again to its only real argument on appeal: "Regardless, there is no evidence that left turns or passing on the right was a factor in this accident.... There is no causal connection between Rodriguez's act and the condition of the property...." We have already rejected this assertion.

*781 DISPOSITION

The judgment is reversed.

WE CONCUR: PREMO and ELIA, JJ.

Parallel Citations

205 Cal.App.4th 749, 12 Cal. Daily Op. Serv. 4701, 2012 Daily Journal D.A.R. 5502

Footnotes

1 Also present, apparently, were three of plaintiff's sons. They have joined her in this action, alleging that they suffered emotional distress as a result of witnessing the accident. Because their claims stand or fall with hers, we will for convenience generally speak of the matter as if only she had sued.

2 In its notice of motion Town asserted that (1) there was "no evidence of a dangerous condition of public property"; (2) there was "no evidence that any dangerous condition of public property caused plaintiffs [']injuries"; (3) there were "no facts giving rise to a special relationship between the Town and the plaintiffs"; and (4) it was immune from liability.

3 Government Code section 835 provides: "Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and either:

"(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

"(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

4 Town cited several specific immunity statutes in passing, but offered no argument in support of their application. Town's brief on appeal also asserts in passing that Town is "protected by design immunity (Govt.Code § 830.6) and discretionary immunities (Govt.Code § 815.2(d) & Govt.Code § 820.2)." These defenses may well defeat some theories of liability that plaintiff might otherwise assert, but Town made no attempt to establish them as a ground for summary judgment.

5 Although *Bonanno* was the decision cited most heavily in plaintiff's opposition memorandum below, it was not mentioned in Town's reply memorandum. Nor was it among the dozen or so cases cited in the trial court's order.

6 Town opens each objection by citing one or two rules of evidence but in the ensuing discussion manages to allude to perhaps half of the major principles in the Evidence Code. We believe that where a trial court is confronted on summary judgment with a large number of nebulous evidentiary objections, a fair sample of which appear to be meritless, the court can properly overrule, and a reviewing court ignore, *all* of the objections on the ground that they constitute oppression of the opposing party and an imposition on the resources of the court. We also note that an evidentiary objection is only preserved for review if it is "so stated as to *make clear* the *specific ground* of the objection." (Evid.Code, § 353, subd. (a), italics added.) Failure to comply with this requirement furnishes its own ground for overruling objections such as those before us.

7 This stratagem, unfortunately, recurs throughout Town's presentation below and on appeal. An argumentative heading asserting some seemingly dispositive premise will be followed by a non-syllogistic, inconclusive discussion of that premise culminating in a repetition of the claim that, in any event, plaintiff cannot establish proximate cause. A motion confined to that single ground might not have led the trial court into error and might not have generated this expensive and unnecessary appeal. Certainly it would have consumed fewer resources than Town's motion has.

8 Town's 25 pages of objections to Shanteau's declaration are followed by another 13 pages entitled "Objections to *Statements in Plaintiffs' Memorandum* of Points and Authorities Unsupported by Evidence." (Italics added; capitalization modified.) It goes without saying that statements in a memorandum of points and authorities are not evidence. "Objections" to such statements are therefore ineffectual. Indeed the filing of such a document appears to offend rules limiting the length of memoranda on motions for summary judgment. (Cal. Rules of Court, rule 3.1113(d).)

9 Town also suggests that it negated the dangerous condition element in its reply memorandum below, but it cites no particular pages from that memorandum and we see no such argument there.

10 Two cases decided before *Bigbee* arguably support a contrary rule, or at least a narrower one. (*Schrimscher v. Bryson* (1976) 58 Cal.App.3d 660, 130 Cal.Rptr. 125; *Whitton v. State of California* (1979) 98 Cal.App.3d 235, 159 Cal.Rptr. 405.) Those decisions were limited to near-invisibility in *Jackson v. Ryder Truck Rental, Inc.* (1993) 16 Cal.App.4th 1830, 1849–1852, 20 Cal.Rptr.2d 913, which interpreted them as resting on rules peculiar to injuries suffered or inflicted by public safety officers while on duty. This case presents no comparable feature.

11 Town uses a form of the word "veer" no fewer than 44 times in an apparent effort to suggest that Rodriguez's vehicle left the road in an uncontrolled or poorly controlled. This is at best an inference resting solely upon the fact of his intoxication.

12 Also falling logically under the rubric of causation is Town's assertion that the manner in which plaintiff was parked placed her farther from the traffic lane on Blossom Hill Road than she would have been if the area had been configured in the usual manner for parallel parking. We find this discussion less than fully intelligible, but whatever its intent it seems to presume that Rodriguez would have driven off the road no matter how the area was configured. Once again Town is free to argue the point to a jury, but it furnishes no basis for summary judgment.

13 A plaintiff unable to establish the requisite notice may still prevail by showing that the dangerous condition was "created" through "[a] negligent or wrongful act or omission of an employee of the public entity within the scope of his employment." (§ 835, subd. (a).) Plaintiff has at no time sought to bring herself within this alternative theory.

14 Government Code section 835.2 provides: "(a) A public entity had actual notice of a dangerous condition within the meaning of subdivision (b) of Section 835 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character.

"(b) A public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character. On the issue of due care, admissible evidence includes but is not limited to evidence as to:

"(1) Whether the existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate (considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise) to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property.

"(2) Whether the public entity maintained and operated such an inspection system with due care and did not discover the condition."

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